Neutral Citation Number: [2025] EWCA Civ 1578

Case No: CA-2024-002282

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke
[2024] UKUT 175 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2025

Before :

LORD JUSTICE NUGEE
LORD JUSTICE SNOWDEN
and
LORD JUSTICE ZACAROLI

- -

Between :

LIAM PHILIP SPENDER & 69 OTHERS	**Appellants**
- and -	
(1) FIT NOMINEE LTD	**Respondents**
(2) FIT NOMINEE 2 LTD	

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- -

Philip Rainey KC (instructed by **Velitor Law**) for the **Appellants**
Simon Allison KC and Tom Morris (instructed by **JB Leitch**) for the **Respondents**

Hearing date : 4 November 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 5 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Zacaroli:

1. The main question on this appeal is whether costs incurred by a landlord under long-term contracts for the hire and maintenance of equipment, including a video door entry system, were "reasonably incurred" within the meaning of s.19 of the Landlord and Tenant Act 1985 (the "**1985 Act**"), so as to be capable of being passed on to tenants as service charges.

2. The appellants are leaseholders of various properties in a development at St. David's Square, Westferry Road, London (respectively, the "**Tenants**" and the "**Development**"). The respondents (the "**Landlords**") are, and have been since 2014, the joint proprietors of the freehold of the Development.

3. Under their leases, the Tenants covenanted to contribute to the Landlords' costs of:

> "providing, inspecting, maintaining, renting, hiring, renewing, reinstating, replacing and insuring … the electronic door systems (if any) and the emergency system and such other plant machinery or equipment forming part of the Block as the Lessor may from time to time consider necessary or desirable for the carrying out of the acts and things mentioned in this Schedule".

4. The Development was built between 1998 and 2003. In about 2000, an entity known as St George North London Ltd (the "**Developer**"), entered into contracts with Countryside Communications Limited ("**Countryside**") for the hire of security and related systems for the Development, including door intercom and remote release systems, a TV and satellite distribution system, car park gates and barriers and leisure centre CCTV and alarms (the "**Countryside Contracts**").

5. Only two of the Countryside Contracts have been located, each undated, one relating to the television distribution system and one relating to the video door entry system. It is common ground that the other contracts are in materially similar terms. The most significant of the contracts, in terms of cost, is the one relating to the door entry systems. For convenience, the parties focused their arguments on this contract and I will do the same.

6. The precise date when the Countryside Contracts were entered into is not known, but each of them is for a term commencing on 6 July 2000. Some of the leases of the properties within the Development were entered into prior to the commencement date of the Countryside Contracts (6 July 2000), but the majority of them were entered into after that date. Given that the door entry systems were, literally, hard-wired into the development, it is possible that the Developer was bound by the Countryside Contracts before any of the leases were granted, but the position remains unclear. Indeed, as I will explain in more detail below, very little at all is known about the circumstances in which the Countryside Contracts were entered into, or about the circumstances in which they were novated to the Landlords in 2014.

7. The contract in relation to the door entry system, called a "Rental and Maintenance Contract", includes the following terms:

(1) By clause 2.1 the rental for the first year was fixed, in the sum of £85,477. The Landlords have been unable to provide a breakdown of that figure as between the maintenance and rental elements.

(2) By clause 2.4, Countryside was permitted to increase the rental once a year, "limited to an amount proportionate to the increase or decrease in the Retail Price Index".

(3) The hire period was 20 years from 6 July 2000. The contract would continue thereafter from year to year, unless terminated on six months' notice expiring not earlier than the last day of the hire period (clause 3.1).

(4) The Developer was entitled to apply to Countryside for consent to assign its interest under the contract. Countryside agreed to give consent provided that it was satisfied that the proposed assignee would be able to perform its obligations under the contract, and provided "the proposed assignee enters into a hiring agreement with [Countryside] on terms identical to those contained herein" (clause 3.2).

(5) By clause 4.1, the installation remained the property of Countryside, and the Developer indemnified Countryside against any loss or damage however caused to or by the installation.

(6) By clause 4.3, Countryside agreed to carry out any repairs and replacements necessitated by fair wear and tear free of charge. If repairs or replacements were necessitated by issues with the electricity supply or third party misuse or neglect, the cost was to be borne by the Developer.

(7) The Developer was entitled to terminate the contract at the end of the seventh or fourteenth year, on giving 12 months' notice, but was obliged to pay a sum equal to four times the annual rental current at the time of the termination (clauses 12.1 and 12.2).

8. In 2008, a number of leaseholders commenced proceedings against the Landlords' predecessors in title, challenging the amounts charged by way of service charge in relation to the Countryside Contracts. Those proceedings were settled on terms that the amount to be charged to leaseholders was capped at 90% of the then level of payment under the Countryside Contracts, without any further RPI increases. We were told that, thereafter, Countryside invoiced only the lower amount. There is no evidence as to what negotiations, if any, took place with Countryside at that stage.

9. The amounts charged by Countryside have consistently been passed on by the Landlords (or their predecessors) to the Tenants (or their predecessors).

10. This appeal relates to the amounts charged under the Countryside Contracts in 2018 (£203,293.10), 2019 (£193,624.17) and 2020 (£193,624.17), totalling £590,541.44. The charges for the door entry system for the period 2018-2020 amounted to £398,440.73.

11. The Tenants contend that the charges in these years are unreasonably high, relying (as I explain in more detail below) on evidence that a wholly new replacement system could be acquired outright for significantly less than the amounts charged over 2018-2020, and that an equivalent system at a nearby site was maintained for a considerably lower price.

12. Through inadvertence, the Landlords failed to exercise their right to terminate the Countryside Contracts in July 2020, so the contracts rolled on. Thereafter the Landlords carried out a tendering exercise for the purchase of a new door entry system, tested the market and sought a new deal with Countryside. After consultation, a majority of the leaseholders opted to continue to rent the existing system, from 2022 onwards, from Countryside at a 50% reduction in price.

13. The Landlords accept that they are at fault for failing to exercise their termination right in July 2020 and conceded before the First-tier Tribunal ("**FTT**") that the charge for the second half of 2020 should be reduced by 50%, reflecting the fact that it could have terminated the old contracts with Countryside in July 2020 and would have been able to enter into the replacement contract at the reduced rent from that date.

14. The Tenants' case is that the charges for 2018, 2019 and 2020 were not "reasonably incurred" within the meaning of s.19(1) of the 1985 Act.

The statutory scheme

15. The relevant statutory provisions are found in ss.18-20 of the 1985 Act.

16. By s.18:

> "(1) … '*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 of insurance or the landlord's costs of management, and
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> (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."

17. By s.19:

> "(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
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> (a) only to the extent that they are reasonably incurred, and
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> (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."

18. Since 2002 (upon the enactment of the Commonhold and Leasehold Reform Act 2002), s.20 of the 1985 Act has made special provision for "qualifying long term agreements", defined as agreements entered into by a landlord, the costs of which are sought to be charged to the tenant, for more than 12 months in length involving expenditure of more than £100 per leaseholder. Landlords are obliged to consult with tenants (unless consultation is dispensed with), and failure to do so results in a cap on the amount which can be charged to the tenant. The revised s.20 has no application to the Countryside Contracts, however, because they were entered into before it came into effect.

Authorities on the meaning of "reasonably incurred"

19. The meaning of "reasonably incurred" was considered by this Court in *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45 ("***Waaler***"). In that case, the leases imposed a repairing covenant on the landlord and obliged the tenants to pay the landlord a service charge and a fair proportion of the costs of any improvements made by the landlord affecting the premises. The windows of the properties were not in disrepair, but suffered from an inherent design problem: two substantial panes of glass were installed in the tilt section of the windows which placed an unreasonable strain on the hinges, leading to a number of failures of the hinges over the years. The hinges themselves could be replaced at a cost of £140 per pair. The landlord chose, however, to address the underlying problem, and carried out works to replace the windows, which itself involved replacement of cladding and removal of asbestos. A demand was issued to each of the lessees in the sum of £55,105.95.

20. The FTT held that the landlord was entitled to recover that sum. The Upper Tribunal allowed the tenants' appeal, finding that the replacement of the windows was an improvement, not a repair, and that the landlord should have taken particular account of the extent of the lessees' interests, their views on the proposals and the financial impact of the works.

21. The Court of Appeal dismissed the landlord's appeal. In the course of his judgment, Lewison LJ, with whom Patten and Burnett LJJ agreed, identified the principles to be applied in considering whether costs were "reasonably incurred". The following is a summary:

    (1) The overall purpose of s.19 is to ensure that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, or (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard (§17, citing *Daejan Investments Ltd v Benson* [2013] 1 WLR 854, at §42).

    (2) The landlord had a discretion to carry out improvements. Where a contract empowers one party to make discretionary decisions which affect the rights of both parties, the law recognises that the exercise of discretion gives rise to a potential conflict of interest and restricts the exercise of discretion to what is rational (§20).

(3) A test of rationality applies a minimum objective standard to the decision maker's thought processes, importing a requirement of good faith, a requirement of some logical connection between the evidence and the ostensible reasons for the decision, an absence of arbitrariness or of capriciousness or perversity. Reasonableness, on the other hand, is an external, objective standard applied to the outcome of the decision maker's thoughts or intentions (§21-22, citing *Hayes v Willoughby* [2013] 1 WLR 935, per Lord Sumption at §14, *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] Bus LR 1304, per Rix LJ at §66 and *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661).

(4) The rationality test applied both to a landlord's discretion to effect improvements and to its choice as between different methods of repair (§23).

(5) If the landlord incurs costs that are not justified by applying the test of rationality, then they fall outside the scope of the contractually recoverable service charge altogether. The 1985 Act must have been intended to provide protection against costs which, but for its operation, would have been contractually recoverable. It follows that the statutory test in s.19 (whether the relevant costs are "reasonably incurred") imposes more than a rationality test (§25).

(6) Part of the context for deciding whether costs have been reasonably incurred is the fact that, in principle, the cost is to be borne by the tenants, reinforced by the fact that no cost is a relevant cost unless it is part of an amount payable by a tenant (§26 and §27).

(7) The argument of the landlords that the focus of inquiry was solely on the landlord's decision-making process was rejected (§28 to §33). Whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome (§37).

(8) The same *legal* test applies to all categories of works falling within the scope of 'service charge' in s.18 of the 1985 Act, but that does not mean that the legal and factual context applicable to one category of works rather than another can be ignored. In particular, there is a real difference between works which a landlord is obliged to carry out, and work which is an optional improvement (§42).

22. The difference between "process" and "outcome" was illustrated in *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173, a decision of the Lands Tribunal (the equivalent in 2005 of the Upper Tribunal (Lands Chamber)), one of the authorities cited by Lewison LJ in *Waaler*. In that case, the tribunal accepted that the landlord had followed appropriate processes, but still found that the relevant costs were not reasonably incurred, because they were not reasonable in amount when tested against the market. The member identified, at §40 of the decision, two distinct questions:

> "First, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the

> grounds that the steps it took justified the expense, without properly testing the market."

23. It might be questioned whether a landlord who had incurred a particular cost without testing the market could ever be said to have followed proper processes. What matters, however, is Lewison LJ's endorsement in *Waaler* of the proposition that the test for "reasonably incurred" also requires consideration of the outcome of the landlord's decisions.

24. It has been established that, certainly for the purposes of limitation, costs are "incurred" for the purposes of ss.18, 19 and 20, at the earliest, when an invoice is rendered to the landlord: see *Burr v OM Property Management* [2013] EWCA Civ 479; [2013] 1 WLR 3071. It was common ground before us that the relevant costs in this case were incurred in 2018-2020 when they were invoiced by Countryside. Where the parties disagreed – at least in their arguments before this Court – was whether the analysis of whether the costs were "reasonably" incurred is similarly focused on the date the costs were invoiced.

25. That was manifestly not an issue that either arose or was addressed in *Waaler*. *Waaler* does not help, therefore, on the question of whether the "outcome" in question means – in any case where there is a delay between the landlord entering into the relevant contract and being invoiced for the particular work or service – the outcome judged by reference to the market at the time of entry into the contract or by reference to the market at the time of the invoice. I return to this point below.

The history of these proceedings

26. Although this appeal raises a freestanding point of construction of s.19 of the 1985 Act, its disposal – consequent on the conclusion on that point of construction – requires a rather more detailed understanding of the history of the proceedings than would normally be the case.

27. The proceedings were brought by the Tenants under s.27A of the 1985 Act. This provides that an application may be made to the appropriate tribunal (in this case, the FTT) for a determination whether a service charge is payable and, if it is, as to – among other things – the amount which is payable.

28. The Tenants originally claimed that numerous items of service charges levied between 2018 and 2020 were unreasonably incurred. By the time of the hearing before the FTT, the matters in dispute had narrowed, but 16 items still remained in dispute. The FTT, in a decision dated 22 March 2023, upheld certain of the Tenants' objections, and dismissed others. Importantly, it upheld the Tenants' objection in relation to the Countryside Contracts.

29. The Landlords appealed that decision to the Upper Tribunal (Lands Chamber). In a decision dated 23 April 2024, Upper Tribunal Judge Elizabeth Cooke ("**the Judge**") allowed the Landlords' appeal concerning the service charges relating to the Countryside Contracts. She also allowed the Tenants' appeal against another aspect of the FTT's decision, but there has been no further appeal on that point to this Court.

The parties' respective positions in front of the FTT and the Judge

30. The Tenants' case in front of the FTT and the Judge was that, applying *Waaler*, there are two stages to the test for determining whether costs are reasonably incurred. The first is whether the decision to incur the costs was rational. The second is whether the outcome was reasonable, by which they meant the outcome in 2018-2020 judged by the cost of equivalent systems at that date. As confirmed in their skeleton argument for this appeal (filed before Mr Rainey KC was instructed), the Tenants argued before the FTT that the costs payable under the Countryside Contracts in 2018-2020 were unreasonably incurred because they were significantly higher than that which would been payable in the market at that time, by reference both to the cost of acquiring a new system, and to the cost of maintaining an equivalent system.

31. The point was succinctly summarised in a Scott Schedule of disputed charges where, in relation to the charges for the door entry system, the Tenants' comment was as follows:

> "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."

32. The Tenants' evidence was that a new door entry system would have cost £268,000 to buy in 2021, and that it cost in the region of one-tenth of the annual cost under the Countryside Contracts to maintain a similar system at a nearby development.

33. It is true that a broader test was suggested in §47 of the Tenants' Reply which stated: "The Applicant's case is that the decision to enter into these contracts was not objectively reasonable at the time it [sic] made." As the reply went on to make clear, however, the sole basis for this contention was that the costs incurred in 2018-2020 far exceeded what it was reasonable to pay for an equivalent system in those years. At §50 of the Reply, the Tenants said that their primary case was simple: "The charges under the Countryside Contracts are unreasonable because they far outstrip the actual costs of running the system." Before the Judge, Mr Spender (who represented the Tenants) expressly eschewed reliance on the contracts themselves.

34. The Landlords also focused, before the FTT and the Judge, solely on the position in 2018-2020. Their case was equally simple: the costs were reasonably incurred because the Landlords had no choice – in those years – other than to pay the amounts that fell due under the Countryside Contracts which were binding on them. In the Scott Schedule, they commented: "Focus should be on the [Landlords'] decisions in 2018-2020, not on the developer's construction decisions." In their Rejoinder dated 6 June 2022, they pleaded to §47 of the Tenants' Reply as follows, at §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 the decision (if it were capable of challenge at all by 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."

The decision of the FTT

35. Notwithstanding that both parties' arguments focused on the period 2018-2020, the FTT, at §44 of its decision, appeared to make a finding as to the reasonableness of the decision to enter into the Countryside Contracts in 2000:

> "The rental arrangement made by the developer in 2000 was short sighted and paid no heed to the leaseholders who were foisted with what was on any account a bad deal for them. Unbeknown to them they were purchasing properties with expensive rental systems covering all of the essential communal systems – Door Entry; TV distribution and Car Park Gates and barriers. The 20 year contract was on any account onerous. The rent was high and the equipment was not owned which meant that the Respondents and in turn the leaseholders were effectively held to ransom. If they didn't pay the equipment would be removed. The clauses in the contract apparently precluded an easy early exit before the 20 years was up."

36. At §45, however, the FTT noted the Landlords' argument that it was not open to them "to revisit a bad deal made in 2000", and said: "We agree with that. We are looking at the years 2018-2020 only and must confine our consideration to these years". As to that, they concluded (at §45) as follows:

> "In these years the leaseholders were still the victims of the bad deal. Nothing had improved. They were paying the high rental costs. If the Respondents or the developer had bought the system the leaseholders would not be paying rental costs. They would only be paying the cost of maintenance which Mr Spender has demonstrated is considerably less. The argument that leaseholders bought into the scheme and are stuck with the consequences only works if they were aware of the details of the Countryside contracts in particular that they didn't own the equipment. This was not the case on the evidence heard by the Tribunal. Moreover, it's not fair to say that because the Respondents could not extract themselves from the bad deal before it had expired the leaseholders should also suffer. If the costs are not reasonably incurred then the leaseholders should not be liable for them. The bad deal made in 2000 was still a bad deal in 2018 and it's not fair to foist upon the leaseholders the consequences of it. If the landlord enters into or adopts a financially unsound arrangement does that mean the tenants have to pay nonetheless for the full term of the contract? – the answer must be no because otherwise s.19 Landlord and Tenant Act 1985 would serve no purpose. The tenants are only liable for the amount reasonably incurred and the landlord who entered into or adopted the bad deal must pay the rest."

37. The FTT's conclusion, at §46, therefore, was that it was not reasonable for the Tenants to meet the rental cost, and they should only be liable for the cost of maintenance and repair for the years in question. In the absence of a breakdown of the yearly sum paid

under the Countryside Contracts, the FTT gave the Landlords a further opportunity to detail and justify the costs of the contracts for the relevant period without the rental fee. The Landlords were, in the event, unable to provide such a breakdown (having been unable to obtain one from Countryside). In a further decision dated 3 May 2023, the FTT concluded, based on estimates obtained by the Landlords from other contractors, that a reasonable sum for the Tenants to pay in respect of the Countryside Contracts for the relevant period was 81% less than had been sought by the Landlords, resulting in payments of £36,551.25 for 2018 and £37,105.56 for each of 2019 and 2020.

The Judge's decision

38. As I have already observed, each side pursued before the Judge an argument that it was necessary to focus only on the position in 2018-2020 (albeit each to the opposite effect). The Judge rejected both parties' interpretations of s.19. The Judge accepted (as is common ground between the parties) that the costs were "incurred" when they were invoiced by Countryside in 2018-2020. That did not mean, however, that in assessing whether those charges were *reasonably* incurred, the FTT should base its judgment only on what happened at that point in time.

39. Instead, the Judge formulated a test which, in assessing whether costs were reasonably incurred, took into account the circumstances in which the Landlords assumed the liability to pay the relevant costs:

> "73. …section 19(1)(a) is aimed at the incurring of costs in the broader sense of the landlord's taking on the liability; the mischief at which it aims is the landlord's committing to too high a price, and therefore the section requires an examination of the background to the presentation of the invoice. The question is whether it was reasonable – in the sense of producing a reasonable outcome for the landlord and the leaseholders as explained in *Waaler v London Borough of Hounslow* [2017] EWCA Civ 45 – for the landlord to have incurred the costs by entering a contractual commitment and thereby making itself liable to incur the costs, whether it did so a short while before invoicing in the case of a one-off contract or years before as in this case.
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> 74. I think the approach of the FTT and the Tribunal to a challenge under section 19(1)(a) in respect of costs incurred under a contract should be to ask whether the cost was reasonably incurred in the sense that 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)."

40. She concluded, at §75, therefore, that the FTT had been right to look at what happened in 2000, and to ask whether it had been reasonable for the Developer to enter into the Countryside Contracts. Although the FTT did appear to find (as I have noted above) that the Countryside Contracts had been a "bad deal" when entered into, it is not clear

to me that this was the basis of its decision, given its acceptance of the Landlords' argument that it was required to confine itself to a consideration of the years 2018-2020.

41. The Judge went on to hold, however, that the FTT's error had been that it had reached a conclusion that was not open to it on the evidence. She set aside the FTT's decision on that basis, and substituted her own decision that the relevant costs were reasonably incurred. Her reasoning is set out in §78 - §80 and §82:

> "78. I agree with Mr Allison that in saying "the bad deal made in 2000 was still a bad deal in 2018" the FTT went beyond the evidence about the circumstances in 2000. There was no evidence whatsoever that the contract was a bad deal in 2000. Mr Spender did not suggest that. I have read the leaseholders' arguments in the FTT and there is no suggestion and no evidence that the developer could have done better in 2000. The challenge is only to the three years 2018, 2019 and 2020 and all the evidence relates to available prices for rental, purchase and maintenance at that date. The problem seems to be that the price of the relevant technology has gone down so much that the price set by the contract (even as modified by agreement in 2008) has become too high, but no-one could have foreseen that. Criticism of the deal in 2000 rests only on hindsight."
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> 79. By the time the costs in 2018, 2019 and 2020 were actually incurred, when the invoices were presented, the landlord had no choice but to pay them; it had no choice because it was bound by contracts made in 2000 which it could not now escape, and the then landlord's decision to enter those contracts has not been shown to have been unreasonable (in the sense required by section 19(1)(a) as explained in *Waaler v Hounslow*).
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> 80. Accordingly I take the view that the FTT's conclusion was not open to it on the evidence, not because it was wrong to look at the arrangements made in 2000 but because there was no evidence before it to justify the judgment that it made about those arrangements; its decision is set aside.
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> …
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> 82. I substitute the Tribunal's own decision. The Tribunal accepts the landlord's concession of 25% of the cost in 2020, and determines that, with that concession, the costs of the Countryside contracts were payable in the years in dispute because they were reasonably incurred."

The grounds of appeal

42. There are two main grounds of appeal (permission for which was granted by Nugee LJ on 10 February 2025).

43. The first is that the Judge wrongly departed from previous Court of Appeal and other authority in applying a different test under s.19 of the 1985 Act in relation to relevant costs arising under a long-term agreement.

44. The second is broken down into four parts: (a) the Judge was wrong to conclude that there was a need for different guidance under s.19 in relation to relevant costs arising under long-term agreements; (b) the Judge wrongly departed from prior authority on the burden of proof, by requiring the Tenants to disprove the Landlords' defence; (c) the Judge failed to take into account undisputed evidence that the costs in dispute were not objectively reasonable in 2018-2020; and (d) the Judge failed to give any, or any adequate or proper, reasons for her substituted decision.

45. By the time of the hearing of the appeal (by which time Mr Rainey had been retained to appear on behalf of the Tenants) the parties' arguments boiled down to two main issues: (1) the correct test for determining whether costs are reasonably incurred under s.19(1)(a) of the 1985 Act; and (2) where the burden of proof lies in making that determination. As the arguments developed, it became clear, however, that the second point gives rise to a broader question as to what approach should have been taken by the Judge, having reached a conclusion as to the correct test under s.19 for which neither party had contended.

46. There is a third ground of appeal, but that relates to the costs orders made by the FTT and the Judge under s.20C of the 1985 Act. Mr Rainey accepted that the Tenants' arguments under this ground were parasitic on the outcome of the appeal on grounds 1 and 2. The parties agreed that consideration of ground 3 would be postponed until after we had handed down judgment on the other grounds.

Issue 1: the correct test under s.19

47. Mr Allison KC, who appeared with Mr Morris for the Landlords, summarised the three options canvassed in this case as to the correct test for determining whether costs are reasonably incurred.

48. The first option, being that canvassed by the Tenants before the FTT and the Judge, is that costs are reasonably incurred if they are reasonable in amount when tested against the market at the time they are incurred, being at the earliest the date on which the landlord was invoiced by Countryside during 2018-2020.

49. The second option, being that canvassed by the Landlords before the FTT and the Judge, is that costs are reasonably incurred if the landlord has no choice but to pay them when invoiced, having committed to do so under an existing contract.

50. The third option is the conclusion reached by the Judge: in testing whether costs payable in 2018-2020 were reasonably incurred it is necessary to consider reasonableness by reference to the circumstances in which the landlord assumed the contractual obligation to pay.

51. Before us, neither side pursued (as their primary case) the case they had pursued below. For the Landlords, Mr Allison's primary submission was that the Judge was correct (i.e. the third option). He maintained the second option as a fallback.

52. For the Tenants, Mr Rainey advanced what he called a variation on the third option. He submitted that, while it is necessary to look at the circumstances in which the Developer entered into the relevant commitment, it is also necessary to go back and look at the consequences in 2018-2020, which the Judge failed to do.

53. If by this he meant no more than that, in considering whether it was reasonable for the Landlords to enter into the commitment in the first place, a relevant piece of evidence to take into account is the fact that the costs payable in 2018-2020 were much higher than could have been achieved if the landlord had been free to contract in the market, then I do not see any difference between that and the test applied by the Judge.

54. I understood, however, Mr Rainey to be submitting something different. His submissions started from the premise that the case is really about the allocation of risk. If a landlord chooses to enter into a long-term contract, even if the terms were objectively reasonable at the time it was entered into, there is a risk that it may turn out that the cost of that contract to the landlord in later years is greater than the cost of another contract available in the market at that later time. He submitted that the effect of s.19 is to require the landlord to assume all of that risk, such that while it must pay the amounts due under the contract, it is precluded from recovering anything from the tenant other than the cost at market rates at the later date.

55. The steps in his argument were as follows. First, the purpose of s.19(1) is "to ensure tenants are protected from paying for inappropriate works or paying more than would be appropriate", in the words of Lord Neuberger in *Daejan Investments Ltd v Benson* (above), at §42 and §44. Second, costs are incurred at the earliest when they are invoiced to the Landlords: *Burr* (above). Third, it is necessary to look at the reasonableness of the "outcome", not merely the process: *Waaler* (above); *Forcelux v Sweetman* (above), and *Hayes v Willoughby* (above), at §14, where Lord Sumption distinguished reasonableness from rationality on the basis that it applied to the outcome of a person's thoughts or intentions. Fourth, since part of the context (see *Waaler*) for determining whether a cost has been reasonably incurred is the fact that the tenant will have to contribute to it, the landlord's answer cannot be simply "our hands are tied."

56. Mr Rainey accepted that "as part of the process" of asking whether a cost was reasonably incurred in 2018-2020 it may be appropriate to look back at the circumstances in which the liability became inevitable – i.e. in this case the entry into the Countryside Contracts in 2000 (ignoring the intermediate points when they were renegotiated in 2008, or novated to the Landlords in 2014). He also accepted that there may be cases where it is objectively reasonable – indeed necessary – for a landlord to enter into a long-term contract. He gave as an example a contract to provide combined heating and power plants where, in order to comply with carbon neutrality and other regulations, the only basis on which it could be done would be to enter into a very long-term agreement. At one point he said this may be a "complete answer" to arguments about whether costs were reasonably incurred 20 years later. When pressed, however, he submitted that, even in a case where the rise in costs was due to external reasons that genuinely could not have been foreseen, "ultimately outcome trumps process", and if the landlord chooses to enter into a long-term contract, it is he who bears the risk of that loss.

57. I do not accept Mr Rainey's gloss on the Judge's approach. The Judge was correct, in my view, to conclude that in order to determine whether a cost was reasonably incurred,

it is necessary to have regard to the circumstances in which the landlord entered into the obligation to pay. I reject Mr Rainey's contention that, if the costs payable in 2018-2020 were far in excess of what could have been obtained if contracting afresh in the market at that time, then that is enough to establish that the costs were not reasonably incurred.

58. Although Mr Rainey was correct to focus on the importance of "outcome", he was wrong to define outcome, in the case of a contract entered into in 2000, by reference only to the costs actually payable in 2018-2020. As I have already observed, neither *Waaler* nor any of the other authorities cited to us support that conclusion. The costs payable in 2018-2020 are a relevant factor, but only in so far as they shed light on whether it was reasonable to enter into a contract in 2000 which led to those costs falling due in that amount in 2018-2020.

59. While the purpose of s.19(1) includes ensuring that tenants are protected from paying more than would be appropriate, the wording of the provision is important. The mechanism for doing so is not to limit the costs payable to "a reasonable amount", but to limit the costs to those that were reasonably incurred. That enables consideration of the reasonableness of the amount of costs, but framed as whether it was reasonable to incur costs in that amount.

60. Adopting Mr Rainey's language, and recognising that s.19(1) imposes a limit on recovery of costs which the tenant has contracted to reimburse, it would not in my judgment be an appropriate allocation of risk to prevent a landlord recovering costs which it was reasonable in all the circumstances for it to have committed to pay.

61. Whether the landlord enters into a long-term contract or a one-off arrangement, the legal principle is the same. Even in a one-off arrangement, there may be a delay between the landlord committing to works being done, and the completion and invoicing of those works by the contractor. There is always the possibility that in the intervening period there is a collapse in the market price for the materials or work provided.

62. The difference between a one-off arrangement and a long-term contract lies mainly in the likelihood of there being such a change in price. Mr Rainey did not go so far as to suggest that a landlord may not enter into a long-term contract. The fact that it may be reasonable for a landlord to enter into a long-term contract is implicit in the revisions to s.20 in 2002, although the greater risks in doing so are recognised by the requirement for consultation with tenants.

63. Assessing the reasonableness of entering into a long-term contract by reference to outcome will entail a consideration of factors including the nature of the goods or services to be supplied, the length of term, the particular terms and the price, all judged by reference to the circumstances existing at the time of contracting including what else was then available in the market. If the conclusion is that, both in terms of process and outcome (judged at that time) it was reasonable to incur the costs, I do not consider that s.19 precludes recovery of the costs as service charge if in later years the cost is greater than could at that time be obtained in the market.

64. Mr Rainey drew a comparison between s.19(1)(a) and s.19(1)(b). The latter precludes costs being taken into account unless the work or services are of a reasonable standard. A landlord could not avoid the consequences of sub-paragraph (b) by relying on the

fact that the work was provided under a long-term contract so why, he asked rhetorically, could the landlord rely upon that fact under sub-paragraph (a)? I do not accept this argument. If sub-standard work is provided by a third-party contractor to a landlord, then either a contractual remedy lies with the landlord, in which case the landlord should enforce it, or the landlord unreasonably failed to bargain for works of a sufficient standard. In either case, the tenant ought not to bear the consequences of the third-party contractor's failings. The fact that a long-term contract might turn out – against reasonable expectations – to be more expensive than anticipated would not, in contrast, provide the landlord with any remedy against the contractor. That reinforces the view that the sole focus is on the reasonableness of the decision entered into at the outset.

65. Given that conclusion, it is unnecessary to consider Mr Allison's fall-back case, that it is always enough for a landlord, in order to establish that costs under a long-term contract were reasonably incurred, to point to the fact that the landlord is contractually obliged to pay the costs. Since we received full argument on the point, however, I will shortly state my reasons for rejecting it. First, the argument has no rational basis in principle. There is no sensible point of distinction between a long-term contract and a one-off arrangement. If all that matters is that, at the point costs are invoiced by the third-party contractor, the landlord is contractually bound to pay, then that would be so irrespective of the time that has passed between making the contract and incurring the cost under it. If the argument was correct, s.19(1) would be deprived of all utility.

66. Second, it is not – on a proper analysis of the cases relied on by the Landlords – supported by authority.

67. The principal authority relied on is *Auger v London Borough of Camden* (2008) LRX/81/2007, a decision of the Lands Tribunal, on appeal from the Leasehold Valuation Tribunal ("**LVT**"), the equivalent in 2005 of the FTT. That case concerned an application by the landlord (London Borough of Camden) for dispensation from the consultation requirements of s.20 of the 1985 Act in respect of long-term "Partnering Agreements" which it proposed to enter into. Those Partnering Agreements provided for works to be carried out on Camden's housing stock over a number of years, at contract rates determined in them. The LVT had granted the dispensation sought. One of the reasons was that tenants would have the protection of s.19(1) of the 1985 Act, so that they would be able to challenge the resulting service charge. The Lands Tribunal (HHJ Huskinson) allowed an appeal from that decision, accepting that s.19(1) would not protect the tenants, saying, at §47:

> "I accept [the leaseholders'] arguments … that once the Partnering Agreement(s) is/are in place there will be difficulty for the tenant to say that the amount of costs incurred under such Partnering Agreement(s) on qualifying works was unreasonably high. We are not here concerned with whether the works to be carried out are reasonably necessary or are carried out to a reasonable standard − in respect of such points the tenants would still have substantial protection under section 19 of the Act. However, as regards works which the tenants accept are reasonably necessary and done to a reasonable standard, there may still be a question which the tenants wish to raise as to whether the cost which Camden seek to charge through the

> service charge in respect of carrying out such works is reasonable. The provisions of section 19(1) provide that relevant costs are to be taken into account only to the extent that they are "reasonably incurred". If works which are reasonably necessary and are done to a reasonable standard are carried out under a Partnering Agreement Camden will be able to meet criticism regarding the level of expense by pointing out that Camden is already contractually bound to the Partner and had to place the works with the Partner at the contract rate provided for in the Partnering Agreement, and therefore the costs were indeed reasonably incurred because, even if the works could reasonably have been expected to have been done significantly cheaper by other competent contractors, Camden would be in breach of contract by giving the works to anyone other than the Partner."

68. This decision is not binding on us. If it is to be taken as deciding that a tenant could never rely on s.19(1) in relation to costs passed on to it as service charge under long-term agreements, simply because the landlord was contractually obliged to pay, then it was in my view wrong.

69. I do not think, however, that the Lands Tribunal was so deciding. The proposed Partnering Agreements would themselves have been the subject of a competitive tendering process, and the local authority would have had to comply with the normal rules of local government law and the relevant Public Contract Procurement Regulations and EU Regulations. There were strong reasons why it would be desirable if not necessary for a local authority to enter into Partnering Agreements (see §5 to §7 of the Lands Tribunal's decision).

70. In those circumstances, the practical ability to challenge the reasonableness of the local authority's decision to enter into a Partnering Agreement is likely to be considerably reduced. I do not read the Lands Tribunal's decision as having any wider importance than on the particular facts of that case.

71. In the other case relied on by Mr Allison, *London Borough of Lewisham v Rey-Ordieres* [2013] UKUT 14 (LC), the Upper Tribunal quoted *Auger* (at §44) but did not follow it, on the basis that the terms of the agreement before it could only be "strongly persuasive" as to reasonableness. That was also a case where the local authority entered into long-term agreements pursuant to regulated procurement processes.

72. Mr Allison also referred to a line of authority which he said establishes that, where a property has fallen into disrepair due to a landlord's historic neglect, that is not relevant in determining whether the costs incurred in carrying out the repairs are unreasonable under s.19(1) of the 1985 Act. He referred us to *Radcliffe Investment Properties Limited v Meeson* [2023] UKUT 209 (LC). In that case the Deputy President noted the "paradoxical proposition" that the reason why a cost has been incurred is irrelevant to the reasonableness of incurring that cost. He said (at §28) that it may be appropriate in some cases, but was not an inflexible rule. He rejected reliance on it on the facts, partly because (at §34) "[t]his was not a case in which many years elapsed between the omission or breach of duty and the incurring of the cost made necessary by it."

73. However flexible this principle, it does not support Mr Allison's fall-back argument that costs are reasonably incurred, at the time they are invoiced, under a long-term contract merely because the landlord is contractually bound to pay them. In cases of historic neglect, if the repairs are necessary or are more costly than they should be due to the landlord's default, then the tenant has a separate remedy for breach of covenant. The tenant has no remedy, however, against a landlord that agrees to pay unreasonably high amounts for repairs to the property. In such a case, s.19(1) and/or a contractual defence of irrationality are the only protections available.

Conclusion on Issue 1

74. For the above reasons, I would dismiss Ground 1 of the Tenants' grounds of appeal. Grounds 2(a) and 2(c) do not add anything material to Ground 1, so it follows I would also dismiss the appeal on those grounds.

Issue 2: The impact of the conclusion on Issue 1

75. The remaining grounds of appeal to consider are Grounds 2(b) and (d).

76. Under Ground 2(b), the Tenants contend that, in substituting her own decision for that of the FTT, the Judge wrongly reversed the burden of proof. Under Ground 2(d), the Tenants contend that the Judge failed to give adequate reasons for her substituted decision.

77. At §58 of her judgment, the Judge recorded the Tenants' argument that, as the Tenants had raised a *prima facie* case that the costs under the Countryside Contracts were not reasonably incurred, it was for the Landlords to satisfy the burden that they *were* reasonably incurred. She did not expressly address that argument, but in substituting her own decision for that of the FTT she used language which assumed that the burden was on the Tenants: at §79 she concluded that "the then landlord's decision to enter into the contracts has not been shown to have been unreasonable." That was itself based on her conclusion at §77 that there was "no evidence whatsoever that the contract was a bad deal in 2000".

78. In the Judge's Order dated 26 September 2024 refusing permission to appeal, she noted the contention that her substituted decision was wrong because the burden of proof had shifted to the Landlords, but said (at §21): "as noted above, it was not the [Tenants'] case that there was anything wrong with the 2000 agreement at the time it was entered into." That was a reference back to §17 of the reasons, where she said: "the applicants did not seek either in the FTT or in the Tribunal to show that there was anything wrong with the long-term agreement when it was first entered into; nor did they say they would have liked to do so but could not do so because documents had been lost."

The law as to the burden of proof

79. Burden of proof is used in two distinct senses: the legal (sometimes called the persuasive or ultimate) burden; and the evidential burden. Generally, the legal burden lies throughout on the party who substantially asserts the affirmative of the issue in question: Phipson on Evidence, 20th ed., at §6-06. The evidential burden, on the other hand, describes the obligation of a party upon whom it rests to adduce sufficient evidence for the matter to be left to the tribunal of fact - in other words, to adduce some

credible evidence which, if left uncontradicted and unexplained, could be accepted by the court as proof of the fact in question. Although reference is sometimes made to the evidential burden "shifting", this can be misleading. The parties will adduce their own evidence, or obtain evidence by cross-examining the witnesses for the other side. As the case progresses, the weight of evidence may appear to shift from one side to the other as new pieces of evidence emerge. But that is simply a reflection of the provisional state of the evidence at the time, and does not entail the shifting of any burden, whether legal or evidential. See generally *Brendon International v Water Plus* [2024] 1 WLR 2434 at §§ 50-54.

80. It was recognised in *Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25 (CA) ("***Yorkbrook***"), per Wood J at p.34, that some difficulty was being encountered by registrars and practitioners in the field in dealing with the burden of proof, in the context of the predecessor to s.19, Schedule 19 to the Housing Act 1980, which in turn was in materially the same terms as s.91A of the Housing Finance Act 1972 ("A service charge shall only be recoverable from the tenant of a flat … to the extent that the liability incurred or amount defrayed by the landlord in respect of the provision of such items is reasonable").

81. That was a case in which proceedings were commenced by the landlord, claiming arrears of rent and maintenance contribution. Wood J, at pp.34-35 said:

> "Having examined those statutory provisions, we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or of costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence establishing a prima facie case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions."

82. This passage was applied in *Schilling v Canary Riverside Development Ptd Limited* (LRX/26/2005) ("***Schilling***") by the Lands Tribunal. In that case, the tenants of a property had applied under s.27A of the 1985 Act for a determination that certain service charges were not payable. The tenants challenged numerous items within the service charge. The LVT rejected many of the tenants' challenges on the basis that no sufficient evidence was furnished to enable the tribunal to conclude that their challenge was justified. The tenants appealed on the basis that the LVT had wrongly failed to hold that the burden of proof was on the landlords. On the appeal, HHJ Michael Rich QC concluded, on the basis of *Yorkbrook*, that while a landlord had the burden of proving liability for service charges under the terms of the lease, the solution to the difficulty that arises in relation to burden of proof and the "defence of unreasonableness" is that it is for the tenant (the defendant) to raise a *prima facie* case of unreasonableness,

whereupon the court will reach its conclusion on the whole of the evidence. Accordingly: "liability in respect of the service charges the subject of the application to the LVT was not determined by the burden of proof, but by consideration of the whole evidence" (see §12).

83. HHJ Judge Rich QC went on, *obiter*, to consider the relevant law as to the *legal* burden of proof, concluding that the only possible conclusion was that the burden lay on the party who made the application to the LVT under s.27A of the 1985 Act: "If the landlord is seeking a declaration that the service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable."

84. In *Enterprise Home Developments LLP v Adam* [2020] UKUT 151 (LC) ("***Enterprise***"*)*, Martin Rodger QC, Deputy Chamber President, also applied the approach adopted in *Yorkbrook* in the context of an application by a tenant under s.27A of the 1985 Act. The tenant had not advanced before the FTT any affirmative case that services had not been provided, or had been provided to a poor quality, and there was nothing to incite suspicion that the costs had not been incurred or had been unreasonably incurred. The FTT had nevertheless assumed such matters against the landlord, unless the landlord could prove to the contrary.

85. The Deputy Chamber President referred to the passage quoted above from *Yorkbrook* and said:

> "Much has changed since the Court of Appeal decision in *Yorkbrook v Batten* but one important principle remains applicable, namely that it is for the party disputing the reasonableness of sums claimed to establish a *prima facie* case. Where, as in this case, the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the FTT is not required to adopt a sceptical approach."

86. The issue was revisited by this Court in *32 St John's Road (Eastbourne) Management Company Ltd v Gell* [2021] EWCA Civ 789; [2021] 1 WLR 6094 ("***Gell***"). In that case a landlord brought a claim in the county court against its tenant for unpaid service charges. The tenant, who suffered from mild cognitive impairment, filed a defence and counterclaim contending that his signature had been obtained by fraud, and that the landlord had failed to provide details of estimates for the work done. The deputy district judge struck these out, but – concerned that the charges were high – entered judgment for an amount to be assessed upon the filing of further evidence. Following a further hearing (the tenant having filed a statement repeating his earlier complaints), the deputy district judge ordered that the question of reasonableness be determined by the FTT under s.27A of the 1985 Act. On appeal, the circuit judge reversed that decision, and entered judgment against the tenant. The Court of Appeal dismissed the tenant's further appeal. In doing so, Edis LJ (with whom Lewison and Arnold LJJ agreed) expressly followed *Yorkbrook*, saying (at §65):

> "I therefore consider it is incumbent on a tenant who contends that service charges are unreasonable in part by reason of [s.19

> of the 1985 Act] because they are unreasonable, to plead that case in the defence."

87. He rejected, at §66, the contention that s.19 of the 1985 Act placed an onus on the court to investigate the issue of reasonableness in all cases, whether they were defended or not, explaining, at §67:

> "Section 19 seems to me to adjust the contractual rights arising under a tenancy as between the parties to that tenancy. It prevents the landlord from demanding unreasonable service charges under a provision in the lease. It does not direct that court how it should proceed in the event that it is claimed that a landlord has charged unreasonable service charges. In contrast to section 84 of the Housing Act 1985, it says nothing at all about the role of the court. The court will proceed in the same way that it does in any other debt claim. If a defence is raised that the debt is not properly due because of the terms of the contract between the parties as adjusted by the Act, it will adjudicate on that issue. Otherwise, it will not."

88. It is clear that the Court of Appeal in *Gell* was primarily concerned with a pleading point, namely that where a court is faced with a landlord claiming payment of service charges, it will not embark on an investigation of whether the charges were reasonably incurred unless the tenant files a defence which puts the reasonableness of the costs in issue. However, Edis LJ expressly endorsed the passages from *Yorkbrook* and *Enterprise* which I have quoted above, as to the need for a tenant to establish a *prima facie* case that a particular cost was unreasonable, before the landlord would be required to adduce evidence to justify it.

89. Pulling the strands from these authorities together, it seems to me that the position is as follows:

(1) In a case where a landlord claims payment of service charges in court proceedings, it has the legal burden of proof.

(2) Irrespective of where the legal burden lies, however, the courts have developed a pragmatic approach that a landlord will not, without more, have to justify each and every element of service charge claimed from the tenant. In the first place, it is for the tenant to identify in its pleading those elements of the costs claimed which it says were unreasonably incurred and, second, the landlord will only be required to prove that particular elements of costs claimed as service charge were reasonably incurred if the tenant is able to establish a *prima facie* case that they were not reasonably incurred.

(3) Given this pragmatic approach, it probably does not matter where the legal burden lies in the case of an application under s.27A. It is clear from *Yorkbrook* and *Enterprise* (as endorsed in *Gell*) that on such an application the critical questions are: (1) has the tenant properly put in issue whether a particular element of the cost claimed as service charge was reasonably incurred; and (2) has the tenant established a *prima facie* case that it was not reasonably incurred. If the answer to

both questions is yes, then (as Mr Allison accepted) the burden lies on the landlord to establish that the cost was reasonably incurred.

(4) If it did matter where the legal burden lay on an application under s.27A, I do not think that HHJ Rich QC was right to say (obiter, in *Schilling*) that the legal burden lies with whoever makes the application under that section. I note, in this regard, that an application for a determination under s.27A would not be made in a vacuum. In practice, the context will either be a claim by the landlord seeking payment of service charge from a tenant, or a claim by a tenant for repayment of amounts already paid as service charge. It is in that context that the incidence of the legal burden has practical importance, the burden lying on the party that needs the court's assistance in obtaining payment, or repayment.

90. Where does that leave this case? Mr Rainey submitted that the Judge was wrong to say that there was "no evidence whatsoever" that the Countryside Contracts were a bad deal in 2000. On the contrary, he submitted that there was more than sufficient evidence to establish a *prima facie* case, so as to shift the burden on the Landlords to justify the level of costs.

91. As Mr Allison pointed out, the door entry system used – as at 2000 – new technology, including colour screens. There is no evidence of what that technology cost in 2000, but it is hardly novel to suggest that it was reasonably understood in 2000 that technological advances would continue and, as they did, costs would be likely to fall. The fact that the Countryside Contracts committed the Developers to a period of 20 years, paying a fixed price for such technology subject to annual upward increases, itself raises a serious question mark. That is compounded by the fact that these were contracts of hire, under which the Developer would never own the equipment. The fact that, in 2008, Countryside was prepared to limit the cost to 90% of the rent as at that time, with no further price increases, adds force to the idea that the contracts may have been a bad deal at the outset. That might have been mitigated if there was an effective break clause. It was the Landlords' evidence, however, (albeit without reference to a particular point in time) that it would not have been cost effective to exercise the break clause, given the very high exit fee that would have been incurred. The lack of an effective break clause in such a long-term contract is a further concern.

92. I agree that it cannot be said in this case that there was no evidence to suggest that the costs of the Countryside Contracts may have been unreasonably incurred. The Judge erred, therefore, in saying that there was no such evidence. On the other hand, as the history of the proceedings described above shows, the Judge was right to say that the Tenants had not put their case on that basis below. Specifically, the criticisms that Mr Rainey made of the Countryside Contracts did not reflect the Tenants' case before the FTT or the Judge.

93. The one thing that is common ground is that neither side adduced any evidence as to the circumstances in which the Countryside Contracts were entered into, or the circumstances in which the contracts were varied in 2008, or in which they were novated to the Landlords in 2014. While evidence as to what in fact happened in 2000 would lie solely with the Developers, the Landlords stand in their shoes and, as between them and the Tenants, the onus would lie on them to produce the relevant evidence. It would have been open to both sides, however, to seek to obtain expert evidence as to what alternatives would have been available in 2000.

94. In the absence of any such evidence, there are three possibilities. For the Tenants, it could be said that there is at least a *prima facie* case that the costs were unreasonable, so the absence of evidence means that the Landlords have failed to show the costs were reasonably incurred. For the Landlords, it could be said that they can only be subjected to a burden of establishing reasonableness in respect of such case as is advanced by the Tenants and, apart from the passing reference in their Reply, the Tenants had not advanced a case that the entry into the Countryside Contracts was itself unreasonable.

95. There is force in both of these extreme propositions, but I do not think either properly reflects what has happened in this case. Neither side had identified the correct legal test. While there may have been material from which the FTT could have found a *prima facie* case that the costs were unreasonably incurred in 2000, it was not appropriate for it to make a finding that the costs were unreasonably incurred on the basis of the circumstances in 2000, when that was not the case advanced by the Tenants and – for that reason – the Landlords had not sought to adduce evidence in answer. Equally, it was not appropriate for the Judge to reach findings to the opposite effect on the basis of a legal test that she had (rightly) identified but which, because the parties had not advanced it, they had not addressed by way of evidence and submissions.

96. While recognising that it is less than ideal, because it leads to yet more cost, I consider that a third possibility best meets the justice of this case, namely that the matter is remitted to the FTT to give the parties the opportunity to make submissions, and adduce evidence, upon the basis of the correct legal test. In accordance with the approach adopted in *Yorkbrook* (above), it will be for the Tenants to formulate a case that the costs under the Countryside Contracts were unreasonably incurred, in the sense I have explained above. That will presumably be along the lines advanced by Mr Rainey in oral argument on the appeal, but that will need to be pleaded by the Tenants. Assuming that this meets the threshold of a *prima facie* case, there is likely to be a need for directions for a responsive pleading from the Landlords, further evidence, and for the FTT then to resolve the issue on the basis of all the evidence then before it.

Conclusion

97. For the above reasons, I would allow the appeal and remit the case to the FTT to determine whether the costs were reasonably incurred, on the basis of the legal test as identified by the Judge.

Lord Justice Snowden

98. I agree.

Lord Justice Nugee

99. I also agree.