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Case No: LC-2023-585

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BK/LSC/2022/0399

15 May 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – apportionment – landlord's contractual obligation to act reasonably – whether the standard imposed by the express term in the lease is reasonableness or rationality – can a reasonable outcome be unfair?

BETWEEN:

GRAHAM BRADLEY (1)
MICHAEL RHODES (2)

Appellants

-and-

ABACUS LAND 4 LIMITED

Respondent

Apartments 202 & 206, Romney House,
47 Marsham Street,
London, SW1P 3DR

Upper Tribunal Judge Elizabeth Cooke
6 March 2024 and 18 April 2024

Mr James Sandham for the appellants on a direct access basis
Mr Tom Morris for the respondent, instructed by JB Leitch Limited

The following cases are referred to in this decision:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Braganza v BP Shipping Ltd and another [2015] UKSC 17
Cain v Islington [2015] UKUT 542 (LC)
G & A Gorrara Ltd and others v Kenilworth Court Block E RTM Co Ltd [2024] UKUT 379 (LC)
Hawk Investment Properties Ltd v Eames and others [2023] UKUT 168 (LC)
Hayes v Willoughby [2013] UKUT 17
Paragon Finance plc v Nash and another [2001] EWCA Civ 1466
Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116
Williams and others v Aviva Investors Ground Rent GP Ltd [2023] UKSC 6

1.

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") in its jurisdiction under section 27A of the Landlord and Tenant Act 1985 to determine whether variable service charges are payable. The appellant tenants, Mr Graham Bradley and Mr Michael Rhodes, hold the long leases of two of the 168 flats in Romney House, 47 Marsham Street, London, where there are also four commercial units and a gym. They applied to the FTT for a determination that service charges paid, or to be paid, by them in respect of the upkeep of the gym were not payable, on the basis that the decision made by the respondent landlord, Abacus Land 4 Limited, to demand those charges of them had been taken in breach of the terms of the lease. The FTT found that the charges were payable and the appellants have permission from this Tribunal to appeal.

2. The appellants were represented by Mr James Sandham, and the respondent by Mr Tom Morris. I am grateful to both for their helpful arguments.

3. At the start of the appeal hearing there was some discussion about how many appellants there are. In the FTT the two appellants were the only applicants. 51 leaseholders joined with them in respect of their application under section 20C of the Landlord and Tenant Act 1985, with a view to preventing the respondent from recovering its litigation costs from the leaseholders as part of the service charge, and they were listed in the appellants' application from as "other people who may be significantly affected by the application." By the time of the FTT hearing that number had grown to 61. But there remained only two applicants. There can therefore be only two appellants, although I accept that the 61 other leaseholders are party to any application under section 20C in the appeal.

The leases and the factual background to the appeal

4. I was not addressed about the physical layout of the property and it is not relevant to the appeal. Suffice it to say that Romney House was constructed in the 1930s as an office block and converted to mixed use by 2006; thereafter it comprised 168 flats, four commercial units and a gym. Long leases of the residential flats were granted. The commercial units are all let. The gym was not initially let; on 23 October 2013 the then Freeholder granted a 999-year lease of the gym to a wholly owned subsidiary, Nash City Limited. Shortly thereafter, the gym lease was assigned to Mr Adam White, who remains the lessee of the gym.

5. The respondent purchased the freehold of Romney House in 2017.

6. The appellants' leases are in materially identical form to the rest of the flat leases. Unsurprisingly they contain provision for the tenants to pay a service charge.

7. Clause 1(a) of the lease sets out a number of definitions, including the "Estate" (being the landlord's freehold), the "Building" (at that stage yet to be built) and the "Common parts." It then defined the service charges payable; because of the mixed composition of the building the lease distinguished costs to be paid ("in whole or in part") by both commercial and residential lessees and costs payable by the residential lessees ("in whole or in part"):

"Building Service Charge Item"	means any item of expenditure which is (or is intended) to be chargeable (in whole or in part) to

	the lessees of the Building (both residential and commercial)
"Building Service Charge Proportion"	means such fair proportion as the Landlord acting reasonably shall from time to time determine
"Residential Service Charge Item"	means any item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the residential lessees of the Building
"Residential Service Charge Proportion"	means such fair proportion as the Landlord acting reasonably shall from time to time determine
"Service Charges"	means the Residential Service Charge Proportion and the Building Service Charge Proportion and the Parking Service Charge Proportion (or any one of them as appropriate or any combination of them as appropriate).

8. The lease then imposes covenants on the leaseholder, set out in the Fourth Schedule, of which the relevant ones are as follows:

> "10 (a) to pay to the Landlord within seven days of demand the Residential Service Charge Proportion of:
>
> (i) Such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which the Landlord (acting reasonably) designated as being a Residential Service Charge Item
>
> (ii) The costs charges and expenses which the Landlord shall incur in doing any works or things to those parts of the Building utilised by the residential flat owners and/or occupiers for the maintenance and/or improvement thereof and
>
> (iii) Any other costs charges or expenses incurred by the Landlord which the Landlord designates as a Residential Service Charge Item
>
> (b) to pay to the Landlord within seven days of demand the Building Service Charge Proportion of:
>
> (i) Such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which the Landlord (acting reasonably) designated as being a Building Service Charge Item
>
> (ii) The costs charges and expenses which the Landlord shall incur in doing any works or things to the parts of the Building for the maintenance and/or improvement of the Building and
>
> (iii) Any other costs charges or expenses which the Landlord designates as a Building Service Charge Item".

9. So the lease prescribes a designation process: the landlord is to designate its expenditure as Residential Service Charge Items or Building Service Charge Items (or Parking charges, with which we are not concerned here). The former are payable in whole or in part by the residential lessees, and the latter in whole or in part by both the residential and commercial lessees. The landlord's obligations are set out in the Sixth Schedule and include the usual obligations to maintain the building, facilities and common parts.

10. I pause to note that the repeated use of the phrase "in whole or in part" is odd; but it is clear that a charge payable partly by the residential lessees and partly by the commercial lessees is a Building Service Charge Item, because otherwise the definition of Building Service Charge Item would be superfluous since everything would fall within the definition of a Residential Service Charge Item, being payable "in part" by the residential lessees. That prompts the question: if a charge is designated as a Residential Service Charge Item because the landlord ("acting reasonably") has decided it is payable in part by the residential lessees, who is supposed to pay the rest? That is a question to which I shall return later.

11. The appellants' leases also grant to them:

> "The right (in common as aforesaid) to use such facility (if any) within the Building and the Estate that may from time to time be designated by the Landlord for use (with or without others) by the Tenant (including but not limited to the lift if any serving the Building)".

12. That "right" is not a very solid one because it is only a right to use such facilities as the landlord may choose to provide. Those facilities have, since 2006, included the use of the gym. From 2006 to 2010 it was open to residents round the clock; in 2010 the landlord and residents agreed that it would be open from 6:00 a.m. to 10:00 p.m. each day, and so it continued until the 2020 lockdown when the gym was closed. However, since 2013 that use has not been exclusive to the leaseholders; the gym has been let to Mr White and his lease entitles him to make the gym available to his own clients provided that the residents of Romney House are not prevented from using it.

13. The gym lease grants the lessee:

> "The Right for the Tenant and Guests to use the Gym Equipment from time to time in the Unit in conjunction with the Occupiers provided that the Tenant shall not allow such number of Guests to use the Gym Equipment that the Occupiers are routinely prevented from the [sic] using a reasonable proportion of Gym Equipment (with the intent that there should always be Gym Equipment available for use by a reasonable number of Occupiers"

14. The "Occupiers" there are the residential leaseholders of the building.

15. The gym lease makes no provision for the gym tenant to pay a service charge. It reserves a rent, with limited scope to increase the rent when reviewed; it requires the landlord to provide heat, lighting, water and electricity for the gym at its own cost, to provide and maintain the gym equipment and replace it when required, and to pay "rates and property outgoings" in respect of the gym as well as "service charges and utility costs for services

and utilities consumed" by the gym. On any reckoning the gym tenant has a remarkably good deal. It might well be described as a gift, despite the rent.

16. After the 2020 lockdown the residents' access to the gym was considerably reduced by the gym tenant; Mr Rhodes' evidence was that the residents were allowed access only between 7:00 and 10:00 a.m. and 5:00 and 8:00 p.m. (and not at all on Sundays or bank holidays).

17. Until 2013 the residential leaseholders were the only people using the gym, and its maintenance and equipment were paid for through their service charge. From 2013 the gym tenant was able to take fees from his own clients, yet was paying no service charge. In 2014 the then freeholder agreed with the residential tenants that the £5,000 per annum rent paid by the gym tenant would be put towards the cost of maintaining the gym, with a corresponding reduction in the amount charged to the tenants by way of service charge in respect of the maintenance of the gym.

18. In 2019 the gym tenant alleged that the respondent was in breach of its repair and maintenance obligations as landlord under the gym lease. That led to a dispute lasting a year or more. It was settled in September 2021; the respondent agreed to refurbish the gym, and also to take no rent from the gym tenant for three years. Its contribution of the gym rent to the service charge therefore also stopped.

19. In November 2021 the respondent sent to all the residential leaseholders a notice of its intention to carry out major works to the gym, to be paid for by their service charge. That notice was the first step in the process of consultation required by section 20 of the Landlord and Tenant Act 1985 when a programme of works is going to cost each leaseholder more than £250. The notice stated that the work was being done in order to comply with the landlord's responsibilities both under the gym lease and under the residential leases. A notice of estimates, served later in the process, indicated that the work would cost over £218,000.

20. In December 2022 the appellants made an application to the FTT for a determination of in relation to the service charges demanded relating to the gym in the years 2013 to 2021, and to be demanded in 2022 and 2023. The application form stated:

> "… the Applicants seek a determination that, in light of the grant of the Gym Lease on 25 October 2013, it was not fair and reasonable for the Freeholder to recover 100% of the Gym costs in aggregate from the residential Leaseholders."

21. The form went on to say:

> "… the Applicants also seek a determination of what would be a fair and reasonable apportionment of the Gym costs to the residential Leaseholders in light of the grant of the Gym Lease on 25 October 2013"

and that a fair and reasonable apportionment would be that the residential leaseholders would pay no more than 50% of "the Gym costs" incurred in 2013 to 2020 and 0% thereafter because their access to the gym had been restricted after July 2020.

22. I will set out the legal background to the application below, but for now it is important to recognise that this was not a claim based on section 19 of the Landlord and Tenant Act

1985; the appellants were not saying that the costs relating to the gym had not been reasonably incurred or that work was not of a proper standard, nor were they saying that interim charges were not at a reasonable level. This was a challenge to the decisions taken by the landlord pursuant to provisions in the lease, set out above, which require him to decide which charges are payable in whole or in part by the residential leaseholders.

23. The application form did not state the amount of the service charges in issue; I am told that that was because the appellants were not able to work out what they and the other leaseholders had been paying for the gym until disclosure was given by the respondent in the FTT proceedings. The respondent disclosed its accounts and budget, and from that the appellants were able to construct a helpful spreadsheet, appended to their statement of case filed in March 2023.

24. The appellants were not represented in the FTT. Their statement of case set out the history of the gym and its availability to the residents and explained the provisions of the lease (which I shall come on to shortly). It sought relief as follows:

> "a determination that the recovery of Gym costs by the Respondent (and its predecessors in title) following the grant of the Gym Lease has breached the terms of the residential Leases"…

25. The spreadsheet that accompanied the appellants' statement of case in the FTT indicates that the appellants were arguing:

    a. That they should not have had to pay the whole of the direct gym costs (upkeep of equipment and so on), which the landlord had designated as Residential Service Charge Items to be paid in full by the residential leaseholders; instead they felt they should have paid 40% of those costs between 2013 and 2020, and nothing thereafter.

    b. That their overall service charge payment should have been reduced by the amount that it would have been reasonable for the gym tenant to pay had there been a service charge clause in its lease. The appellants used an apportionment based on floor area and expressed the view that the gym tenant should have been paying 0.0116% of the service charges that the respondent had demanded from the residential and commercial tenants together, and 0.0122% of the service charges demanded each year from the residential tenants alone.

26. Thus the "gym costs" comprise both the direct costs of the gym, which the respondent's accounts showed had been included in the residential service charge, and also what the appellants regarded as the gym's share of the costs of maintaining the building (insurance, management, cleaning repair etc). In light of the absence of a service charge in the gym lease, the appellants took the view that the landlord should bear the gym costs itself. The spreadsheet alleged, among other things, that:

    a. £50,209.20 from October 2013 to July 2020, in direct gym costs and general service charges, had been overpaid;

    b. The forthcoming cost of the major works - well over £200,000 as we have seen - was not payable by the residential leaseholders; and

c. Legal and professional fees charged by the respondent to the residential lessees in respect of its dispute with the gym tenant was not payable by the residential leaseholders and should be repaid.

27. Obviously, the individual appellants' challenge was to their share of those headline figures, each being one of 168 residential leaseholders.

The legal background

28. Section 27A of the Landlord and Tenant Act 1985 enables the FTT to decide whether service charges are payable by leaseholders:

> "(1) An application may be made to [the FTT] for a determination whether a service charge is payable and, if it is, as to—
> (a) the person by whom it is payable,
> (b) the person to whom it is payable,
> (c) the amount which is payable,
> (d) the date at or by which it is payable, and
> (e) the manner in which it is payable."

29. It is sometimes said that the jurisdiction is to determine the "reasonableness and payability" of service charges, but that is inaccurate as well as inelegant. The jurisdiction is to decide whether a service charge is payable. It might not be payable because, for example, it falls foul of section 19 of the 1985 Act because the cost was not reasonably incurred, or the work or services provided were not of a reasonable standard. Another reason why a service charge might not be payable is because it is not one that the landlord is entitled by the lease to charge, and that is what is said in these proceedings.

30. As we have seen above, the appellants say that the respondent was not entitled by the lease to designate the gym costs as payable in full by the residential leaseholders. So they are challenging, not the level of a cost or the standard of work done, but a decision taken by the landlord; and that brings the Tribunal back again to the decision of the Supreme Court in *Williams and others v Aviva Ground Rent Investors GP Ltd* [2023] UKSC 6 ("*Aviva*"). I am grateful for Mr Morris' very clear explanation of that decision and of the long line of cases that preceded and followed it, from which I learned a lot and with which, save where I indicate otherwise, Mr Sandham agreed.

The background to Aviva

31. The story starts with the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, a decision fundamental to administrative law. Lord Greene MR explained at p.233-4 that the court could review decisions taken by a public authority in exercise of statutory powers on two bases:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take
> into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters

> which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

32. So the court in reviewing administrative decisions is looking both at process – has the decision-maker taken the right *things* into account? – and also, in a very limited sense, into outcome in the very narrow sense of what we have come to call *Wednesbury* unreasonableness. In this context the court cannot substitute its own view of reasonableness; it can intervene only where the decision is "so absurd that no sensible person could ever dream that it lay within the powers of the authority" (Lord Greene MR at p.229).

33. Turning now from administrative discretion to contractual discretion, Mr Morris explained that the state of the law prior to the Supreme Court's decision in *Braganza* was summarised by Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 at paragraphs 60 to 66. I need not go through all the cases to which he referred; his conclusion is at paragraph 66:

> "It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria."

34. So a distinction is made between "reasonable" in the very narrow *Wednesbury* sense and objective reasonableness which is an "entirely mutual" concept – in other words one which takes into account the interests of both parties. It may not be a synonym with "fair", but an important difference can be captured by saying that an unfair decision might be *Wednesbury*-reasonable but will not be objectively reasonable. The distinction was illustrated in *Paragon Finance plc v Nash and another* [2001] EWCA Civ 1466 where a mortgagee had a discretion to vary an interest rate; the question was whether there was an implied term in the contract that the discretion would be exercised reasonably. The answer was yes, Dyson LJ explained, but in a limited, *Wednesbury* sense, but not in a sense that required the lender to consider the interests and point of view of the borrower. This was not objective, mutual reasonableness:

> "41. … It is one thing to imply a term that a lender will not exercise his discretion in a way that no reasonable lender, acting reasonably, would do. It is unlikely that a lender who was acting in that way would not also be acting either dishonestly, for an improper purpose, capriciously or arbitrarily. It is quite another matter to imply a term that the lender would not impose unreasonable rates. It could be said that as soon as the difference between the claimant's standard rates and the Halifax rates started to exceed about two percentage points the claimant was charging unreasonable rates. From the defendants' point of

> view, that was undoubtedly true. But, from the claimant's point of view, it charged these rates because it was commercially necessary, and therefore reasonable, for it to do so.
>
> 42. I conclude therefore that there was an implied term of both agreements that the claimant would not set rates of interest unreasonably in the limited sense that I have described. Such an implied term is necessary in order to give effect to the reasonable expectations of the parties.

35. Those two different senses of reasonableness have been distinguished by referring to the narrower or limited standard as "rationality" – which is something of a relief since much mischief is caused when the same word is used to describe two importantly different concepts. Lord Sumption explained in *Hayes v Willoughby* [2013] UKSC 17 at paragraph 14:

> "Rationality is a familiar concept in public law. It has also in recent years played an increasingly significant role in the law relating to contractual discretions, where the law's object is also to limit the decision-maker to some relevant contractual purpose: see *Ludgate Insurance Co Ltd v Citibank NA [1998] Lloyds Rep IR 221* , para 35 and *Socimer International Bank Ltd v Standard Bank Ltd [2008] Bus LR 1304* , para 66. Rationality is not the same as reasonableness.

36. In *Braganza v BP Shipping Ltd and another* [2015] UKSC 17 the Supreme Court had to determine the standard of review to be applied to a decision by a shipping company not to pay a death in service benefit to the widow of a sailor, on the grounds that he had committed suicide. That discretion was unqualified in the contract. Baroness Hale set out the issue as follows:

> "The particular issue is the proper approach of a contractual fact-finder who is considering whether a person may have committed suicide. Does the fact-finder have to bear in mind the need for cogent evidence before forming the opinion that a person has committed suicide? The general issue is what it means to say that the decision of a contractual fact-finder must be a reasonable one. There are many statements in the reported cases to the effect that the principles are well settled and well understood, but this case illustrates that all is not as clear or as well understood as it might be."

37. Baroness Hale referred with approval to the conclusion set out by Rix LJ at paragraph 66 of *Socimer,* quoted above. She then quoted from the decision of Lord Sumption JSC in *Hayes v Willoughby* [2013] UKSC17, where he distinguished between rationality and reasonableness. In paragraph 14, of which I quoted part above, he went on to describe the test of rationality as a matter of process which

> "applies a minimum objective standard to the relevant person's mental processes", importing "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."

38. Baroness Hale observed that that characterisation of rationality encompasses only one aspect of the test described by Lord Greene MR in *Wednesbury*, which examines the decision-maker's process but also assess whether the outcome of that process is one so absurd that no reasonable decision-maker could have reached it.

39. The issue the Supreme Court had to decide in *Braganza* was whether a lower standard is to be applied to contractual decision-making than is applied to administrative decisions; in other words, is it a lower standard than *Wednesbury* in both its limbs? The answer was no: the decision-maker in that case had to follow a rational process, as well reaching an outcome that was rational in the *Wednesbury* sense (but did not have to be objectively reasonable in the sense of mutuality or even-handedness between two parties). The issue in *Braganza* was about process rather than about outcome; but Baroness Hales' explanation was a useful reminder that rationality is about outcome as well as process albeit in the limited, *Wednesbury* sense. Baroness Hale concluded at paragraph 30:

> "It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable - for example, a reasonable price or a reasonable term - the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test."

40. Lord Hodge at paragraph 52 and Lord Neuberger at paragraph 103 agreed with that approach.

41. In *Hawk Investment Properties Ltd v Eames and others* [2023] UKUT 168 (LC) I referred to Lord Sumption's analysis and concluded that "rationality is therefore focused on process, while reasonableness is a higher standard focused on the outcome of that process." That does not quite give the whole picture: as Baroness Hale's analysis in *Braganza* demonstrates, there is a limited element of outcome in the analysis of rationality, although the major focus is on process.

The Supreme Court's decision in Aviva

42. But that is to jump ahead. The next milestone on the journey is the Supreme Court's decision in *Aviva*. The leaseholders in that case were required by their leases to pay:

> "your share of building services costs is 0.7135% or such part as the Landlord may otherwise reasonably determine."

43. Earlier decisions about the apportionment of service charges had led to a position where any provision in a lease for the landlord to make a final determination about the apportionment of service charges was void and that instead the apportionment fell to be made by the FTT in its jurisdiction under section 27A of the Landlord and Tenant Act 1985. The Supreme Court in *Aviva* put an end to that approach. Lord Briggs said at paragraph 15:

> "If the landlord's discretionary decision in question was unaffected by the statutory regime and fell within the landlord's contractual powers under the lease, then there might at the most be a jurisdiction to review it for rationality: see *Braganza* [2015] UKSC 17."

44. It is clear following the decision in *Aviva* that where a lease confers on a landlord an unqualified discretion then that provision is not void; the landlord is free to exercise it and the only test to be applied by the FTT is one of rationality.

What is the effect of a discretion qualified by an express obligation to act reasonably?

45. However, the lease in *Aviva* expressly stated that the landlord's discretion was to be exercised "reasonably" in determining the service charge proportion. Again the provision conferring the discretion is not, as was thought before *Aviva*, void; but what is the effect of that express term qualifying the discretion? That is the issue in the present case although it was not the focus of *Aviva* and therefore the issue was not clearly addressed. Lord Briggs said this at paragraph 33:

> "Applied to the provisions in issue in the present case, the construction which I now consider to be correct applies as follows. Those provisions gave the landlord two relevant closely related rights: first to trigger a re-allocation of the originally agreed contribution proportions and secondly to decide what the revised apportionment should be. In both respects the landlord is contractually obliged to act reasonably. The FtT decided that the landlord had acted reasonably in making the re-apportionment which was challenged, and it is not suggested that it fell foul of any part of the statutory regime, apart only from section 27A(6). But that subsection did not avoid the power of the landlord to trigger and conduct that re-apportionment, because the jurisdiction of the FtT to review it for contractual and statutory legitimacy was not in any way impeded. The original question, whether there should be a re-apportionment and if so in what fractions, was not a "question" for the FtT within the meaning of section 27A(6). The question for the FtT was whether the re-apportionment had been reasonable, and that question the FtT was able to, and did, answer in ruling on the tenants' application under section 27A(1)."

46. Mr Morris argued that the word "reasonably" in the lease in *Aviva* meant "rationally"; in his skeleton argument he explained:

> "Lord Briggs' decision proceeds on the basis that the express obligation to act "*reasonably"* was in substance the same as the implied obligation considered in *Braganza*: an obligation to act reasonably in the *Wednesbury* sense – i.e. to make the decision lawfully and to deliver an outcome which is not one to which no reasonable landlord would subscribe. Lord Briggs nowhere suggested that an express obligation to act reasonably imposed any requirements above what would otherwise be implied. That is unsurprising: it is difficult to see what more a landlord could be expected to do in complying with an express obligation to act reasonably than a landlord under an implied obligation so to act."

47. This is where I part company with Mr Morris' analysis of the law. Mr Sandham also disagreed. I do not accept that when he used the word "reasonable" in paragraph 33 Lord Briggs meant "rational", as I said in *Hawk Investment*. In that case the landlord argued that where the lease required the landlord's surveyor to produce a "just and equitable"

apportionment of the charges the FTT was nevertheless able to conduct only a rationality review. The argument was subtly different from that in the present case; it was in effect that the express contractual term had to be ignored so far as the FTT's review was concerned and that only a rationality review was permissible whatever the contract said. That required consideration of what Lord Briggs said in paragraph 33 in *Braganza* when he decided that the landlord had acted reasonably. I said this:

> "50. What is the effect of a qualification such as the one in *Aviva* ("such part as the Landlord may otherwise reasonably determine") or the one in the leases in Heritage Close ("some other just and equitable method to be … determined by the Landlord's Surveyor")?
> 51. On Mr Loveday's interpretation of *Aviva v Williams* the additional words "acting reasonably" and "just and equitable" have no effect. What the lease requires is that the landlord shall make a decision, and so long as he does so rationally the FTT cannot change the decision.
> 52. It is very difficult to see that that can be right. It is particularly difficult to see that if the Landlord were to impose an apportionment method devised by its surveyor that was not "just and equitable" it would not be in breach of contract, since the lease specifically requires that the method be just and equitable.
> 53. I find that the respondents' interpretation of the standard of review to be carried out by the FTT is correct, for three reasons.
> 54. First, as just stated, to restrict the FTT to a rationality review would render redundant the additional words that the parties to the lease agreed to include. They wanted a new apportionment to be just and equitable. The parties to the lease in *Aviva v Williams* agreed that the landlord would act reasonably in making the apportionment. … It is difficult to see how the landlord would not be in breach of contract if his new apportionment, in the present case, was not just and equitable; and for the landlord to be able to make a conclusive decision that his new scheme was just and equitable is to nullify the anti-avoidance provision of section 17A(6).
> 55. Second, that approach is consistent with what the Supreme Court did in *Aviva*. That is the inevitable conclusion on reading paragraph 33 of the Supreme Court's decision … - unless one is to re-write it and read "rational" for "reasonable". It is vanishingly unlikely that that is what the Supreme Court intended. It is worth noting that Lord Briggs mentioned *Braganza* and a rationality review only twice, in paragraphs 15 and 16 where he was considering the background law rather than the facts of the case before the court. If he had meant to say that in reviewing this kind of decision the FTT is restricted to a rationality review regardless of the wording of the lease he would have said so and he would have explained why.

48. I stand by that view. The contract in *Aviva* used the word "reasonably" and if Lord Briggs took the view that that meant "rationally" he would have said so.

49. I do not agree that comparisons with the law relating to fully-qualified covenants relating to consent (not to assign the lease for example, with the landlord's consent, such consent not to be unreasonably withheld) have any relevance here; the meaning of the word "reasonable" in that context has been analysed by the courts in the light of that specific factual context which is very different from the context of contractual discretions relating to service charges and their apportionment.

50. In my judgment if the parties to the lease in the present appeal, or in any lease where a discretion is required to be exercised "reasonably", meant "rationally", they would have said so, or would simply have left the discretion unqualified. Their use of the word "reasonably" meant something; it did not simply duplicate the term that would otherwise have been implied. Moreover, it is unlikely that leaseholders would intend the landlord to act without consideration of the outcome for them, in the absence of special circumstances that would make them content with that approach. And in ordinary language the word "reasonable" does not mean *Braganza* rationality, which is very much a lawyers' construct; I do not believe that in ordinary language a decision taken by a landlord without objective consideration of the fairness of the outcome to the tenants would be described as "reasonable". We say: "be reasonable!" when people are being unfair. Therefore if the parties really intended rationality rather than objective reasonableness they would have used the word "rational", or "rationally", rather than "reasonable" etc; if that was really what the parties meant then the landlord in drafting or approving the drafting of the lease would have taken great care to make sure that ambiguity was avoided.

51. Therefore in my judgment an express requirement in a lease or to act "reasonably" in exercising a discretion refers to objective reasonableness. By contrast where a landlord's discretion is unqualified then the test to be applied is one of rationality only.

52. I stress that I am considering only an express requirement to exercise a discretion reasonably, and my decision is purely about the meaning of the word "reasonable" in that context – which has not been the subject of a determination above FTT-level since the Supreme Court's decision in *Aviva*. The law relating to fully-qualified covenants relating to consent has been the subject of many years of analysis by the courts and what I have decided is not relevant to that context.

The FTT's decision

53. The FTT conducted a hearing on 7 June 2023 at which the applicants were represented by Mr Rhodes and the respondent by Mr Morris. I am told that witnesses were cross-examined (Mr Rhodes had made a witness statement, and the applicants also called Mr Calum Watson), but there is no mention of any evidence in the FTT's decision. The FTT set out the facts, rather more briefly than I have done but in similar terms. One difference was that the FTT said that the hours when the gym was available to the residents was reduced in 2013; at the hearing of the appeal the parties agreed that that was a misunderstanding and that although there was an agreed reduction in 2010 there was no further change in until 2020.

54. The FTT summarised the applicants' case as follows:

> "21. The Applicants contend that in the light of the gym lease and the restricted hours during which the tenants are now permitted to use the facilities the allocation of 100 per cent of the gym service charges to the tenants is unfair and unreasonable and Respondent should re-apportion the gym service charge to reflect the current situation ie to allocate a fair proportion of those charges to the gym tenant consistent with that tenant's use of the gym. Those reallocated charges would have to be borne by the freeholder because the gym lease contains no provisions for the gym tenant to contribute to the service charge."

55. Next the FTT found that it had no jurisdiction to make a determination about the charges from 2013 to 2020, because it found that in paying without demur from 2013 to 2020 the applicants had agreed the service charges, referring to *Cain v Islington* [2015] UKUT 542 (LC) (which I explain below).

56. As to the charges beyond 2020, and indeed for the earlier years in case it was wrong in concluding that it lacked jurisdiction, the FTT considered the terms of paragraph 10 of Schedule 4 to the lease. It quoted from *Woodfall's Law of Landlord and Tenant* paragraph 7.193, which is about whether costs, in respect of which a service charge is demanded, were reasonably incurred. At its paragraph 28 it said:

> "28. In the present case the landlord appears to have had two options from 2013 onwards: to continue to charge the gym expenses to the tenants as before or to bear part of the charges itself to reflect the shared use of the gym between the residents and the gym tenant. The Respondent landlord chose the first option which it was entitled under the terms of the lease to do. That choice, though unpalatable to the residential tenants, cannot therefore be said to be unreasonable. It was not a decision of the type where it could be said that no reasonable landlord in a similar position could ever have made it."

57. The FTT went on to say that the applicants had produced no quotations to show that the amounts charged were unreasonable.

58. The FTT made a finding, which is not appealed, that the consultation process for the major works was carried out correctly.

59. The FTT found at its paragraph 37 that the litigation costs of the respondent, allocated to the residential service charge, were payable by the residential tenants.

60. The applicants asked for an order under section 20C of the Landlord and Tenant Act 1985, for their own benefit and also for the benefit of 61 other leaseholders who they said supported their application, to prevent the respondent from recovering the costs of the present litigation from the service charge; the FTT declined to make that order.

The appeal

61. The appellants appeal on a number of grounds. I take them out of order for simplicity.

62. First, at ground 5, the applicants appeal the finding that the litigation costs incurred by the respondent in its dispute with the gym tenant and were payable as a service charge by the residential tenants. That ground is conceded and the respondent confirmed at the appeal hearing that it would refund the relevant payments made by all the residential leaseholders, not just the appellants.

63. Second, at ground 6, the appellants appealed the finding that the FTT had no jurisdiction so far as the years 2013 to 2020 were concerned.

64. Grounds 1 to 4 then go to the FTT's decision at its paragraph 28. It is said that the FTT (1) misinterpreted the provisions of the lease, (2) failed to apply the correct test following the Supreme Court's decision in *Aviva*, and (3) and (4) failed to have regard to relevant considerations when considering the reasonableness of the respondent's apportionment.

By ground (4) it is said that the FTT failed to apply section 19 of the Landlord and Tenant Act 1985.

65. In what follows I therefore look first at ground 6 and then at the remaining grounds which go to the substance of the FTT's decision at its paragraph 28.

Ground 6: was there jurisdiction to make a determination about the years 2013 to 2020?

66. For these eight years the residential lessees paid the gym costs, without protest once the arrangement about the rent, recorded in paragraph 17, had been put in place. The respondent relies upon section 27A(4) of the 1985 Act, which states:

> "(4) No application under subsection (1) or (3) may be made in respect of a matter which—
> (a) has been agreed or admitted by the tenant…"

67. Sub-section (5) then says:

> "(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

68. In *Cain v Islington* the Tribunal (HHJ Nigel Gerald) held that that proviso referred only to single payments, and that if more than one payment had been made then from that alone it could be inferred that the leaseholders had agreed the charge in question.

69. In *G & A Gorrara Ltd and others v Kenilworth Court Block E RTM Co Ltd* [2024] UKUT 379 (LC), published since the FTT's decision, I expressed respectful disagreement with that decision; section 27A(5) is relevant as much to repeated payments as to single payments; payment alone is not enough to indicate agreement. At paragraph 44 of that decision I said:

> "A series of unqualified payments *only* does not indicate agreement, but it *may* do so, *depending on the circumstances*. Imagine a tenant who has paid the service charge without protest for twenty years until 2020. In 2022 she discovers - and could not have known before - that the heating system has not been serviced since 2015, despite the fact that the landlord has paid for the annual servicing and the service charge includes a sum in respect of that payment. She is of course entitled to challenge the charge, because she did not know and could not have found out about the problem."

70. With that in mind I turn to the FTT's decision and the appeal on this point.

71. The FTT said this:

> "24. It is clear from *Cain v Islington* [2016] L & T R 13 … that a single payment of service charge would not be regarded as an agreement or admission but 'where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference [ie of agreement or admission] is irresistible'. In the present case the Applicants' 'payments' appear to have been made without demur since 2013 when the gym lease was first granted and continued to the present day despite unilateral alterations to the terms of gym usage in both 2013 and further in 2020. This

> lengthy pattern of undisputed payments inclines the Tribunal to conclude that the implication or inference of agreement or admission is indeed irresistible and precludes the jurisdiction of the Tribunal under a s27A application at least in so far as it relates to charges levied up to 2020.

72. There is some ambiguity there about the scope of that finding, but I take it to be a finding in respect of the years 2013 to 2020 only. Some of the leaseholders (including the two appellants), withheld part of their service charge from 2021 onwards in protest at the requirement to pay the gym costs, and in saying "at least insofar as it relates to charges levied up to 2020" it seems that the FTT accepted that things changed after 2020.

73. Even so, the FTT's finding that the payments had been made "without demur" during that period is not right; it is not in dispute that the leaseholders *did* "demur" soon after the gym lease was granted and that as a result the respondent agreed to contribute to the service charge the £5,000 per annum that the gym tenant paid by way of rent. So the matter had been discussed and the residents' concerns made known.

74. The appellants in their grounds of appeal said that nevertheless they could not be taken to have agreed the gym charges for that period because they did not know how much they were paying – and indeed did not know until after the commencement of the FTT proceedings, when the respondent disclosed its service charge accounts. Mr Sandham also argued that the FTT's finding was not founded on the evidence, because the FTT did not analyse what the two appellants themselves had done.

75. Mr Morris in response argued that this ground of appeal is a challenge to the FTT's findings of fact, and that therefore there is only very limited scope for an appeal. I do not think it is as simple as that; there was a finding of fact that the appellants had "paid without demur", but the challenge is to the inference the FTT drew from that.

76. However, in my judgment this ground of appeal fails. From 2013 to 2020 the two appellants paid their service charge, which they knew included their share of the whole of the gym costs less the respondent's contribution of £5,000 per annum. That contribution was agreed following discussion with the leaseholders. It was open to the appellants and to any of the leaseholders to challenge the service charge, informally or by issuing proceedings, at any time during those eight years and they did not do so. They did not need to know the amount they were paying for the gym in order to make that challenge and indeed (as Mr Morris pointed out) the present proceedings were commenced while the appellants still did not have the requisite figures; their application form in the FTT simply said that it was "not fair and reasonable for the Freeholder to recover 100% of the gym costs in aggregate from the residential leaseholders."

77. That was not what the respondent was doing before 2021; it was contributing the £5,000 rent and thereby reducing what the leaseholders were paying. That was an arrangement with which the residential leaseholders agreed and it was not challenged until these proceedings were commenced. It could have been challenged earlier, without the need for actual figures. That indicates that the appellants agreed to pay that element of their service charge that included the Gym costs, from 2013 to 2020; the FTT drew the right conclusion. This ground of appeal fails.

The substantive grounds of appeal

The arguments for the appellants

78. It is fair to say, I think, that Mr Sandham was hampered by the structure of grounds of appeal which he did not draft, and I hope he will forgive me if rather than going through the individual grounds I take the four grounds together and set out what I understand to be the appellants' case on appeal.

79. First, Mr Sandham points out that the FTT mischaracterised the appellants' argument in its paragraph 21, which I repeat here for convenience:

> ""21. Currently, the service charges for the gym area are apportioned in accordance with the terms of the lease under which the Respondent landlord has a discretion as to the inclusion and allocation of charges. This is not therefore a matter over which the Tribunal has jurisdiction under this application which concerns only the payability and reasonableness of service charges. This issue would need to be dealt with by an application to vary the leases."

80. Mr Sandham points out that the appellants were not asking for a variation of the lease; their application was for an assessment of whether the respondent had acted in accordance with the terms of the leases. Indeed, the FTT then continued, apparently without regard for what it had said in paragraph 21 by making its determination in paragraph 28, which again it is convenient to repeat:

> "28. In the present case the landlord appears to have had two options from 2013 onwards: to continue to charge the gym expenses to the tenants as before or to bear part of the charges itself to reflect the shared use of the gym between the residents and the gym tenant. The Respondent landlord chose the first option which it was entitled under the terms of the lease to do. That choice, though unpalatable to the residential tenants, cannot therefore be said to be unreasonable. It was not a decision of the type where it could be said that no reasonable landlord in a similar position could ever have made it."

81. That, said Mr Sandham, was an application of the *Braganza* rationality test, which in light of the terms of the lease was not the right test.

82. Mr Sandham's argument then has two limbs.

83. First, if it was in fact correct to apply a rationality test, nevertheless the FTT got it wrong. Rationality is not simply a matter of process, as Baroness Hale observed in *Braganza* (paragraph 40 above); outcome is relevant. What the FTT omitted to consider was the prior decision to grant the gym lease, and to grant it without reserving a service charge; that itself was an irrational decision by the landlord.

84. Second, and as his primary argument, Mr Sandham argued that it was not right to apply a rationality test to the respondent's decision to allocate 100% of the gym costs to the residential lessees (we have seen, of course, that that was not actually what it did before 2021; but it certainly did do so after 2020, at a point when the costs were going to become significantly greater as a result of the forthcoming major works). What the FTT should have done was to assess whether the respondent's exercise of its discretion met the requirements of the lease – as the Tribunal did in *Hawk Investments* and indeed as the Supreme Court did in *Aviva* itself. And the FTT failed to recognise that the respondent

had contracted to be bound by more than a rational process of apportionment. It was committed to ensuring a reasonable outcome in the form of a "fair proportion" while "acting reasonably".

85. And what the respondent did, Mr Sandham argued, did not meet those requirements. Plainly if the landlord withdrew the use of the gym (as it was entitled to do: see paragraph 12 above) then it would not be reasonable to impose any of the gym costs on the residential lessees. Where the residents' right to use the gym was restricted, and shared with others, as it had been since 2013 and far more so after 2020, it could not be reasonable for them to pay 100% of the gym costs; that was not a "fair proportion". Liability for the gym costs was plainly intended to be commensurate to the benefit derived, and that benefit was reduced by the fact that it was now shared with the external customers of the gym. The FTT's attention had been drawn to the RICS Code of practice which refers to the need for apportionment of charges between different leaseholders to reflect the relative benefit enjoyed

86. Implicit in the appellants' arguments is that the respondent ought to have borne part of the gym costs itself in the absence of a service charge provision in the gym lease.

87. Furthermore (and this is ground 4) the major works to be carried out at the gym were, according to the consultation notices sent out by the respondent, done in performance of the landlord's covenants in the gym lease as well as in performance of its obligations to the residential leaseholders, and for that reason also should have been apportioned between the residents and the gym tenant.

The arguments of the respondent

88. As a preface to Mr Morris' argument it is convenient to repeat here the relevant terms of the lease:

> "Residential Service Charge Item" — means any item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the residential lessees of the Building
>
> "Residential Service Charge Proportion" — means such fair proportion as the Landlord acting reasonably shall from time to time determine
>
> …
>
> 10: (a) to pay to the Landlord within seven days of demand the Residential Service Charge Proportion of:
>
> (i) Such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which the Landlord (acting reasonably) designated as being a Residential Service Charge Item
>
> (ii) The costs charges and expenses which the Landlord shall incur in doing any works or things to those parts of the Building utilised by the residential flat owners and/or occupiers for the maintenance and/or improvement thereof and

(iii) Any other costs charges or expenses incurred by the Landlord which the Landlord designates as a Residential Service Charge Item

(b) to pay to the Landlord within seven days of demand the Building Service Charge Proportion of:

(i) Such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which the Landlord (acting reasonably) designated as being a Building Service Charge Item

(ii) The costs charges and expenses which the Landlord shall incur in doing any works or things to the parts of the Building for the maintenance and/or improvement of the Building and

(iii) Any other costs charges or expenses which the Landlord designates as a Building Service Charge Item".

89. Mr Morris pointed out that there are two different decisions to be made by the landlord under the foregoing clauses. The first is to decide which costs are to be Residential Service Charge Items and which are to be Building Service Charge Items. That decision is to be made "acting reasonably". The second is to apportion that item among the residential lessees in order to derive the Residential service Charge Proportion. That proportion has to be "fair". There is no requirement of fairness attached to the first decision, the allocation to the residential service charges. The appellants' challenge was not to the second decision but to the first.

90. In view of that, he argued the FTT's decision was correct.

91. As to grounds 3 and 4, Mr Morris argued that the lease in describing the common parts anticipated that the leaseholder would share the use of the gym with others; they had ample rights to use the gym (which they could, if they chose, enforce against the gym tenant); and the landlord was under no duty to act reasonably in granting the gym lease – which in any event was not this respondent's decision but that of its predecessor in title.

Discussion

92. It is difficult to avoid the conclusion that the FTT did not fully appreciate the legal background to the decision it had to make. As we have seen, at paragraph 21 it expressed the view that it had no jurisdiction to assess the propriety of the allocation of the gym costs to the residential service charge (see paragraph 53 above). At paragraph 26 it then explored, quoting *Woodfall*, the considerations relevant to an assessment of whether costs have been reasonably incurred, which did not form part of either party's case. At its paragraph 28, set out at paragraph 56 above the FTT used the language of reasonableness, yet also referred to *Wednesdbury* test, and left the reader uncertain whether it was looking at rationality in the *Braganza* sense or at objective reasonableness.

93. In what follows I am discussing solely the decision about what happened after 2020, on the basis that from 2013 to 2020 inclusive the appellants' challenge fails because they had agreed to pay the gym costs charged to them (although in paragraph 113 and following I come back to that period of eight years and consider what is the outcome if that analysis is incorrect)

94. I begin with two points about the gym lease:

95. The first is that the respondent bought the property subject to the gym lease as well as to the commercial and residential leases. In that respect it stepped into the shoes of the previous freeholder. Insofar as the terms of the gym lease were generous to the gym tenant the respondent took on that generosity by stepping into the contractual shoes of its predecessor vis-à-vis the gym tenant.

96. The second is that in granting the gym lease the landlord was not under any obligation to act reasonably or even rationally towards the existing lessees. It was free to make a gift if it wanted to, as is any freeholder of property that is not already subject to a lease; in fact it did not quite make a gift, since the gym tenant had to pay rent, but at any rate the then landlord was entitled to grant the gym lease on whatever terms it wished.

97. But that did not change its obligations to its existing lessees. Turning to those obligations, I agree that the lease contemplates a two-stage decision-making process. First the landlord, acting reasonably, must allocate charges between the Residential Service charge and the building service Charge; then it must determine a "fair proportion" for each leaseholder to pay. The FTT had to assess whether the landlord in taking those two decisions complied with the lease.

98. I do not agree with Mr Morris that those two decisions are as completely isolated from each other; nor do I agree that they are subject to a different test. He said that the landlord has to act reasonably in designating a cost as a Residential Service Charge Item, and in that context "acting reasonably" means *Braganza* rationality; the requirement of fairness attaches only to the determination of the proportion of such an item that each leaseholder is to pay. The appellants' challenge is only to that initial designation, and the FTT was therefore right to assess it only in terms of *Braganza* rationality. It did not have to be fair.

99. I disagree with Mr Morris' analysis.

100. As I explained in my analysis of the law above, in my judgment an express requirement to act "reasonably" in exercising a discretion conferred by a lease is likely to refer, and should be understood to refer to, objective reasonableness. Otherwise the word is redundant; otherwise the interpretation runs counter to what Lord Briggs said in *Aviva*. In ordinary language "reasonable" does not mean "rational" in the narrow *Braganza* sense; there is nothing in the language of this lease to indicate that "acting reasonably" means "acting rationally", and nothing in the circumstances to indicate that the original parties – lessee as well as lessor – intended to sanction an outcome that is unfair to the tenant. Mr Morris argued that that was a sensible construction because there would be various commercial considerations relevant to the initial designation of residential service charge items so that the landlord had to be allowed more latitude at that stage. I can see that the landlord might have liked that, but I fail to see any reason why the lessee would have agreed to it. Had the parties intended that, they would have said so and would have used the word "rational" or some other term to indicate that objective reasonableness was not required.

101. Moreover, the text itself does not isolate the two decisions in the way that Mr Morris suggests. A Residential Service Charge Item may be one that is payable not in whole but in part by the residential lessees (see the definition of Residential Service Charge Item). As I pointed out at paragraph 10, if the item was designated as payable in part by the

residential lessees and in part by the commercial lessees then it would be a Building Service Charge Item. So what is contemplated here is that the item is payable in part by the residential lessees and in part by someone else – whether the landlord or some other tenant, for example the gym tenant in circumstances where the gym was let on a lease with a normal service charge provision (at the time the residential leases were drafted the gym was not let). In that case the lease provides that the residential leaseholders must pay a "fair proportion", not of their part of the cost but of the cost itself, because it is the cost itself that is the Residential Service Charge Item.

102. Contrast the outcome if the "Residential Service Charge Item" were defined as a sum that the residential leaseholders had to pay, whether representing the whole or a part of the expenditure of the landlord. That is not what the lease provides; instead of that, it is the expenditure itself that is the Residential Service Charge Item, whether payable in whole or in part by the residential lessees, and each lessee is to pay a "fair proportion" of the whole, not just of that part payable by the residential lessees.

103. If "reasonable" means "rational" in this context, a literal reading of the lease therefore generates the absurd result that (1) if the landlord decides that part of the cost of, say, mending the roof or maintaining the gym, is payable by the residential leaseholders then must each pay a fair proportion of the whole, but that (2) the landlord may, acting rationally but not reasonably, allocate the whole of the cost to the residential leaseholders so that they then pay a proportion of the whole that is fair between themselves but is not a fair proportion of the whole.

104. That is, as I say, an absurd result and it indicates therefore that the parties in using the terms "fair proportion" and "acting reasonably" did not intend different ideas. Fairness was supposed to be a characteristic of the whole process.

105. I am conscious that I am making angels dance on pinheads here. I suspect the parties to the lease did not do that analysis, but that what they intended was at a more general level: that the lessee would pay a fair proportion of costs incurred by the landlord, whether or not they were shared with the commercial tenants or with any other party. As Mr Sandham put it, the two decisions bleed into each other; they are not hermetically sealed from each other. In designating costs as Residential Service Charge Items and then deciding how much each leaseholder is to pay, the landlord's decision must be objectively reasonable.

106. Accordingly if the FTT intended to apply a *Braganza* rationality test it was wrong.

107. If the FTT did indeed intend to apply a test of objective reasonableness then in my judgment it reached the wrong outcome. It is manifestly unfair, and therefore not objectively reasonable, for the residential leaseholders to pay the whole of the gym costs after 2020 when they no longer have exclusive use of the gym. The landlord in 2013 decided to grant the gym lease in extraordinarily generous terms, and the respondent is now seeking to charge that generosity to the residential tenants. I cannot understand how that is not unfair.

108. I do not see any substance in Mr Morris' argument that the arrangement was fair because the appellants could have enforced their right to use the gym against the gym tenant, in light of the precarious nature of their own right against the landlord (see paragraph 12 above).

109. Mr Morris argued that if he was wrong about the construction of the lease, nevertheless the landlord's decision was objectively reasonable. Any other conclusion would mean that the landlord had to pay part of the gym costs itself. That is unfair as between the landlord and the leaseholders, and moreover such a conclusion would devalue the landlord's lease.

110. As I have said, the respondent bought the freehold subject to the gym lease. It took on board its predecessor's generosity to the gym tenant and is bound by that generosity so far as the gym tenant is concerned. The freehold, when the respondent bought it, was already devalued by the terms of the gym lease – which do not impose a service charge – and was already subject to the terms of the residential leases which enable the landlord to recover only a fair proportion of the gym costs. Its predecessor agreed to contribute the gym rent to the service charge and in effect conceded, until and including 2020, that the residential leaseholders should not have to pay the whole charge. And indeed the respondent accepted that that was the situation, in continuing to credit the gym rent to the service charge, although it has resiled from that position now that the resolution of the dispute with the gym tenant has led both to a rent holiday for the gym tenant and a substantial tranche of extra costs for the landlord. But the situation remains that the respondent has bought into the generosity of its predecessor and cannot visit the consequences of that generosity on the residential lessees.

111. So far as the years from and including 2021 onwards are concerned, the FTT's decision that the landlord's decision to charge the whole of the gym costs to the residential lessees was in accordance with the terms of the lease is set aside.

112. There is no scope for a tribunal to remake what the lease designates as the landlord's decision. The respondent will have to try again, preferably in discussion with the residential lessees.

113. Finally I turn to the years 2013 to 2020, in case I am wrong and the appellants did not agree to pay the gym costs in those years. If I am wrong, then again the question is whether the charge imposed by the landlord was objectively reasonable. Until after the commencement of proceedings the appellants did not know what that charge was, but they had been content to pay subject to the landlord's contribution of £5,000 per annum. Mr Sandham says that the charging system was prima face unfair. But I disagree. He has not made a prima facie case, by reference to the figures now disclosed, that the charge made for the gym was unreasonable.

114. Insofar as it related to the charges from 2013 to 2020 the FTT was right to conclude that the landlord's decision was made in accordance with the terms of the lease, even though the route by which the FTT reached that conclusion was unclear.

Conclusion

115. The appeal succeeds in part and fails in part. It fails in relation to the gym costs charged to the appellants in the years 2013 to 2020. It succeeds in relation to 2021, 2022 and 2023 and the FTT's decision is set aside to that extent.

Upper Tribunal Judge Elizabeth Cooke

15 May 2024

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.