IN THE COURT OF APPEAL
CIVIL DIVISION

Case No: CA-2024-002282

ON APPEAL FROM
THE UPPER TRIBUNAL (LANDS CHAMBER)
References: LC-2023-000440 and LC-2023-000441
Upper Tribunal Judge Elizabeth Cooke

B E T W E E N:

LIAM PHILIP SPENDER AND OTHERS

Appellants / Tenants (Respondents below)

– and –

1) F.I.T NOMINEE LIMITED
2) F.I.T NOMINEE 2 LIMITED
(both companies limited by shares incorporated under the Companies Act 2006)

Respondents / Landlords (Appellants below)

APPELLANTS' REPLACEMENT SKELETON ARGUMENT FOR APPEAL

Unless stated otherwise, references below (i) in the form **[Core/]** *are to the Core Bundle; (ii) in the form* **[Supp/]** *are to the Supplementary Bundle; (iii) in the form § are to paragraphs of the Upper Tribunal's decision dated 26 June 2024; and (iv) to the "Act" or to sections (s. or ss.) are to the Landlord and Tenant Act 1985.*

Section A: Overview

[Core/14/230]

1) The issue on this second appeal is when the test of reasonableness under s. 19(1)(a) should be applied. In this case, the First-tier Tribunal ("**FTT**") held that the test of reasonableness should be applied at 2018-20, when the Appellants were asked to pay service charges. The Upper Tribunal ("**UT**"), reversing the FTT, held that the test should be applied in 2000, when the original landlord assumed contractual [Core/12/206] liability to a third party. For the reasons set out in this skeleton argument, the Appellants' case is that the FTT's decision should be restored. The UT erred in law and the FTT's approach is correct: s. 19(1)(a) requires the tribunal to consider all of the factors and evidence known at the date of the hearing and, balancing that evidence and those factors, to decide whether the costs were reasonably incurred in the amount and at the time demanded. The FTT did that. The UT did not.

Section B: Factual Background

2) St. David's Square is an estate of 436 flats and 40 houses at the tip of the Isle of Dogs in London. The underlying dispute concerns £590,000 of charges demanded of the Appellants by the Respondents in the period 2018-20. The £590,000 figure is one neither the Respondents nor their supplier can explain (§67). The £590,000 figure is far outside market norms established by the Respondents' own market testing. The £590,000 was incurred under 20 year rental and maintenance contracts. These contracts were originally made between the developer of St. David's Square, a subsidiary of the well-known listed developer Berkeley Group plc, and a small company in Essex, Countryside Communications Limited ("**Countryside Contracts**"). The Countryside Contracts concern door remote access and video intercom systems ("**Door Entry Systems**"), television distribution systems and car park gates and barriers. [Core/12/205] [Supp/16/124] [Supp/18/144] [Supp/19/145] [Supp/9/74] [Supp/10/81] [Supp/12/91]

3) St. David's Square was developed between 1997 and 2003. The Countryside Contracts provided originally for the price to be increased annually by reference to the Retail Price Index ("**RPI**"). This had the effect of preserving the price, in real terms, at the level prevailing in July 2000. The price therefore took no account of technological development, depreciation, wear and tear or other ageing of the systems supplied. [Supp/9/74] [Supp/10/81]

4) The Respondents can only produce 2 of the 5 original Countryside Contracts, all of which are all undated. Their initial 20 year terms all began on 6 July 2000. [Supp/9/74] [Supp/10/81]

5) The parties have approached the proceedings to date on the basis that the decision applicable to the Door Entry Systems, which cost £433,000 of the £590,000 total, also applies to the other Countryside Contracts. The argument below therefore focusses on the price of the Door Entry Systems. The Schedule to this skeleton argument shows the prices charged for each system in each year.

6) The original term of all the Countryside Contracts was due to end on 6 July 2020. The Respondents took no steps to end the term, in fact at some point extending the term from 6 July 2020 to 31 December 2020. At a date unknown but by no later than December 2020 the Respondents placed a further order to continue to 31 December 2021 at the 2020 rate and without making any effort to test the market.

7) This is the second time a group of tenants from St. David's Square has challenged costs under the Countryside Contracts. In 2008 a group of them brought

proceedings in the Leasehold Valuation Tribunal challenging the costs incurred under the Countryside Contracts between 2002 and 2007 ("**2008 Proceedings**"). The 2008 Proceedings were settled on terms that, from 2009 onward, there would be a 10% reduction in price on 2007 levels and future RPI increases would be cancelled. During 2021 the Respondents' market testing revealed that the 2018-20 charges for renting 20-odd year old Door Entry Systems (£433,000 of the £590,000 in dispute) was 1½ times the £280,000 cost of buying and installing a brand new system. It is the continued deterioration in the situation between settlement of the 2008 Proceedings and the market testing in 2021 that led to these proceedings being issued in August 2021. [Supp/11/88] [Supp/15/113] [Supp/16/124] [Supp/18/144] [Supp/19/145]

8) The trial before the First-tier Tribunal ("**FTT**") was between 16 and 19 January 2023. The FTT gave decisions on 22 March 2023 and 2 May 2023. The UT heard the appeal on 23 April 2024 and indicated its decision on 16 May 2024, giving its final decision on 16 June 2024. The UT made a further decision on s. 20C on 23 August 2024. The Appellants applied for permission to appeal on 25 September 2024. The UT refused permission to appeal on 26 September 2024. The Court of Appeal granted permission to appeal on 10 February 2025 (Nugee LJ). [Core/11/126] [Core/12/192 [Core/13/212] [Core/14/215] [Core/15/240] [Core/7/80] [Core/8/97] [Core/17/244]

Section C: Relevant statutory provisions

9) S. 18 is headed "*Meaning of "service charge" and "relevant costs"*" and provides as follows:

> *(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—*
>
> > *(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and*
> >
> > *(b) the whole or part of which varies or may vary according to the relevant costs.*
>
> *(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.*
>
> *(3) For this purpose—*
>
> > *(a) "costs" includes overheads, and*

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

10) S. 19 is headed "*Limitation of service charges: reasonableness*" and provides, insofar as relevant, as follows:

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

11) S. 27A is headed "*Liability to pay service charges: jurisdiction*" and provides, insofar as relevant, as follows:

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

Section D: Ground 1

The UT erred in law in setting aside the first instance decision by departing from previous Court of Appeal and other authority in applying a different test under s. 19 in relation to relevant costs arising under long-term agreements.

12) At §74, the UT errs in law by holding that the test for whether a relevant cost arising under a long-term agreement is limited to what is known to be reasonable at the start of such agreement. This is a new test. As a threshold issue, the UT identifies no basis in the wording of ss. 18 or 19 for applying this test. The new test is [Core/12/206] inconsistent with the statutory language. It also contradicts binding authority, previous *dicta* of both the Court of Appeal and the High Court, previous UT decisions and the relevant section of **Woodfall** ([7.193]) on how and when the test of reasonableness under s. 19 applies.

Sections 18 and 19 provide a single test of reasonableness

13) Residential service charges are subject to detailed statutory controls set out in ss. 18 – 30 of the Act. The first version of what is now s. 19 was enacted in the Housing Act 1974. Ss. 18-30 have been reenacted and expanded several times since 1974 (see: **Woodfall** (at [7.187]) and the summary of Lewison LJ in **di Marco v. Morsehead Mansions Limited** [2014] 1 W.L.R 1799 at [11-24]).

14) The wording of s. 18 draws no distinction between *how* different types of relevant cost are incurred by landlords in their dealings with third parties. The definitions in s. 18 are focussed on *the purpose* of the relevant costs, which under s. 18(1)(a) must relate to "*services, repair, maintenance or improvements*". There is no dispute in this case that the costs arising under the Countryside Contracts are relevant costs within s. 18. All residential service charges are made up of relevant costs.

15) By the Commonhold and Leasehold Reform Act 2002 ("**CLRA**"), Parliament made significant changes to ss. 18-30. By s. 150 of and para. 7 of Sch. 9 to CLRA, s. 18 was expanded to include "improvements". By s. 151 CLRA, s. 20 was replaced

with current s. 20 introducing a new regime requiring consultation over major expenditure worth £250 or more per leaseholder. For the first time new s. 20 expanded consultation requirements to Qualifying Long Term Agreements ("**QLTAs**"), which are defined as agreements of more than 12 months in length involving expenditure of more than £100 per leaseholder. Also by s.150 CLRA, new s. 20ZA introduced a new process for obtaining dispensation from the consultation requirements in s. 20. CLRA also made other changes to the Act. By ss 155 CLRA, s. 27A was inserted. For the first time new s. 27A(3) provided for the jurisdiction of the FTT to be expanded to answer hypothetical questions on whether expenditure a landlord proposed to incur would be reasonable if incurred.

16) By ss. 151-155 CLRA Parliament clearly contemplated service charges arising from long-term agreements and gave leaseholders new protection in the form of expanded consultation requirements in s. 20. If Parliament had intended a change to the test of reasonableness it would have amended one or both of ss. 18 or 19 to impose that test. It is also unclear why Parliament would have included s. 27A(3) if it did not intend to protect tenants from costs landlords proposed to incur, with the clearest example being the cost of works or QLTAs subject to s. 20 consultation. Nor has Parliament acted to adopt a different test since, most recently making further major changes to ss. 18-30 in the Building Safety Act 2022 (see **Woodfall** at [7.203.1]) and in the largely yet to be commenced Leasehold and Freehold Reform Act 2024.

17) The primacy of s. 19 in protecting tenants is confirmed by high authority. The Supreme Court held in **Daejan v Benson** [2013] 1 W.L.R 854 that s. 20 is an adjunct to the protection afforded by s. 19, not an end in itself:

So I turn to consider section 20ZA(1) in its statutory context. It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect to, those two purposes. This view is confirmed by the titles to those two sections, which echo the title of section 19. (Lord Neuberger at [42])

18) At §74 the UT incorrectly approaches interpretation of s. 19 as requiring a different test for relevant costs arising under long-term agreements. The UT identifies no [Core/12/206] wording in ss. 18 or 19, or any basis in prior authority, to justify this departure. The new test is wrong in law and is not something Parliament chose to introduce itself in 2002, or since.

The statutory purpose of s.19 is to protect tenants, not landlords' contractual arrangements

19) The statutory purpose of s. 19 is relevant to construing its meaning and whether it applies any differently to relevant costs arising under long-term agreements. In **Waaler v. London Borough of Hounslow** [2017] 1 W.L.R. 2817, Lewison LJ approved the *dictum* of Lord Neuburger in **Daejan** quoted at ¶17, holding that the statutory purpose of s. 19 is to protect tenants from paying (i) for unnecessary goods or services, (ii) for poor quality goods or services and (iii) more than they should for necessary goods and services of acceptable quality (at [17]).

20) **Waaler** concerned costs arising under a long-term agreement (at [6]). In that case notice of the works was given in 2004, the works were completed in 2006 and Ms Waaler was sent a demand in 2012. There is no suggestion in the judgment that the landlord argued the question of what was reasonable was limited to what was agreed with the landlord's contractor in 2004. The Court of Appeal also rejected the landlord's argument that reasonableness under s. 19 was limited to testing the rationality of the landlord's decision making process (per Lewison LJ at [28-29, 37]).

21) In **IVS Enterprises Limited v. Chelsea Cloisters Management Limited** (Unreported, 1994), the Court of Appeal considered a dispute between a landlord and its supplier over the operation of a price review mechanism in a long-term (10 year) contract for television and intercom equipment at a residential building in Chelsea. Ralph Gibson LJ observed that s. 19 was "*... a statutory duty upon the* [landlord] *to ensure that "relevant costs shall be taken into account in determining the amount of a service charge payable for a period (a) only to the extent that they are reasonable incurred and...the amount payable shall be limited accordingly*"…"

22) Evans LJ agreed that the landlord had a statutory duty to limit service charges to only those costs which were reasonably incurred. Evans LJ also observed in relation to the landlord's liability to leaseholders: "*At this point, I should comment upon what appears to me as an extraordinary feature of these proceedings. There has been no inquiry, yet, as to whether the sums claimed by the Company and*

charged to individual tenants were unreasonably high. If they were not, then the issue of law is presently academic, and it will only arise in future if the amount becomes unreasonably high and nevertheless the Company then seeks to maintain an existing level. ***If the charges have been unreasonably high, then the Manager has to consider its own position in relation to individual tenants, having regard to its statutory obligations***" (emphasis added).

23) The *dicta* of Ralph Gibson and Evans LJJ is that the test of reasonableness under s. 19 applies independently of the landlord's contractual arrangements with third parties.

24) The (then) Lewison J expressed a similar *dictum* in **Paddington Basin Developments Limited v. West End Quay Estate Management Limited** [2010] 1 W.L.R. 2735. **Paddington Basin** concerned whether a 25 year estate management deed was a QLTA. Lewison LJ held that it was, holding that s. 19 applies regardless of the nature of the landlord's contractual arrangements with third parties: "*The relevant provisions of the* [Act] *do not prohibit a landlord from entering into whatever contract he pleases for the carrying out of works or the supply of services. They merely prevent him from passing on the cost of the works or services to the lessees unless he has satisfied the statutory requirements about price, quality and consultation.*" (at [27]).

25) In **BDW Trading v. South Anglia Housing** [2013] EWHC 2169 (Ch)), Nicholas Strauss sitting as Deputy Judge of the High Court considered whether a 20 year communal energy supply and plant maintenance agreement was a QLTA. Mr. Strauss held that the agreement was not a QLTA because it was entered into by the landlord before the first occupational lease was granted (at [1-5]). At [12] Mr. Strauss accepted the landlord's submission that tenants would *always* have the protection of s.19.

26) The *dicta* in **IVS Enterprises**, **BDW Trading** and **Paddington Basin** are that s. 19 is not concerned with the reasonableness of the terms of landlords' contracts with third parties. The *dicta* confirm that the statutory purpose of s. 19 is to regulate the amount of cost recoverable *by landlords from tenants* as *service charges* and as the *outcome* of landlords' contracts. The UT's approach at §73 errs by misstating the purpose of s. 19 and focusing a new test primarily on the terms of the landlord's contractual relationship with third parties instead of one the objective reasonableness of the outcome, being the level of cost charged to the tenant. [Core/12/206]

27) The dicta in **IVS Enterprises**, **BDW Trading** and **Paddington Basin** also accord with the clear words of s. 19(1)(a), which are directed to determining "*the amount of service charge payable for a period*". The only plausible interpretation of the statutory language is that the test of what is "*reasonably incurred*" is to be applied– at the earliest – at the time the landlord demands the costs from the tenants, in this case 2018-20. As explained below, the previous authorities on s. 19 in fact require the test to be applied later, as at the date of the hearing.

28) It is well understood that the statutory purpose of s.19 is achieved by imposing a statutory cap on the Appellants' contractual liability to pay service charges (**Point West GR v. Bassi** [2020] 1 W.L.R. 4102 per Lewison LJ at [8], and see also **Woodfall** at [7.192.2]). In order to be an effective cap s. 19 must apply to all relevant costs forming a service charge, howsoever the relevant costs are incurred by the landlord in its dealings with third parties.

29) **Waaler** explains that the s. 19 cap operates by requiring the landlord to satisfy a two-stage test of (i) following a rational decision-making process leading to (ii) an objectively reasonable outcome (Lewison LJ at [37]). The objective reasonableness of the outcome is the most important part of the test (see also: **Woodfall** at [7.193]). In other words, s. 19 is an outcomes focussed test. The outcome of a contract made by a landlord cannot be known by the tenant until the landlord demands costs from the tenant.

30) It appears from paragraph 13 of the UT's order refusing permission that the UT **[Core/8/97]** considers a landlord with a long-term agreement does not have to prove the first (rationality) limb of **Waaler** by giving any evidence about its decision-making process. This underscores the fact that the UT obviously intends a new and different test. This is wrong in law. There may be legitimate questions about a landlord's decision-making process. An increasingly common example is for long-term contracts to be entered into for communal heating and power systems before the first occupational leases are granted (e.g. **BDW Trading**). In such cases the determination of reasonableness may depend on determining whether a rational decision was made to contract on particular terms with a particular supplier and for a particular period. There are certainly questions to be answered in this case about why a large listed developer entered into an entirely one-sided agreement. These questions could not be asked because the Respondents had no relevant documents. The UT is wrong in law to say that it is not necessary to have documents evidencing

the landlord's decision-making process. This is vital component of the objective test of reasonableness under s. 19 as explained in **Waaler**.

31) The UT erred in law by not considering or giving insufficient weight to the statutory purpose of s. 19 in deciding that it applies in a different way to relevant costs arising under long-term agreements.

The test under s.19 requires all factors known at the date of the hearing to be considered

32) The UT adopting the test at §74 says that the focus should be on whether the "*landlord acted reasonably in taking on the commitment and thereby making it inevitable that it would incur the cost when the invoice was presented (whether that is going to happen once, or repeatedly throughout the contractual term).*" The UT goes on to say at §78 that "[c]*riticism of the deal in 2000 rests only on hindsight*". Put simply the UT finds that the cost is reasonably incurred by reference to the lack of any evidence about the July 2000. The UT's analysis is also focussed on the point the original landlord became liable under the original contract. The UT has not considered the undisputed evidence from 2018-20 showing that the costs are not reasonably incurred. The UT also gives no weight to the fact that it is the Respondents who have failed to maintain any evidence. **[Core/12/206]** **[Core/12/206-7]** **[Supp/15/113]** **[Supp/16/124]** **[Supp/18/144]** **[Supp/19/145]**

33) The UT's approach is wrong in law. In **Avon Ground Rents v. Cowley** [2020] 1 W.L.R. 1337 the Court of Appeal interpreted section 19(2) as requiring the assessment of reasonableness "… *to take into account all relevant circumstances as they existed at the date of the hearing, giving such weight to the various factors as it considered just and reasonable.*" (Nicola Davies LJ at [36]). See also **Woodfall** at [7.193].

34) The statutory language of s.19 obviously bites no earlier than the point the landlord demands relevant costs of the tenant. If Parliament intended the focus of s. 19(1)(a) to be on the point the landlord assumed a contractual liability, it would not have drawn a distinction between relevant costs before (s. 19(2)) and after (s. 19(1)) the landlord incurred them. In both cases, the statutory language of s. 19(1) and s. 19(2) gives a clear indication as to when the test of reasonableness arises. In both cases the test arises no earlier than the point costs are demanded of the tenants. As explained below, in fact prior authority interprets the s. 19 tests as applying at the date of the hearing.

35) It was common ground below (§§45, 68) that the distinction between a cost incurred and not incurred, and therefore the distinction between ss. 19(1)(a) and 19(2), is explained by Lord Dyson MR in **Burr v. OM Property Management Limited** [2013] 1 W.LR. 3071. The issue in **Burr** was whether a landlord could recover charges it had paid to the wrong gas supplier for about 7 years. The tenant resisted the charges under s. 20B, arguing that the landlord's liability to pay and payment of the charges in question occurred more than 18 months before the landlord raised a demand. Lord Dyson MR, dismissing the tenant's appeal, held at [15] that relevant costs were "incurred" for the purposes of ss. 18, 19 and 20B when the landlord either received or paid an invoice from the third party supplier, not when the landlord receives services. It must follow that the assessment of reasonableness is not to be made when a landlord enters into a contract. [Core/12/201] [Core/12/205]

36) Whilst the UT is correct to hold at §74 that s.19 requires a balancing exercise and all circumstances leading to the presentation of an invoice may need to be considered as part of that balancing exercise, its error is to limit the test to what is known when the landlord assumes a contractual liability (§§75-81). The UT's test gives no weight, or no proper or adequate weight, to the evidence at the date of the hearing. It follows that the criticism at §78 that the Appellants' case is based on hindsight is wrong in law. It is also a departure from **Avon**, **Burr** and **Waaler**. The correct approach to s. 19 is not an exercise in hindsight: s. 19(1) requires the court to determine the service charge "*payable for a period*", in this case the period 2018-20. *A fortiori* this requires that the court considers whether a charge arising in 2018-20 is objectively reasonable by what is known from the evidence as at 2018-20. The UT at §74 reaches the wrong conclusion because it asks if someone knew or thought those costs would be reasonable in July 2000. There is no evidence the relevant costs were reasonable in either July 2000 or the period 2018-20, but there is significant undisputed evidence of the opposite. [Core/12/206] [Core/12/206]

37) In addition to conflicting with the clear words of the Act, with **Avon**, **Burr** and **Waaler**, the new test adopted at §74 and the criticism at §78 also conflicts with previous UT decisions concerning the meaning of "*reasonably incurred*" and the time and manner of assessment under s. 19(1)(a). [Core/12/206]

38) In **Havering LBC v. MacDonald** [2012] 3 E.G.L.R. 49 the UT (HHJ Walden-Smith) considered service charges arising under a long-term (20 year +) contract for television signals (at [6-7]). The UT held (at [27-28]): "*As is consistent with other*

decisions as to what is meant by "reasonableness", in determining the reasonableness of a service charge the LVT has to take into account all relevant circumstances ***as they exist at the date of the hearing*** *in a broad, commonsense way giving weight as the LVT thinks right to the various factors in the situation in order to determine whether a charge is reasonable*" (emphasis added). Consistent with **IVS Enterprises**, **BDW Trading**, **Burr** and **Paddington Basin**, there was no suggestion that the mere existence of the landlord's long-term contract changed the assessment of reasonableness under s.19.

39) In **The Gateway (Leeds) Management Limited v. Nagash** [2015] L. & T.R. 36. UT Deputy President Martin Roger KC considered an appeal from the FTT. The landlord argued the FTT had not given adequate reasons for finding costs under a long-term (5 year) CCTV rental and maintenance contract were unreasonably incurred. The Deputy President held that the reasons given to support the FTT's finding were adequate (at [36]). The Deputy President held that the FTT correctly did not limit its assessment to what was reasonable under the landlord's contract, upholding a finding that the costs charged were not reasonable by reference to what was provided at the time the service charges were demanded (at [40]).

Conclusion on Ground 1

40) Interpreting the wording of s. 19 and the decisions in **Avon**, **Burr** and **Waaler** consistently and together shows that there is a single test of reasonableness for *any* relevant cost under s. 19. That test involves considering (i) whether the relevant statutory provisions related to service charge demands and any consultation requirements have been fulfilled; (ii) whether the costs are payable under the terms of the relevant lease; and (iii) whether the costs otherwise contractually payable satisfy the statutory test under s. 19. All three parts of the assessment must be undertaken independently of the landlord's contractual arrangements with third parties and primarily with a view to what is objectively reasonable at the date of the hearing.

41) What the UT should have done in this case is find that the costs were *not* reasonably incurred because, notwithstanding the original landlord committing itself and its successors in title to a particular contract, there is *no* evidence that the relevant costs were reasonably incurred in July 2000. Giving due and proper weight to the uncontradicted evidence known at the date of the hearing. it is also objectively unreasonable to expect the Appellants to pay (i) in each year 2018-20 £140,000 or

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[Supp/26/155]
[Supp/27/157]
[Supp/28/161]

50% of the £280,000 undisputed cost of buying and installing new Door Entry Systems or (ii) in aggregate across 2018-20, the equivalent of more than 1½ times the undisputed cost of buying and installing a new system when all the Respondents received is the use and maintenance of an 18-20+ year old system. That is so regardless of what the original landlord allegedly known or expected in July 2000 (and of which there is no evidence). The first instance decision correctly reduces the costs by c. 80% to reflect the objectively reasonable amount payable in 2018-20. The UT had no legal basis to set that decision aside. [Core/14/236] [Supp/28/161] [Core/15/238-39]

Section E: Ground 2

42) Ground 2 is argued in the alternative to Ground 1 and is divided into sub-grounds 2(a) to 2(d), dealt with in turn below.

Section E: Ground 2(a)

In the alternative to Ground 1, the UT erred in law in setting aside the first instance decision and substituting its own decision by misapplying previous Court of Appeal and other authority by (i) holding that there was a need for any different guidance in relation to s. 19 in relation to relevant costs arising under long-term agreements and (ii) giving such guidance contrary to previous authority or otherwise with no basis in law.

43) In simple terms, the UT's error is to direct itself that charges incurred in 2018-20 should be assessed only by what the Respondents alleged to be known and reasonable in July 2000 on the basis of the Respondents' hopelessly incomplete documentary evidence. The UT ignores or gives insufficient weight to the fact that (i) the relevant charges were not demanded until 2018-20; (ii) the relevant charges were demanded as a direct consequence of the arrangements made in July 2000; (iii) s. 19 quite clearly applies every time service charges are demanded and (iv) a test of reasonableness that does not consider what is known when tenants are asked to pay is not an objective test of reasonableness at all.

44) At §74 the UT correctly disagrees with and refuses to follow the previous decision of the Lands Tribunal in **Auger v. London Borough of Camden** (Unreported, 2008). It must be right in law that a landlord cannot demonstrate reasonableness by pointing to a contract he has made with a third party. Otherwise that would be the answer to every challenge under s. 19 (§71-72). What matters is whether the [Core/12/205-6] [Core/12/206]

outcome of any landlord contract is objectively reasonable in terms of price and quality at the date of the hearing, as explained in **Waaler** (at [37]).

45) At §73 the Upper Tribunal correctly holds that it is bound by **Waaler**. At §75 and §77 the UT errs by reproducing the error in **Auger**. The error in **Auger** (explained at paragraphs 21 and 47 of that decision) is that there can be no challenge under s.19 to the reasonableness of relevant costs incurred under a QLTA because the landlord would be in breach of contract if he did not pay what was due, or if he dealt with a different counterparty. Therefore if the landlord has a contract then the cost must be reasonably incurred. If correct, this would substantially reduce the protection of s.19 merely as a result of the landlord's long-term agreement. That would defeat the statutory purpose of s.19. [Core/12/206]

46) The UT at §74 correctly holds that **Auger** is wrong and the protection of s.19 applies to tenants in all cases, as it must, but that is for the tenants challenging the reasonableness of costs arising under such agreements to show at the outset that the agreement leads to objectively unreasonable costs, regardless of whether the tenants can otherwise show the costs to be objectively unreasonable. In substance and as applied at §§74, 77-79 this is the same as the incorrect test in **Auger** because the UT focusses only on the landlord's decision making process. This creates an apparent presumption of reasonableness that the tenants must rebut. It also means that tenants who acquire late in the landlord's contractual term effectively have no means of challenging the reasonableness of such costs. That cannot be what Parliament intended in giving all tenants the rights under s. 27A and s. 19. [Core/12/206] [Core/12/206-7]

47) The test at §74 is wrong in both law and principle because there is no presumption that a landlord can recover all of its costs (**Campbell v. Daejan Properties** [2013] H.L.R. 6 (at [56])). It is always for a landlord to prove that a cost is recoverable under the terms of a lease. What a residential landlord can recover depends on the terms of the lease and the application of the s. 19 cap (**Bassi** (at [21]) and **Avon** (at [29])). The test at §74 is also adopted in circumstances where the UT knew the Respondents relied on the Countryside Contracts as their defence on the merits but had disclosed no documents regarding the original landlord's decision-making process in July 2000. The Appellants therefore had no hope of proving anything in July 2000. The usual rule is that a court would be sceptical of any party seeking to rely on the reasonableness of an agreement whilst being unable to produce relevant [Core/12/206] [Supp/15/113] [Supp/26/155] [Supp/27/157] [Supp/28161]

documents, as was the approach taken by the Deputy President in **Nagash** (at [33-34]).

48) It is also apparent from §74 that the UT approaches the **Waaler** test purely in terms of the first limb. The UT says "*the then landlord's **decision** has not been shown to have been unreasonable*" (emphasis added). The decision only had to be rational. The outcome – in terms of the amount of relevant costs demanded in 2018-20 – had to be objectively reasonable. The UT gives no weight at all to the outcome, [Core/12/206] dismissing this as hindsight at §78. This underscores the UT's error in failing to give any or proper consideration to the undisputed evidence that the prices charged in 2018-20 were objectively unreasonably high at those dates. The Respondents conceded that 25% of the 2020 costs were unreasonably incurred (§82). [Core/12/207] Considering the price charged is part of the test for determining whether a cost is unreasonably incurred. It is clear that the UT approached this case on the basis that the price charged – i.e. the outcome, the second limb of **Waaler** – was not an integral part of determining whether the cost was reasonably incurred.

49) What the UT should have done in this case is to ask itself the statutory question in s. 19(1)(a): what is the reasonably incurred service charge *payable for the period* 2018-20? The UT departed from **Waaler** and **Avon** by not considering what was objectively reasonable as at the date of the hearing taking into account all factors, including the undisputed and objective evidence that the costs charged were far outside of market norms. In other words, the UT should have looked back from 2018-20 to July 2000 and not looked only at what was known or reasonable in July 2000.

Section E: Ground 2(b)

In the alternative to Ground 1, the UT erred in law in setting aside the first instance decision and substituting its own decision by departing from prior Court of Appeal and other authority on the burden of proof by requiring the Appellants to disprove the Respondents' defence.

50) The starting point is that it is well established there is no presumption for or against whether relevant costs are reasonably incurred (**Yorkbrook Investments v. Batten** (1986) 18 H.L.R. 25 per Wood J. at (34-35)). **Yorkbrook** is confirmed in the UT decision of **Enterprise Home Developments v. Adam** ([2020] UKUT 151(LC) per Deputy President Martin Roger KC at [27], see also: **Woodfall** at [7.193.1]). It was

for the Appellants to show that there was a question to answer and the burden of proof then shifted to the Respondents.

51) The Appellants' case (§58) was put on the basis that the relevant costs under the Countryside Contracts were not reasonably incurred. The Appellants relied on the Respondents' own 2021 market testing. That market testing showed that the £433,000 rental and maintenance charge for the Door Entry Systems was 1½ times the £280,000 cost of buying and installing a new system. The burden of proof therefore shifted to the Respondents. [Core/12/203] [Supp/15/113] [Supp/16/124] [Supp/18/144] [Supp/19/145] [Supp/26/155] [Supp/27/157] [Supp/28/161]

52) The Respondents did not attempt to strike-out the case on the basis that it did not raise a valid legal claim. The Respondents defended the case on the merits by arguing that the costs were reasonably incurred. The Respondents also conceded that 25% of the 2020 cost was *not* reasonably incurred. It cannot be argued seriously that the costs in any part of 2018-20 were reasonably incurred. The annual average £140,000 cost of renting and maintaining the Door Entry Systems amounted to 50% of the undisputed cost of buying and installing a new system. The unreasonableness of the charges is further demonstrated by the fact that as a result of both these proceedings and the 2008 Proceedings the Respondents have been able to force significant (but inadequate) reductions in price from the supplier. [Core/12/203] [Supp/15/113] [Supp/16/124] [Supp/18/144] [Supp/19/145] [Supp/26/155] [Supp/27/157] [Supp/28/161]

53) The Respondents' defence on the merits was simply that they could do no different because they were bound by the Countryside Contracts (at §38). The Respondents said it was for the Appellants to prove that the Countryside Contracts were unreasonable at the outset (at §38). The Respondents did not disclose any documents regarding July 2000, claiming that they are lost. Apparently, nor did the Respondents make any effort to seek any evidence from St. George / Berkeley Group plc. The lack of evidence is solely the result of the Respondents' failure to maintain proper records, or to seek evidence from relevant third parties. [Core/12/200] [Supp/7/33]

54) The UT's conclusion at §63 does not record its finding on the Appellants' burden of proof argument summarised at §58. The UT proceeds on the basis that the burden was not discharged by the Appellants, concluding at §78 is that "*there is no evidence that the contract was a bad deal*". §79 says the Respondents' "*decision has not been shown to be unreasonable*" and §80 then concludes because the *Appellants* did not demonstrate that the July 2000 contract was entered into unreasonably then there is no legal basis for the first instance tribunal's decision. [Core/12/203] [Core/12/204] [Core/12/206-7]

55) The approach at §§63, 74, 78, 79 and 80 is wrong in both fact and law because it is a misapplication of the burden of proof contrary to both the Court of Appeal's decision in **Yorkbrook** and the UT's previous decision in **Enterprise Home Developments**. [Core/12/203-7]

56) In any event, it is wrong in principle for the UT to give guidance that tenants carry the burden of disproving the reasonableness of landlords' contractual arrangements. Tenants have no involvement in or control over their landlord's contractual arrangements. Tenants have no direct dealings with the landlord's counterparties. Tenants may not know of any their landlord's contractual arrangements until they commence a challenge under s. 27A. Indeed, in this case the Appellants cannot even count on the Respondents keeping proper records. The ordinary rule, followed by the UT in **Nagash** (at [32]), is that the Respondents' failure to disclose any documents in support of its defence would usually mean a cynical approach would be adopted to the Respondents' case. The approach in **Nagash** is correct. The approach adopted by the UT is wrong in both fact and law.

Section E: Ground 2(c)

In the alternative to Ground 1, the UT erred in law in setting aside the first instance decision and substituting its own decision by taking no or insufficient account of undisputed evidence that the costs in dispute were not objectively reasonable as at 2018-20.

57) The UT's decision at §82 to substitute the FTT's reduction of c. 80% for the years 2018-20 with its own reduction of 25% for 2020 only is wrong in law for at least five reasons.

58) First: neither the Respondents nor their supplier could offer any explanation of the amount charged (§67).

59) Secondly: the Respondents conceded that the costs in respect of 2020 were *at least* 25% too high (§82). This concession was based on 2021 marketing testing by the Respondents. That market testing showed that new Door Entry Systems could be bought and installed for £280,000 versus the £433,000 charged under the Countryside Contracts for 2018-20. [Core/12/207] [Core/12/205] [Supp/15/113] [Supp/26/155] [Supp/27/157] [Supp/28/161]

60) Thirdly: at the first sign of disquiet from tenants in the form of the 2008 Proceedings challenging costs 2002-2007 the supplier agreed to vary the Countryside Contracts. The supplier was not party to the 2008 Proceedings, so this

must have been negotiated by the Respondents' predecessor in title. The variation was to reduce the costs by 10% on 2008 levels and to cancel future RPI increases. Such a substantial change in the price mid-term is not consistent with a supplier offering a reasonable price from the outset. **[Supp/11/88]**

61) Fourthly: in response to these proceedings, the Respondents again negotiated a substantial – but inadequate – discount of 50%, applicable from 1 January 2022 (§40). The discount is inadequate because it leaves the Appellants paying 25% (£70,000) of the £280,000 cost of buying and installing a new system every year. At §71 the UT dismisses the Appellants' argument that the Respondents should have renegotiated – as they managed in 2021 and as their predecessor in title managed in 2008 – as being "*fanciful*". This criticism underscores the UT's failure to give proper weight to the undisputed evidence before it. The UT also gave no weight or no proper weight to the fact that the Respondents were also able to negotiate changes to the Countryside Contracts in relation to payment timings and the length of the minimum term. Put shortly, there was nothing "*fanciful*" about the Appellants' suggestion. **[Core/12/205] [Supp/11/88] [Supp/15/113]**

62) Fifthly: the UT approaches the FTT's decision as being a conclusion that the Countryside Contracts were "*a bad deal*" (at §78). In fact, at ¶¶ 44 and 45 of its decision the FTT merely summarises the submission made by the Respondents' counsel that the arrangement made in 2000 was "*a bad deal*". At ¶ 45 of its decision, the FTT explains that it focuses on what is known from the evidence at 2018-20, being the correct approach in law. Even if it were the case that the FTT had concluded that the deal made in 2000 was a "*bad deal*", then the FTT made findings of fact justifying that finding. This includes the penalties for breaking the 20 year term, the fact that the Respondents effectively had a reverse hire-purchase arrangement in which the Appellants' money was used to buy assets for Countryside. Whilst not a finding made by the FTT, it must also be the case that the fact that the Countryside Contracts fixed the price in real terms for 20 years at the July 2000 level was also indicative of a bad deal, because it took no account of wear and tear, technological obsolescence or depreciation. **[Core/12/205] [Core/14/230-31]**

63) Had the UT taken into consideration and given proper weight to the undisputed evidence in its decision in the five ways explained above then its decision would have been different. The UT should have concluded that the costs charged in 2018-

20 were not objectively reasonable and should have declined to interfere with the FTT's decision.

Section E: Ground 2(d)

In the alternative to Ground 1, the UT erred in law in setting aside the first instance decision by failing to give reasons, or any proper or adequate reasons, for its substituted decision.

64) At §82 the UT substitutes its own decision that there should be a reduction of 25% for 2020 alone in place of the FTT's reduction of c. 80% for 2018-20. At §82 the sole reason given is that "*The Tribunal accepts the landlord's concession of 25%*".

65) The UT appears to mean that its substituted decision represents the reasonable cost incurred after 6 July 2020, based on the Respondents' concession. The UT is obliged to give proper and adequate reasons for its substituted decision [Core/12/207] (**MacDonald** at [31ff] and **Nagash** at [32-33]), in particular why it meets the **Waaler** test. The UT has not done so.

66) The substituted decision at §82 does not meet the **Waaler** test. The effect of the Respondents' concession is to reduce the 2020 cost of the Door Entry Systems by 25% from £140,000 to £105,000. The undisputed cost of buying and installing a new Door Entry System is £280,000. Even after the 25% reduction the Appellants in 2020 are still paying 37½% of the cost of buying and installing a new system, just for that one year. That is obviously not objectively reasonable because all the Appellants received is the use and maintenance of a 20+ year old system and *not* a new system. [Core/12/207] [Supp/16/124] [Supp/18/144] [Supp/26/155] [Supp/27/157] [Supp/28/161]

67) Confusingly the UT's order refusing permission says (paragraph 22) that reasons were not required because "*the outcome of the appeal was that the charge had not been shown to be unreasonably incurred and therefore was payable as a service charge; there was no scope for the Tribunal to decide what a reasonable charge would be and no need for further explanation*." If it were the case that the service charge had not been shown to be unreasonably incurred then the UT had no discretion to accept any concession. It should have simply substituted a finding that all of the costs were reasonable and made no reduction at all. It is also surprising the UT finds the Appellants did not prove any of the charges were unreasonably incurred when it accepts the Respondents' concession that 25% of the 2020 charges [Core/8/98]

were unreasonably incurred. The substituted decision at §82 is also a contradiction of §§74, 77-79 relying as it does on evidence gathered by the Respondents in 2021. [Core/12/206-7]

Conclusion on Ground 2

68) On any of the sub-grounds 2(a), 2(b), 2(c) or 2(d) the UT erred in law and its substituted decision should be set aside and the FTT's decision restored, for the reasons given above.

Section F: Ground 3

Parasitic on the success of Ground 1 or Ground 2, the UT further erred in law by relying on its own erroneous decision as the legal basis to both (i) set aside the first instance tribunal's order under s. 20C of the Landlord and Tenant Act 1985 and (ii) refuse an order under s. 20C in the Appellants' favour.

69) At paragraphs 5 and 6 of the 23 August 2024 order, the UT says its decision on points of law is the basis for reversing the FTT's s. 20C order and refusing a s. 20C order in the UT appeal. If the Appellants succeed on either Ground 1 or Ground 2 then the Respondents will not have succeeded on these points of law. The legal basis for the UT's decision will fall away.

70) In any event, the UT's orders in respect of s. 20C are wrong in law. The test under s. 20C is whether it is just and equitable to make an order modifying the landlord's contractual right to recover costs. This gives the UT a principled discretion to decide the issues by looking at the conduct of all parties and all of the circumstances of the case (**Church Commissioners v Derdabi** [2011] UKUT 380 (LC) and see **Woodfall** at [7.201.1]).

71) The UT did not follow the **Church Commissioners** test and did not consider all factors. The only factor it considered was the Respondents' success in relation to the Countryside Contracts. The UT's approach to s. 20C also ignores the fact that the FTT heard the first instance trial over 4 days, deciding multiple issues. Accepting for the sake of argument the UT's decision on the Countryside Contracts, the Appellants still succeeded in their argument that more than £232,000 of other service charges were unreasonable. This was a substantial success. That was after they were put to the trouble of preparing for the cross-examination of 6 witnesses of fact and making legal submissions on those issues. The UT gave no weight at all to this substantial success and did not defer to the FTT's superior knowledge of how the Respondents conducted themselves at first instance. [Core/14/215]

72) It is unsatisfactory that the UT gave the Respondents permission to appeal the s. 20C order in circumstances where (i) it was necessary to bring County Court proceedings before they paid back any of the service charges found to be unreasonable (including the items not being appealed) (ii) the Respondents admitted charging legal costs in 2022 in breach of the s. 20C order; and (iii) the Respondents charged further costs in 2023 in further breach of the 20C and before the UT decided the Respondents' appeal. The UT attaches no weight to any of these issues in its reasoning, all of which are outside the usual course of litigation.

73) The UT's decision is also surprising result in that the Respondents can withdraw a witness the Friday before trial, be found to have prejudiced the Appellants' case in so doing (at §§16, 20), but yet still recover *all* of their costs via the service charge. Respectfully, that makes no sense, encouraging further bad behaviour. **[Core/12/196]**

74) As to the s. 20C order on appeal, it was neither just nor equitable to allow the Respondents to recover their full costs in circumstances where (i) the UT heard two appeals and the Respondents won one and lost one and (ii) the result of the second appeal was not that the Respondents escaped any liability, but that they remained liable to pay more than £50,000 back to the Appellants in respect of the issues in contention on the appeal. The Respondents then delayed in returning any money to the Appellants until 21 February 2025, i.e. until roughly 2 weeks after they discovered permission to appeal had been granted.

Section G: Conclusion and result sought

75) For the reasons given above, the Court of Appeal is respectfully asked to allow the appeal and:

a) In respect of the 26 June 2024 decision, to set aside the UT's substituted decision at §82 and restore FTT's decisions dated 22 March 2023 and 2 May 2023 in relation to the Countryside Contracts;

b) In respect of paragraph 1 of the 23 August 2024 order, to set aside the UT's substituted decision and to restore the s. 20C order made by the FTT; and

c) In respect of paragraph 2 of the 23 August 2024 order, to set aside the UT's decision that there be no s. 20C order in respect of proceedings before the UT and to substitute a decision that there be a s. 20C order.

LIAM SPENDER

24 February 2025 /

Replaced 14 October 2025

SCHEDULE: Costs under the Countryside Contracts and decisions below

System	2018	2019	2020	Total	FTT Allowed	UT Allowed
Door Entry	£152,897.04	£140,310.68	£140,310.67	£433,518.39	£82,368.49	£398,440.73
TV	£37,659.38	£40,576.81	£40,576.81	£118,813.00	£22,574.47	£108,668.80
Covered Car Park Gates and Barriers	£12,736.68	£12,736.68	£12,736.68	£38,210.04	£7,259.91	£35,025.87
Totals	**£203,293.10**	**£193,624.17**	**£193,624.16**	**£590,541.43**	**£112,202.87**	**£542,135.40**