UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether reasonably incurred – costs of a waking watch – landlord following professional advice – rationality and reasonableness – section 19(1) of the Landlord and Tenant Act 1985

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

ASSETHOLD LIMITED

Appellant

-and-

ALEXANDRA ADAM
AND
14 OTHER LEASEHOLDERS OF CORBEN MEWS

Respondents

Re: Corben Mews,
46-48 Clyston Street,
London,
SW8 4TA

Judge Elizabeth Cooke
Heard on: 4 October 2022

Decision date: 2 November 2022

Mr Mark Loveday and Mr Richard Miller for the appellant, instructed by Scott Cohen Solicitors Limited
Mr Edward Denehan for the respondents, instructed by Gregsons Solicitors

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The following cases are referred to in this decision:

Braganza v BP Shipping Ltd [2015] 1 WLR 1661
Cos Services Limited v Nicholson [2017] UKUT 382 (LC)
Forcelux Ltd v Sweetman [2001] 2 EGLR 173
Hayes v Willoughby [2013] UKSC 17
Socimer International Bank Ltd v Standard Bank London Limited [2008] Bus LR 1304
Waaler v. Hounslow London Borough Council [2017] EWCA Civ 45

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") that service charges to cover the cost of a waking watch were not recoverable by a landlord. The appeal is about the test to be applied in determining whether a cost, reflected in service charges demanded from leaseholders, has been reasonably incurred as required by section 19 of the Landlord and Tenant Act 1985.

2. The appellant landlord, Assethold Limited, was represented in the appeal by Mr Mark Loveday and Mr Richard Miller, and the respondent leaseholders by Mr Edward Denehan, all of counsel, and I am grateful to them.

The factual background

3. The property in question is Corben Mews, in London SW8, of which the appellant is the freeholder; it employs a managing agent, Eagerstates Limited. Corben Mews is a warehouse conversion, in two separate but contiguous blocks, A and B (I refer to the two blocks together as "the building"); originally it was divided into 14 flats over four storeys, and more recently a developer has taken an airspace lease and added two penthouse flats. The respondents are the leaseholders who applied to the FTT for a determination of the reasonableness of service charges; they all hold long leases granted in 2013, 2016 and (in the case of the rooftop developer) 2018.

4. The exterior of the building is made of zinc sheeting, brickwork or render, and there is a small amount of wood panelling around the entrance to Block B.

5. In October 2019 the building was inspected by 4site Consulting Limited, which then carried out a health, safety and fire risk assessment for each block. It found some minor defects, such as the storage of flammable items in inappropriate places, and in relation to Block B 4site identified failures in internal compartmentalisation. Eagerstates then issued consultation notices to the leaseholders in relation to the remedial work necessary to cure the defects, but the work was never carried out.

6. In February 2020 a different firm, Hydrock, was instructed by JMC Surveyors and Property Consultants Limited, on Eagerstates' instructions, to undertake a survey of the external walls of the building, and their report indicated that the building was satisfactory subject to changing the timber decking on the balconies to a different material. This has been done.

7. In August 2020 Hydrock carried out an intrusive inspection of the walls and issued a further report in September 2020 which concluded that the construction of the external walls was suitable for a building of this height and did not present a significant fire risk.

8. In January 2021 Hydrock carried out a further external wall assessment and produced a report on 15 March 2021. The report said that combustible materials were present in the external walls and that this presented an "intolerable" risk to the occupants, on the basis that the risk of fire was "medium" and the potential consequences of a fire were "extreme". The

report recommended remedial measures including the removal of combustible materials and the provision of cavity barriers; it also recommended that until that work was done the appellant should put in place interim measures, either in the form of an extended alarm system or by providing a waking watch, but that:

> "Based on the level of risk identified, it is recommended by Hydrock that the client complete the remedial works detailed in section 7.1 at the nearest opportunity to lower the level of risk present in Corben Mews."

9. A draft of the report was sent to Eagerstates in February 2021, and was met with incredulity; their employee Mr Ronni Gurvits wrote back "You are joking! The building has gone from acceptable to intolerable!" Eagerstates instructed surveyors, JMC Surveyors and Property Consultants Limited, who raised a number of queries with Hydrock. Hydrock maintained that its report was correct.

10. Immediately after receipt of the final Hydrock report in March 2021 the appellant hired a waking watch for both blocks (one person in each), at the cost of £28,000 a month.

11. The respondents took advice from Safety Consulting Partnership Limited, which inspected the property on 18 March 2021 and reported that the fire risk at the property was low and did not justify a waking watch, and recommended some minor work which, the respondents say, matched what was recommended by 4site in 2020.

12. In June 2021 the appellant issued service charge demands to the respondents, requiring payment of a charge to cover the cost of the waking watch.

13. Section 19(1) of the Landlord and Tenant Act 1985 provides as follows:

> "(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."

14. The respondents made an application to the FTT, which has jurisdiction under section 27A of the 1985 Act to determine whether service charges are payable. It is common ground between the parties that the leaseholders' service charge liabilities in their leases would cover the cost of a waking watch if reasonably incurred, and so there is no dispute about the terms of the leases. Before the FTT the respondents said that the charges were not payable, first because there was no power in the leases for the landlord to demand a service charge payment on an ad hoc basis during the accounting year (which ends in December), and secondly because the cost of the waking watch was not reasonably incurred and so fell foul of section 19(1)(a). The respondents succeeded on both grounds.

15. The basis on which the FTT said that the cost was not reasonably incurred was that the report by Hydrock was incorrect and that no waking watch was necessary. The FTT further found, at its paragraph 85, that if it was wrong about that, then the cost was reasonably incurred only for one month as an interim measure, by the end of which the remedial work should have been done, and also that the watch should have been set only in Block B, rather than being for both blocks, because it was only in Block B that cavity barriers were needed.

16. The respondents' case was also that if the charges were payable, they were excessive because the quality of the waking watch was unsatisfactory (with reference to section 19(1)(b)); the FTT found on that issue (again, if it was wrong about the reasonableness of the whole cost) that the standard of the watch was so poor that 50% of the cost (for that one month, in one block) was payable.

17. The waking watch ceased on 16 November 2021, the day after the FTT delivered its decision. The remedial works recommended by Hydrock had not at that date been done. Mr Loveday at the appeal hearing was without instructions as to whether anything had been done since then.

The appeal

18. The appellant appeals the finding that the cost of the waking watch was not reasonably incurred. It also appeals the finding that if the cost was reasonably incurred it could not have been reasonable to incur that cost in respect of block A.

19. There is no appeal from the FTT's finding at its paragraph 85 that if the cost was reasonably incurred then that was the case only for one month; nor from the FTT's decision about the standard of service provided. Accordingly what the landlord seeks to establish in the appeal is that the cost of the waking watch for both blocks for one month (£28,000), reduced by 50% because of the standard of service (to £14,000), was reasonably incurred.

20. Because the charges in question were not validly demanded, the appellant if successful will not be able to recover anything pursuant to the demands made in June 2021. But the decision in the appeal will enable the parties to know what can be recovered if validly demanded in due course.

21. The grounds of appeal as drafted – not by Mr Loveday - gave rise to some confusion and rather than setting them out it will be more helpful if I distil them into the two issues argued at the hearing, namely (1) whether the FTT applied the correct test to the question whether the cost of the waking watch was reasonably incurred and (2) whether when the correct test is applied the cost was reasonably incurred. In order to explain those two issues I have to set out some of the detail of the FTT's decision.

The FTT's decision

22. As I noted above there were two issues before the FTT, and I do not need to say anything about the validity of the service charge demands because that finding is not appealed. As to

the reasonableness of the cost on which the charges were, and would be, based, the respondents' case was both that it was wholly unnecessary and that it was carried out incompetently. As to competence, again I need not say anything else because the FTT's finding is not appealed. The issue is purely whether the cost was reasonably incurred.

23. The respondents' case before the FTT and on appeal was that the Hydrock report was flawed and gave the wrong advice. The FTT heard evidence about the Hydrock report both from Mr Sun, one of its authors, and from Mr Evans of the Safety Consulting Partnership Limited. It concluded:

> "75. The tribunal has concluded that the authors of the Hydrock Report have dramatically overstated the risk of fire at the Property, in stating that the risk is "intolerable", because among other things they have (a) overstated the risk of fire spreading through cavities in the external walls, essentially through simply assuming that there would be breaches of the walls allowing fire ingress, when breaches did not exist except in the riser cupboard; (b) made assumptions as to the combustibility of insulation which had not been tested; (c) treated regulations applicable to buildings over 18m in height as if they directly applied to a building under 18m; and (d) misapplied the risk matrix, apparently from a desire to bring home to Eagerstates the need to carry out repair works. That report was therefore wrong in its conclusions as to risk and so as to necessary steps.
>
> 76. Our conclusion is supported by the significant number of other reports which concluded, in circumstances not materially different to the Hydrock Report, that there was a low risk of fire through the external walls. Neither the recommendation of a waking watch, nor the recommendation of an interim alarm system can therefore be supported as reasonable. Furthermore, given that Mr Sun himself accepted that the risk could be substantially reduced by repairing the riser cupboard, these could not in any event be reasonable interim recommendations where the problem could be resolved permanently so much more cheaply."

24. To explain point (d): Hydrock's risk ratings were derived from their assessments of the risk of fire and the harm that would be caused by a fire. The "intolerable" rating was supposed to be given only where the risk of fire was "high" and the consequential harm "extreme", but the report assessed the risk of fire as "medium" and the harm "extreme". Mr Sun said that he nevertheless signed off the "intolerable" risk rating because "they had felt they needed to emphasise to the client the need to do something urgent. They had therefore increased the overall stated risk level to "intolerable", even though this did not follow the matrix."

25. So the report was flawed and overstated the risk, and there is no appeal from that finding of fact. The FTT then went on to assess whether, in light of that, the cost of the waking watch had been reasonably incurred:

> "78. Following the decision of the Court of Appeal in *Waaler v. Hounslow London Borough Council* [2017] EWCA Civ 45, whether costs have been "reasonably incurred" is to be determined by reference to an objective standard of

reasonableness, not by the lower standard of rationality. The focus of the enquiry is not simply a question of the reasonableness of the landlord's decision-making process, but also one of outcome. Where there was more than one reasonable course of action, the landlord did not have to choose the cheapest, and there is a margin of appreciation to be allowed to the landlord in choosing. The Court of Appeal approved the decision in *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 which had treated this as a two-stage process: first, whether the landlord's process was reasonable and second whether the amount actually charged, i.e. the outcome, was reasonable.

79. The tribunal considers that Mr Granby's submission [for the landlord] that it is sufficient if Assethold acted reasonably in relying on the Hydrock Report to institute – and continue for many months - the waking watch, only addresses the first part of the *Waaler* test, and not the second.

80. As to the first part of this test, the tribunal considers that Assethold acted reasonably in obtaining the EWA from Hydrock, a reputable company for these purposes. However, when Assethold/Eagerstates received a report from Hydrock whose conclusions were radically different from the earlier Hydrock Report and from other reports of which it was aware, conclusions which its own surveyors JMC queried, the most sensible response would have been to instruct a second opinion from another fire safety expert. Mr Gurvits offered this to the tenants, but only on the basis that they paid for such a second report, and when they would not do so, he refused to arrange for Assethold to obtain such a further report. In failing to instruct a second report itself, the tribunal concludes that Assethold probably failed to act reasonably.

81. As to the second part of this test, in any event the outcome must also be reasonable. Since the tribunal has concluded that the Hydrock Report was incorrect and its recommendations were not in fact objectively justifiable, it follows that the outcome, i.e. incurring the costs of a waking watch which was recommended by that report, was not reasonable. The tribunal accepts the submission of Mr Bromilow that those costs were unnecessary, and that unnecessary costs will not have been reasonably incurred. This is not a case where the landlord has selected one of a range of reasonable outcomes; rather it has opted for an outcome which was unnecessary because it was based on flawed advice."

26. On appeal, Mr Loveday says that the FTT applied the wrong test, and that when the right test is applied – alternatively, even if the FTT was right about the test – the cost was reasonably incurred.

The first issue in the appeal: did the FTT apply the wrong test?

The principal authority: Waaler

27. It is not in dispute that the principal authority on the meaning of "reasonably incurred" in section 19(1) is the Court of Appeal's decision in *London Borough of Hounslow v Waaler*

[2017] EWCA Civ 45. In order to put the arguments into the proper context I therefore start with that decision, although it is not quite where Mr Loveday's argument begins.

28. The Court of Appeal had to decide whether service charges in respect of repairs and improvements were payable; the fact that some of the works were improvements rather than repairs made no difference to what it had to decide, which was the meaning of "reasonably incurred". The landlord argued that the subsection imposes merely a test of rationality, rather than a more demanding test of reasonableness.

29. Lewison LJ, with whom Patten LJ and Burnett LJ agreed, explained that in order for the service charge to be payable pursuant to the terms of the lease, the landlord must have acted rationally. He referred to the decision of the Supreme Court in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661. He quoted Rix LJ in *Socimer International Bank Ltd v Standard Bank London Limited* [2008] Bus LR 1304 at paragraph 66:

> "… pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself."

30. Lewison LJ then set out at paragraph 22 the explanation of rationality given by Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 at paragraph 24:

> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

31. Therefore, said Lewison LJ in *Waaler* at paragraph 23,

> "… In my judgment Hounslow's contractual ability to undertake improvements whose cost is to be passed on to the lessees is constrained by these principles. In my judgment therefore the rationality test applies both to a choice as between different methods of repair and also to a decision whether to carry out optional improvements."

32. He then went on to ask whether the test under section 19(1) is different:

> "24. That, however, leads on to the next question: is the question whether costs are reasonably incurred within the meaning of section 19 to be answered by reference to an objective standard of reasonableness, or by the lower standard of rationality?

If the landlord incurs costs that are not justified by applying the test of rationality, then the costs in question will fall outside the scope of the contractually recoverable service charge. The Landlord and Tenant Act 1985 must have been intended to provide protection against costs which, but for its operation, would have been contractually recoverable. It follows in my judgment that merely applying a rationality test would not give effect to the purpose of the legislation. The statutory test is whether the cost of the work is reasonably incurred."

33. Counsel for the landlord in *Waaler* argued that "what was critical was the landlord's decision-making process" (paragraph 28). That argument was rejected at paragraph 28 on the basis that if all the court is to do under section 19 is to look at the landlord's process, that is "in effect a test of rationality", so that section 19 would be achieving no more than does the test for contractual liability. Section 19 does indeed go further than that; at paragraph 37:

> "… whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome."

Mr Loveday's argument in the appeal

34. Mr Loveday started from the decision of the Lands Tribunal in *Forcelux Limited v Sweetman* [2001] 2 EGLR 173, which was referred to by Lewison LJ at paragraph 32 of *Waaler* as follows:

> 32. [Forcelux] concerned the recovery of insurance premiums. The member said:
>
> > "[39] In determining the issues regarding the insurance premiums and the cost of major works and their related consultancy and management charges, I consider, first, Mr Gallagher's submissions as to the interpretation of section 19(2A) of the 1985 Act, and specifically his argument that the section is not concerned with whether costs are "reasonable", but whether they are "reasonably incurred". In my judgment, his interpretation is correct, and is supported by the authorities quoted. The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
> >
> > [40] But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. 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."

> 33. It is true that the member considered the landlord's decision-making process. But the important point is that he did not stop there. He also tested the outcome by reference to what the cost of cover was on the market. In other word's the landlord's decision-making process is not the only touchstone. The outcome was also "particularly important"."

35. Mr Loveday observed that the Tribunal in *Cos Services Limited v Nicholson* [2017] UKUT 382 (LC) described those two questions as "necessarily a two-stage test".

36. Mr Loveday argued, on the basis of *Forcelux*, that the test of reasonableness, under section 19(1)(a), applies only to the issue of price. The landlord's decision-making process and his practical choice of what to do fall within the first stage of the test and are required only to be rational.

37. Mr Loveday's arguments rested heavily on paragraph 23 of *Waaler*, which bears repeating:

> "… In my judgment Hounslow's contractual ability to undertake improvements whose cost is to be passed on to the lessees is constrained by these principles. In my judgment therefore the rationality test applies both to a choice as between different methods of repair and also to a decision whether to carry out optional improvements."

38. Mr Loveday therefore argued that the FTT was wrong to subject the landlord's choice of what to do to the objective test of reasonableness, which led it to reject the cost of the waking watch because the flaws in the Hydrock report made that choice objectively unreasonable.

39. Mr Denehan did not place a great deal of weight on this issue because his position was that the appellant's actions in setting a waking watch rather than commissioning a further opinion were not even rational. But the point is important.

40. Mr Loveday in relying upon paragraph 23 has wrenched it from its context. In paragraph 23 Lewison LJ was discussing contractual liability only. He went on in paragraph 24 to examine the different test to be applied under section 19, which goes beyond the contractual test and is an objective test of reasonableness.

41. Accordingly, at paragraph 29, Lewison LJ rejected the landlord's argument (set out at paragraph 28) that it had merely to apply a test of rationality, or *Wednesbury* unreasonableness, to the landlord's decision about a proposed course of action. It made clear that to pass that test the landlord must not only have a reasonable decision-making process but must also achieve a reasonable outcome. It made no distinction between choice (what to do) and outcome (which contractor to choose on the basis of price); Lewison LJ's words in paragraph 37, and in particular his reference to a choice of different methods, appear to me to be unambiguously referring to the landlord's decision, or choice, as to what to do, not just to the cost of the work:

> "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. I agree with Mr Beglan that the tribunal should not simply impose its own decision. 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.

42. Mr Loveday relies on *Forcelux*; but in that case there was no choice as to what to do; the landlord had to insure. The only alternative outcomes were the difference insurers who charged different prices; the only outcome in issue was price, and the Tribunal decided unsurprisingly that the choice of insurer had to be reasonable. That does not mean that in a case where the landlord had to make a practical decision as to what to do (for example, whether to repair or replace defective window-frames) that choice between different outcomes would not be subject to the test of reasonableness in section 19.

43. On the appellant's case there would be no objective scrutiny of a landlord's decision as to what action to take in carrying out repairs or maintenance or safety works. Any rational choice is acceptable, and the only scrutiny imposed by section 19(1) in addition to contractual enforceability is price. That flies in the face not only of common sense but also of the Court of Appeal's decision in *Waaler* and of the plain words of the statute, because if Parliament in enacting a test of reasonableness had intended that the test of reasonableness should apply only to the choice between differently priced ways of achieving the chosen outcome, they would have said so.

44. So a landlord in deciding what to do must follow a reasonable process and must then adopt a reasonable course of action. There may be more than one such course of action; the court or Tribunal is not to impose its own decision as to what should have been done. But even if the landlord followed a rational decision-making process, if the outcome of that process is not reasonable then the cost will not have been reasonably incurred.

45. It follows that I do not accept Mr Loveday's primary argument, that the FTT applied the wrong test. The FTT's analysis of *Waaler* at its paragraph 78 (set out at paragraph 25 above) was correct. And it was entirely correct to say at paragraph 81 that the outcome of the landlord's decision-making, meaning its choice of what to do, must also be reasonable. As we have seen, in order for expenditure to have been reasonably incurred under section 19(1) the landlord must have acted not just rationally but also reasonably in deciding what action to take as well as in deciding which contractor to use and how much to spend.

The second issue: did the FTT apply the test correctly?

46. Mr Loveday also takes issue with the way in which the FTT applied the test, even if his primary argument fails. As discussed, there is a two-stage test and the FTT had to look both at process and at outcome, which it did in its paragraphs 80 and 81.

47. At its paragraph 80 (set out above at my paragraph 25) the FTT judged that on receipt of the Hydrock report, seeing how different was its conclusion from that of its earlier reports and of other reports of which it was aware, the sensible thing to have done would have been to commission a further report. "In failing to instruct a second report itself, the tribunal concludes that Assethold probably failed to act reasonably."

48. We noted above (at paragraph 33) that the Court of Appeal in *Waaler* took the view that the assessment of a landlord's process is a rationality test. Mr Denehan argued strenuously that in the circumstances the only rational reaction to the Hydrock report was to commission another one in light of the report's own flaws and of the content of the other reports available to the landlord including Hydrock's previous report, given that there had been no change of circumstances since the previous reports had been delivered.

49. There are two difficulties with that submission. The first is that the final Hydrock report, and the assessment of risk as "intolerable", was not said to be made on the basis that circumstances had changed. It was a report based on a different inspection, in which different processes were followed and different aspects of the building examined. So the fact that this report reached a different conclusion from Hydrock's and 4sites's previous reports did not mean that there was a contradiction and did not itself mean that the latest report was wrong. The other difficulty is that I fail to see how any landlord, faced with a report from a reputable company signed by three professionals saying that the fire risk in the building was intolerable, could be said to be irrational for putting interim measures in place pending further reports or remedial work.

50. It might well be that a confident landlord, noting some of the flaws in the report that were evident to the careful but unqualified reader – in particular that the report was using standards appropriate for buildings more than 18m high, and that the risk matrix had been misapplied (see paragraph 23 above) – might have decided to do nothing pending a further report and that that would have been a rational choice in the circumstances. But I accept Mr Loveday's argument that it was rational to act as this landlord did, and I take the view that the FTT's conclusion to the contrary could not have been justified on the evidence before it.

51. Turning to the FTT's assessment of the outcome, in the second stage of the test, at its paragraph 81 the FTT concluded that because the Hydrock report was (to put it bluntly) wrong, the landlord's decision to follow its advice was not reasonable. It did not look at a range of reasonable choices of outcome open to the landlord (*Waaler* paragraph 37), because it took the view that only one response could have been reasonable. That is not an automatically incorrect application of the test; there might well be cases where there truly is only one reasonable response. But did the FTT rationally conclude that this was such a case?

52. The FTT went on to explain in paragraph 81 that it accepted the argument that

> "these costs were unnecessary, and that unnecessary costs will not have been reasonably incurred".

53. Mr Denehan argued that this was right. "The First Tier Tribunal could only objectively assess the outcome of Assethold's decision-making process by making a finding as to

whether or not the waking watch was objectively necessary" (skeleton, paragraph 28). And Parliament intended that the landlord, rather than the tenants, should take the risk under section 19(1)(b) of professional advice being incorrect just as the landlord rather than the tenant takes the risk of the work done not being of a reasonable standard.

54. I disagree. What the FTT had to decide was whether it was objectively reasonable for the appellant to have put a waking watch in place as an interim measure in reliance upon the report in March 2015, in the light of what it knew or could readily have found out and of what the report said. Instead, the FTT made a decision on the basis of the hindsight provided by the evidence of the parties' expert witnesses and following their cross-examination. As it turned out, as the FTT found, the report was wrong and it held that therefore expenditure incurred in reliance upon it could not have been reasonably incurred. That is an objective assessment, but it is one that depends upon the hindsight provided by the leaseholders' expert witness. What the FTT had to look at was not what it knew as a result of the proceedings, but at whether the expenditure was reasonable in the circumstances and on the basis of the information available when the cost was incurred.

55. I have already said that to put in place an interim safety measure in response to a report that said the fire risk was "intolerable" cannot be said to have been irrational on the information then available. Nor can it be said to have been unreasonable. What the FTT had to decide was whether setting a waking watch in both buildings, pending further work or investigation, was a reasonable response to the advice the landlord received. It need not be the only reasonable outcome. But on the facts of this case only a supremely confident landlord would have done anything else. It had a report signed by three fire safety professionals telling it that the risk to life from fire was "intolerable". There were obvious points to query, and the landlord's agent raised some of them. But the writers of the report stood their ground and the final report made the same recommendation as the draft. I fail to see that the adoption of one of the interim measures recommended could be described as unreasonable, provided it was adopted purely as an interim measure, for as long as was needed either to implement the report's main recommendations or to establish on taking further advice that they were not needed. There is no appeal from the FTT's finding that that period was one month.

56. Accordingly, while the FTT applied the correct test, on the evidence available to it it misapplied that test and its decision is set aside.

Conclusion

57. It is open to the Tribunal to substitute its own decision, and it will be clear from what I have said that I take the view that the landlord followed a rational process in commissioning and following the Hydrock report, and that the outcome – setting the waking watch as an interim measure – was a reasonable one. Moreover, Hydrock recommended that that watch be put in place for both blocks, and since they are contiguous I take the view that it was reasonable to set up a watch for both. That cost was therefore reasonably incurred, subject to the assessment of the standard of service provided under section 19(1)(b).

58. The FTT has already addressed that issue and has found that the quality was such that only half would be recoverable. Accordingly, the sum of £14,000 was reasonably incurred by the landlord within the meaning of section 19(1)(a).

Upper Tribunal Judge Elizabeth Cooke

2 November 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.