**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)**

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**APPELLANTS' REPLACEMENT SUPPLEMENTAL SKELETON FOR APPEAL**
**7 August 2025**

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*Unless stated otherwise, references and defined terms below are the same as in the Appellants' Skeleton Argument for Appeal dated 24 February 2025.*

## A: INTRODUCTION

1) This is the Appellants' supplemental skeleton argument. It is produced in response to the case raised by the Respondents that the UT's decision should be upheld on the basis of a burden of proof point: that the Appellants' never raised a *prima facie* case for them to answer. For the reasons below, this point is both new and wrong.

2) The Respondents acknowledge, obliquely, at paragraph 25 of their skeleton that the basis on which they are inviting the Court of Appeal to uphold the UT's decision is not one they argued before either the FTT or the UT. This supplemental skeleton is therefore the first time the Appellants have had the opportunity to deal with this point. The Appellants reiterate that they are the only party to have taken a point on the burden of proof before the UT. The UT's failure to deal with that point forms Ground 2(b) of their appeal. [Core/5/55] [Core/2/16] [Core/3/31-33] [Core/12/203]

3) There are four further striking features about the Respondents' *prima facie* point. The first is that a different group of tenants brought proceedings regarding costs incurred under the Countryside Contracts in 2002-2008. In response to those proceedings, the Countryside Contracts were renegotiated to reduce the price by 10% below 2008 levels and to end index-linking. There has *always* been something wrong with the prices charged by Countryside. The second is that the Respondents did not dispute that the market evidence was that the costs of the Countryside Contracts were too high in 2018-20, recorded at §58 of the UT's decision. Third, the Respondents conceded that there should be a reduction in costs of 25% for 2020, notwithstanding that the Countryside Contracts are still in place even today. Fourth, at some point after the Appellants made their application in 2021 the Respondents negotiated an inadequate 50% reduction in the price of the Countryside Contracts with effect from 1 January 2022. The succinct point made by the Appellants is that none of this is the response of a landlord with no *prima facie* case to answer. [Supp/11/88] [Supp/15/113] [Supp/16/124] [Supp/17/142] [Supp/18/144] [Supp/19/145] [Supp/26/155] [Supp/27/157] [Supp/28/161]

4) It is also surprising that the Respondents, having at all times been represented by experienced counsel and solicitors specialising in this area of law, did not make any attempt to strike-out or to require the Appellants to re-plead their case to deal with what is now said to be a fundamental procedural point on the balance of proof. As explained below, the FTT's procedural rules have provisions equivalent to the strike-out and summary judgment provisions in the CPR. The Respondents did not avail themselves of them. [Supp/1/3] [Supp/2/7] [Supp/3/9] [Supp/5/25] [Supp/6/29] [Supp/7/33]

5) A further point the Appellants make is that the Respondents' argument on there being no *prima facie* case undercuts their argument that the UT's decision is consistent with prior authority. Again, if the UT's decision were in accordance with prior authority one would expect that the Respondents' experienced legal team would have taken precisely that point before the FTT. The fact that the Respondents did not do so shows that the UT's decision *is* contrary to prior authority. The UT's decision is far from "*orthodox*", as the Respondents claim. [Core/5/48]

6) Nor are the Respondents' correct to characterise the UT's decision as being explicable as a decision on the burden of proof. The basis for the UT's decision (at §§74-76) is quite clearly that a challenge to a long-term contract can only be made by reference to the point the landlord enters that contract. That is wrong in law. The Respondents are [Core/12/206]

wrong to say that the issue of the burden of proof can be separated from the UT's errors of law.

7) In any event the burden of demonstrating a *prima facie* case is a low one. As explained in **Gell** and **Yorkbrook**, cited by both parties, all that the Appellants were required to do is demonstrate there was a question for the Respondents to answer. Paragraph 3 above is reiterated. Plainly there was a question for the Respondents to answer.

## B: THE PARTIES' CASES BEFORE THE FTT

8) **Gell** is authority for the proposition that a party faced with no *prima facie* case to answer should raise the issue with the FTT at an early opportunity and the FTT should then deal with it using its case management powers (per Lewison LJ at [65, 71]).

9) Rule 6(3)(c) of the Property Chamber Procedure Rules provides that the FTT has the power to permit or require any party to amend a document. Rule 9(2)(d) permits the FTT to strike out any case that has no reasonable prospect of success. It is submitted that Rules 3 and 9 are analogous to CPR 3.4 and CPR 24. The Respondents never made any application under either Rule 3 or Rule 9 that there was no *prima facie* case.

10) On 10 August 2021 the Appellants commenced proceedings in the FTT. On 7 September 2021 the FTT gave standard directions that the Appellants give written submissions on the law in dispute and also that they set out further details case in a Scott Schedule.

11) On 28 January 2022 the Appellants filed their written submissions and Scott Schedule. The Appellants written case on the Countryside Contracts was set in the Scott Schedules for each of 2018, 2019 and 2020 in identical terms as follows: **[Supp/1/3]**

*The costs are not reasonably incurred because the cost per flat was significantly above each of (i) the cost of a proposed replacement system and (ii) the cost paid at comparable local developments.*

12) The Appellants' Scott Schedule was supported by a witness statement from Mr. Spender exhibiting the Respondents' 2021 quotes, together with service charge accounts showing the costs of similar systems at comparable nearby developments. **[Supp/16/124]** **[Supp/19/145]** **[Supp/26/155]** **[Supp/27/157]**

13) On 4 March 2022 the Respondents filed their responsive statement of case and responsive Scott Schedule. The Respondents' defence on the Countryside Issue set out in their statement of case engaged on the merits of the Appellants' case as follows:

> *10. The majority of [the Appellants'] challenges as set out in the Scott Schedules relate to the question of whether a particular cost was reasonably incurred…*
>
> […] **[Supp/1/3] [Supp/2/7]**
>
> *41. The* [Countryside Contracts] *were granted in July 2000 for a 20 year term. They imposed significant penalties for early exit, and for fixed price uplift. They were in place at the time the leases were all entered into. Such facts point strongly toward a conclusion* ***that the relevant costs up to the earliest date upon which the contract could have been terminated without penalty were reasonably incurred****, even if outside of current market rates.* (emphasis added)

14) In the Respondents' responsive Scott Schedule dated 4 March 2022 they said:

> *20-year contract entered into by original developer with Countryside Communications. Terms of contracts in all material respects identical for door entry system, TV Distribution Systems and car park barriers.* **[Supp/1/3] [Supp/2/7]**
>
> […] **[Supp/1/3] [Supp/2/7]**
>
> *All contracts were in place prior to the leases originally being entered into, so all original leaseholders took on the lease of their properties with the 20-year contract in place.* ***The price was not negotiable during the term and was reasonably incurred in the circumstances****.* (emphasis added).

15) The Respondents also adduced a witness statement from Mr. Robert Williams, the (then) Senior Development Manager of the Respondents' managing agents. Mr. Williams evidence was also directed to the merits of the Countryside Contracts. For example, he said that the costs under the Countryside Contracts were reasonably incurred in 2018-20 because: **[Supp/3/9]**

29. *The way in which the contracts are designed is that the supplier, Countryside Communications, provide (at their cost) the initial installation of the equipment and retain ownership of it; the equipment, and associated cabling, is therefore leased from Countryside Communications, and they also deal with the maintenance of the leased equipment.* **[Supp/3/13]**

[…]

37. *For the period during the initial 20 year contract, the contract is one which was "locked in" at the site, and not able to be negotiated; the fee isn't merely the cost of the leasing of the equipment, but also inclusive of callouts and repairs, and is in line with other similar contracts available; the cost beyond the 20 years is reduced because Countryside have already recouped their costs associated with the initial installation and leasing.* **[Supp/3/15]**

16) On 1 April 2022, in response to Mr. Williams' evidence that the costs under the Countryside Contracts had always been reasonably incurred, the Appellants filed their reply submissions and reply Scott Schedule. Paragraph 47 of the Appellants' reply statement of case dated 1 April 2022 said in reply to the Respondents' case that the costs had always been reasonably incurred:

*The Applicants' case is that the decision to enter into these contracts was not objectively reasonable at the time it* [was] *made. Nor is the outcome of that decision, in the form of the staggering costs passed on to leaseholders, an objectively reasonable one.* **[Supp/1/3]** **[Supp/4/17]**

17) The Appellants' Scott Schedule said in response to the Respondents' case:

*The Tenants' case is simple:*

1. *The Landlord is required to show that it made a rational decision to enter into a rental maintenance contract in July 2000;*

2. *The Landlord failed that test because the* [Countryside Contracts] *cost £2.25 million, which was not (and is not) reasonable;*

3. *The Landlord is required to demonstrate a reasonable outcome. In light of Ms Jezard's evidence , it is for the Landlord to show why paying approximately £130,000 a year in rental in each of 2018, 2019 and 2020 is reasonable.*

4. *The same applies to the other Countryside Contracts, the terms of which have ensured that leaseholders are gouged.*

18) On 6 June 2022 the Respondents' Rejoinder said:

*[14] Paragraph 47 is noted, however, not only do none of the parties have all the relevant information to properly analyse the decision making process when the contracts were entered into 22 years ago,* ***the time to challenge that decision (if it were capable of challenge at all by any of the leaseholders) has now passed; it is stale. It would be an abuse of process for leaseholders to let a contract, entered into prior to them taking their leases, run for nearly 20 years and then seek to impugn the decision making process of the developer before this Tribunal.*** (emphasis added) [Supp/5/26]

***[16] In issue in this application is what R / FirstPort did in respect of the Countryside Contracts in 2018-2020.*** (emphasis added) [Supp/5/26]

19) On 11 January 2023, the Respondents filed a skeleton argument before the hearing before the FTT, saying:

[15(i)] ***Rs' case is that it was reasonable to incur the cost in each year because the Rs had no choice*** *– the system was under contract for 20 years, the cost of breaking the contract (in 2014) was far too high to be commercially sensible, and the first time the contract could be broken thereafter was in July 2020 (mid-pandemic).* [Supp/6/30-32]

[…]

[17(i)] *It is no good going back to 1999/2000 when the contracts were entered into and taking a s19(1) point on the decision making process at that point, because…* ***more importantly, the costs were incurred in 2018, 2019 and 2020, and so it is the landlord's decisions in those years that is in question*** *– not decisions by a developer 20 years earlier - see Burr v OM Property Management [2013] 1 WLR 3071 on this point.* [Supp/6/30-32]

[…]

[19] ***In any event, any attempt now to challenge the decision making of the developer*** [i.e. in July 2000] ***must be stale / an abuse of process.***(emphasis added)

**[Supp/6/30-32]**

20) It is emphasised that it is the Respondents who raised the issue of the Countryside Contracts and the reasonableness of the costs arising under them. As is clear from the extracts above, the Respondents engaged on the merits asserting that the costs *had always been* reasonably incurred and *were* reasonably incurred in 2018-20. The Appellants only engaged with that case to point out that the Respondents carried the burden of proving that was so, pointing out that they offered no evidence of either the rationality of the original decision or the outcome experienced throughout the term.

21) In summary, the position before the FTT was:

a) With the benefit of hindsight neither side did the best job it could with the pleadings, which could have been clearer. It is nevertheless tolerably clear that the Appellants challenged the relevant costs under the Countryside Contracts in 2018-20 by reference to the evidence in 2018-20; the Respondents' defended on the basis that they were always reasonably incurred;

b) Neither side adduced any evidence about the original landlord's decision making in or around July 2000, when the Countryside Contracts were entered into;

c) The Respondents introduced the issue of the Countryside Contracts. They said that the costs arising under the Countryside Contracts were *always* reasonably incurred. They therefore entered a substantive defence on the merits;

d) The Appellants' case was that it was for the Respondents to prove that the Countryside Contracts led to relevant costs that were reasonably incurred and that they had not do so.

e) The Respondents did not adduce any evidence to explain the charges made under the Countryside Contracts, for example being unable to distinguish between rental and maintenance;

f) The undisputed evidence, being market evidence in the form of quotes obtained by the Respondents themselves in 2021, was that the costs of the Countryside Contracts by 2018-20 was far too high, being 1½ times the cost of buying and installing replacement systems;

g) The Respondents conceded that the costs for 2020 should be reduced by at least 25% because they were *not* reasonably incurred; and

h) Both parties agreed that the question for the FTT to answer was whether, considering s. 19(1)(a), the costs of the Countryside Contracts were reasonably incurred *in 2018-20*.

22) The FTT therefore made its decision on the common basis adopted by both parties. The Respondents unequivocally participated in a FTT hearing on the merits focussed on whether the costs were reasonably incurred *in 2018-20*. If the UT decided to remake the FTT's decision on the basis that there was no case for the Respondents to answer, then it was wrong to do so.

## C: THE CASE BEFORE THE UT

23) There are two extraordinary features of this appeal. The first is that at §78 the UT decides that the Appellants have not discharged the burden of proof by reference to some unspecified part of *their* statements of case with no reference at all to the *Respondents'* statements of case. The UT records at §78 that the Appellants did *not* submit that the Countryside Contracts had always been a bad deal. The UT does not mention the Respondents' introducing or relying on the Countryside Contracts as their defence, or their argument that costs arising under the Countryside Contracts were always reasonably incurred. The UT proceeds on the basis that the Appellants bear the burden of proof, despite never raising the argument about the Countryside Contracts.

24) The second extraordinary feature is that the UT entertained the Respondents' appeal on the basis that the FTT had found the Countryside Contracts were a bad deal in July 2000. The FTT did not do so. Paragraphs 44 and 45 of the FTT's first decision records that the FTT did *not* make any finding about July 2000. All paragraphs 44 and 45 do is to record the *Respondents' own counsel* describing the Countryside

Contracts as "*a bad deal*". Paragraph 45 makes explicit that the FTT was deciding the case on what was reasonably incurred in 2018-20.

25) As they obliquely concede at paragraph 25 of their skeleton, no part of the Respondents' case before the UT was on the burden of proof in July 2000. Their case was the exact opposite, that the FTT was wrong to look at the position in July 2000 because the Respondents could not do anything different once the contracts were entered into (recorded at §§45-47 of the UT's decision)

26) As recorded by the UT at §58, the Appellants were the only party to raise the issue of the burden of proof. The UT required them to disprove the Respondents' defence. The Appellants raised a *prima facie* case. Paragraph 3 above is repeated. The Respondents defended that case on the merits, by pleading the issue of the Countryside Contracts. The Respondents' pleading the existence of a contract did not require the Appellants to disprove that defence by showing that the charges under the Countryside Contracts *were not* reasonably incurred. Instead the Respondents carried the burden of proving that the costs arising under the Countryside Contracts *were* reasonably incurred. The Respondents did discharge that burden. Indeed, both the Respondents and their supplier claim that they cannot even explain the costs charged under the Countryside Contracts. The FTT was therefore entitled to make the decision it made. The UT was wrong in law to substitute its own decision.

27) Paragraph 23(1) of the Respondents' skeleton argument is not an accurate statement of the position before the UT. It was common ground before the UT that, following this Court's decision in **Burr**, the meaning of the word "*incurred*" was consistent across ss. 18, 19 and 20B not – as the Respondents' now claim – limited to s. 20B. That is recorded at §45 of the UT's decision. As above, that was also the Respondents' position before the FTT.

28) The Court of Appeal recently affirmed **Burr** in **Adriatic Land 5 Limited v. Long Leaseholders of Hippersley Point**.[2025] EWCA Civ 856 (Newey LJ at [38], [95] and Nugee LJ at [197]). **Hippersley Point** concerned very similar language to s.19 found in paragraph 9 of Schedule 8 to the Buildings Safety Act 2022. The Court of Appeal in **Hippersley Point** held that costs to remediate relevant defects were not "*incurred*" at the point landlords signed contracts for remedial works or related

professional services. Nugee LJ held at [197] "… *there will nevertheless be landlords who have committed themselves to contracts in the belief they would be able to pass on costs to leaseholders but who find that they are unable to do so* ***as costs are not incurred when the contract is signed but only when invoices are rendered or payments made***…" (emphasis added).

## D: THE RESPONDENTS' CASE ON THE BALLOT

29) At paragraph 18 of their skeleton argument the Respondents criticise the Appellants for not referring to a so-called ballot conducted in late 2021. This is of course something the Appellants refer to in their chronology supporting their application for permission to appeal, including the fact that the Respondents kept the ballot open after serving a service charge demand based on their preferred option of a 50% discount. The ballot is therefore not determinative of the Respondents' choice to continue with the Countryside Contracts, if it was conducted properly at all.

30) The Appellants do not refer to the ballot in their skeleton argument because the FTT made no findings of fact on the ballot. There being no relevant findings of fact, this is not an issue the Court of Appeal can entertain on this second appeal. The fact that the Respondents rely on the ballot also contradicts their position that only the position at July 2000 should be considered. **[Core/5/52] [Core/14/215] [Core/24/262-3] [Supp/17/142] [Supp/18/144] [Supp/19/145] [Supp/20/146] [Supp/21/147] [Supp/22/148] [Supp/22/150] [Supp/23/151] [Supp/24/152] [Supp/25/153]**

31) To the extent the UT took the ballot into account in its decision, it did so without hearing any evidence, without the benefit of factual findings by the FTT and despite the Appellants' objections. Nor can the ballot be probative, being held *after* these proceedings were issued in August 2021 and in relation to service charges arising from 1 January *2022*.

32) In any event, and not for the first time in these proceedings, paragraph 18 of the Respondents' skeleton argument is untrue. Nor is at an accurate characterisation of the Appellants' submissions. Even on the untrue basis pleaded by the Respondents, none of the Appellants voted in favour of the proposal to continue the Countryside Contracts at a 50% discount. The fact that non-parties to this appeal agree with the Respondents is irrelevant. **[Core/5/52]**

## E: CONCLUSION

33) The Respondents are wrong to argue that the UT's decision can be explained by the Appellants' alleged failure to raise a *prima facie* case. Paragraph 3 above is repeated. The Respondents obviously considered that the Appellants raised a *prima facie* case on the merits. If they believed otherwise it was incumbent upon them to strike out the Appellants' case before any hearing on the merits. The Respondents did not do so.

34) Having chosen to engage on the merits the burden of proof shifted to the Respondents. It was for the Respondents to adduce the evidence necessary to prove their own defence. If the Respondents' defence required evidence of the original landlord's decision making process and view of the market in July 2000 then it was for the Respondents to adduce that evidence. The UT was wrong to substitute its own decision on the basis that the Appellants had not adduced that evidence. Particularly so if the legal basis for the UT's decision is that the Appellants did not raise a *prima facie* case.

35) For the reasons given above and in their skeleton argument, the Court of Appeal is respectfully asked to allow the appeal on all grounds.

**LIAM SPENDER**

7 August 2025

**Replaced 14 October 2025**