

The following cases are referred to in this decision:

British Telecommunications Plc v Sheridan [1990] IRLR 27

Burr v OM Property Management Ltd [2013] EWCA Civ 479

Dimond v Lovell [2000] QB 216

E v Secretary of State for the Home Department [2004] EWCA Civ 49

Edwards v Bairstow [1956] AC 14

Hanlon v Law Society [1981] AC 124

JS v Secretary of State for Work and Pensions [2013] UKUT 100 (AAC)

Railtrack plc v Guinness Limited [2003] EWCA Civ 188

R (RB) v First-tier Tribunal (Review) [2010] UKUT 160 (AAC)

Vital Nut Co. Ltd v HMRC [2017] UKUT 192 (TCC)

Introduction

1. This appeal is another concerning the Point West Building at 116 Cromwell Road, London SW7. The Building is a large mixed residential and commercial development comprising 399 leasehold apartments together with parking spaces and approximately 20,000 sq metres of commercial space including a supermarket. Under the leases of the apartments the landlord is obliged to provide certain services and is entitled to receive a contribution towards its expenditure through an annual service charge payable by the leaseholders.

2. The underlying dispute between the parties arises out of two applications under section 27A Landlord and Tenant Act 1985 (“the 1985 Act”) brought by a group of leaseholders who challenge their liability to contribute towards service charges totalling £577,577.20 for the calendar years 2013, 2014 and 2015. The respondent to the applications is the appellant head-leaseholder and landlord, Point West GR Ltd.

3. After a three-day hearing the First-Tier Tribunal (“FTT”) issued a decision on 15 August 2016 which appeared to reduce some of the disputed charges by 50% while allowing others in full. It is now common ground that the FTT had misunderstood the evidence to such an extent that it had considered the same charges twice without appreciating that it was doing so: it first decided that certain sums claimed were reasonably incurred and reasonable in amount, and thus fully recoverable, and then that the same sums were excessive and should be reduced by half.

4. Section 9 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) allows a first-tier tribunal to review its own decisions and, in appropriate cases, to set aside and remake them. Following an application for permission to appeal by the leaseholders the FTT decided to review its first decision (although not, initially at least, on the basis that it had reached inconsistent decisions about the same sums). It eventually undertook that review at a further three-day hearing in December 2017.

5. On 23 January 2018 the FTT issued a new decision which was in favour of the leaseholders on the issues which it decided, and absolved them entirely from liability for at least part of the disputed service charges. Unfortunately, it did not explain clearly how much, if any, of its original decision it intended should remain undisturbed and how much should be treated as having been set aside.

6. Both the appellant and the leaseholders sought permission to appeal the FTT’s January 2018 decision, which in each case was granted by this Tribunal.

7. The appeal raises issues concerning the jurisdiction of the FTT under section 9 of the 2007 Act, the exercise by the FTT of the power of review in this case, the jurisdiction of this Tribunal to entertain an appeal from its decisions and the rights of the parties in the underlying service charge dispute.

8. At the hearing of the appeal the appellant was represented by Ms Zia Bhaloo QC and Mr Jonathan Wills, neither of whom had appeared before the FTT. The leaseholders were represented by Mr Daniel Dovar, who had first been instructed for the second hearing and had not attended the

original hearing. We are grateful to all counsel for their assistance in this procedurally complex appeal.

The parties

9. The appellant, Point West GR Ltd, is a BVI registered company which acquired the head-leasehold interest in the Building on 4 July 2014 from the administrators of its predecessor, Point West London Ltd (which we will call “the old Landlord”).

10. The old Landlord had entered administration on 22 June 2012. Two partners in Chantrey Vellacott were appointed as its administrators. Their appointment lasted until 28 June 2013 when they were replaced as administrators by partners in the firm of Smith & Williamson. The administration continued until shortly after the sale of the head lease to the appellant; the old Landlord then went into liquidation with Smith & Williamson as its liquidators.

11. The fourteen individuals who are respondents to the appeal are, between them, the sole or joint leaseholders of thirteen flats in the Building. Their names and flat numbers appear in the appendix to this decision. Each flat is subject to a separate lease.

The residential leases

12. The leases of flats in the Building make provision in the Fifth Schedule for the calculation and collection of the service charge.

13. The leaseholder is obliged to pay interim charges quarterly on account and to make a balancing payment after the end of the accounting period (if the leaseholder has overpaid any surplus must either be credited against charges payable in the next accounting period or held on trust as part of a reserve fund). Paragraph 7 requires that a certificate be prepared by the landlord or its managing agents as soon after the end of each accounting period as practicable, containing details of the landlord’s total expenditure, the interim charges paid by the leaseholder, and the amount of the service charge for that accounting period and any excess or deficiency over the interim charges.

14. Paragraph 8 of the Fifth Schedule provides that the certificate is to be conclusive and binding on the parties in the absence of manifest error. Paragraph 10 nevertheless provides that:

“Any omission by the landlord to include in any accounting period a sum expended or a liability incurred in that accounting period shall not preclude the landlord from including such a sum or the amount of such liability in any subsequent accounting period as the landlord shall reasonably determine.”

That power has been taken by the appellant to permit it to reopen service charge accounts after the preparation of apparently final accounts, despite the binding nature of the certificate required by paragraph 8. The leaseholders have not challenged that assumption so we have not been asked to form any view of our own on the relationship between paragraphs 8 and 10.

15. Each leaseholder's service charge is a proportion of the landlord's "total estate expenditure". By paragraph 1(1) of the Fifth Schedule this expression includes all costs and expenses incurred by the landlord in carrying out its obligations under the lease, including costs of management. If the landlord chooses to undertake the duties normally carried out by a managing agent it is entitled to include a management fee in the total estate expenditure "not in excess of the sum reasonably and properly payable to an independent managing agent".

16. The landlord's covenant in clause 6(4)(f) of the lease gives it the right to employ such staff as it considers necessary for the purpose of performing its obligations, and to provide them with accommodation free of charge in the Building or elsewhere. Its expenditure in doing so is recoverable as part of the total estate expenditure. Paragraph 1(1)(c) of the Fifth Schedule also entitles the landlord to include an annual sum equivalent to the market rent of any accommodation owned by it and provided rent free to its own staff. For the accounting periods in dispute this provision has been taken by the appellant to allow the landlord to recoup a notional rent for its own premises in the Building which it uses as an estate manager's office (rather than as domestic accommodation for porters or other employees). The leaseholders did not challenge that interpretation before the FTT or before the Tribunal.

The history of the disputed charges

17. The leaseholders' applications under section 27A, 1985 Act challenged the appellant's entitlement to charges totalling £557,557 (inclusive of VAT). That figure is the sum of three invoices rendered by the old Landlord (in liquidation) to the appellant and said to be in respect of costs incurred or services rendered during the period it was in administration. In its decisions the FTT sometimes referred to a figure of £577,577 which may simply have been a misprint.

The disputed invoices

18. The disputed invoices were paid by the appellant out of service charge funds which it had collected or which it held in reserve following the assignment to it of the head leasehold interest in the Building in July 2014. The appellant contends that they represented costs incurred by the old Landlord while it was in administration which are properly recoverable through the service charge. The leaseholders' case is that the administrators did not view the invoices as recoverable service charge items at all, but regarded them as expenses of the administration which, the leaseholders contend, is precisely what they were.

19. The circumstances in which the invoices were paid is a little complicated, but their outline at least is clear from documents which were before the FTT.

20. The disputed invoices were sent to the appellant by the liquidators of the old Landlord, after it had sold its interest in the Building to the appellant. The invoices contained limited information about what they were for, and were not accompanied by any supporting vouchers. The following details are apparent on the face of the documents themselves:

1. Invoice No. 1 was for £363,600. It was dated 16 October 2014 and described the sum charged as being for "fees incurred as agreed", with an explanatory note that the invoice was "in respect of service charge monies due for work carried out by the former administrators and their professional advisors during the former administrators'

appointment ... in relation to costs and expenses incurred by the landlord in carrying out its obligations under the leases ...”.

2. Invoice No. 2 was for £399,291.00 (which included the sum claimed by Invoice No. 1 plus an additional £36,349.20), and it was described as being for the 9-month period ending on 31 December 2012 and the financial year ending 31 December 2013; it was dated 3 July 2015, and included a slightly modified version of the same explanatory rubric as had appeared in Invoice No. 1.
3. Invoice No. 3 was for a further £157,608 in respect of the period from 1 January 2014 to 4 July 2014, that being the date on which the appellant acquired the old Landlord’s interest in the Building; it was also dated 3 July 2015, and included the same explanation as invoice No. 2.

21. Invoices Nos. 2 and 3 were accompanied by restatements of the service charge accounts for the years ending 31 December 2013 and 2014 which incorporated the new invoices into the old accounts previously prepared by the administrators.

The background to the invoices

22. The disputed invoices have their origin in a dispute between Rothschild Trust (Bermuda) Ltd (“Rothschild”) and the old Landlord over the repair of Apartment 1601, which is the largest flat in the Building and contributes 3.1% of the service charge. The lease of Apartment 1601 is owned by Rothschild which holds it, ultimately, in trust for the family of Mr David Gomes da Costa, who resides in the flat when he is in the UK.

23. In December 2011 Rothschild obtained judgment against the old Landlord in the county court for £1.075 million together with an order for a payment on account of costs of £500,000. The judgment precipitated the appointment of the administrators in June 2012. The old Landlord’s liability to Rothschild was accepted by the administrators to be £2.8 million, representing over 85% of the company’s total unsecured liabilities. We were informed that this rose in 2014 to a claim of £3.3 million, representing over 90.7% of the value of the unsecured creditors.

24. The appellant acquired the old Landlord’s interest in the Building from the administrators in July 2014. The ultimate beneficial owner of the appellant is believed by the leaseholders to be Mr Gomes da Costa or other members of his family, but the true position is not clear; it is apparent however that, at the very least, Mr Gomes da Costa is in a position to exercise significant influence over the appellant’s affairs.

25. During the administration both Chantry Vellacott and their successors, Smith & Williamson, levied service charges according to the practice adopted by the old Landlord in the years before the administration. In accordance with that practice a management fee of £40,362.50 per quarter was levied (£33,635.42 plus VAT), in addition to expenditure on maintenance and other services including accountancy fees but no sum was claimed as a notional office rent. There was no suggestion in the service charge budgets that the management fee was an interim or on-account figure to which an additional sum might later be added.

26. In the course of the administration Rothschild challenged Chantry Vellacott's fees and disbursements in the High Court. In those proceedings, Rothschild asserted that the leases did not allow the administrators to charge a management fee because all day to day management of the Building was carried out on-site by staff employed by the old Landlord and paid separately through the service charge.

27. After the sale of the headlease, Rothschild and the administrators sought to resolve their dispute by agreement. In a letter of 6 August 2014, Mr Shinnars, one of the Smith & Williamson administrators, expressed willingness to consider whether any of the administrators' costs might properly be charged to the service charge. Mr Shinnars nevertheless said that he was "unaware of a basis or legal precedent for administrators to charge remuneration to the service charge account".

28. In an email to the administrators dated 26 August 2014 Mr Gomes da Costa analysed the administrators' fees based on the time recorded by them as having been spent on different tasks. He suggested that certain categories of activity were directly concerned with the management of the Building rather than the administration of the old Landlord. The most significant of these was recorded as "trading", which represented more than 70% of the time charge.

29. Settlement of the dispute over Chantry Vellacott's fees was achieved on 19 September 2014. It was a term of the settlement that Rothschild would procure payment from the service charge to the liquidators of the old Landlord of the sum of £363,000 in respect of Chantry Vellacott's fees. Chantry Vellacott themselves agreed to make a contribution of £106,000 towards Rothschild's legal costs. The effect of this arrangement was that the disputed fees would be recouped through the service charge rather than being met from the assets of the old Landlord (leaving a greater sum available for the unsecured creditors including Rothschild whose dividend would be increased by a little under £358,000).

30. Rothschild also threatened to challenge Smith & Williamson's fees and suggested that these too should, in part, have been met by the leaseholders through the service charge.

Preparation and payment of the disputed invoices

31. By the time the settlement was agreed the Building was being managed on behalf of the appellant by Point West Management Services Ltd ("PWMS"), whose director, Mr Mark Mahoney, informed the FTT that he worked for Mr Gomes da Costa's family office. On 17 October 2014 Rothschild wrote to PWMS requesting that payment of £363,600 plus VAT be made out of the service charge funds into the liquidation. Mr Mahoney had already been authorised by the directors of the appellant to make the payment from the service charge account.

32. The preparation of Invoice No. 1 was an elaborate exercise in which Mr Mahoney and the appellant's other advisers played the leading roles. A first draft prepared by Smith & Williamson referred only to "fees incurred as agreed". Mr Mahoney initially suggested that reference should be made to the settlement agreement, but after discussions with the appellant's advisers he proposed the lengthy explanatory note referred to above. Thus, unusually, the paying party drafted the invoice on behalf of the receiving party.

33. In June 2015 Mr Mahoney provided a draft invoice in respect of the fees of Smith & Williamson containing the same generic service charge statement as the October 2014 Invoice No.1. Invoices 2 and 3 were eventually rendered by the liquidators on 3 July 2015.

34. The three invoices were duly paid by Mr Mahoney from the service charge funds held by the appellant.

Restatement of the service charge accounts

35. The total sum paid under the invoices in respect of the fees of Chantrey Vellacott was £303,000 plus VAT (£363,600) and in respect of those of Smith & Williamson £161,631 plus VAT (£193,957.20).

36. The old Landlord's 2012 accounts had been signed off on 23 August 2013 (by which time the company was already in administration), and the accounts for 2013 were signed on 18 December 2014, before the relevant invoices were issued. In order to accommodate the invoices in the service charge accounts it was necessary for the 2013 accounts to be restated in the accounts for 2014 which were signed on 1 July 2015.

37. The restatements did not allocate the payments in the proportions in which they had been claimed by the administrators, nor on the basis first suggested by Mr Gomes da Costa on 26 August 2014. The additional charges were not identified as fees of the administrators. Instead, for each of the years 2012, 2013 and 2014 a number of adjustments were made to the original accounts. These appear most clearly from the two restatement documents prepared either by Mr Mahoney or by Mr da Costa, the first showing the restatement of the 2012 and 2013 accounts, the second performing the same exercise for draft 2014 accounts. When the revised accounts were prepared some of the sums were not dealt with exactly as proposed, but the general principles applied were the same.

38. First, a notional rent was to be included for offices in the Building used by staff employed by the old Landlord. Under this heading £68,908 was to be included in the restated accounts for 2012, £91,460 for 2013, and £46,356 for 2014. No charge was made for that part of 2012 before the appointment of the administrators, nor for 2014 after the sale of the Building to the appellant.

39. Secondly, an additional charge was to be included in respect of management to bring the total management fee up to 10% of the total service charge costs incurred, allowing for the management fees of £40,362.50 per quarter which had originally been levied by the administrators in continuation of the previous practice of the old Landlord. The additional management charge for 2012 was £24,871, for 2013 it was £59,398, and for 2014, £35,087.

40. Thirdly, additional professional fees for accountancy and surveying were included in the accounts. The additional accountancy fees were £37,800 (2012), £50,853 (2013) and £25,350 (2014). For 2014 additional surveying fees of £24,546 were also added to the accounts.

41. We assume that the restatement of the accounts led to additional service charge demands being made of the leaseholders, although we were not shown any document which confirmed this

was the case. In its subsequent decision the FTT confirmed that no challenge had been made to the manner in which demands had been made.

Procedural history

42. On 15 December 2015 the leaseholders applied to the FTT for a determination of their liability to pay service charges for the years calendar years 2013, 2014 and 2015. On 18 January 2016 the same leaseholders issued a second application in respect of service charges payable on account for 2016.

43. The main thrust of the leaseholders' case appears from Scott schedules prepared for each of the four disputed years. So far as the issues raised then are still live in this appeal, the leaseholders considered staff wages (including the wages of an employed manager) to be excessive and the addition of management fees and a notional office rental on top of those wages to be additional costs which would not be charged by an external managing agent.

44. The applications were considered at a 3-day hearing in July 2016. The appellant was represented by counsel and the leaseholders by a Fellow of the Institute of Residential Property Management.

The FTT's August 2016 decision

45. The FTT issued its decision on the applications on 5 August 2016. In order to understand the relationship between this, the FTT's first decision, and its subsequent decisions it is necessary to refer to it in some detail, but we will mention only those aspects of the decision which are of relevance to the appeal.

46. In the category of staff wages the leaseholders had challenged fees of £30,371 charged in 2013 for services provided by Prime Building Consultants Ltd on the basis that Mr Nicholson of Prime (which was described by the leaseholders as "Mr Nicholson's company") was also employed as the Building's General Manager whose salary was included in the staff wages recouped elsewhere in the service charge. It was argued that Prime's invoice ought therefore to be covered by the management fee. The FTT accepted that Mr Nicholson had a dual role and distinguished between management services provided in his employed capacity and the surveying services provided by Prime; on that basis it allowed the disputed charges in full (there being no dispute over the time spent or the rate charged by Prime).

47. The management fees included in the service charge were challenged by the leaseholders on a number of different grounds. These were explained to their fullest extent in the 2013 Scott Schedule, to which cross references were then made for subsequent years. The leaseholders made the following points:

1. Management costs of £160,000 recorded in the original draft accounts were "upped by £216,000 worth of liquidators' fees ... to appear in the 2013 accounts as £366,939". The accounts were then "re-stated" to introduce a charge of £192,000 in rent for the management office which was "a totally arbitrary figure to simply mop-up all the liquidation costs for which invoices had been very carefully drafted and crafted" to justify payment from the service charge account.

2. In subsequent years rent of £106,000 had been added, producing a management charge of £455,000, an increase of 200% on the average of the previous four years.
3. An additional £137,000 was included in the accounts as staff wages, which an external managing agent would include in a flat rate fee per flat of £320, a figure supported by reference to quotations from four firms of managing agents; aggregating the charges for management and staff wages, the challenged figures equated to almost £1500 per flat.
4. The management fee of 10% was contrary to good practice and, in addition to staff wages and office rent costs, meant “tenants are effectively paying another 10% plus VAT on the improperly charged liquidator’s costs.”

48. In its decision on the management fees the FTT dealt first, and at relative length, with the quotations provided by four other managing agents. In summary it found these to be unsupported by any witness and of little evidential value. It then accepted the appellant’s evidence that management of the Building had improved since PWMS had become responsible in July 2014. The FTT next explained that it could “understand” a charge based on a percentage of expenditure, rather than a fixed fee per unit, given the complex circumstances, including the financial difficulties of the old Landlord. It concluded that, having regard to those complexities, and the difficulties which PWMS faced when it took over management, the fees were “within a reasonable range regardless of the method by which they have been arrived at” and were payable in full.

49. The FTT did not state the amount of the fee which it considered to be payable and “within a reasonable range”, nor did it refer to the Scott schedule or any other specific document which would have identified the figure it had in mind. It did preface its determination by saying it had “considered all of the documents” and it referred to the Scott schedule in connection with the first item (a redundancy payment to a former employee) and in recording a number of matters which were agreed. Nor did the FTT deal under the heading of management fees with the office rent, restatement of accounts or relationship between staff wages and management fees. The significance of that omission will be apparent in light of the next item considered by the FTT.

50. Under a separate heading the FTT next addressed the subject of “the administrators’ fees”, although these do not appear as a separate charge in either the annual accounts or the Scott schedule. The sum in issue was identified in paragraph 51 of the decision as £557,557 . The FTT explained that the administrators’ fees were costs which the leaseholders contended related to the administration and were not payable through the service charge.” On the other side, the appellant accepted that costs of the administration were not service charge items but said that the disputed costs “represented the administrators’ costs of managing the estate”.

51. The FTT then referred to evidence about the role played by the administrators in managing the estate. Mr Hunter QC, a leaseholder who had given evidence, (but whom the FTT referred to in this part of its decision as “Mr Turner”), had accepted that the administrators would have dealt with employment issues and approved expenditure; Mr Tayub, an accountant who had kept the books from 2005 to 2015, had accepted that the administrators had visited the management office and had liaised with him; the administrators had also described their supervisory role in their progress reports to the Court.

52. Having referred to that evidence the FTT then concluded that “the disputed costs arise from work carried out by the administrators in managing the Point West estate and that the “restatement” in the accounts was carried out in order to improve their accuracy”. The only previous reference to the restatement of the accounts had been in a section on “the background” in which the FTT had recorded simply that: “certain items of expenditure in [2013] were reclassified or restated, in July 2015, in accounts for the year ended 31 December 2014”.

53. Continuing under the heading of “administrators’ fees” the FTT then recorded that the leaseholders “also contend that the sums claimed are too high”. It noted the submission of counsel for the appellant that “the administrators’ charges amount to in the region of 90 minutes a day or 10-11 hours a week”. In paragraphs 64 and 65 it reached its conclusion on quantum, saying this:

“The Tribunal has considered the evidence relating to the role of the administrators and their experience; the matters which are covered by the management fee; and the work carried out by ‘staff’ and considers that it is likely on the balance of probabilities that no more than half the amount time spent would have been necessary for the performance of administrators’ limited supervisory functions, notwithstanding the considerable difficulties and complexities of the Point West estate.

Accordingly, the Tribunal finds that, insofar as the disputed administrators’ fees exceed 50% of the amount claimed, they are outside the range of reasonable fees. The applicant did not raise any specific challenges to the disbursements and the Tribunal finds that the disbursements were reasonable in amount and reasonably incurred.”

Once again, the FTT did not say what sum it considered should be reduced by 50%; its reference to “the amount claimed” did not assist, because no claim was made under the heading of administrators’ fees. Nor did it identify the disbursements to which it said there had been no challenge, although it had already dealt with the disputed fees of Prime.

54. The FTT dealt with the notional office rent at paragraphs 73 to 77. It recorded the leaseholders’ acceptance that, in principle, the service charge could include a charge for office space. The debate had concerned whether the occupation of office space by PWMS was occupation by “staff” in the sense intended by clause 6(4)(f) of the lease. This entitled the landlord “... to employ ... one or more caretakers porters [etc] ... and in particular to provide accommodation either in the Building or elsewhere ... and any other services (including the provision of uniforms and telephones) considered necessary by the Landlord for them whilst in the employ of the Landlord”. The FTT considered that the office used by PWMS fell within the meaning of this covenant and that the notional cost of providing it was a recoverable expense (the Fifth Schedule allowed the recovery of “an annual sum equivalent to the market rent” of accommodation provided rent free to those mentioned in clause 6(4)(f)). The evidence relating to the rental value of the office space had not been challenged so the FTT found that the notional rent was reasonable and payable.

55. Taking stock for a moment, in dealing with administrators’ fees the FTT appears to have intended to reduce by half the sum of £557,557, being (approximately) the aggregate of the three invoices challenged by the leaseholders, notwithstanding having already allowed in full the management fees, office rent and disbursements over which the administrators’ invoices had been distributed in the restated accounts.

The leaseholders' first application for permission to appeal and the FTT's response

56. On 12 September 2016, the leaseholders' newly appointed legal advisors applied for permission to appeal. The only grounds of appeal which remain relevant concerned the treatment of the administrators' fees. In summary, it was said that it was wrong in principle to allow any costs of administration through the service charge, and that these fees were levied in addition to the ordinary management fees so that the effect of the decision was to allow an aggregate management fee (for regular staff plus administrators) which was far above a reasonable charge for management. The finding that 50% of the administrators' fees was recoverable was not justified by any evidence and the whole of the three disputed invoices ought to have been disallowed.

57. The grounds of appeal did not assert that the FTT had reached inconsistent decisions about the same sums; indeed, they suggested that "the effect of the Tribunal's decision is that fees of 50% of £557,577 were reasonable ... which is in addition to the 10% management charge which the Tribunal determined was reasonable which is in addition to the direct staff costs". It was not until rather later that the leaseholders' new advisors appreciated that the administrators' fees were not in addition to management, accounting, surveying and rental charges but were the same costs claimed under those headings, which had already been allowed.

58. The FTT responded to the application on 26 October 2016. It said that it was satisfied "that a ground of appeal is likely to be successful" and determined that it would exercise its power under rule 55(1)(b) of the FTT's Rules. It would review "that part of its decision dated 15th August 2016 in which it concluded that part of the administrators' fee could be attributed to 'management fees' in the service charge."

59. We will consider the effect of the FTT's determination, and what if anything can now be done about it, later in this decision. At this stage we would point out that the FTT reached its decision to review without having invited any relevant submissions from the parties on the course it should take. When the FTT receives an application for permission to appeal it is required by its rule 53(1) to consider whether to review its own decision; where, in a case of this complexity, the FTT is considering whether it ought to undertake a review we suggest that it ought in principle to allow the parties the opportunity to comment.

60. In subsequent exchanges between the parties and the FTT all three struggled to understand the effect of the decision. The FTT asked the parties to "explain the nature of the dispute between them regarding how the sum of £577,577 is made up", an invitation to which both sides responded at considerable length. The appellant suggested that the logic of the decision was that it might be entitled to a further payment equal to half of the administrators' fees, but its formal position remained that no money was due to be repaid to the service charge account, because the administrators' fees were not charged as separate sums, but were settled from service charge items which had been found by the FTT to be reasonable and payable. The leaseholders' solicitors described the dispute as "far more complicated and far reaching" than had been appreciated by the FTT at the first hearing, which they suggested had been marred by procedural mishaps on the part of the FTT itself and by the inadequacies of the leaseholders' former representative. A further hearing with additional evidence and full argument was said by the leaseholders to be the only satisfactory way of conducting the review, but the appellant's solicitors criticised that as an attempt by the leaseholders to re-argue their case with additional evidence and improved representation.

61. On 10 April 2017, the FTT issued a case management decision dealing with the manner in which the review it had directed was to be undertaken. The greater part of the decision was devoted to disagreeing with the leaseholders' suggestion that the original hearing had been marred by procedural irregularities. The FTT suggested that the full nature of the dispute concerning administrators' fees had not been brought to its attention, and acknowledged that it had not appreciated that it been the appellant's case that the fees were not charged in addition to the management fee, office rent and disbursements. It was concerned that it had heard insufficient evidence and argument during the course of the first hearing to enable it to make a just and fair determination on the review. It therefore directed that the review was to be conducted by way of a further oral hearing on the basis of the submissions which had already been exchanged (including since its original decision) which were to be incorporated into new statements of case.

62. Neither party sought permission to appeal the FTT's decision of 10 April 2017.

63. At a case management hearing on 1 June 2017 the FTT gave permission for the preparation of expert accountancy evidence. The accountants instructed were later able to agree that the restated service charge accounts did not include any separate charge for administrators' fees and that the three disputed invoices were not paid in addition to the sums shown in the accounts for management, professional fees and rent.

64. In their subsequent statement of case the leaseholders asserted that the administrators' invoices represented their fees and disbursements in the administration, inaccurately relabelled in light of the settlement of the dispute between Rothschild and the administrators; additionally, they asserted that the appellant had been under no obligation to pay the invoices, which purported to represent charges due to the old Landlord, for which the appellant had no liability; they should therefore be deducted from the service charge with a credit being given for sums already paid.

65. The appellant's case was that the old Landlord had been entitled to charge certain sums under the leases, including while in administration; that the administrators were bound to seek to recover those charges on behalf of the old Landlord when reminded by Rothschild of their right to do so; and that what the administrators then did with the sums received was immaterial. The invoices reflected proper charges for management and oversight of the Building by the administrators, notional office rent and disbursements.

The FTT's January 2018 decision

66. Following a three-day hearing in December 2017 the FTT issued a further decision on 23 January 2018. In paragraphs 23 to 25 the FTT identified two issues as remaining in dispute: "the scope of the review", and whether the £557,557 paid out of the service charge by the appellant to the old Landlord following the receipt of the three disputed invoices were service charges payable by the leaseholders.

67. In paragraphs 27 to 38 the FTT recorded the parties' submissions on the scope of the review.

68. The appellant contended that the scope of the review was controlled by the scope of the application for permission to appeal which had precipitated it. There had been no application for

permission to appeal the FTT's findings upholding eight heads of expenditure (including the 10% management fee, the notional rent and the administrators' disbursements) and, as a result, the review could not disturb those conclusions. The leaseholders disputed that restriction and argued that, by the time of the FTT's decision of 10 April 2017 to conduct a new hearing, it had clearly been contemplated that their challenge to the administrators' fees would, if successful, require reconsideration of the items in the restated accounts over which the disputed invoices had been distributed.

69. When it determined the scope of the review issue in paragraphs 75 to 86 of its decision the FTT did not refer to the appellant's submission concerning the significance of the application for permission to appeal. Instead it approached the issue as a question of interpreting its own decision of 10 April 2017, a large part of which it recited, emphasising its direction that it would consider all of the submissions which had been filed up to that point.

70. The FTT noted that its own confusion over the treatment of the administrators' fees had been shared by the leaseholders when they applied for permission to appeal. It said it had been led to believe the fees related to 10 or 11 hours a week spent in supervision and therefore understood to be additional to the heads of expenditure it had upheld. It had only become clear after the application for permission that the invoices were "in respect of sums which were considered under the other headings" in its original decision. The FTT "did not consider that the [leaseholders] could have been expected to have understood that it was the [appellant's] case that the disputed fees were not levied in addition to the upheld heads of expenditure at the time the application for permission to appeal was drafted." It went on, at paragraph 83, to record that:

"Neither party appeared to be contending that the original decision (which was based on fees charged in addition to the upheld heads of expenditure) was correct. The Tribunal remained of the view that an appeal against this aspect of its decision was likely to be successful and the nature of the issues which needed to be resolved in order to determine the true dispute between the parties relating to the fees in question had been clarified."

71. Emphasising again that it had previously indicated that the review would be on the basis of the submissions filed before its 10 April 2017 directions the FTT concluded in paragraph 86 that the issues properly before it for consideration were those set out in the statements of case it had required to be filed.

72. The FTT then recorded the parties' submissions on the substantive dispute, focussing on the origin of the three invoices and on the restatement of the accounts. It recorded evidence given by Mr Mahoney and Mr Gomes da Costa (who considered the invoices were properly payable simply because they had been submitted by administrators acting as officers of the court) and referred to the position taken by Rothschild when it challenged the administrators' fees as excessive. It recorded the appellant's submission that it was immaterial that when the administrators were carrying out their functions they had no subjective intention to recoup a notional office rent or levy an additional management charge to the service charge account, and that a landlord, including a subsequent landlord, was entitled to adopt "a more aggressive approach" when drawing up service charge accounts than might have been contemplated at the time the relevant services were being provided. In response the leaseholders suggested that the appellant's submissions departed from its statement of case and raised issues which they would wish to answer by relying on section 20B of the 1985 Act.

73. The FTT based its determination of the substantive dispute on a concession by counsel for the appellant that there was no evidence that the appellant had had a contractual liability to pay the invoices submitted by the administrators on behalf of its predecessor. It concluded that the relevant charges had not been reasonably incurred in circumstances where they represented notional expenditure which had not been included in previous years' service charges and which the appellant had no contractual liability to pay. It also referred to several aspects of the history of the matter which remained unclear and which the appellant's witnesses could not clarify, but it did not consider it necessary to make findings on those matters.

The issues

74. On 5 June 2018, this Tribunal granted permission to the appellant to appeal and to the leaseholders to cross appeal.

75. The appellant sought to argue that the FTT exceeded its jurisdiction at each stage of the proceedings after the original decision: it decided to conduct a review without first considering whether any ground of appeal had been identified which raised a point of law; it prematurely determined that the leaseholders' proposed appeal was likely to be successful; it then decided to hold a complete rehearing into a new factual question rather than restricting itself to a review on a point of law raised in the application for permission to appeal; it proceeded to amend its original decision, not on the grounds that it was clearly wrong in the light of the evidence at the original hearing, but in reliance on a wholly new factual issue which had not been raised in the grounds of appeal; finally, it failed to consider or explain the effect, if any, of its 2018 decision on those parts of its 2016 decision which had not been appealed.

76. The leaseholders challenged the appellant's entitlement to raise these jurisdictional points on the grounds that the FTT's January 2018 decision implicitly set aside those parts of its original 2016 decision by which it had allowed the recovery in full of the 10% management fee, the notional office rent and the surveyor's fees. A tribunal's decision to set aside a previous decision after a review is an excluded decision under section 11(5) of the 2007 Act, meaning that it cannot itself be the subject of an appeal. The leaseholders therefore argued that only the 2018 decision could properly be the subject of this appeal.

77. The appellant also challenged the FTT's substantive reasons for finding that the sums in the three disputed invoices were irrecoverable; the question was not whether the appellant had been obliged to make payment to the old Landlord, but whether it was entitled to do so, which it clearly was since a change in the identity of the landlord had no effect on the recoverability of costs properly incurred.

78. The purpose of the leaseholders' cross appeal was to uphold the FTT's 2018 decision on the additional grounds that the disputed invoices were for sums which were expenses of the administration and not service charge matters at all. Additionally, if any part of the invoices was allowable, the leaseholders sought to challenge their liability on the grounds that recovery of the charges was barred by section 20B of the 1985 Act.

79. It is convenient to address the issues which arise in the appeal and the cross appeal in the following order:

- (1) What effect, if any, did the FTT's 2018 decision have on its 2016 determinations that the 10% management fee, notional office rent and surveyor's fees were all reasonable and payable?
- (2) Does the appellant have permission to challenge the scope of the review undertaken by the FTT?
- (3) Was the FTT's decision to set aside the original decision on review an excluded decision which cannot be the subject of an appeal? As we will explain, this issue raises two subsidiary questions: (1) is the FTT's power of review restricted to points of law only, and (2) having decided to review its decision, ought the FTT to have restricted its consideration to the original grounds of appeal?
- (4) Was the FTT's conclusion that nothing was payable because the appellant was under no obligation to the old Landlord correct?
- (5) How much, if any, of the sum of £557,557 paid by the appellant to the old landlord was the appellant entitled to recover through the service charge?

Issue 1: What effect did the FTT's 2018 decision have on its 2016 determination?

80. It is necessary to address this issue first because of its significance to the jurisdictional questions which the appellant raises, and because other issues may not arise at all if the FTT's 2018 decision is so inadequately explained that it cannot be allowed to stand.

81. On behalf of the appellant Ms Bhaloo QC submitted that those parts of the 2016 decision which were not the subject of the review must stand. The FTT had not set aside the whole 2016 decision by its 2018 decision, but left it entirely unaffected as regards its factual findings including its conclusion that the administrators' fees represented expenses properly arising from the administrators' work in managing the Building and were not simply expenses of the administration. By the 2018 decision it was common ground that the disputed fees had not in fact been paid in addition to the other heads of expenditure allowed in 2016, so in finding the administrators' fees to have been unreasonably incurred while saying nothing about the management fee, rent and disbursements the FTT could not be taken to have intended that those sums which had previously been approved should now also be disallowed.

82. Ms Bhaloo also pointed out that the FTT had not dealt at all with parts of the professional fees which had not been challenged by the leaseholders, but which had been included in the aggregate sum of £557,557. In paragraph 55 of its 2018 decision it had identified accounting fees totalling £84,603 in addition to the £24,546 which had been allowed in full in the 2016 decision as fees of the surveyor, Prime. The FTT cannot have intended to disallow sums which had not been disputed, and gave no reason for doing so.

83. Ms Bhaloo is clearly correct that the 2018 decision did not replace the 2016 decision in its entirety but we do not accept her submissions on the extent to which the FTT intended to set aside its original conclusions and re-make the decision. We are satisfied that, by its 2018 determination that the charges totalling £557,557 were not payable, the FTT intended to relieve the leaseholders of liability for each of the sums included in the restated accounts which aggregated to reach that total, namely the additional management charge, the notional office rent, and the disbursements on accountancy and surveying fees. We have reached that conclusion for the following reasons.

84. The uncertainty over the effect of the 2018 decision is rooted in the change in the understanding of the FTT and of the leaseholders which occurred between the August 2016 decision, which assumed that the administrators' fees were claimed as service charge items in addition to the additional management fee, notional office rent and disbursements, and the April 2017 direction that the review would be undertaken at a further oral hearing, by which time the true position was appreciated.

85. The structure of the 2016 decision reflected that mistaken understanding. It addressed the administrators' fees as a separate head of expenditure in their own right, distinct from the component parts. The same distinction was maintained in the leaseholders' application for permission to appeal, where the key complaint was that administrators' fees in handling the administration were being dressed up as service charges and claimed on top of fees incurred in the employment of staff to carry out "ordinary" management, with the aggregate being far above a reasonable fee for the management of the Building. The application went so far as expressly to disavow a further challenge to the 10% management fee.

86. A consequence of the original confusion, and its perpetuation in the leaseholders' grounds of appeal, was that the FTT expressed its 26 October 2016 decision to undertake a review by reference only to the part of its decision concerned with the administrators' fees. At that stage there was no suggestion that the other heads of expenditure were to be investigated further, having been allowed in full in the original decision.

87. By the time of its 10 April 2017 case management decision, and with the benefit of further detailed explanation, the FTT appreciated that it had fundamentally misunderstood the appellant's case. Unfortunately, it continued to refer to the review as being concerned with the "administrators' fees" (paragraphs 26 and 29) and to distinguish that issue from "numerous other issues" which had already been determined (paragraph 30). It is nevertheless apparent from the leaseholders' solicitors' letter of 10 March 2017 that they no longer complained of double charging, but disputed the entitlement of the appellant to recover the sums paid out in response to the three invoices as if they were legitimate service charges for management, rent and professional disbursements. The FTT undoubtedly intended the challenge explained in the letter of 10 March to be investigated fully at the review hearing, as it directed that the review should be conducted "on the basis of the submissions which have been filed".

88. Long before the 2018 decision it was well understood that the disputed administrators' fees were not claimed in addition to the three heads of expenditure originally approved, but comprised them. The FTT set out the sums in its account of the leaseholders' case, at paragraph 55, where it divided the sums in the restated accounts into "additional service charge costs" incurred by Chantry Vellacott and by Smith & Williamson, before noting that "these sums coincide with the total sums paid to the administrators". A determination that £557,557 was not payable could therefore only mean that the individual components included in the restated accounts which, when aggregated, made up that total were not payable. There was no other sum in issue.

89. Had the FTT decided only to confirm that the sum it had originally allowed in respect of the administrators' fees (50% of the total of £557,557) was not payable in addition to other sums approved in 2016, there would have been no need for any further hearing and its decision need only have referred to the accountancy experts' joint statement in October 2017 which had

confirmed the basic facts. The explanation the FTT gave for the administrators' fees being irrecoverable (i.e. that there was no obligation on the appellant to pay the old Landlord's invoices) would also have been both unnecessary and inconsistent with any conclusion that the specific charges for management, rent and disbursements were payable.

90. We are therefore satisfied that the FTT's 2018 decision was intended to set aside and re-make its 2016 decision so far as it concerned each of the disputed items in the restated accounts and not simply the aggregate sum which it had previously assumed was claimed for the supervisory work of the administrators. The management fee, rent and disbursements allowed in full in 2016 were therefore disallowed in full in 2018. This included the disbursements in respect of professional fees to which no separate objection was taken by the leaseholders, other than that they had been incorporated for the first time in the restated accounts in order to provide cover for the administrators' invoices.

91. We agree with Ms Bhaloo that the manner in which the FTT dealt with the charges previously allowed was unsatisfactory. The effect of its decision ought to have been made very much clearer, but we consider that, on proper examination, there can be no real doubt what was intended.

92. Having now identified what the FTT decided in its 2018 decision it is possible to address the appellant's complaint that the FTT exceeded its jurisdiction by making that decision. Before doing so it is first necessary to consider two separate grounds on which the leaseholders contend the appellant is prevented from raising that complaint.

Issue 2: Does the appellant have permission to challenge the scope of the review undertaken by the FTT?

93. On behalf of the leaseholders Mr Dovar submitted that the appellant was too late to challenge the FTT acceptance in its decision of January 2018 that the review extended to a reconsideration of the individual heads of expenditure found to have been payable by the 2016 decision. His contention is that the scope of the review was settled by the FTT in its decision of 10 April 2017, against which there was no appeal. The appellant's response is that although the extent to which the original decision could be challenged featured in correspondence before the case management ruling of 10 April 2017 it was not properly argued until the hearing in December 2017, and was not the subject of any decision until 23 January 2018.

94. A short answer to the leaseholders' point is that this Tribunal granted permission to appeal on 5 June 2018 in respect of grounds of appeal which included the complaint that the FTT had not been entitled to go behind its original decision that individual heads of expenditure were reasonably incurred and reasonable in amount. Permission was granted despite the leaseholders having suggested in response to the application that this point ought to have been taken in an appeal against the April 2017 case management decision. That was not considered by the Tribunal to be a sufficient answer when it granted permission to appeal and, with the benefit of a fuller understanding of the issues, it appears to us still to be a bad point. Nevertheless, as it was the basis on which the FTT had itself refused permission to appeal on 12 April 2018 we need to explain our reasons in a little more detail.

95. It is apparent from the correspondence which preceded the decision of 10 April 2017 that the scope of the review was a contentious matter. In particular, Fladgate, the appellant's solicitors, asserted in a letter of 4 April that the leaseholders were not entitled to reopen issues resolved by the FTT in its original decision in respect of which permission to appeal had not been sought.

96. Nevertheless, the FTT's case management decision of 10 April 2017 described the application then under consideration as being a "request for the review to be conducted at an oral hearing". In the body of its decision the issue was said to be "the form of the hearing" (para 37). The FTT's formal determination, recorded at the start of the decision, was that that the review should be conducted at a hearing, and that it should be "on the basis of the submissions which have been filed so far" which were to be incorporated into statements of case.

97. The decision lacks any clear statement defining the scope of the matters to be considered at the review, other than by reference to the correspondence which had been received. That correspondence was not analysed except to refute a number of suggested procedural irregularities in the conduct of the original hearing which had been identified by Wallace LLP, the leaseholders' solicitors. It appears to us that the FTT's purpose at this stage was simply to provide reasons why it should conduct a further oral hearing rather than to express conclusions on the substantive matters which had been debated in correspondence.

98. Consistently with that understanding of the stage the proceedings had reached, the appellant's consolidated statement of case repeated the assertion that the leaseholders were not entitled to reopen the issues resolved by the FTT in its original decision and in respect of which permission to appeal had not been sought. Equally consistent with the scope of the review still being a live issue was the FTT's willingness to hear argument at the hearing in December 2017, as is apparent from parts of the transcript to which we were referred.

99. The FTT began its January 2018 decision by reciting its conclusions, the first of which was that the issues which were the subject of the review were those recorded in the parties' statements of case; at paragraph 94 it defined the issues before it as "the scope of the review and whether or not the relevant sums amount to service charges payable by the leaseholders". At that stage it clearly considered that it had not previously made a final determination on the scope of the review.

100. It was not until the FTT was asked by the appellant for permission to appeal that it suggested (in its refusal decision of 12 April 2018) that the scope of the review had been determined by it in April 2017 in a decision from which there had been no appeal. For the reasons we have explained that does not appear to us to be a correct statement of the subject matter or effect of the April 2017 decision.

101. We are therefore satisfied that the appellant is entitled in this appeal to challenge the scope of the review undertaken by the FTT in its decision of 23 January 2018.

Issue 3: Was the FTT's decision to set aside the original decision on review an excluded decision which cannot be the subject of an appeal?

102. Section 11(1)-(2) of the 2007 Act creates a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded

decision”. Section 11(5) identifies those decisions which are excluded decisions, against which there is no right of appeal under section 11(1). They include the following:

“(d) a decision of the First-tier Tribunal under section 9 –

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal,

(iii) to set aside an earlier decision of the tribunal, or

(iv) to refer, or not to refer, a matter to the Upper Tribunal,

(e) a decision of the First-tier Tribunal that is set aside under section 9 (including a decision set aside after proceedings on an appeal under this section have been begun)”

103. Section 9 of the 2007 Act gives the FTT power to review a decision made by it on its own initiative or on the application of “a person who for the purposes of section 11(2) has a right of appeal in respect of the decision” (section 9(1)-(2)). If the FTT does review a decision it may correct accidental errors or omissions, amend the reasons or set the decision aside (section 9(4)). If it sets aside the decision it must either re-decide the matter or refer it to the Upper Tribunal (section 9(5)).

104. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the FTT Rules”) make further provision in relation to the scope of the FTT’s powers of review. Rule 55(1) allows the FTT to undertake a review of a decision only where it has received an application for permission to appeal, and only if it is satisfied that a ground of appeal is likely to be successful.

105. On behalf of the leaseholders, Mr Dovar submitted that an appeal against the FTT’s decision to review its 2016 decision and to set it aside in part was precluded by the prohibition on appeals against excluded decisions. A number of the appellant’s grounds of appeal were said to fall foul of that prohibition.

106. Ms Bhaloo’s answer was that the FTT had had no power to do what it purported to do, namely to rehear a substantial part of the original application and then to set it aside on impermissible grounds, which had not been raised in the application for permission to appeal and which did not involve any allegation of an error of law but simply took a different view of the facts. The FTT had exceeded its jurisdiction and it was open to this Tribunal to entertain an appeal against its decision to review and set aside. As Ms Bhaloo put it, the FTT could not turn a decision into an excluded decision by purporting to exercise a power it did not have.

107. Ms Bhaloo submitted that the FTT’s jurisdiction was restricted in two important respects. First, it had no power to undertake a review on any ground other than a point of law. Secondly, the permissible scope of any review was dictated by the issues for which permission to appeal had been requested and which the FTT considered were likely to be successful.

108. Since they concern the extent of the FTT’s powers these questions are of some general importance.

Is the FTT's power of review restricted to points of law?

109. As to the first restriction, Ms Bhaloo initially submitted that the sole right of appeal from the FTT to this Tribunal was on a point of law under section 11 of the 2007 Act. The leaseholders' grounds of appeal which persuaded the FTT to review its 2016 decision challenged its assessment that the combination of the "ordinary" management fees and the fees of the administrators were reasonable. That, Ms Bhaloo suggested, did not raise an issue of law and could not be the subject of an application for permission to appeal or an application for a review.

110. It is not always appreciated that section 11 of the 2007 Act does not provide the only right of appeal to this Tribunal from decisions of the FTT. In other Chambers of the Upper Tribunal section 11 is the sole basis of appeals, but the Lands Chamber is different. By section 176B, Commonhold and Leasehold Reform Act 2002 (which was inserted into the 2002 Act on the creation of the Property Chamber of the FTT in 2013 in order to preserve rights of appeal which had previously existed against decisions of the FTT's statutory predecessors) a quite separate right of appeal (with permission) is available to "a person aggrieved" by a decision of the FTT under the Leasehold Reform Act 1967, the Landlord and Tenant Acts 1985 and 1987, the Leasehold Reform, Housing and Urban Development Act 1993 and the Housing Act 1996. That right is not exercisable on a point of law, in relation to which section 11 of the 2007 Act creates the only route of appeal, but otherwise section 176B provides an unrestricted opportunity to appeal on issues of fact or assessment.

111. The right of appeal conferred by section 176B is not coupled with any separate power of review akin to section 9 of the 2007 Act. The existence of that power of review is acknowledged by section 176B(3) which prohibits an appeal under section 176B(1) against a decision which has been set aside under section 9 of the 2007 Act in the same way as section 11(5)(e) of the 2007 Act prohibits an appeal under section 11(1) against a decision which has been set aside on review. The FTT's Rules restrict the occasion on which the power of review may be exercised, either on its own initiative or in response to an application: the FTT may only undertake a review of a decision where it has received an application for permission to appeal, and only if it is satisfied that a ground of appeal is likely to be successful. But if those conditions are satisfied the Rules themselves give no further guidance on the scope of the review. If the FTT has power to review a decision of its own on grounds other than an error of law that power can only be conferred by section 9 of the 2007 Act.

112. Mr Dovar submitted that the power of review was available on any ground on which an appeal against a decision of the FTT could be brought, including a ground under section 176B. The reference in section 9(2) to an application for a review being made by "a person who for the purposes of section 11(2) has a right of appeal in respect of the decision" simply served to identify the person who may initiate a review but did not require that they should have sought to *exercise* the right to appeal on a point of law. It was enough that they should possess the right of appeal under section 11, although the basis on which they could seek to obtain a review might not fall within that section.

113. We do not accept that submission. As a matter of construction of section 9 it appears to us that the scope of a review is intended to be confined to matters which could be the subject of an appeal under the 2007 Act (i.e. an appeal on a point of law under section 11). Section 9(2) makes the power of review exercisable "on application by a person who for the purposes of section 11(2)

has a right of appeal in respect of the decision”. It is true that the purpose of that provision is to identify those who may apply for a review, but before the 2013 amendments to the 2002 Act the right of appeal referred to could only have been a right of appeal on a point of law. We do not consider that the availability of a right of appeal on other grounds under section 176B of the 2002 Act can have been intended to extend the scope of the power in section 9. The purpose of section 176B (which was inserted into the 2002 Act by the Transfer of Tribunal Functions Order 2013) was to retain the full range of appeal rights which had existed under the specified statutes before residential property tribunals were absorbed into the unified tribunal structure created by the 2007 Act. Those tribunals had not been entrusted with a power of review at all, and there is no indication that the Property Chamber of the FTT was intended to enjoy a more extensive power of review than other FTT chambers.

114. We acknowledge that rule 55(1) of the FTT Rules is expressed in slightly different terms from the equivalent rules referring to the power of review in other FTT Chambers. For example, rule 41(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the tribunal may only undertake a review of a decision “if it is satisfied that there was an error of law in the decision”. In contrast rule 55(1) of the FTT Rules requires only that the FTT must be satisfied that “a ground of appeal is likely to be successful”, without describing the ground of appeal. It is therefore clearly arguable that, had it been intended to restrict the power of review to cases where there was a right of appeal on a point of law, there would have been no reason to make a different rule.

115. The circumstances in which delegated legislation may be used as an aid to interpretation of primary legislation were analysed by Lord Lowry in *Hanlon v Law Society* [1981] AC 124 at 193–194 (cited in *Bennion on Statutory Interpretation* at section 24.18):

"A study of the cases and of the leading textbooks ... appears to me to warrant the formulation of the following propositions:

- (1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous.
- (2) Regulations made under the Act provide a Parliamentary or administrative *contemporanea expositio* of the Act but do not decide or control its meaning: to allow this would be to substitute the rule-making authority for the judges as interpreter and would disregard the possibility that the regulation relied on was misconceived or ultra vires.
- (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation.
- (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former.
- (5) The regulations are a clear guide, and may be decisive when they are made in pursuance of a power to modify the Act, particularly if they come into operation on the same day as the Act which they modify.
- (6) Clear guidance may also be obtained from regulations which are to have effect as if enacted in the parent Act."

116. In *Dimond v Lovell* [2000] QB 216 at [48] Sir Richard Scott V-C did not think regulations that post-dated the Consumer Credit Act 1974 by nine years could be taken to be a guide to what Parliament intended by the language used in the Act. In view of the emphasis given in the authorities to the need for delegated legislation to be roughly contemporaneous with the Act under consideration before it may be regarded as a helpful guide to interpretation, we do not consider it to be permissible to construe the 2007 Act by reference to procedural rules made in 2013. Despite the ambiguous terms in which rule 55(1) has been drafted, and the contrasting language used in the procedural rules applied in other Chambers, the stronger argument seems to us to be that the power conferred by the 2007 Act was intended to be available only as an alternative to an appeal under section 11 of that Act, and therefore only on a point of law.

117. In any event, it may be that the distinction between appeals on point of law under section 11 and the wider rights of appeal conferred by section 176B are of limited practical significance. That is because, in appeals from tribunals, the concept of an error of law or a point of law has been widely interpreted. In *Railtrack plc v Guinness Limited* [2003] EWCA Civ 188 at [51] Carnwath LJ summarised the principles applicable to an appeal on a point of law from a specialist tribunal (in that case the Lands Tribunal), as follows:

“This case is no more than illustration of the point that issues of "law" in this context are not narrowly understood. The Court can correct "all kinds of error of law, including errors which might otherwise be the subject of judicial review proceedings" (*R v IRC ex p Preston* [1985] 1 AC 835, 862 per Lord Templeman; see also De Smith, Woolf and Jowell, *Judicial Review* 5th Ed para 15-076). Thus, for example, a material breach of the rules of natural justice will be treated as an error of law. Furthermore, judicial review (and therefore an appeal on law) may in appropriate cases be available where the decision is reached "upon an incorrect basis of fact", due to misunderstanding or ignorance (see *R (Alconbury Ltd) v Secretary of State* [2001] 2 WLR 1389, 2001 UKHL 23, para 53, per Lord Slynn). A failure of reasoning may not in itself establish an error of law, but it may "indicate that the tribunal had never properly considered the matter...and that the proper thought processes have not been gone through" (*Crake v Supplementary Benefits Commission* [1982] 1 All ER 498. 508).”

118. In the *Railtrack* case the issue was whether the Lands Tribunal had misunderstood expert valuation evidence leading to double counting. The Court of Appeal accepted that, in principle, that was a permissible ground of appeal where the right of appeal was limited to questions of law, but held that the ground was not made out on the facts.

119. A tribunal's treatment of the facts may also give rise to an appeal on a point of law. In *Edwards v Bairstow* [1956] AC 14 the House of Lords held that a finding of fact which was unsupported by evidence, or “a view of the facts which could not reasonably be entertained” amounted to an error of law. In *British Telecommunications Plc v Sheridan* [1990] IRLR 27 Ralph Gibson LJ considered the limited circumstances in which a tribunal's misunderstanding of the facts might give rise to a right of appeal on a point of law:

“Misunderstanding or misapplying the facts may, in my view, amount to an error of law where the Tribunal has got a relevant undisputed or indisputable fact wrong and has then proceeded to consider the evidence and reach further conclusions of fact

based upon that demonstrable initial error. Such may be an error of law because the Tribunal is required by law to consider the case in accordance with agreed or undisputed facts. Where, however, the alleged misunderstanding of fact depends upon a decision of fact open to the Tribunal to make, and which it did make, then an attack on that finding cannot be converted into an error of law unless it can be shown that there was no evidence to support it, or that the conclusion was perverse.”

120. In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 the Court of Appeal held that the Immigration Appeal Tribunal had the power to review a decision of the tribunal where it was shown that an important part of the tribunal's reasoning was based on ignorance or mistake of fact, and to admit new evidence to demonstrate the mistake.

121. It follows that, while we accept Ms Bhaloo's submission that the power of the FTT to review its own decisions is limited to doing so on a point of law which could provide a ground of appeal under section 11 of the 2007 Act, we do not accept her submission that the FTT exceeded its jurisdiction when it decided to undertake a review on the grounds stated in the application for permission to appeal filed by the leaseholders in September 2016. The grounds identified a number of points of law which could properly be taken under section 11. The overarching point, namely that fees incurred by an administrator could not be “re-classified” and charged to the service charge as part of the cost of management, was clearly a point of law. So too were the contentions that the FTT's allowance of 50% of the administrators' fees had been made without any evidence to justify it, that its decision was not supported by adequate reasoning, and that no reasonable tribunal could have found the aggregate fees permitted by the FTT to be reasonable.

Having decided to review its decision, ought the FTT to have restricted its consideration to the original grounds of appeal?

122. The second limitation on the FTT's power to review its decisions suggested by Ms Bhaloo was that the scope of any review must be taken to be fixed by the issues for which permission to appeal was requested and which the FTT considered were likely to be successful. If that submission is correct it might undermine the FTT's 2018 decision, which proceeded on a different basis from the original grounds of appeal. As we have explained, when they sought permission to appeal the leaseholders were under the mistaken impression that the administrators' fees were charged in addition to the more routine heads of expenditure, and the grounds of appeal were framed on that assumption. The appellant therefore submitted that the FTT was not entitled to go further than to correct the error it had made when it allowed recovery of 50% of the administrators' fees in addition to 100% of the same sums as “ordinary” service charges.

123. Ms Bhaloo also submitted that the FTT had not been entitled to hear additional evidence or, in effect, to approach the application afresh. If it could not identify a “clear error” in its decision it ought not to have undertaken a review at all. The need to hear additional evidence and argument demonstrated that the exercise on which the FTT embarked was not within the proper scope of a review under section 9 of the 2007 Act.

124. We do not accept these submissions. When it decided to embark on the review the FTT did not identify which of the leaseholders' proposed grounds of appeal it considered was likely to succeed. With the benefit of the fuller understanding of the facts achieved as a result of the second hearing it is possible to be confident that, had the 2016 decision been the subject of an appeal it

would have been set aside and would have been required to be re-made. The suggestion that the FTT's original error was insufficiently clear to engage the power of review is untenable. At an early stage, the appellant's solicitors had disavowed any desire to collect, in full, the sums awarded to it in 2016 and at the hearing in November 2017 neither party sought to uphold the original determination.

125. Neither section 9 nor the FTT Rules restrict the matters which may be considered once it has been decided that the FTT will undertake a review of its decision. In *Vital Nut Co. Ltd v HMRC* [2017] UKUT 192 (TCC) the Upper Tribunal rejected a submission that the power of review under section 9 was confined to correcting "legal" errors and could not address "factual" errors, although (at paragraph 45(4)) it doubted that there was any relevant distinction given the breadth of the concept of error of law.

126. We reject the submission that the power under section 9(4) of the 2007 Act to set aside a decision on a review is limited by the grounds of appeal. What matters is that the scope of the exercise on which the FTT intends to embark is clearly identified so that both parties can make full submissions; if the FTT takes the exceptional course of receiving additional evidence, the parties must have the opportunity to prepare it. No authority was cited in support of the proposition that the power to set aside cannot be exercised where, after further investigation in which both parties have participated fully, the errors which the review discloses are even more profound than those which persuaded the FTT to embark on the review. Nor is the power in section 9(5) to re-make a decision which has been set aside on review constrained by reference to the grounds of appeal. Additionally, where a tribunal is redeciding a matter under section 9(5)(a), section 9(8) provides specifically that it may make such findings of fact as it considers appropriate.

127. It must however be stressed, emphatically, that the fact that the substance of a review is not constrained by section 9 or by the FTT Rules does not mean that there are no limitations on the lengths to which the FTT may properly go on a review. The purpose of conferring a power of review on the FTT was described by the Upper Tribunal (Administrative Appeals Chamber) in *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC) (at paragraph 28) as being, self-evidently "to allow the First-tier Tribunal to avoid the need for an appeal to the Upper Tribunal in the case of clear errors". Earlier, in *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC) a Tribunal presided over by Lord Justice Carnwath SPT warned that the power should not be used in a way which usurps the Upper Tribunal's function of determining appeals on contentious points of law or otherwise subverts the integrity of the appeal process. It was not intended that the FTT should be free on a later occasion to take a different view of the law from that previously reached, when both views were tenable. There may nevertheless be occasions when it is desirable for a case to be reconsidered by the FTT so that further findings may be made even if it is likely to go to the Upper Tribunal eventually. The key question is what, in all the circumstances, will best advance the overriding objective of dealing with the case fairly and justly.

128. We have asked ourselves the question suggested by the Senior President in *R (RB)*, namely whether the course taken by the FTT was consistent with the overriding objective. Although initially we had serious misgivings about the extent to which the FTT in this case was prepared in effect to start from scratch, we have concluded that it cannot be criticised for its decision to embark on a review, nor for its subsequent conclusion that it must set aside its original decision when it became clear that that it had been arrived at on a fundamentally mistaken view of the facts. The extent of the review was a reflection of the unsatisfactory nature of its own 2016 decision, which

awarded the appellant 150% of the sum it sought to recover. Having acknowledged that it had not understood the basis of the appellant's case, the FTT was bound either to give permission to appeal or to direct a review in which the facts could be investigated once more. Had it taken the former course it is inevitable that a further investigation of the facts would have been required in any event, since the findings of the FTT itself were compromised by the extent of its misunderstanding. Given the need for the matter, in effect, to be re-opened entirely, the better course would have been for that task to be undertaken by a differently constituted tribunal. Nevertheless, we are satisfied that having decided to exercise the power of review the FTT was entitled to set aside its original decision and, having done so, to make fresh findings of fact.

129. We therefore dismiss the appellant's complaint that the FTT exceeded its jurisdiction by embarking on a full re-hearing of the application with new evidence.

130. Even if the FTT was restricted to the leaseholders' original grounds of appeal in the way suggested by Ms Bhaloo those grounds were certainly wide enough to enable them to argue for the exclusion of the disputed sum from the service charge in its entirety. The leaseholders' original application for permission to appeal has never been determined and, were the outcome of this appeal to be the setting aside of the 2018 decision on the basis that the FTT had exceeded its jurisdiction, it would be necessary for their grounds to be adjudicated on in a further appeal before this Tribunal before the appellant could retain an entitlement to any part of the disputed sum. In that event, and given what they now know, the leaseholders would no doubt seek permission to rely on additional grounds of appeal substantially in the terms of their current cross appeal.

131. We are satisfied that it is neither necessary nor possible for us to consider the leaseholders' original grounds of appeal against the 2016 decision or any additional grounds. For the reasons we have given, we agree with Mr Dovar that the FTT's original decision, its decision of 26 October 2016 to undertake a review, and the decision to take action by setting aside part of its original decision on 23 January 2018, are all excluded decisions and cannot be challenged on appeal. All that can be challenged by the appellant in this appeal is the FTT's final decision of 23 January 2018.

132. Before turning to the 2018 decision we would add finally that, in any event, we do not accept Ms Bhaloo's suggestion that it is open to the appellant to seek, in an appeal, to challenge an excluded decision on the grounds that it was *ultra vires*. Judicial review is the only remedy available to a party who wishes to challenge an FTT's excluded decision to undertake a review or in consequence of that review to set aside an earlier decision, as explained in *R (RB)* at paragraph 11. Such an application may be made under sections 15 to 18 of the 2007 Act in accordance with the Lord Chief Justice's Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327 made under section 18(6) of the 2007 Act (provided the applicant does not seek a declaration of incompatibility under the Human Rights Act 1998). There has been no application for judicial review in this case. Had it been necessary to do so the Tribunal would have invited further submissions on whether it was appropriate to direct that the appeal be treated as if it were an application for judicial review. Given the conclusions we have reached on the points which have been argued, there is no need for us to adopt that course.

133. Having dealt with the procedural aspects of the appeal we can now turn to the more substantive issues.

Issue 4: Was the FTT correct in its conclusion that nothing was payable because the appellant was under no obligation to pay the old Landlord's invoices?

134. Both parties are dissatisfied with the FTT's 2018 decision and both were granted permission by the Tribunal to challenge it. The appellant contested the FTT's conclusion that it had been under no contractual obligation to pay the sums comprised in the three invoices rendered by the old Landlord and that, as a result, the expenditure had not been reasonably incurred. The leaseholders' cross appeal is based on the FTT's omission to reach any conclusion on their wider challenge to the administrators' fees, which they maintain were impermissible costs of the administration process dressed up as service charges and wrongly charged to the leaseholders. The leaseholders also maintained that any sums which were recoverable as a matter of contract were nevertheless made irrecoverable by section 20B of the 1985 Act.

135. The basis of the FTT's determination that no part of the sum paid by the appellant to the old Landlord was recoverable through the service charge is contained in two short paragraphs of its decision. At paragraph 87 the FTT recorded the acceptance by the appellant's counsel "that there was no evidence before the tribunal of any contractual liability on the part of the [appellant] to pay the invoices". It then said this, at paragraph 88:

"He stated that the [appellant] would be unjustly enriching itself if it kept the monies. However, the tribunal is not satisfied on the evidence that the [appellant] was obliged to include in the service charge accounts these sums, which included expenditure which had not been charged to the leaseholders in previous years, and which the [appellant] had no contractual liability to pay to the [old Landlord]. In all the circumstances, the tribunal finds that the relevant charges were not reasonably incurred."

136. The FTT appears to us to have been making two connected points. The first was a contractual point, namely that the appellant, as successor in title to the old Landlord, was under no obligation or contractual liability to pay the sums included in the administrators' invoices. The second invoked the statutory limitation imposed by section 19(1)(a) of the 1985 Act which provides that costs may be taken into account in determining the amount of a service charge "only to the extent that they are reasonably incurred." The FTT took the view that for the appellant to pay a sum which it was not obliged to pay was for it to incur a cost unreasonably, thus rendering it irrecoverable.

137. As Ms Bhaloo pointed out on behalf of the appellant, there is no doubt that the Lease allows for the recovery by the landlord of the "Total Estate Expenditure" comprising "all costs and expenses whatsoever incurred by the Landlord in any Accounting Period in carrying out its obligations", including in managing the Building and the larger estate of which it forms part, together with a notional management fee and a notional rent for office premises (Fifth Schedule, paragraph 1(1)).

138. The first strand of the FTT's reasoning in paragraph 88 was not concerned with the contractual entitlement of the landlord to recoup its own expenditure. It focussed instead on the contractual rights as between the landlord who was said to have provided the services (the old Landlord, which was managed during the relevant period by the administrators) and the landlord who sought to recover the cost of those services, having first introduced them into the re-stated

service charge accounts (the appellant). As the FTT noted, there was no evidence of what, if any, contractual obligation the appellant was under to the old Landlord, although it is apparent that the invoices were paid as part of a wider settlement of the dispute over the administrators' fees.

139. If it is assumed at this stage that the sums sought to be recovered through the service charge were properly regarded as the costs of services provided by the old Landlord (which is disputed by the leaseholders) the effect of the FTT's approach was to make those costs recoverable through the service charge only by the landlord who incurred them, or to a successor in title who was under an obligation to pay those sums, once collected, to the landlord who incurred them.

140. No justification for this approach can be found in the Lease. As one would expect, the expression "the Landlord" is defined in clause 1(1) as including the person for the time being entitled to the reversion. When the leases were granted that was the old Landlord, as it was when the relevant expenditure is said to have been incurred. By the time the re-stated service charge accounts were drawn up and the additional expenditure was sought to be collected, the appellant had become the landlord, and it was the person entitled to collect the service charges. But the leaseholders' liability to contribute towards the Total Estate Expenditure is not defined by reference to the expenditure of a specific landlord, such as the landlord making the demand for service charges. Provided the costs were incurred by a person who, at that time they were incurred, was the landlord, and are demanded in accordance with the lease by the person who, at the time of the demand, is the landlord, there is no requirement that the two persons be the same. A change in the identity of the landlord does not change the liability of the leaseholders to contribute to costs properly incurred.

141. On behalf of the leaseholders Mr Dovar submitted that it was not permissible to treat the landlord as one entity throughout the relevant period. It was impermissible, he suggested, for a new landlord to increase a charge with which its predecessor had been content, and to apply the increased charge retrospectively to a period before it had had any interest in the Building. But that was not the basis on which the FTT appears to have reached its decision (and its failure to address that argument is part of the leaseholders' cross-appeal). The FTT was concerned only about the existence of an obligation by the successor in title to account to its predecessor.

142. The FTT's error was to focus on the payments made by the appellant to the administrators, rather than on the costs said to have been incurred by the administrators when they were responsible for the affairs of the old Landlord. The payments made by the appellant were not "costs incurred by the Landlord ... in carrying out its obligations" in the sense in which that expression is used in defining the Total Estate Expenditure, because the appellant was not the landlord at the time the relevant costs were said to have been incurred by it. The existence of a contractual or other obligation on the part of the appellant to pay the disputed sums to the old Landlord would not have made any difference. The relevant question for the FTT was whether costs had been incurred by the old Landlord in the amounts claimed. If so, it was immaterial that the identity of the landlord had changed between the incurring of those costs and the demand for payment.

143. The FTT's reliance on section 19(1)(a) of the 1985 Act was misdirected for the same reason. The costs incurred by the appellant in meeting the administrators' invoices were not "relevant costs" i.e. costs incurred by the landlord "in connection with the matters for which the

service charges were payable”, and the service charges payable by the leaseholders were not a contribution towards those costs. The only relevant costs were the costs of providing services which were said to have been incurred by the old Landlord, through its administrators, while they were responsible for managing the Building.

144. We therefore accept the appellant’s submission that the FTT was wrong to find that the disputed sums were irrecoverable because there was no evidence of a contractual obligation by the appellant to pay the invoices. That was the sole basis of the FTT’s 2018 decision. As the FTT set aside its 2016 decision (so far as it concerned the administrators’ fees), and as the decision to set aside was an excluded decision which cannot be the subject of an appeal, the conclusion we have reached cannot lead to the reinstatement of the FTT’s 2016 reasoning.

145. It remains to consider the leaseholders’ other challenges to the inclusion of the disputed sums in the service charge. Those challenges were contained in the grounds of cross-appeal, but they are more accurately described as alternative grounds on which the leaseholders seek to uphold the FTT’s conclusion that no part of the sum of £557,557 is payable by them.

Issue 5: How much, if any, of the sum of £557,557 paid by the appellant to the old Landlord was the appellant entitled to recover through the service charge?

146. The most important primary facts are clear on the face of the documents and the undisputed evidence. In particular, fees and disbursements of approximately £662,000 plus VAT were charged by the first administrators, Chantry Vellacott, during the 12 months they held office between 22 June 2012 and 28 June 2013. Smith & Williamson, who held office as administrators until 30 July 2014 charged a further £261,000. During the period of their appointment neither firm sought to recover a notional office rent and the fee for managing the Building was collected at the same rate as had been levied by the old Landlord.

147. We have already described the route by which it was agreed between the administrators and Rothschild that part of the administrators’ fees would be collected by the appellant through the service charge. The omission of the FTT to make comprehensive findings of fact concerning the motive or state of mind of those involved in reopening the accounts to include the disputed invoices (which is the subject of the leaseholders’ cross-appeal) is not an obstacle to this Tribunal considering whether the disputed sums are recoverable.

148. The 2012 service charge accounts were signed off by the old landlord’s accountants on 23 August 2013. The accounts for 2013 signed on 18 December 2014, and the accounts for 2014 were signed off on 1 July 2015, all before the relevant invoices were issued by the administrators.

149. The amount which was to be recouped through the service charge was not calculated by reference to any assessment by the administrators of the time spent in supervising the old Landlord’s staff who managed the Building, or in approving expenditure, although the administrators undoubtedly devoted significant time to tasks of that sort. There are therefore no time sheets or vouchers showing how it was calculated. Instead the amount which it was agreed should be added to the service charge was the maximum which the appellant considered could be justified in respect of the notional cost of services provided directly by the old Landlord, together with certain disbursements on professional fees which had previously been treated as expenses of

the administration. Thus, the notional rent was included for office space which had not previously been thought of as a recoverable head of expenditure. The sums charged for management was increased from the fixed figure of £33,635.42 plus VAT per quarter to 10% of expenditure. This was considered a defensible rate consistent with paragraph 1(a) of the Fifth Schedule to the Lease which allowed the landlord to recover “a management fee not in excess of the sum reasonably and properly payable to an independent managing agent” if it carried out management in house.

150. Mr Dovar submitted that it was not permissible for charges which the administrators had made no attempt to recoup when they were managing the Building to be added to the service charge retrospectively, after the administrators had left office.

151. There is no doubt that the restatement of the service charge accounts was a retrospective exercise, undertaken at the initiative of the appellant long after the work which the additional charges were attributed to had been completed and service charges predicated on the original accounts had been demanded. Its purpose was to enable part of the administrators’ fees, which would otherwise fall to be met by the assets of the old Landlord (so leaving less for its creditors) to be recouped as service charges.

152. Ms Bhaloo’s response was based on the FTT’s 2016 decision, which had found the individual heads of expenditure to be reasonable and payable. We have already concluded that the effect of the FTT’s 2017 decision was to set aside and remake the 2016 decision, with the benefit of a proper understanding of the facts. It is open to the challenges raised by the leaseholders in their original grounds of appeal, which the FTT had considered likely to succeed. We therefore do not consider it is permissible for the appellant to rely on the FTT’s original conclusions as an answer to the leaseholders’ complaint.

153. On the other hand, we do not consider that the points focussed on by Mr Dovar in his submissions lead to the conclusions he sought to persuade us of. The state of mind or intention of the administrators in treating only part of their fees as recoverable through the service charge appears to us to be irrelevant. Equally, the role of the appellant in procuring the carefully crafted invoices from the administrators, while it may be a strikingly unusual feature of this case, does not of itself assist in answering the important questions. Those questions are: first, whether the fees and disbursements of the administrators were within the charging provisions in the Fifth Schedule; and secondly, is there any statutory impediment to the recovery of the additional charges.

Are the administrators’ fees and disbursements within the contractual charging provisions?

154. As to the first question, we agree with Ms Bhaloo that there is no reason in principle why the cost of property management tasks performed by the administrators should not form part of the Total Estate Expenditure representing costs and expenses incurred by the landlord (while in administration) in carrying out its obligations under the Lease. Considerable care is required to ensure that the costs and expenses of running the building are not increased as a result of the administration (for example, by the need for the administrators to familiarise themselves with matters with which the appellant itself was already well aware, or by additional supervision of staff, which we would regard as costs of the administration rather than costs of management) but in principle it should make no difference to the liability of the leaseholders that the administrators had taken responsibility for the performance of the landlord’s obligations. We also agree that if, as the leaseholders concede, a notional rent is recoverable for office premises occupied by the

landlord itself, the fact that the person occupying that office is an administrator responsible for discharging the landlord's obligations does not make a difference to the recoverability of that rent.

155. But the leaseholders' challenge was not limited to a point of principle. As the Scott schedules demonstrate, and the FTT recognised in its 2016 decision at paragraph 63, the leaseholders also contended that the sums claimed by the administrators were too high. In particular, they challenged the level of fees charged in addition to the costs of wages paid to salaried employees, including the property manager, which totalled £532,000 in 2013 even before the administrators' management fees were added.

156. The contractual measure of the landlord's entitlement to charge for its own management of the Building, if it chose not to employ a managing agent, was a fee "not in excess of the sum reasonably and properly payable to an independent managing agent". The market rate, as it were, set a ceiling above which the recoverable sum could not rise, although on the facts that market rate must be understood as the sum which would be payable by an independent agent who was not responsible for the salaries of the employed staff who were also engaged in managing the Building.

157. No evidence was adduced from the administrators concerning their activities in managing the Building or the wider estate at either of the substantive hearings in 2016 or in 2017. In 2016 reliance was placed instead on Chantry Vellacott's report to the Court, which referred in general terms to them undertaking management functions. An admission was extracted in cross examination from Mr Hunter QC, the principal witness on behalf of the leaseholders, that he was sure the administrators were engaged in the business of management (although he said it was clear to him they had no relevant property management experience). Mr Tayub, who had prepared the old landlord's books, also agreed that the administrators must have had some involvement in management decisions. None of these evidential straws assists in identifying the extent or value of the administrators' activities which were carried on at a supervisory level in addition to day to day property management tasks undertaken by employed staff. It is therefore impossible to tell whether the services provided by the administrators were worth more or less than the sum originally included in the accounts at the rate of £33,635 per quarter.

158. The evidence was so limited that counsel for the appellant based his closing submissions in 2016 on his own calculation that, at the administrators' charging rate, the total fees sought to be recouped for their management time amounted to only 10 or 11 hours a week. The FTT seem to have placed some weight on that calculation, as they referred to it when explaining the source of their own confusion in their decision of 10 April 2017 (at paragraph 28). But the submission of counsel was simply an arithmetical exercise and was not evidence. It does not assist in identifying the charge which an independent managing agent would make for providing management services equivalent to those provided by the administrators in the circumstances pertaining to the Building. It cannot be relied on as an indication of the time which professional managing agents would take, or the rate at which they would charge for that time. Nor was there any other evidence of the appropriate charge, particularly for a management service provided in conjunction with employed staff. The FTT did not consider the quotations obtained by the leaseholders from four firms of agents to be of assistance because they did not take account of the special difficulties which had been encountered in managing the Building.

159. In the absence of any relevant record keeping we see the force in the leaseholders' submission that the best evidence of "a management fee not in excess of the sum reasonably and properly payable to an independent managing agent" is the fixed annual sum which had been charged by the old landlord and continued by the administrators until the restatement of accounts. It may be assumed that the old Landlord was taking advantage of the right to charge a reasonable fee, and it may be taken that the administrators familiarised themselves with the Lease and did not consider that the sums previously charged ought to be increased. The manner in which the increased charge was calculated allows no confidence to be placed in it as an assessment of the cost or value of the service provided. It did not purport to be based on any such assessment, but represented an arbitrary percentage of costs. Since those who had provided the service had been content with a lesser sum, it was for the appellant to adduce evidence to demonstrate that a higher fee was permissible, but it failed to do so.

160. We reiterate that we can place no weight on the FTT's original conclusion that a management fee equal to 10% of outgoings was reasonable. At all times a full time General Manager was employed to manage the estate and the FTT did not deal with the leaseholders' case that it was wrong in principle for his salary not to be paid out of the management fee. It appears not to have appreciated that was the leaseholders' case despite it being clearly stated in the Scott schedule. When it focussed on the value of the administrators' own activities the FTT reduced their fees by an unexplained 50%.

161. It follows that there was no evidence before the FTT at either hearing to support the inclusion of additional management fees in the service charge for the period in dispute. The only course properly open to the FTT was to make a determination that those fees were irrecoverable and that the management fee properly recoverable during the period of administration was limited to the sum of £161,450 a year charged before the restatement of accounts. The additional sums, as appear from the restatement of service charge costs prepared by the appellant to support the disputed invoices, are £24,871 in the year to 31 December 2012, £29,130 for Chantry Vellacott and £29,400 for Smith & Williamson in 2013, and £35,087 in 2014. The total sum to be disallowed is therefore £118,488.

162. As we have already indicated, the leaseholders accept that a notional office rent is recoverable in principle.

163. The disbursements are more difficult to resolve. They comprise accountancy fees totalling £114,003 in the period of the administration and a fee for surveying services provided by Prime for which £24,546 was included in the 2015 accounts.

164. The difficulty with the accountancy fees is that the accountants acting for the administrators were providing services not simply in respect of the management of the Building but also in respect of the administration generally. A fee was included for their services in the original service charge accounts but this was subsequently increased in the restated accounts. No evidence was adduced explaining the basis of this reapportionment, and we were shown no document or other evidence which would cause us to doubt that the additional charge represented the sum which the appellants thought would be defensible, rather than being based on an analysis of what the accountants did.

165. We have concluded that the additional accountancy fees should be dealt with in the same way as the additional management fees. The best evidence of a reasonable charge for the services provided by the accountants and falling within the service charge provisions is the charge they included in the original accounts. No reason has been suggested why the accountants would have misattributed their charges and included less in the service charge accounts than was justifiable. On that basis we are satisfied that the additional accountancy fees of £114,003 included in the service charges only after the three disputed invoices are irrecoverable.

166. The fee of £24,546 for Mr Nicholson's surveying services was allowed in full by the FTT in its 2016 decision. As before, we place no weight on that determination, but we note that the FTT recorded that no analysis had been provided of Prime's time sheets, nor had it been suggested that Mr Nicholson had spent too long on the work he charged for or that his rates were too high. Although we were not shown those time sheets, we take it from the 2016 decision that there was unchallenged evidence of services provided at a rate which was not suggested to be unreasonable. This issue was not revisited at the 2017 hearing. Nothing has been said in the appeal to cast any doubt on the Prime fees and, having rejected the leaseholders' broad case that the restatement of the accounts was impermissible in principle, there is no reason to disallow them.

Is there any statutory obstacle to the recovery of the administrators' fees and disbursements?

167. The leaseholders rely finally on section 20B of the 1985 Act as prohibiting the recovery of the disputed fees in whole or in part. It provides as follows:

20B.— Limitation of service charges: time limit on making demands.

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

168. Mr Dovar submitted that the date on which the disputed costs were incurred was not the date of the invoices presented by the administrators to the appellant, but was the much earlier date on which the services themselves were provided (to the extent that the charges were notional charges for management and office rent) or the date on which invoices supporting the disbursements in respect of accountancy or surveying services were presented by the accountants and surveyors to the administrators for payment by the old landlord. On the basis that the restated charges cannot have been demanded any earlier than the date of the disputed invoices themselves, which was 3 July 2015 in the case of invoices 2 and 3, the earliest date from which previously unnotified sums could be included in the service charge would be 3 January 2014. (As we understand it, no separate use was made of Invoice No.1). None of the charges for the years 2012 and 2013 were therefore recoverable, and only those included in the third invoice covering the period from 1 January to 4 July 2014 could even potentially be permissible.

169. In the light of our previous conclusions on the irrecoverable management and accountancy fees, the only remaining expenses which might be included in the service charge, if Mr Dovar's submission is correct, are the notional office rent which accrued from 3 January to 4 July 2014 (the figure from 1 January was £48,356), and the disbursements of £24,546 on Prime's fees for surveying services.

170. Ms Bhaloo had three responses to the leaseholders' reliance on section 20B. The first point was that the issue had not been properly investigated before the FTT. We do not think that is an answer. The issue was certainly live in the proceedings. It was specifically dealt with by the FTT in its 2016 decision, when it held that the relevant dates on which the disputed costs were incurred were the dates of the invoices sent on behalf of the old landlord to the appellant. The issue was also recorded as having been raised in the 2018 decision when the FTT noted that the leaseholders wished to rely on section 20B if the appellant was permitted to characterise the disputed sums as notional charges accruing over time. In the event, because of the conclusion it reached on the absence of any liability to pay the invoices, the FTT did not deal with the issue. We have taken a different view from the FTT and it is necessary for us to determine, so far as we can, whether section 20B prevents the recovery of the disputed service charges.

171. Ms Bhaloo's second submission was that costs of £303,000 which were the subject of Invoice No.1 were included in the 2013 accounts as management expenses and professional fees, and although these had later been re-allocated part of the sums in issue were known about.

172. We do not think the appellant is assisted by that submission. The first 2013 accounts were delivered to the leaseholders on 19 December 2014. They did not include any entry for a notional office rent, or for the enhanced management or accountancy fees. For the purpose of section 20B(2), the inclusion of a lesser figure under a particular head of expenditure does not amount to notification in writing that a greater figure has been incurred to which the leaseholder will subsequently be required to contribute.

173. Ms Bhaloo's final submission was that no costs were incurred in respect of the notional rent, the disbursements or the management fees until the disputed invoices were presented. She relied on the decision of the Court of Appeal in *Burr v OM Property Management Ltd* [2013] EWCA Civ 479 which concerned part of the cost of utilities which had been consumed but not billed for by the supplier. Lord Dyson MR, with whom the other members of the Court agreed, held that, for the purpose of section 20B, costs are incurred only when they are paid (or when an invoice or other demand for payment is submitted by the supplier or service provider) and not when the services are provided or supplies are made.

174. We do not accept Ms Bhaloo's final submission. As we have already found, the dealings between the appellant and the old Landlord are irrelevant to the liability of the leaseholders to contribute through the service charge to costs incurred. What matters is that the landlord at the time the service was provided incurred a cost in providing it, and it is the date on which that happened which is significant for the purpose of section 20B.

175. In the case of accountancy fees and other disbursements the relevant cost was incurred by the old Landlord (while in administration) when its accountants delivered an invoice for their fees or the old Landlord made a payment on account. At that point the cost of accountancy services

was incurred. The fact that some years later the manner in which that cost was dealt with was revised by their inclusion in the service charge accounts supported by a new invoice relating in part to the same sum is, we consider, immaterial. We were led to believe that no invoices or records of time spent by accountants or their charges have ever been produced; we do not know whether the Prime surveyor's fee was ever supported by an invoice. Nevertheless, Ms Bhaloo said that, if the section 20B issue was live, the appellants would wish to adduce evidence showing when fees were invoiced. The sum in question comprises only the 2014 accountancy and 2015 surveying fees, which total £49,896. We do not think that course is necessary: the additional accountancy fees have been disallowed for reasons unconnected to section 20B, and the Prime surveyor's fee was incurred during 2015, the same year in which the proceedings were commenced, and cannot therefore be caught by the 18-month rule.

176. The position is much clearer in relation to the notional charges for management (which we have already disallowed for other reasons) and office rent. The old Landlord did not deliver an invoice to itself recording a liability to pay for its own administrators' time spent in managing the estate. The entry in respect of management undertaken in-house by the old Landlord was a notional expense (although no doubt the administrators themselves provided invoices for their services). Whatever cost the old Landlord decided to attribute to in-house management services, it was a cost which it incurred when the service was provided. We consider that it was at that point that the landlord became entitled to recoup through the service charge such reasonable sum as did not exceed the charge which would have been made for the same service by an independent managing agent.

177. We do not regard the decision of the Court of Appeal in *Burr* as being in point. It did not concern a notional charge for services provided directly by the landlord. In the case of such a charge the distinction between a liability to pay and the incurring of costs does not exist, since there is no liability on the part of the landlord to make a payment to itself, but only a contractual entitlement to receive a payment from the leaseholder which accrues when the service is provided. In *Burr*, Lord Dyson MR said (at [13]) that "the incurring of costs entails the existence of an ascertained or ascertainable sum". The old Landlord's management fee was ascertainable when the management was provided, and indeed the charge considered appropriate at the time was ascertained and included in the original service charge accounts. No additional cost was incurred by the landlord when the decision was taken to restate the accounts and claim a higher amount for the same service.

178. So too, the cost of office space provided by the old Landlord was a notional cost. The old Landlord passed up the opportunity to receive an income from letting the office space when it chose to use it instead as its own management office. No other cost was incurred by it at a later date when it was decided to make a charge for that space.

179. In our judgment, where a landlord has the right to include notional costs in a service charge for services which it provides, such as in-house management or the provision of premises, the only date on which such a cost may be taken to have been incurred is the date on which the service was provided. We therefore accept Mr Dovar's submission so far as it relates to the notional charges for management fees and office rent incurred before 3 January 2014. We do so subject to one qualification.

180. The qualification concerns only the enhanced management fees, which we have determined are irrecoverable in any event. For that reason (and subject to any successful appeal) the point is academic, but we mention it as it was part of Ms Bhaloo's submissions. We accept her submission that if it were to be shown that demands had already been made for payments on account of management fees exceeding those eventually included in the restated accounts, section 20B would have no application to that sum. Our understanding is that payments on account were demanded on the basis of the management fees charged by the old Landlord before it went into administration, in which case this point would not arise, but Ms Bhaloo suggested that there may have been overprovision in 2013 which would require to be investigated.

181. We therefore conclude that section 20B is an additional reason for excluding the sums claimed in Invoices Nos. 1 and 2, but does not affect the appellant's entitlement to recover the notional office rent after 3 January 2014 or the Prime fees.

Disposal

182. The effect of our decision is that the appeal is dismissed in respect of the sums totalling £363,600 included in Invoices Nos. 1 and 2. For different reasons from those given by the FTT we determine that no part of that sum is recoverable as a service charge from the leaseholders who are party to these proceedings.

183. We also determine that, of the sum of £157,608 included in Invoice No.3, only the surveyors' fees of £24,546 and the notional rent of £46,356 are recoverable.

184. The appeal is therefore allowed to the extent of £70,902 which we determine was properly included in the service charge for 2014. The appeal in respect of the balance of the sum of £557,557 is dismissed. The cross appeal is allowed except to the extent of the same sum of £70,902.

185. These conclusions should enable the parties to agree the consequences for the liability of individual leaseholders in the relevant years. If they are unable to do so within one month we will consider whether to deal with any outstanding matters ourselves, or remit the applications to the FTT for further consideration.

Martin Rodger QC
Deputy Chamber President

P.D. McCrea FRICS
Member

22 May 2019

APPENDIX

Schedule of Respondents

Name of Respondent	Flat Number
Rita Bassi	333,665
Glyn Smith, Judith Smith, David Smith and Anna Smith	511
Franco Bizzi and Ana Alonso	716, 909
Scott Pagel and Alison Pagel	1002
Mitch Mathau	1008
Roy Martins and Anita Martins	1021,1022, 1023
Ian Hunter and Jill Hunter	1029.1030,1031