Neutral Citation Number: [2025] UKUT 56 (LC)

Case No: LC-2024-431

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER
REF: LON/00/BG/LSC/2023/0100

Royal Courts of Justice
Strand, London, WC2A 2LL
17 February 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – assured tenancies – whether references to 'management fees' and 'PSCTP' apt to create liability to contribute to cost of services provided by superior landlord – whether cost of lift maintenance and repair recoverable as "daily building fabric" charge – list of services missing from tenancy agreements – whether course of dealing sufficient to establish liability

BETWEEN:

NOTTING HILL GENESIS

Appellant

-and-

MR HELAL UDDIN AND OTHERS
(TENANTS OF ENDEAVOUR HOUSE AND MAYFLOWER HOUSE)

Respondents

Endeavour House,
47 Cuba Street, London E14
and
Mayflower House,
19 Westferry Road, London E14

Martin Rodger KC,
Deputy Chamber President

30 January 2025

Ms Tina Conlan, instructed by Devonshires, for the appellant
Mr Robert Bowker, instructed directly, for the respondents

The following case is referred to in this decision:

Cardiff Community Housing Association Ltd v Kahar [2016] UKUT 279 (LC)

Introduction

1. The thirty two respondents listed in the schedule to this decision are all assured tenants of flats in either Endeavour House or Mayflower House in East London. The appellant, Notting Hill Genesis (NHG), is a housing association and is the respondents' landlord. NHG holds long leases of the two buildings granted to it by the freeholder Celtic Motors (C.M.) Ltd.

2. By a decision issued on 19 April 2024 the First-tier Tribunal (Property Chamber) (the FTT) determined that, with the exception of two categories of charges, sums charged to the respondents by NHG and its predecessors for services provided between 2016 and 2023 were payable under the terms of the respondents' tenancy agreements. But the FTT found that none of the respondents were liable to contribute towards the cost of services supplied by the freeholder (which NHG is liable to pay under its own headlease), and that some of them were not liable to contribute towards the costs of lift maintenance and servicing undertaken by NHG.

3. The issues of liability turned on the meaning of labels applied to different categories of expenditure in the respondents' tenancy agreement. The agreements were in different forms, but in each case the standard printed form was designed to have a list of services attached to it for which the tenant was to pay a charge. NHG does not have complete copies of all the agreements, but most of those which it does hold have schedules of charges in two different forms, one containing a typed or printed list of services, the other including a screenshot of a list from an accounting software package. NHG's primary case before the FTT, which it rejected, was that the cost of services provided by the freeholder could be recouped either as a "management fee" (a term used in the printed schedule) or under the heading "PSCTP" (an acronym used in the screenshot). The FTT also found that, where the printed schedule was used, NHG was not entitled to recoup the costs of lift maintenance and servicing under the heading of "daily building fabric".

4. The sums involved in the appeal are substantial. Since 2016 the cost of services supplied by the freeholder has represented two-thirds or more of the service charges paid by the respondents, and over the seven year period in question NHG had sought to collect more than £870,000 from its tenants of 104 flats in the buildings to meet those costs. The charges for lift maintenance were much smaller, but the effect of the FTT's decision was that some tenants were liable to pay them, while others in the same building were not.

5. The FTT granted NHG permission to appeal. At the hearing of the appeal NHG was represented by Ms Tina Conlan, and the respondents were represented by Mr Robert Bowker, both of whom had appeared before the FTT. I am grateful to them both for their assistance.

The tenancy agreements

6. The Landmark Estate is a mixed-use development of five blocks comprising social housing, private sector housing, and commercial and retail space. Endeavour House and Mayflower House are two of those blocks.

7. The two blocks were completed in 2009 and each was let under a separate Lease for a term of 125 years by Celtic Motors (C.M.) Ltd to Paddington Churches Housing Association Ltd (PCHA). The terms of each Lease obliged PCHA to pay a Block Service Charge and an Estate Service Charge which, amongst other expenditure, were intended to cover costs incurred by the landlord in keeping the main structure of the Block and its service installations in repair, and in maintaining, cleaning and lighting the common areas, roads and service installations of the Estate.

8. The earliest lettings by PCHA were in one of its two standard forms of assured tenancy. Twenty-eight of the respondents occupy their flats under a tenancy in on one or other of these forms.

9. In about 2011 PCHA either merged with or renamed itself Genesis Housing Association, and two respondents hold tenancies granted by it. A further merger in about 2015 created NHG and saw the introduction of a new standard form of agreement.

10. Although there are six different forms of tenancy agreement in use in the two buildings, the basic obligations under those agreements are the same. Each agreement obliges the tenant to pay a weekly rent which comprises a sum variously referred to as "net rent" or "Rent" and a service charge. In return for the service charge element of the weekly rent NHG agrees to provide the services set out in an appendix or schedule. NHG may review the service charge not more than twice a year, increasing or decreasing it on notice. No balancing payment or credit is due at the end of the year but NHG is required to take account of any surplus or deficit when setting the service charge for the next period. As the agreements themselves recite, the service charge component of the weekly rent is therefore a variable service charge for the purpose of the Landlord and Tenant Acts 1985 and 1987.

11. Although the tenancy agreements are in standard forms, those forms required the addition of a schedule of services which was not standard but, I assume, was intended to take account of the services provided to a particular estate or block. Some of the agreements include a front sheet with a box for the housing association's staff to tick to confirm that a service charge schedule has been attached to the document. In some examples that box has been ticked, in other it has not.

12. For some tenancies the documents held by NHG are incomplete and may comprise only the particulars page of the agreement, giving the name of the tenant and the address of the flat, or the whole agreement but not the service charge schedule (if one was ever included). In one case the agreement includes a blank schedule with only the amount of the weekly service charge inserted in manuscript at the bottom; in two cases NHG has no copy of the tenancy agreement. All of the documents which were before the FTT were provided by NHG, and it is a surprising feature of this case that the tenants themselves appear never to have been asked to provide copies of the agreements they are likely to have received when they took their tenancies.

13. In those cases where a printed schedule is attached to the tenancy agreement it comprise a printed list of services with the name of the building at the top and the initial weekly service charge inserted in manuscript at the bottom. A typical printed schedule looks like this:

Endeavour House

- Internal Cleaning & Window Cleaning
- Internal Lights
- Pest control
- Roof terrace Replacement
- Alarm Equipment
- Floor Covering to (communal Areas Only)
- Communal TV System (including Cable Satellite)
- Entry Phone
- Alarm Equipment
- Daily Building Fabric
- Building Fabric Sinking Fund
- Cyclical Maintenance Fund
- Audit Fee
- Management Fee
- Basement Fee
- 10% Admin Charge

Per Tenant £ *17.64* per week

The weekly "per tenant" figure in the last line is a manuscript addition and differs from flat to flat.

14. The other variety of schedule found attached to some of the agreements comprises a screenshot of a page from a software programme. The screenshot identifies the flat to which it relates. There is then a series of tabs, one of which is labelled rent, and another service charges. Most of the screenshots show the service charge tab, but in two cases the screenshot is of the rent tab and contains no information about service charges. The service charge tab contains thirteen lines, each representing a different service identified by an acronym beginning with the letters PSC. The meaning of some of these acronyms is easier to deduce than others. They include: PSCDOOR, PSCFIRE, PSCLIFT, PSCMANFEE and, last in the list, PSCTP. Each line also records a start and end date (the same for each line and typically 1 April 2009 to 31 March 2010) and a weekly sum for the individual item. In one agreement I was referred to the original PSCTP charge was £2.57, and the sum of the charges was £17.48.

15. Since its completion in 2009 the Estate has been managed by Rendall & Rittner on behalf of the freeholder, now Adriatic Land 5 Limited. Rendall & Rittner has arranged for the provision of the estate and block services which the lessor covenants to provide in the head leases. The cost of these services has been collected each year from NHG and its predecessors. They in turn have recouped part of the cost from the respondents through the service charge component of their rent, which also meets the cost of services provided

by NHG including cleaning of the communal parts of the buildings, gardening and lift maintenance. In the service charge demands provided to the respondents by NHG the charge for services provided by the freeholder has been described variously as 'managing agent communal cost', 'managing agent cost', 'third party service charge-tenants' and 'third party service charge–leaseholders'. In the annual accounts the description reaches new levels of obscurity, being referred to as 's.106 recoverable charge'.

16. There was no evidence before the FTT of the services provided by the freeholder in 2009 or 2010, on which the contributions included in the original service charges recorded in the schedules might have been based. The only evidence of services provided by Rendall & Ritner was a schedule appended to a letter written to the tenants involved in the 2023 mediation by Mr Milson, NHG's head of rent and services. The list included services provided to the Estate, including staff costs, utilities, communal heating and hot water and general repairs and maintenance, as well as services supplied to the individual buildings, including the supply of electricity to the common parts, maintenance of cctv and entry systems, fire alarm costs, refuse room cleaning, landscaping, ground maintenance, vermin control and insurance. No information was supplied about the cost of any of these items in any year.

The proceedings and the FTT's decision

17. It is the respondents' case that from 2016 onwards their service charges have increased significantly, and they attribute the increase to an escalation in the charge for services provided by the freeholder. It was their belief that this charge was introduced for the first time after NHG became their landlord, a belief perhaps explained by the repeated changes in the way the charge was described. They sought an explanation from NHG and eventually engaged in a process of mediation which did not provide a resolution. In 2023 they applied to the FTT under section 27A, Landlord and Tenant Act 1987 for a determination of the amount of service charges they were liable to pay for the years 2016 to 2023.

18. The FTT was unable to determine whether the respondents were correct in their belief that the services for which they were charged had changed and that the cost had increased substantially after NHG became their landlord. The respondents themselves had no information to substantiate that belief and NHG provided no evidence to the FTT about charges for the years 2009 to 2015. Belatedly, and shortly before the hearing of this appeal, NHG applied for permission to adduce additional evidence of charges in the early years of the tenancies. I refused that application as no satisfactory explanation had been provided why the documents had not been provided to the FTT.

19. The FTT decided that the respondents were not obliged to contribute anything towards the cost of the services supplied by the freeholder. It considered that the reference to "Management Fee" in the printed list of services was not apt to include the costs of the services provided by Rendall & Rittner to the whole estate: "The mere fact that it is a managing agent who is seeking to recover a cost does not make that cost a management fee." The FTT said that there was no ambiguity in the printed list and nothing on it would be understood by the reasonable reader to include a charge for services provided by the freeholder.

20. In relation to the screenshot, the FTT said that it was not possible to discern from the screenshot, or from the tenancy agreements to which it was attached, what 'PSCTP' stands for or what it might have been intended to include. The label "would be unintelligible to a reasonable reader." Nor could the ambiguity in the tenancy agreement be cured by evidence of what had in fact been charged for, as had happened in *Cardiff Community Housing Association Ltd v Kahar* [2016] UKUT 279 (LC). The charge had been claimed under so many different headings in the service charge demands sent to tenants that nobody would have understood that the 'managing agent cost', or 'third party service charge-tenants' or whatever description was chosen in a particular year was intended to refer to the obligation imposed by the tenancy agreement to contribute towards a service referred to as 'PSCTP'.

21. The FTT reached the same conclusion for all versions of the tenancy agreements, including those with no list at all and those where the agreements, or the service charge schedules, had been lost or not retained. It also determined that it was impossible to say whether the charges had been reasonably incurred or were reasonable in amount because no evidence had been supplied by NHG showing what the charges were for or how the total PSCTP figure had been built up.

22. Only one other part of the FTT's decision is challenged in this appeal. It concerns the cost of lift maintenance, which is one of the services provided by NHG itself. Four of the tenancy agreements, those which included the screenshot list of services, contained an express reference to lift maintenance (as "PSCLIFT"). Nothing specific was included in the printed list. The printed list did include "daily building fabric" as a service for which the tenants were required to pay and NHG argued that the cost of maintaining the lifts could be recovered under that heading. The FTT disagreed. It did not think that phrase would be understood by the reasonable reader as including the maintenance or repair of items of plant or machinery such as a lift and would generally be understood to refer to the structure of the building and perhaps its decorative surfaces and floor coverings. That conclusion is challenged by NHG.

23. The FTT reached a different conclusion in relation to those tenancies which could not be found, or which contain a blank schedule or no schedule at all. In those cases it accepted NHG's argument that the uncertainty over the terms of the agreements could be cured by its evidence that since at least 2016 every demand for service charges had included a sum for either lift repair or lift maintenance. The demands were easily ascertainable and understandable, and it would therefore have been common ground between the parties that the weekly service charge included a contribution towards the costs of the lift. The FTT's conclusion on that issue is not challenged by the respondents affected by it.

The appeal

24. The FTT gave permission for two grounds of appeal:

    1. That it had been wrong to find that the cost of services provided by the freeholder were not recoverable through the weekly service charge payable by all of the tenants.

    2. That it had been wrong to find that the reference in the printed list of services to "daily building fabric" was not sufficient to oblige the tenants whose agreements included that list to contribute towards the cost of lift maintenance provided by NHG.

Issue 1: Are the tenants obliged to pay for services supplied by the freeholder?

25. The first issue raises separate questions for different categories of tenants. The agreements may be divided into two main categories, with a third residual category for all those which do not fit into the first or second. The first category contains tenancy agreements which are known to include the printed list with its reference to "Management Fee". The second category comprises agreements which include the screenshot with the service charge tab visible, including the reference to "PSCTP". The residual category contains the remaining agreements, including some to which a blank schedule or a printout open at the wrong page was attached, and others where insufficient evidence has been provided of the terms of the agreement to know whether it included a schedule or what it might have said.

Category 1: "Management Fee"

26. On behalf of NHG, Ms Conlan submitted that the FTT had taken too narrow a view of the expression "Management Fee" in the printed list of services. The natural meaning of "management fee" was broad enough to encompass the disputed charges. "Management" covered a broad range of tasks including, according to the OED: "Organisation, supervision, or direction; the application of skill or care in the manipulation, use, treatment, or control (of a thing or person), or in the conduct of something." It was not, she suggested, limited to administrative matters but could comfortably include physical tasks, such as maintenance. The breadth of the intended meaning would depend on the context.

27. The relevant context included the labels attached to other services in the printed list. These included a specific reference to a "10% Admin Charge". The FTT had interpreted "Management Fee" as equivalent to a charge for administration, but the list already included such a charge so the management fee must have been intended to cover something else. That something else could be inferred, Ms Conlan suggested, from the wider context of the agreements and from "business efficacy".

28. The wider context included, Ms Conlan suggested, the fact that the flats are located on a large mixed-use estate. The reference to the disputed charges in NHG's annual accounts as "s.106 charges" reflected that the buildings were part of an estate constructed pursuant to a planning obligation requiring a proportion of affordable or social housing. The blocks occupied under assured tenancies were part of the same development as the adjoining private blocks and benefitted from shared space and estate services provided by the freeholder. That context, Ms Conlan submitted, was reflected in the headleases and tenancy agreements and would lead to an expectation that services would be provided to the whole Estate which would have to be paid for.

29. In that wider context a reasonable person would understand the reference to a "Management Fee" as covering expenses of NHG which went beyond administration and the other matters referred to in the list. Looking around the Estate a reasonable person would understand that those expenses were providing for the maintenance of the buildings and common areas. The alternative, she suggested, was that NHG would not be obliged to provide or procure the services which the Management Fee had been intended by it to cover.

30. Looking at the question first as one of contractual interpretation, I do not accept that Ms Conlan's submissions lead to the conclusion that the cost of services provided by the freeholder are recoverable through the service charge.

31. A useful starting point is an observation of Lewison LJ in *City of London v Leaseholders of Great Arthur House* [2021] EWCA Civ 431, at [38], that in a lease or tenancy which provides for the tenant to pay for services provided by the landlord, "there is no presumption that the cost of all works that the landlord is obliged to carry out can be passed on to the Lessees". That was said in the context of a long lease granted under the statutory right to buy, but it is even more apposite in the case of an assured tenancy under which the tenant pays a weekly rent, part of which is a service charge and the remainder is for the right to occupy the premises. Whether the tenant is obliged to pay separately for a particular service, or whether the receipt of that service is simply one of the rights covered by the balance of the weekly rent, depends on the meaning of the agreement which the parties have entered into.

32. I agree with Ms Conlan's submission that the rest of the printed schedule is of assistance in understanding what, if anything, the parties must have meant when they agreed that the services to be provided and paid for were to include something referred to as "Management Fee". But I disagree with the conclusion she asks me to draw from the other services on the list. The list includes routine services: internal cleaning, window cleaning, lighting and pest control. It refers to specific fittings and installations: floor coverings, alarm equipment, a communal TV system and an entry phone; I assume these were present in the buildings when the agreement was entered into and are in the list because they are intended to be maintained at the tenants' expense. It also includes what sound like more substantial matters: roof terrace replacement, daily building fabric; and two funds likely to be earmarked to meet the cost of future expenditure. Finally, it includes four items at the end, audit fee, management fee, basement fee and 10% admin charge.

33. The variety of these services makes it difficult to accept Ms Conlan's submission that "Management Fee" is capable of being understood as a broad category of expenditure encompassing building repairs and estate-wide services. The agreements include obligations on the landlord to repair the structure and exterior of the building, to repair the common parts, to take reasonable care to keep the lighting and entryphone systems in working order, and to keep the common parts in a good state of decoration. But the list of services does not cross refer to these obligations. The items on the list are not restricted to the interior of the building (except in the case of lighting and cleaning), or to routine or recurring tasks. They include both works and administration. Three items are referred to as a "fee", two of which sound like a payment for the delivery of a service, as opposed to works (audit fee and management fee) but the third (basement fee) is less obvious.

34. Reading the list as a whole, and the agreement of which it is part, no consistent impression is created; the impression is instead of a fairly random collection of activities or installations which is hard to categorise or explain. The normal meaning of a management fee is that it is a charge for the services of a manager in arranging services, rather than a charge for the services which the manager has arranged. I do not think a reasonable person would be alerted to the possibility that by the inclusion of a management fee in the schedule the landlord was agreeing to procure and the tenant to pay for a mixed bag of services to the Estate as a whole including the supply of electricity to common parts,

maintenance of some parts of the building or cleaning and lighting of common areas, roads and service installations of the Estate. A reasonable person would not, without assistance, be able to understand what was covered by the management fee or in what way it was different from the 10% Admin Charge. They might assume that it was not intended to cover the cost of an audit, and they would appreciate that there was a charge for administration to be paid on top, but quite how management and administration were divided between the two categories would be unclear.

35. Nor do I consider that the wider background or context of the Estate would enable a reasonable person to understand that the management fee was intended to cover the cost of services provided by the freeholder. The relevant background against which the agreement must be interpreted is restricted to the background known to both parties. Any special knowledge which might have been available to PCHA about planning obligations and ownership of the Estate would be relevant to the interpretation of the agreements only if it had been shared with the tenants at the time they entered into their tenancy agreements. None of the tenancy agreements refer to the Estate, or include a plan of it, nor do they refer to the existence or identity of the freeholder. There is no suggestion in the documents themselves that anyone other than NHG will be providing services, and no suggestion that the tenant will be contributing to costs incurred in the provision of services outside the building.

36. But even if a particular tenant had been well informed and had been aware that someone other than NHG would be responsible for the upkeep of the Estate and the structure of the buildings, I do not consider that they would therefore have understood that they would be required to contribute to the variable cost of providing those services through their own service charge. They simply wouldn't know that that was what the Management Fee was intended to relate to or which services were covered by the service charge and which services were provided in return for the rent.

37. There is no evidence that PCHA itself intended to recoup the charges it was obliged to pay to the freeholder under the terms of its own Lease by allocating them to the category of Management Fee in the schedule of services. There are other items in the schedule to which specific costs of services said to have been provided by Rendall & Rittner might have been allocated, including internal lights, pest control, entry phone, daily building fabric, and the management component of the freeholder's charge. But, as I understand the evidence, since at least 2016 those categories have been reserved for costs incurred by NHG and its predecessors.

38. In *Cardiff Community Housing Association Ltd v Kahar* a tenancy in the landlord's standard form had been granted in 2006 in return for a weekly rent and a service charge specified in the agreement as £14.60 but variable on notice. The part of the tenancy agreement where it was intended a list of the services covered by the charge should be included had been left blank, but in 2014 when the tenancy was assigned, the new tenant was given a list of services. The list was not referred to in the original tenancy agreement or in the deed of assignment. The Tribunal held that the original tenant had been liable to pay for the services provided by the Housing Association because that was what the parties had agreed in the document and because the gap left in the agreement by the absence of a list could be filled by evidence of the services on which the original charge had been based:

> "20. […] the building was new in 2006, so it may not have been possible to point to services already being provided to other tenants of flats in the building when the tenancy was granted. What is clear, however is that an assessment had been made of the charge which was to be levied and, as the landlord is a housing association, it can fairly be inferred that the figure of £14.60 was based on an estimate of the costs of providing specific services. At the commencement of the tenancy there must, therefore, have been a list of services which it was intended should be provided and paid for by the tenant. At any time between July 2006 and July 2014 details of the services to which the charge related could have been requested. The evidence does not disclose whether any such request was made, nor whether the service charge schedule said by Miss Evans to have been annexed to the deed of assignment, had been provided to the original tenant in 2006 or subsequently. What is indisputable, however, is that services were costed, delivered and paid for during the period of 8 years before the assignment of the tenancy to Ms Kahar. The nature of those services was therefore capable of being ascertained, and there is no reason to doubt that they were the same services as were dealt with in the appellant's evidence to the LVT.

39. Ms Conlan submitted that any ambiguity in what the parties had meant by Management Fee in the printed list could be filled by the course of dealing between them since 2010. I do not agree. Unlike in the *Cardiff* case, there is no ambiguity in what the parties agreed in the first category of agreements. They agreed the tenant would pay a management fee. The agreement to pay a management fee cannot be varied to include a charge for the supply of electricity, or insurance or staff costs or maintenance of access or cctv equipment, simply because NHG and its predecessors may later have included charges for those items under a variety of different labels in their annual accounts. Had it been the case that a tenant was provided each year with a list of the services covered by the management charge, with an explanation that that was the heading under which the charge was being made, and had the tenant then paid the charge with the benefit of that knowledge, then it might have been argued that their course of dealings was evidence that the parties had always intended that the management fee was to cover those services. But there is no evidence of that sort. On the contrary, the evidence of dealings after 2016 shows that the charge was described in obscure and uninformative language.

40. I therefore agree with the FTT that those tenants whose agreements include the printed schedule of services are not obliged to contribute to the costs of services provided by the freeholder as a "management fee". That does not mean that NHG is entitled to discontinue the provision of the services which it believed were covered by the management fee. The agreements impose specific obligations on NHG, and others are imposed by statute, none of which depend on a reference in the list of services.

Category 2: "PSCTP"

41. The second category of agreements contains those to which the screenshot showing the makeup of the original service charge was attached. The disputed charge is referred to in the screen shot as PSCTP. As far as I am aware, and the contrary was not suggested, PSCTP is not an acronym with a recognised meaning. Nor is it an acronym which someone would be able to work out for themselves given only the very limited knowledge of the background which was shared between the parties. Unlike the reference to

"management fee" in the printed schedule, the category of expenditure under which NHG seeks to recover the cost of services provided by the head landlord is ambiguous.

42. Although the entry is ambiguous, someone trying to interpret it would not be totally dependent on their own imagination. The body of the agreement refers to the service charge and the landlord's agreement to provide the services listed in the appendix attached to the agreement in return for the charge. The screen shot page is headed "Property Charge Details" and the list itself is headed "Service". In those circumstances I do not think there would be doubt in the mind of a reasonable person that the acronym PSC which precedes each entry in the list stands for "Property Service Charge" and that the charge referred to as PSCTP was a charge for a service of some sort which PCHA had agreed to supply.

43. There are two flats for which the screenshot includes an additional piece of information. In each screenshot the standard list of services is followed by a box marked "description". Ms Conlan explained that if one clicks on a particular service in the list, an explanation of what it is for is displayed in the description box. The screenshots attached to the agreements for flats 16 and 17, Endeavour House, were taken when the entry for PSCTP was highlighted and the description box reads "3rd party service charges/Charge". Someone who studied the screenshot for long enough might make the connection that PSCTP might be a reference to a third-party service charge but I think it more likely that they would give up the effort before they deciphered that piece of information.

44. But anyone signing the agreement as tenant would also appreciate that by doing so they were agreeing to pay £2.57 a week for whatever service PSCTP was intended to refer to. As with the blank list of services in the *Cardiff* case, the ambiguity in the agreement could be cured by evidence of the services which were already being supplied or which were intended to be supplied and which had been costed and apportioned to make up the sum inserted into the agreement as part of the service charge.

45. The second category therefore seems to me to be analogous to the *Cardiff* case. The FTT did not think so, giving as its reason that there had been no consistent course of dealing on the basis of which the parties could be taken to have agreed what the charge was for. On behalf of the respondents, Mr Bowker supported that approach, saying that it was not until the charge under this heading shot up in 2016 that anyone was alerted to it. But that seems to me to miss the main point on which the *Cardiff* decision depended. The Tribunal's reasoning in that case was in three stages. The first was that the tenant had agreed in 2006 to pay for services which had been costed and which could then have been ascertained if anyone had bothered to ask. The second was that it could be established by evidence whether those original services had changed and, on the evidence, they had not. Finally, when the tenancy was assigned, the incoming tenant agreed to be bound by the terms of the original agreement. The Tribunal's decision was not based on the proposition that the liability to pay was the result of a course of dealing between the parties. The original tenant's liability did not depend on her having paid for services over the period of her tenure; it depended only on what she had agreed in 2006. The significance of the parties' course of dealings was evidential; what they had continued to do consistently since the start of the tenancy provided evidence of what they had intended when the tenancy had been granted.

46. I am therefore satisfied that any item which was taken into account in calculating the PSCTP charge in 2009 or 2010 when each tenancy agreement was granted, is a service for which the tenants with category 2 agreements are liable to pay. What those items were is a matter of evidence but, subject to the provision of the necessary evidence, the principle that each tenant is liable to contribute to charges for the same services notwithstanding the obscurity of the expression used to identify them. The corollary of that proposition is that any service which was not costed in 2009 or 2010 and included in the calculation of the original PSCTP figure cannot be treated as payable under the PSCTP label.

Category 3: missing, blank or incomplete agreements

47. Agreements which include an obligation to pay a specified service charge, subject to variation, for services listed in a schedule but where the schedule itself is blank and where no separate printed schedule or screenshot has been attached (such as the tenancy of 17 Mayflower House) are covered by the reasoning in the *Cardiff* case. Into the same category fall agreements such as those for 27 and 28 Endeavour House where a screenshot has been attached showing the wrong page and providing no details of the services to be provided in return for payment. In my judgment in all such cases the tenant is bound to continue to pay for the services which were being provided when the tenancy was granted, and which were taken into account in determining the amount of the original weekly contribution. The tenant is not liable to pay for services which were not being provided or which were not taken into account in the original calculation.

48. There are several agreements, including those in respect of 35, 37, 52 and 53 Endeavour House and 20 and 21 Mayflower House, where the tenant has agreed to pay for services stated to be set out in Appendix Four, but where that appendix comprises a blank sheet with the words "Schedule of services provided (to be entered or attached below)". No services were entered in the Schedule but a printed schedule or screenshot may have been attached. If so, no copy has been retained by NHG. There are other agreements, including for 1 Mayflower House, where NHG has not retained a complete copy of the agreement, but only the particulars page. There are two flats where not even that material is in NHG's possession. In total there are said to be 14 flats, almost half the total number involved in these proceedings, where no complete copy of the tenancy agreement is held by NHG. In these cases it is not yet possible to know what the tenant's liability is.

49. It seems likely that in every case the tenant was given a complete version of the agreement when they signed it. The tenant may well have retained a copy of their own agreement, as it is an important document. In some cases the complete copy of the agreement is likely to include the printed list and in others it is likely to include the screenshot. Because I have come to different conclusions about the effect of these schedules, without knowing which was used in a particular case it is not possible to say what that tenant's liability is. What determination should the FTT make in such cases?

50. Each of the tenants has made an application under section 27A, Landlord and Tenant Act 1987 for the FTT to determine their liability to pay service charges. Each tenant is obliged to cooperate with the FTT to enable it to complete its task. That cooperation includes producing a copy of the tenancy agreement which they signed, if they have one and are asked to do so. No request for disclosure of the tenants' copies of the agreements was made by NHG and no disclosure by the tenants was ordered by the FTT. Whatever the outcome of this appeal, all tenants for whom NHG does not yet hold a complete copy of

their tenancy agreement should be asked to provide a copy so that there can be greater certainty on both sides over the extent of their liability.

51. Where the tenant is able to provide a copy of their tenancy agreement, it is likely that in most cases they will be found to include either the printed schedule or the screenshot. It has not been suggested that other forms of the schedule of services were in use. If the agreement includes the printed schedule, the tenant will not be liable to contribute towards the cost of services provided by the freeholder, but if it includes either the screenshot or a blank schedule, evidence would be admissible to show what the charge originally agreed had covered.

52. If neither NHG nor the tenant of a particular flat is able to produce a copy of the relevant tenancy agreement which includes the schedule of services, and if there is no evidence on which it could be determined on a balance of probability what form that schedule had originally taken, the FTT would be unable to make a determination. That does not mean that it would make a decision that no charges were payable for services provided by the freeholder during the years in question; it would be unable to make a decision because it would not know what, if any, terms had been agreed about those services.

The FTT's alternative ground of decision

53. I have so far concluded that the FTT was correct that those tenants whose agreements included the printed schedule are not liable to contribute towards the costs of services provided by the freeholder, but that it was wrong, as a matter of interpretation of the agreements, to find that those costs were not payable by those tenants whose agreements included the screenshot, or those in category 3 whose agreements were blank or incomplete. But the FTT made a second important determination.

54. Having decided that none of the tenants was obliged to contribute towards the cost of the freeholder's services, the FTT went on:

> "Furthermore it is simply impossible to say whether the charges are reasonably incurred or reasonable in amount as we have no information as to what services the charge relates to for any of the years in question, nor any information as to what has been charged for any given service in any given year. While there is a burden on the applicants to raise at least a *primae facie* case, we consider that the size of the charges levied, and the significant annual variation in the annual cost, is sufficient to pass the burden back to the respondent to supply some evidence to show that the s.106 charges consisted of costs that were reasonably incurred and reasonable in amount, particularly as all of the relevant information is within their control. They have not met this burden."

55. NHG had been unable, for any of the years in dispute, to provide a costed breakdown of the services provided by the freeholder which it had paid for and for which it was seeking reimbursement from the tenants. All it identified was the gross sum it had paid for a particular year. That was a surprising omission, since it was NHG's evidence that it scrutinised the invoices received from Rendall & Rittner and regularly queried any discrepancies and checked that the costs being passed on to tenants were reasonable.

56. In the paragraph quoted above the FTT determined that it was impossible for it to say whether the charges had been reasonably incurred or were reasonable in amount as it did not know how much had been charged for which services. It was suggested by Ms Conlan that this determination was of no effect, as the FTT had already decided that the tenants were not liable to contribute to the cost of the freeholder's services. But it appears clear to me that the FTT was providing an additional reason why the tenants were not liable to pay the disputed charges. NHG had been unable to explain what the charges were for, so it was impossible for the FTT to ascertain whether they have been reasonably incurred or were reasonable in amount. The FTT was entitled to take the view that the tenants had raised enough of a case to put the burden on NHG of establishing those matters. It is striking, for example, that while the PSCTP charge represented about 15% of the original service charge (£2.57 out of £17.64 in the example I was shown) it had risen to 72% of the estimated charge for 2020-21 (£34.33 of a total weekly charge of £47.36). There may be a perfectly good explanation for that apparent disparity, but it was not provided by NHG and the FTT was entitled to conclude that the charges had not been justified and were therefore not payable. There is no cross appeal against that determination and it is binding on NHG as far as the years 2016 to 2023 are concerned.

Issue 2: Lift maintenance

57. The FTT decided that those tenants whose agreements included the printed schedule were not obliged to contribute towards the cost of lift maintenance and servicing. The list included "daily building fabric" but the FTT did not think that "this phrase would be understood by the reasonable reader to include the maintenance and/or repair of items of plant/machinery such as a lift and would generally be understood to refer to the structure of the building and perhaps its decorative surfaces and floor coverings". Nor did it consider that evidence of what had been charged under that heading was of assistance in understanding what the charge for daily building fabric was intended to cover. There was no ambiguity which could be filled by a consistent course of dealing because the list "clearly does not include the charge in question".

58. I do not agree with the FTT that the printed list of services clearly does not include lift maintenance and servicing. The meaning of many items on the list is far from clear and either daily building fabric, or cyclical maintenance fund could be construed as covering the cost of such work.

59. The agreement places a variety of obligations on NHG to repair the structure and exterior of the building, service installations and common parts. These include an obligation to take reasonable care to keep the lifts in reasonable repair and safe and fit for use by the tenant. As far as I can see there is no reference in the standard forms of agreement to "building fabric" so the inclusion of "daily building fabric" in the list of services for which the service charge is payable cannot be read as a specific reference to any of these obligations. It is true that the printed list does not refer expressly to lift maintenance, but I do not think it is possible to say that a reasonable reader of the agreement would conclude that "daily building fabric" did not include the cost of lift maintenance or that the cyclical maintenance fund could not also have been a pot of money from which those costs were intended to be met. In my view both expressions are of uncertain breadth, but daily building fabric is certainly capable of including work on any part of the fabric of the building, including the lifts.

60. The FTT stated that every demand for service charges which it was shown included a sum for lift repair or maintenance. On that basis it was satisfied that the course of dealing between NHG and tenants whose agreements did not include a schedule of services demonstrated their agreement that the cost of this item was recoverable. Although the evidence does not show that lift servicing and maintenance was one of the services taken into account when the original service charge was calculated, it has not been suggested that it appeared as a new item at a later date. It is a reasonable inference that the original bargain between the parties was on the basis that the total service charge included a sum representing the estimated cost of lift servicing and maintenance in the first year. That inference is sufficient to cure the ambiguity and to allow NHG to include those costs in its service charge demands.

61. I would therefore allow the appeal on the second issue. The FTT was satisfied that the sums claimed for lift servicing and maintenance were reasonable and I substitute a determination that the tenants whose agreements include the printed schedule have the same liability to pay those sums as the remaining tenants.

Disposal

62. Had it not been for the FTT's additional reason for deciding that none of the tenants is liable to contribute to the cost of services provided by the freeholder, it would have been necessary to remit the appeals of the category 2 and 3 tenants to the FTT for further consideration. NHG might then have been able to show what was included in the freeholder's service charge when the agreements were first entered into, and how the aggregate charge was built up in each of the disputed years. But as the FTT determined that NHG had failed to substantiate the charges, and as there has been no challenge to that conclusion, there is no need to send the proceedings back to it.

63. The liability of the tenants to contribute to the cost of services provided by the freeholder from 2015 to 2023 has now been settled. So too has the absence of liability on the part of the tenants with agreements which include the printed schedule to contribute to those costs in future. What has not been resolved is the liability of the tenants with category 2 or 3 agreements to contribute in future. That question must await agreement or determination on another occasion.

64. For these reasons the appeal on issue 1 is dismissed and the appeal on issue 2 is allowed.

Martin Rodger KC,
Deputy Chamber President
17 February 2025

Respondents

Helal Uddin

Mohammed Rahman

Rahena Bibi

Suheli Begum

Jasmin Begum

Mohammed Ilyas

Shaifur Rahman

Amina Ibrahim

Muhammad Harun Miah

Khadja Mezzi

Julian Cleaver

Ayan Hussien

Shamsun Nehar

Abdul Basith

Fathama Begum

Noora Jama

Fatima Bencheikh

Rui Diogo

Nalone Diakiese

Sitara Begum

Abdul Motin

Hafida Jama

Nurra Mohammed

Moshaid Khan

Nicola Hewlett-Golding

Tota Miah

Hafa Abokar

Shamina Akhtar

Deoranee Bhagwan

Sultan Ali

Faisa Munye

Rachid Azarkhan

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.