UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
APPEALS AGAINST A DECISION OF THE FIRST TIER TRIBUNAL
(PROPERTY CHAMBER)

LANDLORD AND TENANT – SERVICE CHARGES – estimated service charges – insurance valuation costs – fire safety works

BETWEEN:

ASSETHOLD LIMITED **Appellant**

-and-

THE LESSEES OF FLATS 1-14 CORBEN MEWS

Respondents

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

Upper Tribunal Judge Elizabeth Cooke
21 February 2023
Royal Courts of Justice
Decision Date: 21 March 2023

Mr Mark Loveday and Mr Richard Miller for the appellant, instructed by Scott Cohen Solicitors
Mr Daniel Bromilow for the respondents, instructed by Gregsons Solicitors

The following cases are referred to in this decision:

Assethold Limited v Adam and others [2022] UKUT 282 (LC)
Ridehalgh v Horsefield [1994] Ch 205
Willow Court Management Co Ltd v Alexander [2016] UKUT 0290

Introduction

1. This is an appeal by Assethold Limited, the freeholder of Corben Mews, against a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges, and a cross-appeal by the lessees of Flats 1 to 14. Because the parties are respondents to each other's application, and because the lessees were the applicants in the FTT, I refer to the parties as "Assethold" and "the Lessees" throughout.

2. Assethold was represented in the appeal by Mr Mark Loveday and Mr Richard Miller, and the Lessees were represented by Mr Daniel Bromilow, and I am grateful to them all.

Background

3. Corben Mews in London SW8 is a warehouse conversion in two separate but contiguous blocks, A and B. 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 developer is no longer party to this appeal. The Lessees hold long leases of flats 1 to 14, granted in 2013 and 2016.

4. The leases of course contain provisions about service charges, in identical terms so far as material. At clause 4(6) the lessee covenants:

> "To pay 6.25% of the Landlord's costs in complying with its covenants in respect of the Estate and to pay 16.66 per cent of the Landlord's costs in complying with its covenants in respect of the Building such proportions to be paid on demand and in default to be recoverable by the Landlord as rent in arrears. Such payments to be collected and payable as provided by Clause 5 hereof".

5. The proportions payable vary from flat to flat, but nothing turns on that. By clause 5(1) the lessee covenants to pay to the landlord "the annual sum of £500.00 ("the maintenance charge")" as a contribution towards the landlord's costs of carrying out its obligations under clause 6 (which sets out the landlord's obligations as to maintenance, repair etc). Clause 5(2) provides that the maintenance charge is to be paid to the Landlord "annually in advance on the same day or days as the rent hereby reserved".

6. Clause 5(3) reads as follows:

> "If the expenditure incurred by the Landlord in any accounting period of twelve months in carrying out its obligations under Clause 6 hereof (hereinafter called "the annual cost") exceeds the aggregate maintenance charge payable (or deemed to be payable) on account as aforesaid by the tenants of all the flats in the Building or on the Estate in the accounting period in question (hereinafter called the "annual contribution") and together with any unexpended surplus as hereinafter mentioned then a certificate of the amount by which the annual cost exceeds the annual contribution or any such unexpended surplus will be served upon the Tenant by the Landlord or its Agent with audited accounts in support

> thereof and then the Tenant shall pay to the Landlord within twenty eight days of the service of such certificate … such proportion of the annual cost as set out in clause 4(6) hereof less the maintenance charge (hereinafter called the "excess contribution") determined by the Landlord or the Surveyor of the Landlord … PROVIDED THAT if in any such accounting period as aforesaid the annual cost is less than the annual contribution the difference (being the unexpended surplus) shall be accumulated by the Landlord and shall be applied in or towards the annual cost in the next succeeding or future accounting period or periods as aforesaid…"

7. Despite its verbosity clause 5(3) is a straightforward provision for a balancing charge, so that the tenant has to pay extra if the maintenance charge does not cover the landlord's costs for the past year.

8. Clause 5(4) enables the Landlord to increase the maintenance charge:

> "(d) At any time after the first year of the said term the Landlord may increase the maintenance charge by a sum equal to the average of the excess contribution (as defined) for the previous year … and it shall be open to the Landlord or Managing Agent to charge the increased maintenance charge on an annual, bi-annual or quarterly basis payable by the Tenant in equal instalments upon demand"

9. Conspicuously the leases make no provision for the landlord to demand service charges in advance on the basis of estimates. The maintenance charge is an advance or interim payment, initially £500 but with provision for the lessor to increase it by reference to the excess contribution payable for the previous year. There is of course no such thing as "a sum equal to the average of the excess contribution (as defined) for the previous year", and something has gone wrong in the drafting there; Assethold has suggested (at paragraph 11(4)(a) of its application for permission to appeal) that the words "the average of" should have been omitted. But at any rate, the maintenance charge can be increased by reference to the excess payable in the previous year, but there is no power to demand payment on account of estimated future expenditure.

10. Assethold acquired the freehold in June 2019, and it employs a managing agent, Eagerstates Limited. Eagerstates produces the service charge demands. Ground rent is due in early December each year and therefore in accordance with the lease provisions the service charge year runs from the same date. Despite what we have just observed about the provisions of the lease Eagerstates demanded in December 2019 a service charge payment comprising each lessee's share of the total actual costs for the year 2018/19 just past (for the Estate and the Block) less what the lessee had already paid, and the ground rent, plus the lessee's share of the estimated costs for the year ahead. It did the same in December 2020.

11. To take one example, Mr Bowditch of flat 1 was required in December 2019 to pay:

Lessee's share of actual Estate costs 2018/19:	332.88
Lessee's share of actual Block costs 2018/19:	1, 242.65
	1,575.53

Less paid in advance:	1,433.27 =	152.26
Lessee's share of estimated Estate costs 2019/20:		421.24
Lessee's share of estimated block costs 2019/20:		959.12
Ground rent		350.00
Total payable:		1,882.62

12. In the spring of 2021 as a result of fire safety inspections Assethold put in place a waking watch for both blocks, and proposed to pass on the cost to the Lessees. In April 2021 they applied to the FTT for a determination as to whether such a charge would be reasonable and payable. On 1 June 2021 Assethold/Eagerstates issued a demand for service charges, taking in the last six months' actual costs and estimated costs for the year. The actual costs for each Block included a sum of over £22,000 (to be shared by all the lessees) in respect of the cost incurred so far for the waking watch. The estimated costs for each Block included each lessee's share of £3,000 for the estate and £150,000 for the Block for "Repair fund if needed". The validity of that demand became an issue in the proceedings in the FTT, which I will call the "April proceedings", although (by agreement with the parties) the only charges that the FTT considered were those for the waking watch and for the repair fund which related to fire safety works.

13. The FTT made its decision in the April proceedings in November 2021, by which time the waking watch had been in place for many months despite the fact that it had been recommended only as an interim measure pending other fire prevention works (which had not been carried out). The FTT's decision has an important bearing on the present appeal and we have to look at two passages in it. At its paragraph 35 the FTT said:

> "Mr Granby [for Assethold] accepted in his skeleton and orally that Assethold is not entitled to raise ad hoc demands for service charges incurred, as Assethold purported to do between March and June 2021. He also accepted that the service charge arrangements in the lease do not entitle Assethold to demand interim service charges based on estimates of future expenditure."

14. At paragraph 38 the FTT found:

> "the service charge demands which were purportedly served by Assethold on 1 June 2021 therefore fail to comply with the leases in at least two respects: they clearly incorporate estimated costs as well as past costs, and even the incurred costs do not represent expenditure said to have been incurred by Assethold in a service charge accounting period of twelve months.
>
> 39. Given there is no power to raise demands for estimated future service charges, the estimated "Repair fund if needed" of £150,000 per Block and Estate "Repair fund if needed" of £3,000 could not be payable through service charges even if valid demands had been served.
>
> 40. Accordingly, whatever the Tribunal's conclusion as to the reasonableness of the service charges in dispute, they have not been properly demanded in accordance with the terms of the lease."

15. That finding was not appealed.

16. Therefore neither the estimated "repair fund" costs nor the incurred costs of the waking watch were payable, the latter having not been properly demanded because they were demanded on the wrong date. Nevertheless the FTT also made findings as to whether the cost of the waking watch was reasonably incurred, and found that it was not, and moreover that if it had been the quality of service provided was so poor that a 50% reduction was to be made in the cost payable by the lessees. The finding that the cost was not reasonably incurred was appealed to the Upper Tribunal, but the finding about the quality of the watch was not. The outcome of that appeal was a finding that the cost of the waking watch was reasonably incurred only for the first month that it was in place, as an interim measure (*Assethold Limited v Adam and others* [2022] UKUT 282 (LC)).

17. Meanwhile the present proceedings began in August 2021 when the Lessees applied to the FTT for a determination of the reasonableness and payability of the three service charge demands issued by Assethold up to that date, including the June 2021 demand already in issue in the April proceedings. There was therefore necessarily some duplication, but I think it may have been unclear at that stage exactly what charges were going to be in issue in the April proceedings. A further set of demands was made in December 2021, again for actual costs for the past six months and for estimated costs for the year 2021/2022, and that demand was subsumed in the application. This appeal is from the FTT's decision on that application.

18. It is worth listing the demands that were before the FTT, with their dates:

    a. 2 December 2019, for actual expenditure for 2018/2019 and estimated expenditure for the year ending December 2020

    b. 7 December 2020, for actual expenditure for 2019/2020 and estimated expenditure for the year ending December 2021

    c. 1 June 2021, for actual expenditure for 2020/2021 to date and estimated expenditure for the year ending December 2021

    d. 6 December 2021, for actual expenditure from June to December 2021 and estimated expenditure for the year ending December 2022.

19. I have to refer to three aspects of the proceedings in the FTT which have a bearing on this appeal.

20. First, the FTT gave directions on 18 August 2021 but they had to be amended on a number of occasions because Assethold repeatedly failed to comply with them. A hearing date was lost as a result. The Lessees twice applied for Assethold to be debarred from taking further part in the proceedings; no such order was made despite the FTT (in directions given on 8 November 2021) observing that Assethold's behaviour "clearly demonstrates an

unwillingness to comply with the Directions given". However, on 17 March 2022 the FTT directed that:

> "[Assethold] will only be able to rely upon evidence at the hearing in respect of which provision has been expressly made in the Tribunal's Directions and then only insofar as [Assethold] has complied with those Directions".

21. As a result, Assethold did not adduce any evidence before the FTT. For that it has only itself to blame.

22. Second, until shortly before the hearing Assethold was unrepresented. The hearing was listed for two days, the first day being devoted to the Lessees' application to enfranchise the property. Mr Loveday explained to me that he and his instructing solicitors were instructed very late in the day, and that while they were able to prepare properly for the enfranchisement matters they really did not have sufficient time to prepare for the application relating to service and administration charges. In the bundle is Mr Loveday's skeleton argument in relation to the service charges, which he said was an endeavour to define what was in issue for the benefit of the parties and the FTT. It is an impressive piece of work done by the light of midnight oil, and I shall have to refer to it later as an indication of Assethold's position on one of the grounds of appeal.

23. Third, time was short at the hearing. As a result, Mr Loveday was able to deliver a closing speech but Ms Adam for the Lessees produced a written closing. Again I shall have occasion to refer to this later.

24. A large number of issues were determined by the FTT; applications were made by both parties for permission to appeal, which the FTT refused. The Tribunal has given permission to Assethold to appeal on four grounds, numbered 2 to 5 in its application for permission, and has directed that Assethold's ground 1 be determined on a "rolled-up" basis. That means that ground 1 was argued at the hearing on the basis that if appropriate I would grant permission to appeal and determine the appeal. The Lessees also applied to the Tribunal for permission to appeal; the Tribunal refused permission on most of the Lessees' grounds but directed that the Lessees' grounds 3 and 6 be determined on a "rolled-up" basis.

25. In the paragraphs that follow I address first Assethold's three substantive grounds of appeal, then the Lessees' two grounds, and finally the matters relating to costs being Assethold's grounds 4 and 5.

Assethold's ground 1: estimated service charges

26. As set out above, four service charge demands were before the FTT. Each included demands for estimated service charges for costs not yet incurred, and indeed the only charges demanded in respect of the year 2021/2022 are estimated charges. There is no provision in the lease for estimated service charges to be demanded; the maintenance charge is an advance payment but, as we have noted, the lease set an initial sum which the

lessor was enabled to increase by reference not to estimated future costs but to the amount by which the current maintenance charge fell short of the previous year's expenditure.

27. The FTT found at its paragraph 24 as follows:

> "The estimated service charges for the years 2019/2020, 2020/2021 and 2021/2022 have not been calculated in accordance with the terms of the leases. It is not clear from the evidence before the tribunal how the respondent fixed the individual elements of the sums demanded, but they have not been calculated by reference to the excess charge for the previous year as required by clause 4(4)(d). The tenants are therefore not liable to pay the estimated charges demanded."

28. Assethold seeks permission to appeal that finding on the basis, first, that the estimated charges were not before the FTT, and second on the basis that even if they were, the Lessees were estopped by convention from denying their liability to pay them because they had paid them "over a very long time" (paragraph 11(4)(b) of the grounds of appeal).

29. It was not possible to determine the application for permission to appeal on this ground without sight of material not yet before the Tribunal and so I directed that it would be heard on a "rolled-up" basis along with the grounds on which permission had been given.

30. What is now clear is that an appeal on this point would serve no practical purpose. Insofar as the charges that were estimated in the demands before the FTT have become actual costs, they can now be recovered (insofar as not covered by what the Lessees have already paid) by way of "excess contribution" as authorised in the lease – save insofar as the Lessees have already secured a determination that they were not reasonable, as is the case with the bulk of what Assethold has spent on the waking watch and with the two "Repair fund if needed" items, and subject to any other challenge to reasonableness that the Lessees may make. Assethold's ability to recover its reasonably incurred costs does not depend upon the validity of past demands for estimated costs.

31. Moreover, it is also now clear that the fact that the leases do not permit estimated charges was conceded by counsel for Assethold (Mr Granby, not Mr Loveday) in the April proceedings (see paragraph 13 above) and determined by the FTT (see paragraph 14 above).

32. Mr Loveday explained that he did not seek to challenge that finding so far as it related to the charges that were before the FTT in the April proceedings, but that Assethold sought permission to appeal on the basis that the issue was not before the FTT in the current proceedings so that no determination should have been made upon it – thereby leaving Assethold free to argue in future that estimated charges were payable.

33. The difficulty with that submission is that the four sets of estimated charges were listed in the Lessees' Scott Schedule, at items 1 – 4, with the Lessees' comment being "Do not comply with lease terms" and Mr Loveday in his written opening at paragraph 15 acknowledged that the estimated charges were before the FTT. He said in that opening that they could be ignored but he did not say why. The "Repair fund if needed" items had

already been adjudicated upon but the rest of the very substantial estimated charges had not been addressed in the April proceedings and the demands for them had not been withdrawn; there is no substance in the argument that it was not open to the FTT to make a determination about them. There was only one possible determination it could make, in light of Assethold's concession in the April proceedings and in light of the clear terms of the leases, but it was able to make that determination.

34. Assethold wants to have another go at the estimated charges on the basis of the estoppel argument, but I see no substance in that. Assethold only acquired the freehold in June 2019. Service charge demands were issued in December 2019 and December 2020; in April 2021 proceedings were issued in which the Lessees said that estimated charges were not payable. That is not "a very long time"; it is a challenge made relatively promptly after only two demands. I find it difficult to see how a plausible case in estoppel could be mounted on those facts.

35. So the challenge to the FTT's determination at its paragraph 24 is legally hopeless; it is also pointless for the reasons I explained at paragraph 30 above. I refuse permission to appeal on this point.

Assethold's ground 2: the insurance valuation

36. In the service charge demand for the year 2019/20 Assethold required the Lessees to pay their share of a charge of £2,820, being the actual cost of having the property valued for insurance purposes.

37. In the FTT the challenge was not to whether this charge was payable but as to the reasonableness of the cost incurred; Ms Adam in her written closing submissions accepted that the charge would be covered by clause 6(6) of the lease:

> "(6) Without prejudice to the foregoing to do or cause to be done all such works installations acts matter and things as in the landlord's absolute discretion may be necessary or advisable for the proper maintenance safety and administration of the Estate and the Building."

38. Nevertheless the FTT's finding about this charge was that it was not payable under the terms of the lease. It considered whether the charge was payable under clause 6(8) and found, correctly, that it was not, but failed to look at clause 6(6), overlooking what Mr Loveday had said in argument and what Ms Adam had said in closing. The FTT helpfully added at its paragraph 35 that if the charge had been payable it would have found the cost to have been reasonably incurred.

39. In the appeal Mr Bromilow did not dispute that the cost of the insurance valuation would be payable, if at all, under clause 6(6), but sought to argue that the charge was not payable because Assethold failed to give evidence that the expenditure was "Necessary or advisable for the proper maintenance" etc. I did not allow Mr Bromilow to advance this new argument on appeal, which in any event did not appear to me to have any substance in

light of the nature of the expenditure. The FTT's finding on this charge is set aside and I substitute the Tribunal's decision that the charge was reasonable and payable.

Assethold's ground 3: fire safety works

40. The service charge demand for 2019/20 included the sum of £1,608 incurred in respect of fire-proofing works.

41. The FTT said at its paragraph 53:

> "From the limited information before the tribunal the charge appears very high for the described work. The tribunal therefore find it reasonable that this charge is discounted. In the absence of evidence as to what a reasonable cost for the work would be the tribunal, using its own knowledge and experience, find that an appropriate charge would have been £750 plus VAT."

42. The appellant has permission to appeal on the basis that this finding is unexplained, since the FTT's "own knowledge and experience" is not a sufficient reason for making a particular finding, and on the basis that in the absence of evidence from the Lessees that the work could have been done more cheaply the amount charged should have been allowed.

43. It is of course well-established that the Lessees cannot simply put the landlord to proof of the reasonableness of expenditure; they have to provide some evidence that a cost was excessive. The FTT followed that principle in making its decision about drainage costs, at its paragraph 56, where it said:

> "In the absence of any alternative quotes for similar work the tribunal finds these invoices to be reasonable".

44. That, says Mr Loveday, should be the answer to the challenge to the cost of the fire safety works.

45. In response Mr Bromilow pointed out that the FTT, faced with a small item in the context of service charges running to tens of thousands of pounds, took a pragmatic decision that was open to it to make. He pointed to the evidence given by Ms Adam in her witness statement that the work done was not completed because the electrical cupboard was not fireproofed, and to a later fire safety report commissioned by the Lessees which confirmed that the electrical cupboard still needed work. Ms Adam suggested in her witness statement that the cost should be reduced to £500 + VAT. It is not known whether the FTT had that evidence in mind – it seems it did not since its decision purported to be about the overall cost of the work rather than about its quality or completeness. Mr Loveday could not remember whether Ms Adam was cross-examined on this point.

46. I find that the FTT's explanation was insufficient. Its expertise is in no doubt, but when it employs that expertise it must offer explanation, and it failed to do so; a reference to its

expertise is not in itself an explanation for the figure it arrived at. Pragmatism is appropriate in some circumstances but where a tribunal arrives at a figure without evidence, on a commonsense basis for the sake of proportionality, it must say so. The FTT's decision on this point is set aside because it was unexplained.

47. Should the Tribunal then substitute its own decision that the whole charge was reasonable and payable? I note that the Lessees offered no alternative quotes; but what they did was give evidence that the work was incomplete. Neither Mr Bromilow, who was not present at the FTT hearing, nor Mr Loveday who was, can point to any challenge having been made before the FTT to what she said, and Assethold for its part gave no evidence that the work was completed. (It is no answer to that that Assethold was prevented from giving evidence; it had many months in which to do so before further extensions were refused, and it failed to do so). I take the view that the FTT should therefore have accepted Ms Adam's evidence on that point, and that in the light of that evidence it was right to reduce the charge. As to the amount of the reduction, it is not proportionate to remit the matter for further evidence to be produced; I take a pragmatic approach and reduce the cost by around half to £800 including VAT.

The lessees' ground 3: was the insurance charge duplicated?

48. I now turn to the Lessees' two grounds on which they have not yet been granted permission to appeal, because it was not possible to understand the grounds without further explanation.

49. The first relates to one of the actual costs listed for 2018/19, in the demands issued in December 2019. The first item in the list of actual costs for Block A is "Insurance June 2019/20 + Broker's fee £1,748.41" (being the total cost, to be shared between the lessees). That is unsurprising because Assethold had to insure the property when it purchased in June 2019. But the second item is "Insurance by previous agents £2,045.37". The same thing happens in the service charge demands for Block B, where the "Insurance by previous agents" is said to be £2,631.88.

50. The Lessees' case was that they had already paid for the insurance taken out by the previous freeholder, Reydene Limited, and should not have to pay for Reydene's insurance again. They referred to Reydene's service charge accounts for 2018 and demonstrated that the figures in the December 2019 demand were Reydene's insurance costs for 2018, not for 2019.

51. Assethold's comment on the Scott Schedule was that the previous landlord's agent said that this cost had not been paid. Mr Loveday in his skeleton argument in the FTT said that the Lessees' case was "pure speculation", and pointed out that the amounts were certified by Assethold's accountants as being correct. Assethold's position was therefore that the Lessees were put to proof that they had paid this cost already to Reydene Limited.

52. The FTT said at its paragraph 32:

> "There is no evidence before the tribunal of the tenants having paid the previous owner's insurance premium for the year to 31 December 2018, or that it had been demanded from them. Nor is there any evidence before the tribunal that the respondent reimbursed the previous owner with this cost on completion of the sale. The sums are included in the certifications by Martin + Heller dated 2 December 2019, which certification states that the costs certified (which include the contested sums) are 'sufficiently supported by accounts, receipts and other documents which have been produced to us.' This is not evidence of when and to whom the certified sums may have been paid, but in the absence of clear evidence the tribunal have had to proceed on the basis that this suggests that Martin + Heller were satisfied that it had not been paid to the previous owners and was owed to the respondent. The tribunal find the tenants liable to pay a due proportion of the previous owners' insurance premiums."

53. At the hearing before me Mr Bromilow explained that the Lessees' reasoning was that the service charge demands issued in 2019 showed that they had all paid Reydene Limited the previous December – as we saw in the case of Flat 1, paragraph 11 above. He argued that it was inconceivable that Reydene Limited would not have claimed insurance costs for 2018/19 in its latest service charge demand. There was no evidence that the tenants were in arrears or had refused to pay. Moreover the charge demanded in December 2019 was not for Reydene's costs of insurance up to August 2019 but was for the figure that appeared in its 2018 accounts. Those accounts were in the bundle, whereas Reydene's accounts for 2019 were not although Assethold should have produced them.

54. Mr Loveday explained that Assethold's difficulty at the hearing before the FTT was that it was not able to produce evidence, and so it adopted the approach of putting the Lessees to proof. He could not explain why the sums charged appeared to be for Reydene's 2017/18 costs rather than for 2018/19.

55. I remind myself that Assethold was not prevented from giving evidence in the FTT. It was given repeated extensions of time over many months and repeatedly failed to do so. The Lessees should not be penalised, or held to a higher standard of proof than is appropriate, because of that. The Lessees raised a good prima facie challenge to the payability of this item; faced with a charge by Assethold in respect of an expense incurred by the previous landlord, the Lessees are entitled to ask why they have to pay that to Assethold. The Lessees said enough to shift the evidential burden on to Assethold to explain the charge. It did not do so. The accountants' certificate does say that the service charge accounts are "a fair summary of the landlord's relevant costs and is sufficiently supported by accounts, receipts and other documents that have been produced to us", but if there were documents that explained this charge they were not produced to the FTT by Assethold. Assethold adduced no evidence that it had incurred this cost either by paying the premium directly or by reimbursing the previous freeholder for its insurance costs for 2018/19. And it gave no explanation of the actual figure.

56. The FTT's decision on this point was unfair to the Lessees because it enabled Assethold to benefit from its own failure to adduce evidence. The Lessees raised a proper challenge to an item that called for explanation. There was no documentary proof that they had already paid it, but there is no evidence that when Assethold purchased the property the Lessees

were in arrears with service charges – and I have no doubt that if they had been, that position would have been front and centre of Assethold's case.

57. I grant permission to appeal on this point and I set aside the FTT's decision. I substitute the Tribunal's decision that the sums claimed in respect of the previous landlord's insurance costs were not payable by the Lessees.

The lessees' ground 6:

58. The Lessees sought to challenge the FTT's finding about a demand dated 16 June 2020 for fire risk assessment works following a consultation under section 20 of the Landlord and Tenant Act 1985. The FTT at its paragraph 51 said that this charge does not appear in the service charge accounts and therefore "does not appear to be a service charge item and is not before the Tribunal to consider".

59. Assethold's position is that this work has not been done and this demand is not payable. It was agreed at the hearing that I should refuse permission to appeal on Assethold's admission that this demand is not payable, and the parties have since agreed the wording of an order to that effect, so I need say no more about this ground here.

60. That deals with all the substantive grounds of appeal; I now turn to Assethold's two grounds of appeal relating to costs.

Assethold's ground 4: rule 13 costs

61. At paragraph 20 above I summarised the procedural failings on Assethold's part which led to its being unable to adduce any evidence before the FTT. Generally there is no power for the FTT to make costs orders in applications for the determination of the reasonableness and payability of service and administration charges, but the Lessees applied for a costs order against Assethold in respect of the costs it had incurred as a result of Assethold's procedural defaults, pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which reads:

> "(1) … the Tribunal may make an order in respect of costs only—…
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings"

62. An order for costs under this rule will be made only in the clearest cases, and where the paying party's behaviour has been "vexatious, designed to harass the other party rather than to advance the resolution of the case" (*Ridehalgh v Horsefield* [1994] Ch 205). In *Willow Court Management Co Ltd v Alexander* [2016] UKUT 0290 the Tribunal indicated that in deciding whether to make an order it is necessary first to decide whether the party has acted unreasonably, then to make the discretionary decision whether or not to make an order, and finally what the terms of the order should be.

63. The FTT made the order sought. In paragraphs 87 to 92 it went through the reasons why the Lessees said that an order should be made; it discussed Assethold's response to the application; it noted that Assethold's position was that it had not behaved unreasonably, and rejected Assethold's argument that it had been unfairly prejudiced through not having legal representation. It concluded:

> "The tribunal finds that the respondent, acting by its agent Eagerstates, has acted unreasonably, to the extent that it has met the high threshold required by Willow Court, evidenced by the failure to comply with directions and the threat of disbarment. It also notes that Mr Gurvits did not attend the hearing.
>
> 94. Adopting the approach taken in *Willow Court* [2016] UKUT 0290 the tribunal finds that in the circumstances of this case an Order should be made, and that that Order should be for costs.
>
> 95. The amount of the applicant's costs not having been challenged by the respondent, the tribunal awards the applicants its costs of £6,096."

64. Assethold appeals this order on the grounds that the FTT went through only the first of the three stages of reasoning set out in the *Willow Court* decision. Assethold says that the FTT decided that its conduct had been unreasonable in the sense required by *Willow Court*, but did not give separate consideration either to the decision whether or not to make a costs award or to what that order should be.

65. In Assethold's grounds of appeal it argued that in fact it had given "proper explanation" for its default, in the written submissions made in response to the costs application; that it had already been penalised by being barred from bringing evidence to the FTT and should not be penalised in costs; that there was no evidence that the costs claimed had been incurred, and that there was no evidence that the costs had been incurred as a result of any default by the respondent. I take it that those points are presumably made in support of the argument that no costs order should have been made, or that if an order was made it should have been for less than the full amount claimed, and that had the FTT considered these points it would have made a different decision.

66. I take the view that the FTT did follow the reasoning process set out in *Willow Court*; certainly it had the three-stage test in mind as is made clear by its reference to the case. Its paragraph 94 (quoted above) takes a rapid run through the second and third stages, and it might have been helpful for the FTT to have articulated its reasoning more extensively. However, the fact that it felt it unnecessary to say much may have been because Assethold's conduct had been particularly egregious. There had been repeated delays in the proceedings caused by failure to make disclosure, a hearing date was lost as a result, and explanations given in the course of proceedings by Assethold's representative Mr Gurvits had been inadequate or non-existent. Assethold's written representations in response to the costs application did not give a "proper explanation" for that conduct, but instead sought to play it down. The Lessees' application for costs set out the disastrous consequences of Assethold's failure to co-operate in the proceedings – not only delay but also the inability of any leaseholder to sell or mortgage its lease pending the resolution of

the proceedings, the delay of the purchase of the freehold, and two lessees had been sued and threatened with forfeiture over unpaid service charges. Assethold in response did not dispute that those consequences had occurred. It is unsurprising that the unreasonable behaviour resulted in a costs order being made and the reasons for that were clear to the parties.

67. As to the quantum of the order, the costs claimed were set out in an application made by Ms Adam, who is a solicitor and has represented the leaseholders in these proceedings. For the Lessees Mr Bromilow observes that it is well-established that a solicitor whose firm has not charged for its time may nevertheless seek to recover the amount that would have been charged absent that arrangement made by the firm for the benefit of its employee or partner, and that that is what has happened here. Ms Adams had confirmed that the costs claimed were incurred entirely in dealing with Assethold's default. Again, it is unsurprising that the whole of the costs claimed – being, as litigation costs go, a relatively modest sum – was awarded on the basis that these were costs occasioned by the default.

68. The argument that Assethold had already been penalised by being barred from producing evidence, and should not be penalised again in costs, is obviously spurious. For one thing, Assethold was not barred from producing evidence, it was merely held to compliance with the FTT's directions and it was its own failure to comply that made it impossible for it to adduce evidence. More importantly, insofar as that was a penalty it did not wipe the slate clean. The consequences of Assethold's default in terms of prejudice to the Lessees remain, and some of their practical implications cannot fully be compensated, but the additional costs incurred can be reimbursed through a costs order.

69. I regard the FTT's decision on the rule 13 costs application as manifestly correct and adequately explained, and this ground of appeal fails.

Assethold's Ground 5: Section 20C

70. Section 20C of the Landlord and Tenant Act 1985 provides:

> "(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" … the First-tier Tribunal… 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."

71. The objective of that provision is the avoidance of the obvious injustice of leaseholders being successful in proceedings brought by or against their landlord but then having to pay the landlord's costs pursuant to an obligation in their lease. An order will not be made as a matter of course where the leaseholders are successful in such proceedings, and the court or tribunal will bear in mind that the obligation in the lease is a contractual obligation that the parties have entered voluntarily.

72. In the present proceedings the Lessees sought an order under section 20C, which the FTT granted. It said just this at its paragraph 86:

> "In the application form the applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

73. Assethold appeals that order on the ground that it is unexplained, the words "just and equitable" not amounting to an explanation in the circumstances. Moreover, in the context of a case where it has incurred a five-figure sum in costs, Assethold says that it is entitled to an explanation as to why its contractual rights have been overridden. It is said that substantial parts of the application duplicated other proceedings, and that in fact Assethold succeeded on numerous points.

74. In response, Mr Bromilow did not seek to justify the level of explanation provided by the FTT.

75. I accept that the FTT's explanation was inadequate and I set aside the decision on the section 20C application.

76. It is open to the Tribunal to re-make the decision, and I will do so.

77. Assethold says that substantial parts of the application duplicated the subject matter of other proceedings. I agree that there was some duplication, but it is not substantial. When the current proceedings were issued the April proceedings had not yet been decided and it was not clear what their scope would be, but eventually the subject of the April proceedings boiled down to the waking watch costs and the "Repair fund if needed" items. No other items in the four service charge demands in issue here were addressed in the April proceedings.

78. Mr Loveday in his written opening described the other items in issue, aside from the estimated charges which he was saying should be ignored, as "relatively modest" (his paragraph 13), and is it fair to say that Assethold was successful or partially successful on most of those items. But the demands for estimated costs, even excluding the "Repair fund if needed" items, were not modest, as can be seen from the example at paragraph 11 above; indeed the demand for 2021/2022 was composed entirely of estimated charges. The FTT's decision about the estimated charges, which as I have already said were properly before it, represented a substantial success for the Lessees. The payability of the estimated charges should have been conceded by Assethold at an early stage and the demands withdrawn. The fact that the point was not conceded is illustrative of the way Assethold has conducted these proceedings, in a manner designed to frustrate and obfuscate, not only by its failure to disclose (which has already been penalised in the rule 13(1) order) but throughout. It may be said that it was doing the best it could without legal representation, but the complexity of the proceedings should have been obvious to Assethold from the start and it should have obtained legal representation early, as it eventually did at the eleventh hour. Had it done so its own costs and no doubt the Lessees' too would have been considerably less.

79. For all those reasons it is, as the FTT said, just to make an order under section 20C of the Landlord and Tenant Act 1985 in respect of the costs incurred in the FTT, and I do so.

80. I have of course said nothing about the costs of this appeal because no application has been made in respect of them.

Upper Tribunal Judge Elizabeth Cooke

21 March 2023

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.