Neutral Citation Number: [2025] UKUT 19 (LC)

Case No: LC-2024-677

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

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

REF: LON/OOAU/LSC/2023/0456

23 January 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether costs incurred were reasonable - First-tier Tribunal finding in favour of the landlord contrary to the leaseholders' unchallenged evidence – findings set aside and the Tribunal's decisions substituted – costs under rule 13 of the First-tier Tribunal's rules

BETWEEN:

SAMEER RANA (1)
JESAL VISHNURAM (2)

Appellants

-and-

ASSETHOLD LIMITED

Respondent

106 Tollington Way,
London, N7 6RY

Upper Tribunal Judge Elizabeth Cooke
Determinations on written representations

Gregsons Solicitors for the appellants

The following cases were referred to in this decision:

Lea v GP Ilfracombe Management Company [2024] EWCA Civ 1241
Ridehalgh v Horsefield [1994] Ch 205
Willow Court Management Company (1985) Limited v Alexander [2016] UKUT 290 (LC)

Introduction

1. This is an appeal against the findings of the First-tier Tribunal in a decision made under section 27A of the Landlord and Tenant Act 1985 about whether services charges were payable. The leaseholders challenged a number of charges, and on most points the FTT found in their favour; on some points the FTT made findings in favour of the landlord despite the leaseholders' unchallenged evidence to the contrary, and those findings are appealed. The leaseholders also appeal the FTT's refusal to award costs in their favour under rule 13 of the FTT's rules in response to the landlord's unreasonable behaviour in failing to follow the FTT's directions, which caused the leaseholders to incur additional costs.

2. The appeal has been decided under the Tribunal's written representations procedure; the appellant leaseholders have been represented by Gregsons solicitors. The respondent has chosen not to take part in the appeal.

The factual and legal background

3. 106 Tollington Way is a building divided into five residential flats. The respondent owns the freehold and its sister company Eagerstates Limited is the managing agent. The flats are held on 125-year leases granted in 2001, and the appellants hold the lease of flat 3. The leases reserve a ground rent of £200 and contain provisions in unsurprising terms for the leaseholders to pay a service charge to reimburse the landlord for its costs of repairing and maintaining the building and the common parts, but not the individual flats because they are the responsibility of the lessees.

4. On 6 November 2023 six individuals including the appellants, between them holding the leases of four of the five flats, made an application to the FTT for it to determine whether service charges for the 2022/2023 and estimated service charges for 2023/24 were payable; later the charges for 2021/22 were added. The FTT has jurisdiction under section 27A of the Landlord and Tenant Act 1985 to decide whether service charges are payable; section 19 of that Act provides that service charges representing costs incurred by the landlord are payable only insofar as those costs were reasonably incurred, and that estimated charges are payable only insofar as they are reasonable.

5. When the FTT's jurisdiction under section 27A is invoked by leaseholders, they must raise a prima facie case that indicates that a cost was not reasonably incurred, or that an estimated charge was not reasonable. Once they have done so the evidential burden shifts to the landlord to show that the expenditure, or the charge (as the case might be), was reasonable.

6. The leaseholders said in their application that service charges had risen dramatically in the last few years and that the landlord had failed to provide copies of invoices so that they were unable to understand the charges; accordingly they required disclosure of various documents by the landlord and disputed all the charges items charged for the years in question.

7. On 13 December 2023 the FTT gave directions in standard form, which were revised and re-issued on 14 December so as to reflect the items the leaseholders wanted to be disclosed. A hearing was listed for May 2024. Following a series of failures on the part of the respondent to comply with the FTT's directions the hearing had to be re-listed to July 2024. Sufficient progress was made for a Scott Schedule to be complied, setting out the items in dispute, the leaseholders' reasons for challenging them, and the respondent's comments, but the respondent did not file a statement of case nor any witness evidence.

8. On 26 June 2024 the FTT made an order preventing the respondent from adducing or relying upon a statement of case, a witness statement or any document in addition to those it had already filed. However, the respondent was not prevented in any other way from taking part in the proceedings, and it was represented by counsel at the hearing on 11 July 2024. At that hearing the FTT had to consider:

    a. the leaseholders' challenge to the service charges,

    b. their application for an orders under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold reform Act 2002 preventing the landlord from recovering its legal costs of the proceedings from them by way of service or administration charge,

    c. their application for the reimbursement to them by the respondent of the fees they had paid to the FTT, and

    d. their application for an order for costs arising from the respondent's unreasonable conduct of the proceedings under rule 13(1)(b) of the Tribunal Proceedings (First-tier Tribunal) (Property Chamber) 2013, which had been made on notice to the respondent on 2 July 2024 and was supported by a chronology and a detailed statement of case setting out the respondent's procedural defaults and the reasons why the respondent's conduct in the proceedings had caused them to incur additional legal costs.

The FTT's decision

9. The FTT's written decision was very brief, most of its substance being set out on the Scott Schedule rather than in narrative form. It made a determination in favour of the leaseholders on most of the costs that they challenged; some items were disallowed altogether others reduced by 20%, 33% or even 50% in some cases. However, on a number of items the leaseholders were unsuccessful and the FTT allowed the charge in full. The decisions on three of those items are the subject of the appeal.

10. The FTT made the orders requested under section 20C of the 1985 Act and under Schedule 11 of the 2002 Act, and ordered the respondent to reimburse the application and hearing fees paid by the applicants (paragraph 11 of its decision), no doubt reflecting the fact that the leaseholders' application had been largely successful. However, the FTT's response to the application under rule 13(1)(b) made no reference to the leaseholders' chronology or statement of case, and simply said:

> "[Counsel for the landlord] made no submissions in respect of this application although was offered the opportunity to do so. The tribunal is not persuaded that the high bar set in r13 as discussed in *Willow Court Investments v* has been made. The tribunal finds the respondent largely complied with the tribunal's directions, although often late an in a piecemeal fashion. However, despite this, the tribunal finds the applicants have not been prejudiced in seeking a determination of the various issues they raised."

11. The appellants, being two of the applicants in the FTT, have permission granted by this Tribunal to appeal the FTT's decision on three items of expenditure which the FTT decided were reasonably incurred, and to appeal the refusal to make a costs order under rule 13(1)(b). So the appeal can be said to fall into two parts: a substantive appeal and an appeal relating to costs.

The substantive appeal

12. I deal first with the appeal from the FTT's decision that three items of expenditure we reasonably incurred. They were:

    a. £1,416 paid to BML Group Ltd for internal decoration to flat 2 following roof leaks.

    b. £332.94 paid to Property Run Contracts for the replacement of a fan in flat 3 following damage caused by a roof leak

    c. £12,885.58 for external decoration of the building.

13. A number of points are common to all three items, which are presented as three separate grounds of appeal. The first is that the material before the FTT in each case was the leaseholders' initial application, their detailed statement of case made once they had some disclosure from the respondent, their comments against each item on the Scott Schedule, and a witness statement made by Mr Sameer Rana, the first appellant. From the respondent the FTT had only its comments on the Scott Schedule, which were brief and formulaic (for example, against most items the respondent's comment was

    > "all invoices have been included
    >
    > reasonable cost for service
    >
    > no alternative quote provided"

14. There was therefore no *evidence* from the respondent at all (its comments on the Scott Schedule were not verified by a statement of truth). Accordingly the leaseholders' evidence (given by Mr Rana) was not challenged by evidence to the contrary. If the FTT was going to disagree with what he said it would have to explain its conclusion very carefully indeed.

15. The second point these three items have in common is that the FTT's decision was brief, being comprised only in the final column of the Scott Schedule, and did not explain why it did not accept the leaseholders' evidence.

16. Third, the FTT's reason for refusing of permission to appeal on these three items was cursory in the extreme and does not indicate that it had engaged in any way with the grounds of appeal:

> "The applicants seek to challenge the tribunal's finding of fact it was entitled to make on the evidence presented to it by the parties and in respect of grounds on two and three identifies in this application for Permission to Appeal."

17. Bearing those points in mind I turn to the individual items.

Ground 1: internal decoration to flat 2

18. This was a charge of £1,416.00 made by BML Group Ltd for work done in October 2021. It seems there had been a leak in the roof, so that flat 2 required internal decoration, and that the landlord had the decoration done but then charged it to the service charge. As the leaseholders said in the Scott Schedule, work to the interior of the demised premises is not within the scope of the service charge, and in any event it was covered by the landlord's insurance. Mr Rana said in his witness statement:

> "It is clear that these works relate to internal damage to flat 2 as a result of a leak in the roof. This damage was subject to an insurance claim and as may be seen from the accounts dated 5 September 2022, the insurance claim excess of £250 has been charged. In consequence the sum of £1,416 is not a service charge item and is not therefore payable by us."

19. The respondent's comment in the Scott Schedule was "not covered by insurance so charged to service charges". The FTT's comment in the following column was: "The tribunal finds this work is reasonable and payable by the applicants."

20. No reason is given for the FTT's disagreement with the leaseholders' evidence, nor for its judgment that work to the interior of one of the flats could be charged to the service charge despite what the leaseholders said about the terms of the leases. Its decision is at best unexplained, if not irrational, and is set aside.

21. As I have all the material that was available to the FTT I can substitute the Tribunal's decision on this item. For two reasons it is not payable as a service charge.

22. First, as Mr Rana said, the service charge account for 2021/2022 (which is in the appeal bundle) indicates that the landlord did charge a £250 insurance excess to the leaseholders, and no evidence has been adduced to refute the leaseholders' assertion that this excess related to a claim that included the redecoration of flat 2. Whether or not the cost was reasonably incurred, the cost was therefore not a cost to the landlord and is not payable as a service charge.

23. Second the service charge is defined in Schedule 7 of the leases (of which there is a sample copy in the appeal bundle) as the aggregate of the costs set out in the sixth schedule, together with contributions to a reserve fund and a management fee. The sixth schedule sets out a number of costs and refers to the landlord's maintenance and repair obligations in the fifth schedule. All the landlord's obligations relate to the structure of the building and to the maintenance of the common parts. There is no obligation in the lease to decorate the interior of any of the demised premises; there might of course be an obligation arising in a different way, for example as a result of damage caused by the landlord's failure to repair the roof, but that would not be an obligation of which the cost could be met by the service charge. Whatever the reason why the decoration was done, this cost was not within the service charge and is not payable by the leaseholders.

24. The appeal therefore succeeds on this ground.

Ground 2: replacement fan in flat 3

25. This is a charge of £332.94 paid to Property Run Contracts for the replacement of a fan in flat 3. Mr Rana said in his witness statement:

> "23. This was the cost charged to us for the replacement of a fan inside flat 3. That is my flat. It needed replacing as a result of the roof leak and was part of the insurance claim. Firstly, it has been paid by insurers to the Respondent as confirmed in an email from Mr Gurvits to me dated 29 September 2022. Secondly it is not a cost which may be charged to service charges and thirdly it is an excessive cost. We don't dispute the cost of the fan itself which was £61.98 but we do dispute the 2.5 hours of labour charged. It literally took less than half an hour."

26. The email referred to is annexed to the statement and is Mr Gurvits' reply to an email from Mr Rana in which he asked about the fan. Mr Gurvits said:

> "Have located the invoice and this was part of the insurance claim at the time so you haven't had to cover the cost".

27. It is hard to see how Mr Rana's evidence could have been challenged in light of the content of Mr Gurvits' email of 29 September 2022. Yet in its comments on the Scott Schedule the respondent said:

> "not covered by insurance so charged to service charge"

28. It is impossible to understand on what basis the FTT found that that comment was true in the face of the appellants' evidence and Mr Gurvits' own email, and its finding is set aside. I substitute the Tribunal's decision that this charge was not payable by the leaseholders, first because it appears to have been covered by insurance and second because, again, it is work done in an individual flat which is not within the definition of the service charge in the lease.

Ground 3: the external decoration of the building.

29. The lease requires the respondent to maintain, repair and decorate the exterior of the building and so of course charges for external decoration will be payable from time to time. This work was done in 2023, and before it was carried out the respondent engaged in a consultation exercise pursuant to section 20C of the Landlord and Tenant Act 1985. The leaseholders objected to the work being done because they said it was not needed, having been done well a few years previously; but in any event they provided a quote in the sum of £4,700. The respondent nevertheless engaged contractors at a price of £12,886.58.

30. The leaseholders' case in the FTT, as Mr Rana explained in his evidence, was that the work was unnecessary, but that if it was necessary then the cost was too high and the quote they had obtained should be regarded as an indication of what would have been a reasonable cost for this decoration.

31. The only material before the FTT from the respondent on this point was the respondent's comment in the Scott Schedule:

> "this went through a consultation
>
> no alternative quote provided at the time
>
> estopped from claiming this."

32. The FTT's decision was this:

> "The tribunal finds the applicants are not estopped from challenging this item.
>
> The tribunal also determines it is the respondent's obligation to carry out works of redecoration to the exterior and may carry them out 'from time to time when reasonably necessary' (The Fifth Schedule). Although the applicants may not have wanted the works to be carried out, it is for the respondent to determine how it will carry outs its obligations and in the absence of any independent evidence to suggest this work was not required, the tribunal allows this sum in full."

33. What the argument about estoppel was I do not know, but at any rate it was determined in the leaseholders favour and so I do not have to deal with it. As to the substantive determination, the FTT again misunderstood the evidential situation with which it was faced. The leaseholders had raised a prima facie case, in their statement of case, in the Scott Schedule, and in Mr Rana's statement. They had therefore shifted the evidential burden to the respondent; and the respondent provided no evidence in response. It was therefore bound to be extremely difficult for the FTT to find that the charges were reasonable and payable. It would not be impossible; the FTT might be persuaded in argument that no prima facie case had actually been made, for example if counsel for the respondent could show that the leaseholders' evidence was incorrect, but in that case the FTT would have to explain why it had made its decision on that basis. It is difficult to escape the conclusion that the FTT did not understand this. The leaseholders'

responsibility was not to *prove* that the cost was unreasonably incurred but to raise a prima facie case that there was a problem. There was certainly no reason why they should have produced "independent" evidence; more fundamentally there was no reason for the FTT to disagree with what Mr Rana said about the necessity for the work was incorrect. It did not even need to make a finding of fact that Mr Rana was right; the position was simply that the leaseholders had raised a prima facie case that the work was unnecessary (or, if the work was necessary, that the cost was unreasonable); the landlord had produced no evidence in response, not even a witness statement from its managing agent; it was therefore not open to the FTT to find that the cost was reasonably incurred.

34. The FTT's decision is set aside, being unexplained and, apparently, made on the basis of an error of law about the evidence. I substitute the Tribunal's own decision that the cost of the external decoration, in the sum of £12,886.58, was not reasonably incurred and is not payable by the leaseholders.

35. The appeal has therefore succeeded on all three substantive grounds.

The costs appeal

36. As I mentioned above, the respondent in the FTT failed to comply with directions to such an extent that on 26 June 2024 it was barred from adducing any evidence or producing any more documents before the hearing on 11 July 2024. On 2 July 2024 the leaseholders made an application for a costs order against the respondent, supported by a statement of case extending to 12 pages and a statement of costs. Those costs were confined to those they said they had incurred as a result of procedural defaults by the respondent, and amounted to £4,767.60.

37. The FTT is a no-costs jurisdiction in applications under section 27A of the Landlord and Tenant Act 1985. However, costs may be awarded under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 "if a person has acted unreasonably in bringing, defending or conducting proceedings", and that was the basis of the appellants' application. The explanation they gave in their application was as follows.

38. First, the revised directions dated 21 December 2023 (see paragraph 7 above) required disclosure by the respondent by 22 January 2024. On 23 January 2024 the respondent sent a document in a form that was inaccessible because it was blocked by the appellants' solicitors' security software; after some work by the IT department it was rendered readable on 24 January and was found to be in complete. i.e. not disclosing all the material required by the directions

39. On 26 January 2024 the appellants applied for an "unless" order requiring proper disclosure. However, on 2 February they also made an application for further disclosure. In response to both those applications the FTT on 20 February 2024 directed the respondent to produce the documents missing from its January disclosure together with the additional documents the appellants required.

40. On 11 April 2024 the FTT issued directions vacating the hearing in May and re-listing it in July, and requiring the respondent to serve its witness statement, its comments on the Scott Schedule, copies of various invoices and a statement of case by 24 May 2024.

41. On 24 May 2024 the respondent's representative asked for an extension to 29 May, to which the appellants agreed. On 29 May the respondent filed its comments on the Scott Schedule but nothing else.

42. On 3 June 2024 the appellants asked the FTT for an order debarring the respondent from relying on a witness statement, a statement of case or any other document material, because they did not want to be ambushed by material produced at the last minute. On 10 June 2024 the FTT ordered the respondent to explain why it had failed to comply with the directions of 11 April 2024. It did not do so, and on 26 June 2024 the FTT made an order debarring the respondent from producing any further material or relying upon any document in the hearing other than what it had already filed.

43. In their application for costs under rule 13(1) the appellants complained that there could be no reasonable explanation for the respondent's conduct of the litigation, that it had acted "unreasonably" and "with impropriety", and had treated the FTT with contempt. The hearing had to be postponed as a result of its behaviour. It failed to explain its behaviour when given the opportunity to do so. It failed to make proper disclosure and therefore made it extremely difficult for the appellants to challenge the service charges. It caused the appellants to incur additional costs.

44. The leaseholders were entitled to a proper response to that application from the FTT, and the cursory paragraph with which their application was disposed of was inadequate. The FTT did not properly explain its decision, and its decision is set aside. I have before me the material available to the FTT and therefore I can re-make the decision.

45. In *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC) the Tribunal explained the approach to be taken to such applications. There is a three-stage process; first the FTT has to decide whether the conduct complained of is unreasonable in the sense required by rule 13(1)(b). If it is, then it has a discretion to make a costs order, and thirdly if it decides to make an order it must decide the amount.

46. The first of those three stages is not a discretionary decision. The test of what is unreasonable was set out by Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] Ch 205, at 232 E-G:

> "'Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course

> adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

47. The decision in *Willow Court* was approved by the Court of Appeal in *Lea v GP Ilfracombe Management Company* [2024] EWCA Civ 1241. Giving the leading judgment, Coulson LJ said this:

> "28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be."

48. The conduct complained of in the present case essentially comprised failure to comply in full with the directions of 21 December 2024, failure to comply with the directions of 11 April 2024 beyond the somewhat minimalist annotations made by the respondent to the Scott Schedule, and failure overall to make full disclosure. Those failures were unexplained, despite an explicit direction by the FTT to explain them. There may have been no intention to harass the appellants or to be vexatious, but the conduct was nevertheless a hindrance and a cause of expense to the appellants, and an impediment to the efficient conclusion of the proceedings by the FTT. The fact that ultimately the appellants succeeded in challenging most of the service charges in issue does not make the conduct any less unreasonable.

49. Essentially the respondent did not bother to comply with directions. Its failure to comply in unexplained and inexplicable. In my judgment that passes Lord Bingham's "acid test", and the discretionary power to make a costs order is engaged.

50. The respondent's conduct caused expense and inconvenience to the appellants, and caused the hearing to be postponed. It was penalised by the debarring order, which meant that any late attempt to make good its default was prevented and the arguments available to it at the hearing were very limited, but the appellants had still had to go through a more protracted and expensive procedure than they would other wise have had to go through. I have no hesitation in saying that a costs order should be made the appellants' favour.

51. The appellants have asked only for £4,767.60, being the costs occasioned by the respondent's default. They arise from the solicitors' need to communicate with their client about the respondent's defaults, and from the additional applications made to the FTT as a result of the defaults. They also include the costs of making the costs application itself. The costs are reasonable and proportionate. The respondent at the hearing before the FTT offered no comment upon or criticism of the amount claimed. I allow it in full. The sum of £4,767.60 is an award in addition to the determinations regarding service charges

Conclusion

52. The appeal has succeeded on all grounds.

One further ground of appeal was that the FTT did not make an order in favour of the leaseholders for the reimbursement of the fees they had paid to the FTT. As I noted above the FTT said that those fees should be reimbursed, and therefore there was no need for an appeal on this point; but the FTT did not respond to the leaseholders' request for an order setting out the amount of £300 to be repaid and the date by which it was to be paid. Without such an order the leaseholders are unable to enforce the FTT's decision about the fees in the county court, and the leaseholders' experience is that the respondent will not pay unless they enforce the order. In making an order pursuant to rule 13(1)(b) of the FTT's rules following the successful appeal about costs I will also make an order that the respondent reimburse the FTT fees in accordance with the FTT's decision.

Upper Tribunal Judge Elizabeth Cooke

23 January 2025

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.