IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2024-002282**

ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke

BETWEEN:

LIAM PHILIP SPENDER AND OTHERS

Appellants

and

(1) F.I.T NOMINEE LIMITED
(2) F.T.T NOMINEE 2 LIMITED

Respondents

RESPONDENTS' APPEAL SKELETON ARGUMENT

References to the core bundle are in the format [CB/Tab/Page]

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I Introduction

1. This appeal raises a familiar question in an unusual context: how does a tribunal assess the reasonableness of service charges incurred under a long-term contract, where the liability to pay a fixed amount was assumed by the developer, decades before the invoice was presented and prior to some leases even being granted?

2. Upper Tribunal Judge Cooke (the "**Judge**") took an orthodox approach to the question, applied well-established tests and came up with a simple answer. Since a landlord subject to annual payment obligations in a contract entered into twenty years ago is contractually obliged to make those payments, whether the costs were reasonably incurred turns on the reasonableness of the decision to enter into the contract. The Appellants on this appeal object to her focus on the original decision, because they adduced no evidence to properly suggest that it was unreasonable. Because of that, she held that the Appellants had failed to do what was incumbent upon them: to raise a *prima facie* case that the decision and its outcome was unreasonable, adjudged by reference to the prevailing market at the time. Because they had not done so, there was no case for the Respondents to answer, and the Appellants' challenge failed.

3. The Appellants refer to many cases which they (wrongly) say support their contention that the reasonableness of a cost incurred under a long-term contract should be adjudged by reference to the present-day market. However, there is no dispute that

a tenant wishing to challenge the reasonableness of a cost must raise a *prima facie* case for the landlord to answer. If they do not, they cannot simply put the landlord to proof, and so their challenge must fail. As the applicant, they bear the burden of proof, and must do something sufficient to 'shift' the evidential burden to the respondent. Only if they do so is it for the landlord to demonstrate that the cost was reasonably incurred: *Schilling v Canary Riverside PTE* [2005] LRX/26/2005.

4. Distilled to its essence, and despite the various grounds advanced by the Appellants, this appeal at heart is more about whether the Judge was right to find that the First-tier Tribunal (the "**FtT**") had made a decision which was not open to it on the evidence. The issue is whether a tenant can be said to have raised a *prima facie* case that a decision to enter a contract over two decades ago was unreasonable simply by seeking to show that the cost of doing so in the present day would be less.

5. For the reasons developed below, and in line with simple common sense, the Judge correctly appreciated that this was not legitimate. The Respondents as a fall-back rely on a respondent's notice which contends that, if the Appellants are correct that the Judge erred in her approach, then the Judge should have held that it was reasonable to incur the costs for the simple reason that the Respondents were contractually bound to pay the relevant invoices. An additional argument, that the Judge should alternatively have found an estoppel by convention preventing the Appellants from contending that the costs were not reasonably incurred, is not pursued.

II The statutory framework and the authorities

6. The statutory limitation on recovery of residential service charges is found in section 19 of the Landlord and Tenant Act 1985 (the "**1985 Act**"), which provides as follows.

> ***19.— Limitation of service charges: reasonableness.***
>
> *(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.

7. Under section 27A of the 1985 Act, residential landlords and tenants may apply to the FtT for a determination of whether a service charge is payable and, if it is, the amount which is payable.

8. The leading decision on section 19 of the 1985 Act is *Waaler v Hounslow London Borough Council* [2017] 1 WLR 2817. Lewison LJ explained at [23] (having referred to the decision of the Supreme Court in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661) that the decision of a landlord to incur a cost at all and, if so, which particular cost is constrained by an implied obligation to make that decision in a rational way. He rejected a submission that section 19 requires of a landlord in the service charge context what would already be required of them at common law and, at [37], said this.

> *In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. That said it must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of a building (whether the problem arises out of a design defect or not) there may be many outcomes each of which is reasonable… If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable.*

9. It is now well-established that the onus is on a lessee who wishes to challenge the reasonableness of a service charge to put forward some evidence that the charges are unreasonable and cannot simply put the landlord to proof of reasonableness: *ASP Independent Living Ltd v Godfrey* [2021] UKUT 313 (LC) at [7]. In *Yorkbrook Investments Ltd v Batten* (1986) 18 HLR 25, Wood J giving the decision of the Court of Appeal (in a different statutory context) explained that "*if the tenant* ***gives evidence establishing a prima facie case*** *then it will be the landlord to meet those allegations and ultimately the court will reach its decisions*" (emphasis supplied). That was applied to section 19 by the Court of Appeal in *Gell v 32 St John's Road (Eastbourne) Management Co Ltd* [2021] 1 W.L.R. 6094.

10. Accordingly, whilst the burden is on a landlord to satisfy the FtT that a particular cost was reasonably incurred, it need only discharge that burden if the tenant through evidence has raised a *prima facie* case to answer. It is not legitimate for a tenant to point to a particular cost and simply to require a landlord to prove that it was reasonably incurred. Nor is it legitimate for a tenant to point to evidence that,

properly analysed, carries no value or relevance to the issue within the challenge; again, no *prima facie* case will have been shown.

11. It has also been made clear by the Upper Tribunal that, where a tenant's challenge proceeds on the basis that a particular cost is too high, the fact that a landlord has adopted appropriate procedures in incurring the cost does not mean that the costs were reasonably incurred if they were in excess of an appropriate market rate: *Forcelux Ltd v Sweetman* [2001] 2 E.G.L.R. 173.

III The relevant facts

12. The uncontentious facts can be summarised as follows. The appeal concerns a development known as St David's Square on the Isle of Dogs. St David's Square was developed between 1998 and 2003 and comprises 436 long-leasehold flats in large blocks and 40 freehold houses in two terraces. The Respondents have been the joint proprietors of the freehold estate in St David's Square since 2014. The leases of the flats are, as the Judge noted, in unsurprising form. They are bi-partite (i.e. between landlord and tenant only) and oblige the leaseholders to reimburse the Respondents for services which they provide and for which they pay. The estate is managed on behalf of the Respondents by FirstPort Bespoke Property Services Limited (as agent).

13. Under their leases, the Appellants covenanted to contribute to the landlord's 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 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"* (emphasis added) [**SB/8/60**].

14. The Appellants applied to the FtT under section 27A of the 1985 Act for a determination whether certain service charges demanded in respect of the 2018, 2019 and 2020 service charge years were payable. This was a very wide-ranging challenge, with a large number of heads of cost in dispute, many (but not all of which) remained in dispute before the FtT at the final hearing. Amongst those, there was a challenge to certain insurance costs (engineering and public liability), which failed. As the Judge noted, this was worth less than £5 for each leaseholder. The Appellants

appealed that finding to the UT, and succeeded before the Judge; there is no appeal against her order on that point.

15. The more substantial issue remaining in these proceedings, raised in this second appeal, concerns rental and maintenance charges paid by the Respondents to Countryside Communications Limited ("**Countryside**") for the security system for the estate, including the door intercom and remote release systems, TV and satellite distribution, car park gates and barriers and leisure centre CCTV and alarms. The contracts with Countryside (the "**Countryside Contracts**") were entered into in or about 2000 by the original developer, Berkeley. The Countryside Contracts were for a term of 20 years and then to roll over from year to year.

16. The price of the rental under the Countryside Contracts was fixed subject to RPI increases. Over time, technology improved and the cost of installing such equipment fell relative to what was payable in 2000 for a 'state of the art' video entryphone system.

17. In 2008, some leaseholders challenged the costs and a settlement was reached between them and the Respondents' predecessor in title that the amount charged would be capped at 90% of the then level of payment without any further RPI increases [**SB/11/88-90**].

18. Through inadvertence, the Respondents' agents failed to exercise a right to terminate the Countryside Contracts in July 2020 and they rolled on. Thereafter (which is a notable omission from the Appellants' factual summary), the Respondents carried out a tendering exercise for the purchase of a new system, tested the market and sought to negotiate a new deal with Countryside. The options of purchasing a new system (from a new supplier) or continuing to rent the existing one (from Countryside) were put to leaseholders, who *elected* to continue with Countryside at a 50% reduction in the price. The decision was based on what a majority of leaseholders who voted wished to do. The Appellant voted for the installation of a new system, as reflected in Mr Spender's submissions, but his view was not universally held. Accordingly, the Countryside systems remain in place and continue to be leased (on a maintenance 'inclusive' basis as before).

19. In 2018, the amount included in the service charge for the estate came to just over £200,000, with similar sums in 2019 and 2020. It is the costs incurred in respect of those years which the Appellants challenge. Before the FtT, the Respondents conceded that the charge for the second half of 2020 should be reduced by 50% (reflecting the fact that it could have terminated the Countryside Contracts in July 2020 and the fact that an agreement was then reached with Countryside to reduce the ongoing cost by 50% - the concession thus reflecting reality).

20. The Appellants' case was that the charge should have been just under 20% of the amount in fact charged to the service charge in the years in issue, based on a comparison with present-day maintenance costs for similar systems. Before the FtT, the thrust of the Appellants' complaint was that, in present-day terms, buying a system was cheaper than renting one and that the developer's decision to enter into the rental agreement under the Countryside Contracts had lumbered them twenty years later with a cost that was unreasonable.

21. The Appellants succeeded before the FtT, which observed that "*the bad deal made in 2000 was still a bad deal in 2018 and it is not fair to foist upon the leaseholders the consequences of it*" [**CB/14/231, §45**]. Its reasoning was as follows:

    (i) the decision to enter the Countryside Contracts was "*short sighted and paid no heed to the leaseholders who were foisted with what was on any account a bad deal for them*" [**CB/14/230, §44**];

    (ii) the 20-year contract "*was on any account onerous*" and, since the equipment was rented, "*the Respondents and in turn the leaseholders were effectively held to ransom*" [**CB/14/230, §44**];

    (iii) the answer to the question "*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?*" was "*no because otherwise s.19 Landlord and Tenant Act 1985 would serve no purpose*" [**CB/14/231, §45**];

    (iv) 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.

IV The Decision of the Upper Tribunal

22. As the Judge identified, the central problem with the FtT's approach was that its conclusions were not open to it on the evidence. The Judge noted at [78] that "*there was no evidence whatsoever that the contract was a bad deal in 2000*" [**CB/12/206**] and, crucially, that the Appellants' representative "*did not suggest that*". She observed that she had read the Appellants' arguments in the FTT "*and there is no suggestion and no evidence that the developer could have done better in 2000*". The only challenge, she noted, was to the years 2018, 2019 and 2020 "*and all the evidence relates to available prices for rental, purchase and maintenance at that date*". The problem, the Judge observed, seemed 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 the agreement in 2008) has become too high, but no-one could have foreseen that*" [**CB/12/207**]. It was that observation, and the absence of any evidence from the Appellants about the circumstances in 2000, which led her to remark that "*criticism of the deal in 2000 rests only on hindsight*" [**CB/12/207**]. The Judge's assessment of the evidence should not be lightly interfered with by this court.

23. As to the test, the Judge's reasoning was, straightforwardly, as follows.

(1) A cost is incurred on the date an invoice is presented to the landlord for payment, following *Burr v OM Property Management* [2013] 1 WLR 3071, in the context of the limitation period for making service charge demands imposed by section 20B of the 1985 Act. This was common ground between the parties in any event.

(2) Whether it was reasonable for that cost to be incurred requires a judgment which is not limited to that point in time and which takes into account more than just the landlord's options when presented with the invoice.

(3) Section 19 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 decision to commit to too high a price and therefore requires an examination of the *background* to the presentation of the invoice.

(4) The approach to a long-term contract is the same as to any contract. At the point when the invoice is presented by a supplier, a landlord will in most cases already

be contractually obliged to pay and will have no choice about incurring the cost on that date.

24. Having so reasoned, the Judge framed the test as follows [**CB/12/206**].

> *[73]… 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…– 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.*
>
> *[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).*

25. That was not the Respondents' position below, but it is nonetheless reconcilable with the authorities. It is a formulation of the test which directs the inquiry to the point in time at which the landlord decides to assume a liability to pay – whether on the same day, the next week, or in instalments or every year for twenty years.

26. On the Judge's formulation of the test, what the Appellants needed to have done before the FtT was to raise a *prima facie* case that the decision by the Respondents' predecessor to enter into the Countryside Contracts was unreasonable in the sense of producing an unreasonable result *at the time*. The question was whether there was any suggestion that, adjudged by reference to the market at the time, the outcome of the decision was an unreasonable one.

27. As the Judge correctly appreciated, the fact that the same equipment and services could be obtained in the present day for a lower price is <u>not</u> relevant. The landlord when deciding whether or not to pay an invoice as a result of a liability assumed years before is not deciding whether or not to enter into a contract in the prevailing market for the provision of equivalent equipment and services. The state of the market when the invoice is presented tells one nothing about the market which prevailed in 2000. It was at all times open to the Appellants to adduce evidence – whether expert or factual – on the possibility that the developer could have found a better deal and paid less. That would have shifted the burden to the Respondents to justify what was done, in the light of the material to suggest it was done unreasonably. At the risk of stating

the obvious, it was *not* open to the Appellants to suggest that the developer should have installed the relevant systems at its own cost as part of the construction of the development so as to reduce the financial burden to leaseholders.

28. The Appellants did not do that. The Appellants were required by the FtT's directions to set out their case by reference to a Scott Schedule. They did so on 28th January 2022, stating that "*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"* [**SB/1/3**]. In a reply column, completed on 1st April 2022, they explained that their case was simple, and set out the following steps: (i) the Respondents were required to show that they made a rational decision to enter into the Countryside Contracts in July 2000; (ii) they failed that test because the cost of the contract was £2.25 million which, they asserted, was not and is not reasonable; (iii) the Respondents were required to demonstrate a reasonable outcome and it was for them to show why the costs in 2018, 2019 and 2020 were reasonable.

29. The only evidence to which they referred was to a witness statement of Angela Jezard dated 1st April 2022. That evidence was about the costs of maintaining an entry-phone system in a development known as Canary Riverside, said to have been developed around the same time as St David's Square. However: (i) there was no evidence of when the Canary Riverside system was installed; (ii) that system differed in some respects from the St David's Square system; (iii) the Countryside Contracts provided for the supply (rental) of the equipment and cabling, as well as maintenance costs throughout the term, including replacing broken or superseded equipment and fobs. It is obvious that the Canary Riverside costs provide no evidence of any value as to the cost of leasing and maintaining the systems at St David's Square; the situation simply was not comparable. The Appellants' contention that the appropriate comparable was a *bought* rather than rented system fails both as a matter of practical reality, and on the language of the leases, which expressly provides for them to pay for the costs of *renting* or *hiring* the system.

30. The Judge's conclusion therefore flows unimpeachably from the reasoning which she set out. She was right for the reasons she gave to allow the appeal against the FtT's decision. Its findings were unsupported by any evidence, its approach was inconsistent with the authorities and rested on unwarranted supposition. It wrongly

assumed that, just because the developer entered into a rental and maintenance contract for a 20-year term, the decision was "*financially unsound*". The Appellants had failed to raise a *prima facie* case and it was not open to the FtT to reach that view based solely on evidence of what might be financially sound in the present day.

V The Appellants' appeal

Ground 1

31. The Appellants' ground 1 [**CB/2/15**] asserts that the Judge applied a different test under section 19 to costs arising under long-term agreements. For the reasons set out above, that is wrong: the Judge applied the same test to the Countryside Contracts as applies to any other decision to assume a liability to pay a particular cost. The Appellants place reliance on *Avon Ground Rents v Cowley* [2020] 1 WLR 1337, apparently in support of the proposition that the test of reasonableness "*arises no earlier than the point costs are demanded of the tenants"* so that the Upper Tribunal's approach is "*wrong in law"* (skeleton, §§ 33 and 34 [**CB/3/26**]). *Avon* concerned section 19(2) of the 1985 Act, which bites on costs *to be incurred* and not – as here – costs incurred. Both the context and the test are different.

32. The thrust of the Appellants' case is that the Judge erred by *limiting* the test to what is known when the contractual liability is originally assumed. The Appellants object that this approach impermissibly diminishes the weight to be given to evidence about matters prevailing at the date of the hearing: skeleton at §36 [**CB/3/27**]. That is not a fair criticism of the Judge's approach. Her formulation of the test does not close off consideration of matters which occur after the contract is concluded, and nor could it. For instance, a landlord may instruct a contractor to carry out works at an agreed price which are carried out negligently or below the contractual standard. If a landlord were able to reduce the price it paid the contractor in consequence, it would be unreasonable for it not to do so, regardless of its contractual obligations. In any event, at [71] [**CB/12/205**] the Judge did take into account Mr Spender's suggestion that the Respondents could have sought to re-negotiate the contract. She gave no weight to that suggestion because it was unsubstantiated and fanciful, but she did not rule it out in point of principle.

33. Really the Appellants' complaint is that their evidence of prevailing prices in the present day was not given enough weight. But, for the reasons set out above, it carried no weight in connection with the critical question, which is whether the decision to enter the Countryside Contracts in 2000 was reasonable. At the point of presentation of an invoice under a long-term contract, it is wrong to approach the question of reasonableness as though the landlord were deciding to assume a liability to make payment in the market prevailing at the date of that invoice. That is not least because, in this case, it is acknowledged that the cost of the technology has decreased. The Judge was therefore right to observe that the Appellants' case rests on hindsight. It is akin to saying that a futures trader has not reasonably fixed the price at which oil will be bought in two years' time *just* because two years later the spot price was better. The question is whether what was done at the time was reasonable.

34. The Judge's approach is consistent with basic notions of fairness. Where it is said that a cost is too high, the reasonableness of a landlord's decision must be adjudged by reference to the prevailing market at the time the decision was made. The outcome of a decision to enter into a contract which was reasonable at the time ought not to become unreasonable over time simply because of changes in the market. That would leave a reasonable landlord who took every precaution to protect leaseholders from unreasonable costs unable to recover all of those costs in the future as a result of matters outside of their control. The Appellants' submissions to the contrary would open the door to considerable injustice. To avoid that injustice in the future, landlords would be forced to insist on the shortest possible contractual term. The response of contractors would be to insist on a higher price, to the ultimate disbenefit of their lessees.

35. Indeed, in the context of the cap on costs to be incurred by section 19(2) of the 1985 Act, the Upper Tribunal (Martin Rodger KC) has made clear that when considering a landlord's assessment of reasonableness of on-account payments, matters which became known only after a contractual liability arose should be disregarded. In *Knapper v* Francis [2017] L. &. T.R. 20, the Deputy President said this at [32].

> *Those facts did not turn what had been a reasonable sum into an unreasonable sum. The question of what sum ought reasonably to be paid on a particular date, or ought reasonably to have been paid at an earlier date, necessarily depends on circumstances in existence at that date, and should not vary depending on the point in time at which the question is asked.*

36. That reasoning applies with force to the facts of the present case. It is consistent with the approach adopted by the Courts in another familiar circumstance when assessing the reasonableness of costs: legal costs should not be assessed with hindsight (see *Francis v Francis and Dickerson* [1956] P 87, at 91).

37. Ground one should therefore be dismissed.

Ground 2(a)

38. The Appellants' ground 2(a) [**CB/2/15-16**] is in substance the same as ground 1: they contend that the Upper Tribunal failed to apply the correct test. It echoes the Appellants' evidential complaint under ground 1: that their evidence of the present-day market was not sufficient to raise a *prima facie* case that the decision in 2000 resulted in an unreasonable outcome. They also complain that the Judge's approach reversed the burden of proof, so that it is leaseholders who are required to prove unreasonableness. That is not right. The Judge properly directed herself as to the approach at [25] and [26] [**CB/12/200**]. What she meant when she said that the landlord's decision "*has not been shown to have been unreasonable*" was that the Appellants had failed to raise a *prima facie* case for the Respondents to rebut. That is clear from [78] [**CB/12/206**], where she explained that before the FtT "*there was no evidence whatsoever that the contract was a bad deal in 2000*" and that "*Mr Spender did not suggest that*".

39. Their complaint that "*the Appellants therefore had no hope of proving anything in July 2000*" (skeleton, §47 [**CB/3/30**]) is misconceived in two respects. First, because their obligation was just to raise a *prima facie* case with some evidence that the decision in 2000 was unreasonable by reference to the market in 2000. Secondly, because the Appellants plainly could have adduced evidence of the market in 2000 in order to raise that case (and if they could not, then how could the Respondents either, given they are rather removed from the developer). Without that evidence, there was nothing on which basis the FtT could have found that there was a *prima facie* case for the Respondents to answer.

40. The Appellants' submission that everything in this case must be seen through the lens of the period 2018-2020 (skeleton, §49 [**CB/2/31**]) is therefore misconceived and at odds with the authorities. There is nothing in *Waaler* to endorse the approach for

which the Appellants' contend: that leaseholders many years after a decision was taken to incur a particular cost can argue that, with the benefit of hindsight, it can be seen that the cost of the equipment and services has fallen.

Ground 2(b)

41. The Appellants' ground 2(b) [**CB/2/16**] is a variation on the same complaint: that the Judge rejected their evidence of the present-day market as sufficient to raise a *prima facie* case that the decision in 2000 was unreasonable. It turns on an assertion of the very thing the Appellants needed to put in issue: that "*it cannot be argued seriously that the costs in any part of 2018-20 were reasonably incurred*" (skeleton, §52 [**CB/3/32**]). The Appellants complain about the incompleteness of the Respondents' records but, of course, those were not required for them to raise a *prima facie* case and – had they done so – it might be thought that the unavailability to the Respondents of historical documents might have worked in the Appellants' favour.

42. When the Judge's decision is read fairly, it is clear that it was based on the Appellants' failure to raise a *prima facie* case for the Respondents to answer and *not* because she thought that they bore the burden of proving unreasonableness. She did not reverse the burden of proof and correctly applied the established test to the Appellants' case and evidence before the FtT.

Ground 2(c)

43. The Appellants' ground 2(c) [**CB/2/16**] seeks to make good the evidential problems identified by the Judge. What is said is either irrelevant to the position in 2000 (e.g. the reliance on the discount negotiated after the fixed term of the Countryside Contracts and the settlement in 2008) or assertion (e.g. that the terms of the agreements showed that they were a "*bad deal*" in 2000, without reference to what else was available on the market).

44. For these reasons, grounds 2(a) to (c) should be dismissed.

Ground 2(d)

45. Ground 2(d) [**CB/2/16**] is misconceived. It challenges the Judge's decision, after setting aside that of the FtT, to substitute the Upper Tribunal's own decision. The Judge at [82] [**CB/12/207**] explained that she was ordering that the sums which the

Respondents actually sought to recover through the service charge were payable under section 27A of the 1985 Act, because it followed from her decision that they were reasonably incurred. In other words, she restored the *status quo*. That followed from her decision on the appeal and did not require reasons. The consequence of that conclusion is unimpeachable. The only difference was that, with respect to the second half of 2020, she accepted the Respondents' concession that the costs should be reduced to reflect the fact that the Respondents accepted they could and should have terminated the Countryside Contracts earlier and that, had they done so, the 50% reduction *as was in fact negotiated*, would have been in place sooner (see §18, above). That was plainly a proper approach for the Judge to take, the Judge having correctly found at [81] [**CB/12/207**] that the FtT's approach to this issue was 'obviously problematic', given that the FtT used a comparator figure that related only to maintenance and not to maintenance plus rental.

VI The respondent's notice

46. If the Appellants are right that the Judge erred in her approach, then the Respondents' position is that her decision to set aside the decision of the FtT and to substitute her own should nonetheless be upheld, for the reasons set out in their respondent's notice [**CB/4/42-47**].

47. Before the Judge, the Respondents relied on a passage from the decision of the Lands Tribunal in *Auger v London Borough of Camden* (2008) LRX/81/2007, which was quoted with approval by the Upper Tribunal in *London Borough of Lewisham v Rey-Ordieres and others* [2013] UKUT (LC). The London Rent Assessment Panel had granted dispensation from consultation on the basis (among other things) that there would be no disadvantage to the leaseholders because they would still have the protection of section 19 of the 1985 Act and could still challenge the resulting service charges. The Lands Tribunal allowed an appeal on the basis that the leaseholders would have no such protection, since any criticism about the level of expense could be met by the landlord pointing out that it was already contractually bound to a particular entity and to place the works with that entity at the rate provided for in the agreement. HHJ Huskinson reasoned that "*the costs were indeed reasonably incurred because, even if 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".

48. Relying on that reasoning, the Respondents submitted that at the point of paying and passing on the cost of the Countryside invoices in 2018, 2019 and 2020, their hands were tied by the Countryside Contracts so that there were no other options open to it. The position is analogous to that under the 'historic neglect' cases, starting with *Continental Property Ventures v White* (2006) EW Lands LRX/60/2005 in which the President of the Lands Tribunal said this.

> *[T]he 'relevant costs' that, by section 19(1)(a), are limited to what is 'reasonably incurred' are defined by s. 18(2) as the 'costs… incurred… by the landlord… in connection with the matters for which the service charge is payable.' Those matters include 'repairs maintenance etc'. The question of what the costs of repairs is does not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for their remedy cannot, as a matter of natural meaning, depend upon how the need for remedy arose.*

49. That approach was followed more recently in *Daejan Properties v Griffin* [2014] UKUT 0206 (LC) (per Martin Rodger KC, at [88]). Were it otherwise, a new landlord might through no fault of its own be debarred from recovering costs incurred as a result of a decision taken or not taken by a predecessor in title, for which the landlord is blameless (but for which the predecessor might be liable).

50. The Judge held that the reasoning in *Auger* and in the 'historic neglect' cases did not apply, since otherwise a landlord would always have an answer to a reasonableness challenge: it was reasonable to pay an invoice it was contractually obligated to pay. However, the Judge was wrong so to hold. There is a clear distinction to be drawn between what the Judge identified as a 'one-off contract' and a long-term contract requiring periodic payments to be made over many years. In the former case, the close temporal proximity between the assumption of the obligation to pay and the making of the payment would preclude a landlord from relying on the *Auger* or 'historic neglect' reasoning. The obligation to pay would be no answer to a case that the price agreed was unreasonably high, taking into account evidence of the prevailing market.

51. In the latter case, there is no temporal proximity, with important consequences. The decision to incur the liability to pay was made years before. A downward shift in the market price of particular work or services could not fairly be set up by a tenant as a

defence under the guise of unreasonableness to the obligation to recompense the landlord through a service charge. At that point, regardless of the market, the landlord's hands were tied. It had no choice but to pay and the possibility that a lower price would have been obtained if it had contracted later would be irrelevant.

52. The distinction between a 'one-off' contract and a long-term contract is even recognised in the 1985 Act, which imposes on landlord particular consultation requirements when they propose to enter into a 'qualifying long term agreement' (defined by section 20ZA(2) as "*an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months"*). It is right to note that the consultation requirements were introduced by section 151 of the Commonhold and Leasehold Reform Act 2002, a few years after the Countryside Contracts were entered into, and therefore did not apply at the time. However, it is significant that Parliament recognised the special treatment which needed to be afforded to long-term contracts and the need to give leaseholders greater protection than the law previously afforded to long-term liabilities.

53. On that analysis, the Judge was wrong to think that the reasonableness of incurring the costs under the Countryside Contracts turned on a factual inquiry of such historical matters. The reasonableness of incurring the cost at the point in time of presentation of the invoice must turn on a consideration of the landlord's options *at that point in time*. In 2018, 2019 and 2020, the Respondents had no option but to pay what was demanded of them. Applying the *Auger* analysis, the incurring of the cost cannot be said to be unreasonable in the circumstances prevailing at the time. The Judge was therefore wrong to distinguish the 'historic neglect' cases at [76] [**CB/12/206**] for the reasons she gave. She should have directed herself that the decision to *enter* the contract in the past was part of the incurring of the cost. On that basis, she should have found that the cost was reasonably incurred, regardless of what was the situation in 2000.

VI Ground 3

54. The Appellants challenge the Judge's decision to set aside FtT's order under section 20C of the 1985 Act (preventing the Respondents from recovering their costs of the proceedings before the FtT as service charges) and her refusal to make a section 20C

order in respect of the appeal to the Upper Tribunal. Section 20C provides, relevantly, as follows.

> *(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application. (…)*
>
> *(3)The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

55. It has been said that the "*the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust"*: per HHJ Rich QC in *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000.

56. The Judge gave a separate decision on 23rd August 2024 (the "**S20C Decision**") [**CB/13/212-214**] on the FtT's section 20C decision and on her own decision on the costs of the appeal before her. She set aside the FtT's order under section 20C and refused to make an order on the costs of the appeal, leaving the Respondents free to recover the costs of both stages of the proceedings as service charges from the Appellants.

57. The Appellants suggest that their appeal against the Judge's decisions on costs is "*parasitic"* on the success of their grounds 1 and 2. However, they also advance a free-standing challenge to the Judge's S20C Decision, contending it should be set aside even if their appeal otherwise fails. That, however, involves challenge to the Judge's exercise of a discretion, which ought not lightly to be interfered with on appeal. As is well-estblished, the appeal court should only interfere with a judge's exercise of discretion where it has "*exceeded the generous ambit within which reasonable disagreement is possible"*: *Tanfern v Cameron MacDonald (Practice Note)* [2000] 1 W.L.R. 1311.

58. If the Appellants' appeal otherwise fails, there is no basis for suggesting that the Judge's discretion in the Section 20C Decision exceeds that generous ambit. In respect of the Upper Tribunal, she correctly directed herself that the Respondents had been

"*by far the more successful party*" – unsurprisingly, given that the sums at stake in relation to the insurance premiums was around £5 per leaseholder, whereas the sums at stake in the principal issue were considerable. Reflecting the Appellants' limited success, the Judge ordered the Respondents to reimburse them the Tribunal fees.

59. In setting aside the FtT's section 20C decision, she directed herself that it had made the order on the basis that the Appellants had succeeded "*on most of the issues, including the biggest issue in monetary terms namely the Countryside Contracts*". As a result of the Respondents' successful appeal, that was no longer the case. She recognised that the Appellants had been the more successful party overall, took the view that the extent of their success "*does not merit the making of a section 20C order depriving the freeholders of their contractual rights*". Her decision is one with which a more generous judge might reasonably disagree – but that does not mean that the Judge's decision was in any way flawed.

60. The Appellants contend that the Judge failed to apply the proper test, by giving insufficient weight to their success before the FtT. That is simply wrong: the Judge had it squarely in mind, took it into account and exercised her discretion in the Respondents' favour nonetheless. That was a perfectly proper exercise of her discretion.

61. The free-standing challenge to the S20C Decision should be dismissed.

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15th October 2025