UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 168 (LC) UTLC Case Number: LC-2022-479
Venue – Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – apportionment – effect of section 27A(6) of the Landlord and Tenant Act 1985 – standard of review to be applied to a determination by a Landlord's surveyor of a new method of apportionment pursuant to the lease

BETWEEN

HAWK INVESTMENT PROPERTIES LIMITED

Appellant

-and-

DIANA AND CHRISTOPHER EAMES (1)
ERIK MIELKE AND KAREN MARIE RICHARDSON (2)
TIMOTHY ADRIAN ROBERT CLARK AND PENELOPE JANE COOPER (3)
RICHARD JOHN LATHAM (4) MARK COMISKEY (5)
HARSHA RANIL PERERA (6)
JOHN WILLIAM BISWELL AND JENNIFER BISWELL (7)
ANNE VALENTINE (8)
NICHOLAS CHARLES HOWES AND SUSAN JEAN HOWES (9)
NANCY JACKSON (10)
ELIZABETH ANNE BLOSSOM AND JONATHAN HINKINS (11)
DIANE HARRISON (12)

Respondents

Re: 1-12 Heritage Close, High Street, St Albans, AL3 4EB

Judge Elizabeth Cooke
1 June 2023
Decision Date: 20 July 2023

Mr Mark Loveday and Ms Ceri Edmonds for the appellant, instructed by Darlington Hardcastles Solicitors
Mr Nicholas Grundy KC for the respondents, instructed by SA Law LLP

The following cases are referred to in this decision:

Aviva Investors Ground Rent GP Limited v Williams [2023] UKSC 6

Braganza v BP Shipping Limited [2015] UKSC 17

Hayes v Willoughby [2013] UKSC 17

London Borough of Hounslow v Waaler [2017] EWCA Civ 45

Sheffield City Council v Oliver [2017] EWCA Civ 255

Windermere Marina Village Limited v Wild [2014] UKUT 163 (LC)

Introduction

1. Leasehold service charges are often payable on the basis that the landlord's cost of maintaining the building is shared between a number of lessees. The lease will usually prescribe the way that cost is apportioned between them; in a straightforward case the cost will be shared equally, and in other cases the apportionment may be unequal. Some leases give the landlord the power to change the apportionment, and there have been a number of decisions of the higher courts in recent years about the exercise of such powers. The law now has to be interpreted in the light of the recent decision of the Supreme Court in *Aviva Investors Ground Rent GP Limited v Williams* [2023] UKSC 6 ("*Aviva v Williams*").

2. The appellant, Hawk Investment Properties Limited, is the freeholder of Heritage Close, a 1970s development in St Albans, near the Abbey, comprising both commercial units on the ground floor and residential maisonettes above. The residential leases prescribe a method of apportioning the service charge, and give the landlord power to change that apportionment in certain circumstances. The appellant appeals the decision of the First-tier Tribunal (Property Chamber) ("the FTT") about the validity of its decision to change the apportionment in the exercise of that power.

3. The FTT's decision was made, and the grounds of appeal drafted, before the Supreme Court handed down its decision in *Aviva v Williams*. The appellant then applied to add an additional ground of appeal, namely that the FTT's decision was not consistent with the law as set out by the Supreme Court in *Aviva v Williams*; the respondents helpfully did not object to that amendment and I gave permission for the additional ground to be added.

4. The appellant was represented in the appeal by Mr Mark Loveday and Ms Ceri Edmonds of counsel, and the respondent leaseholders by Mr Nicholas Grundy KC; I am grateful to them all.

The factual background

5. The twelve respondents to the appeal are the lessees of the maisonettes at Heritage Close. On the ground floor there are retail and restaurant units, eleven at present – fewer than there used to be because some units have been amalgamated. There is a basement car park, which the residential and commercial lessees can pay to use.

6. The residential leases each make provision for the lessee to pay a proportion of the landlord's costs in maintaining the building. Paragraph 1 of the Fourth Schedule reads as follows:

> "(1) To pay to the Landlord from time to time in manner hereafter provided the proportion properly attributable to the Demised Unit (meaning thereby that proportion which the rateable value of the Demised Unit bears to the aggregate Rateable Value of the Demised Unit and the other Lettable Units in the Centre) of the total outgoings and expenditure (the aggregate amount of which … is … referred to as "the Service Cost") incurred …. by the Landlord in … providing the services amenities and facilities specified in the Third Schedule … the amount of the Service Cost and the proportion thereof aforesaid to be determined

and notified in writing in manner hereinafter provided by the Landlord's Surveyor PROVIDED NEVERTHELESS :- … [1]

(b) That if the system or method of rating buildings and premises in operation at the commencement of the term hereby granted shall hereafter be changed or abrogated so as to render the apportionment of and contribution to the Service Cost according to rateable value inoperable or manifestly inequitable then such apportionment and the proportion of the Service Cost to be attributed to and paid in respect of the Demised Unit shall be calculated by some other just and equitable method to be conclusively determined by the Landlord's Surveyor"

7. So the proportion payable by each residential lessee is calculated by dividing the rateable value of his or her maisonette by the total rateable value of all the lettable units, residential and commercial. Such provisions in residential leases were not uncommon before the abolition of domestic rates in 1990. The procedure required by the residential leases at Heritage Close is that the landlord's surveyor is to calculate the apportionment every year before interim service charges are demanded in January for the coming year (the service charge year running from 1 January to 31 December).

8. After the abolition of domestic rates the service charges were apportioned by a method devised at some point in 1990 or 1991; the landlord calculated that, on the basis of the 1990 rateable values, the residential lessees together were to pay 9.74% of the total service charge, with the commercial lessees paying the balance of 90.26%. That method of apportionment has been used ever since. However, towards the end of 2021 the appellant told the lessees that a new method of apportionment had been determined by its surveyor, and in December 2021 the appellant applied to the FTT for a determination of the payability of the forthcoming interim charges for 2022/23. The FTT was asked to exercise its jurisdiction in section 27A of the Landlord and Tenant Act 1985 to determine the reasonableness and payability of service charges, which provides (so far as relevant):

"(1) An application may be made to [the FTT] for a determination whether a service charge is payable and, if it is, as to— …

(c) the amount which is payable,

…

(3) An application may also be made to [[the FTT] for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—…

(c) the amount which would be payable,

…

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

[1] I have omitted wording here which was considered by the FTT but to which I do not need to refer because of the concession made by the respondents, see paragraph 14 below.

(a) in a particular manner, or
(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3)."

9. In the present case the application was made under subsection (3)(c), since the only issue was whether a service charge imposed on the basis of the proposed new apportionment would be payable. Such a challenge often alleges that the amount charged was not reasonable, in light of section 19 of the 1985 Act which provides that service charges based on costs not yet incurred are payable only in so far as they are reasonable. But the respondent lessees in this case did not challenge the reasonableness of the amount charged and so section 19(2) of the 1985 Act was not engaged. The issue in the FTT was the validity of the new apportionment in light of section 27A(6). The FTT heard expert evidence from the landlord's surveyor, Mr Forrester, who had made the determination permitted by paragraph 1(b) of Schedule 4 of the Leases.

10. The FTT decided, first, that although the rating system in operation when the lease was granted had been "changed or abrogated" by the abolition of domestic rating in 1990, the method of apportionment set out in the lease was neither inoperable nor manifestly inequitable.

11. The FTT also decided, in case it was wrong about that first question, that the new method of apportionment put forward by the Landlord's surveyor was not just and equitable.

12. Accordingly the method of apportionment operated since 1990 was to continue and the service charges would be payable in the proportions thus determined. The appellant landlord appeals that decision with permission from the Tribunal.

The appeal about the condition precedent

13. Paragraph 1(b) sets out a condition precedent: before there can be a new apportionment it must be the case that "the system or method of rating buildings and premises in operation at the commencement of the term" is "abrogated or changed" so as to make that method of apportionment "inoperable or manifestly inequitable". The first two of the appellant's grounds of appeal challenged the FTT's findings about that condition precedent.

14. At the hearing of the appeal Mr Grundy KC for the respondents conceded that the condition precedent has been satisfied. The abolition of domestic rating means that the system in operation at the commencement of the lease has been changed or abrogated so that the method of apportionment in the lease is inoperable. That seems to me obviously correct. Counsel for both parties agreed that I need say no more about the first two grounds of appeal. The decision of the FTT about that condition precedent is set aside and the Tribunal's decision substituted that the condition precedent has been satisfied.

15. That means that the appeal is now focussed on the second and alternative limb of the FTT's decision, made on the usual "in case we are wrong" basis: in case the FTT's decision about the condition precedent was wrong, the FTT went on to decide whether the

appellant's proposed new apportionment method, devised by Mr Forrester, was "just and equitable" and decided that it was not. The appellant appeals that decision.

The appeal about the new apportionment method

16. Ground 6 of the grounds of appeal as originally drafted challenged the FTT's decision that the new apportionment was not just and equitable, as the lease required, by arguing that it was.

17. The additional ground, added by consent after the Supreme Court handed down its decision in *Aviva v Williams*, argued that the FTT's decision was inconsistent with that decision because the FTT was now restricted to assessing the rationality of the landlord's decision; it has no jurisdiction to determine whether the new scheme was just and equitable.

18. Because the law has changed it is important to take that latter, additional ground first in order to see what the FTT should (as the law now stands) have done and, second, whether it did that. If it did not, the decision has to be set aside and the Tribunal's decision substituted. If in fact the FTT did have jurisdiction to make the decision it made, then we can turn to the original ground of appeal and ask whether it got it right.

(1) What is the standard of review now to be applied by the FTT to a decision to change the apportionment of service charges?

(a) What is not in issue in this appeal

19. As we have seen, section 27A(6) of the Landlord and Tenant Act 1985 provides:

> "An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
>
> (a) in a particular manner, or
> (b) on particular evidence,
>
> of any question which may be the subject of an application under subsection (1) or (3)."

20. The contractual provision in the residential leases of Heritage Close that the new apportionment is to be "conclusively determined by the Landlord's Surveyor" is a provision for a determination to be made in a particular manner, and in recent years a number of decisions of the Tribunal and of the Court of Appeal have grappled with the effect of section 27A(6) upon provisions of this kind.

21. In paragraph 30 of the Supreme Court's decision in *Aviva v Williams* Lord Briggs explained that the cases, culminating in the Court of Appeal's decision in *Sheffield City Council v Oliver* [2017] EWCA Civ 255:

> "… clearly decided that where the relevant lease conferred upon the landlord (or some person other than the FtT) a contractual right to determine a discretionary question about service charges, that determination was by section 27A(6) rendered irrelevant to the determination of the same question by the FtT, which was not limited to a review of its contractual or statutory legitimacy."

22. So under the law as it stood when the FTT made its decision, the words at the end of paragraph 1(b) of Schedule 4, quoted above at paragraph 6, had to be read as follows:

> "the proportion of the Service Cost to be attributed to and paid in respect of the Demised Unit shall be calculated by some other just and equitable method ~~to be conclusively determined by the Landlord's Surveyor~~"

23. The FTT set out that paragraph from the lease with that deletion, and said at its paragraph 16:

> "It was agreed that, on the current law as confirmed in *Aviva Investors Ground Rent GP Ltd v Williams* [2021] EWCA Civ 27, by s.27A(6) of the 1985 Act, the words struck out in the above extract from paragraph (1)(b) are void, so if the condition has been satisfied but the parties are unable to agree a method it is to be determined by the tribunal as part of its determination under section 27A(3)."

24. The practical effect of that was that in a situation where the method of apportionment prescribed by the lease had become inoperable or manifestly inequitable, only the FTT could decide upon a new just and equitable method, and that either party to any of the leases could apply to it to do so at any point.

25. That was how the law stood when the FTT made its decision in this case.

26. In *Aviva v Williams* the Supreme Court decided that the Court of Appeal was wrong in *Sheffield v Oliver* and that a new approach was to be adopted.

27. The leases in issue in *Aviva v Williams* provided that each tenant was to pay a certain percentage of the landlord's costs "or such part as the Landlord may otherwise reasonably determine". Lord Briggs (with whom Lord Reed, Kitchin, Sales and Richards agreed) considered the FTT's jurisdiction under section 27A which enables the FTT to determine whether a service charge is payable. He said that the FTT "would decide by reference to common law principles of contractual liability, subject to the detailed scheme for statutory control laid down in the immediately preceding provisions of the 1985 Act."

28. Lord Briggs went on to say that section 27A(6) is an anti-avoidance provision. It renders void a provision in a lease for the determination in a particular way *of any question which may be the subject of an application under subsection (1) or (3).*" (emphasis added). Under those two subsections, the FTT has jurisdiction to decide whether service charges are payable under the lease, and whether there is any statutory restriction upon

their amount. The section does not confer a jurisdiction to scrutinise the landlord's management decisions.

29. He went on:

> "14. Generally speaking, the making of a demand upon a tenant for payment of a service charge in a particular year will have required the landlord first to have made a number of discretionary management decisions. They will include what works to carry out or services to perform, with whom to contract for their provision and at what price, and how to apportion the aggregate costs among the tenants benefited by the works or services. To some extent the answers to those questions may be prescribed in the relevant leases, for example by way of a covenant by the landlord to provide a list of specified services, or by a fixed apportionment regime. But even the most rigid and detailed contractual regime is likely to leave important decisions to the discretion of the landlord, such as whether merely to repair or wholly to replace a defective roof over the building, with major consequences in terms of that year's service charge. Usually the conferring of this discretion on the landlord will be implicit, in order to give the lease business efficacy. But sometimes it may be express, as in the power of the landlord to re-apportion which is the subject of this case. It may be little more than happenstance whether these discretions are conferred expressly or implicitly.
>
> 15 …the jurisdiction of the FtT under section 27A(1) to decide whether a service charge demand is payable will extend to the contractual and/or statutory legitimacy of these discretionary management decisions. Thus, where the service charge enables the landlord to recover its cost of performing its repairing obligations under the lease, the replacement of a roof may give rise to questions whether replacement fell within the landlord's repairing obligation (or rather whether it was an improvement) and whether, if it was a repair, the costs incurred satisfied the statutory reasonableness test in section 19. But, leaving aside section 27A(6) for the moment, it would not be a part of the FtT's task to make those discretionary decisions itself, let alone for the first time. It would be too late, on an application under section 27A(1), and there would be no warrant either contractually in the lease or in the statutory regulatory regime under the 1985 Act for it to do so. If the landlord's discretionary decision in question was unaffected by the statutory regime and fell within the landlord's contractual powers under the lease, then there might at the most be a jurisdiction to review it for rationality: see *Braganza* [2015] UKSC 17**.**
>
> 16. On an application under section 27A(3) in relation to a prospective service charge the FtT might well be invited to exercise its jurisdiction before the landlord made the relevant discretionary management decisions, but the jurisdiction would not thereby be enlarged from that described above merely because of the timing. Ignoring section 27A(6) for the moment, the FtT would still be limited to ruling upon the contractual and statutory legitimacy of the landlord's proposal, coupled with a *Braganza* rationality review if necessary, which is really an aspect of the testing of contractual legitimacy. …"

30. Lord Briggs went on to explain that section 27A(6) can then be seen in its context as an anti-avoidance provision, designed to ensure that the jurisdiction of the FTT to determine whether a service charge was payable could not be ousted by terms imposed by a landlord, for example by stating that his own decision was to be final.

31. Yet, said Lord Bridge, the Court of Appeal's interpretation of section 27A(6) in *Sheffield v Oliver* was that the provision that enabled the landlord to exercise its discretion was void. The decision could only be taken by the FTT. Lord Bridge reasoned that if that is the effect of section 27A(6) upon an express discretion, it must have the same effect upon implied terms that give business efficacy to a lease by providing that the landlord can decide when to repair the roof, which contractors to employ, and so on. They are all void, with catastrophic consequences:

> "21… the construction which (as the Court of Appeal described it) transfers the landlord's discretionary management powers relating to service charges to the FtT produces the most bizarre and surely unintended results. If subsection (6) first renders void and then transfers to the FtT the landlord's discretionary management powers, then it is hard to see how a landlord could ever safely incur relevant costs without first making an application to the FtT for clearance of proposed service charges under subsection (3).
>
> 22. If making an application under subsection (3) were to become the main route enabling landlords to incur relevant costs with a manageable risk of not recovering them in full from the tenants, then the FtT would be likely to become overwhelmed with prospective applications. This is of course unless agreement with all relevant tenants could be obtained in advance, so as to obtain the protection for the landlord of subsection (4)(a). But obtaining agreement from all tenants in a large block or estate in respect of all service charge decisions would surely be impracticable. This applies a fortiori in respect of apportionment decisions, where the tenants' interests are inherently in conflict with one another."

32. By contrast, said Lord Briggs, if section 27A(6) is read so as simply to preserve the FTT's jurisdiction under section 27A to decide whether a service charge is payable under the terms of the lease, and reasonable where the statute so requires (as in the case of costs incurred where service charges are demanded to cover them), then all is well:

> "21. … In sharp contrast, under the construction that the FtT is limited to a review of the contractual and statutory lawfulness of the service charge demanded, reasonable and well-advised landlords would (and do) incur the costs and then make the service charge demands on the basis that the risk of losing in the FtT on an application under section 27A(1) by one or more tenants is manageable. There is, in short, all the difference for a landlord between facing a regime under which the FtT has freedom to make a completely different discretionary decision from that made by the landlord, and one where the jurisdiction of the FtT is limited to deciding whether the landlord acted in breach of contract or in contravention of the statutory scheme regulating residential service charges."

33. I pause to observe that if the decision of the Court of Appeal in *Sheffield v Oliver* did have the effect of taking away from landlords all their decision-making powers in the management of leasehold premises, no-one noticed and the FTT has not been overwhelmed. Be that as it may, it is now perfectly clear that where a lease gives a landlord a discretion to make a decision, section 27A(6) does not take it away. What is taken away is any provision that the landlord's decision is final. Continuing from *Aviva v Williams:*

> "28. … If a tenant applies under section 27A(1) to the FtT to challenge a service charge demand on contractual or statutory grounds, then the FtT will treat as void any provision in the lease, other than a post-dispute arbitration agreement, which purports to provide for questions arising under such an application to be determined in any particular manner, or on particular evidence. …
>
> 29. Contractual provisions which would fall to be ignored under this construction would of course include a term which rendered the landlord's decision final and binding…"

34. Accordingly the only part of the contractual provision in a case such as the present that has to be ignored is the provision that the determination of the Landlord's surveyor is to be conclusive. Turning back to paragraph 22 above, only the word "conclusively" has to be deleted or ignored and the FTT gets to review the "contractual and statutory legitimacy" (*Aviva v Williams* paragraph 32) of charges demanded on the basis of the new apportionment. In fact only contractual legitimacy is in issue, because there is no statutory restriction on the landlord's power to make that apportionment (there being no provision in the 1985 Act that apportionments have to be fair, or reasonable, or anything else).

35. It is clear therefore that the apportionment by the Landlord's surveyor is not rendered void. Instead what the FTT has to do is to determine whether it is contractually legitimate or whether instead, the new apportionment (and demands based on it) breaches the terms of the lease. Thus far I think the analysis is fairly straightforward and, I believe, common ground between Mr Loveday and Mr Grundy KC.

(b) The issue in this appeal: the arguments

36. Mr Loveday and Mr Grundy KC disagree about the type of review to be carried out by the FTT.

37. In his skeleton argument Mr Loveday said:

> "Provided a tribunal is satisfied that there is a contractual provision which permits a landlord to re-apportion service charges, the actual apportionment is a matter for the landlord acting reasonably."

38. That reflects the provision in the leases in *Aviva v Williams*, where each tenant's share was "x % or such part as the landlord may otherwise reasonably determine". I do not

think Mr Grundy KC would quarrel with Mr Loveday thus far. But next Mr Loveday says:

> "Where a landlord is required to act "reasonably" (as in *Aviva Ground Rent*) the exercise of that discretion may be challenged on grounds of *Braganza* rationality."

and, he argued, only on rationality grounds. Here the respondents part company and Mr Grundy KC argues that the Supreme Court did not find that the FTT's jurisdiction to review a decision about apportionment was limited to a rationality assessment in cases such as *Aviva*, and the present case, where there are contractual requirements about the new apportionment such as reasonableness, fairness etc.

39. To explain this disagreement we have to look at rationality. Lord Briggs alluded at his paragraphs 15 and 16 to *Braganza v BP Shipping Limited* [2015] UKSC 17, where the Supreme Court explained that where a contract confers a discretion upon one party, the courts have implied a term about how that discretion is to be exercised:

> "18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."

40. That implied term is that the discretion must be exercised rationally:

> "30. It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable – for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose."

41. The Supreme Court in *Braganza* grappled with some deep questions as to the relationship between a rationality test and the standard to be applied in judicial review, which need not detain us here save to say that it is difficult to draw a bright line between the two and clear that they are closely related if not identical. The point relevant to the present appeal is that where a discretion is unqualified – where there are no contractual requirements about reasonableness, fairness etc – then there remains an implied contractual term that the discretion must be exercised rationally.

42. In *London Borough of Hounslow v Waaler* [2017] EWCA Civ 45 the Court of Appeal explored the difference between a review of the rationality of a decision and a review of its reasonableness in the context of section 19 of the Landlord and Tenant Act 1985 which provides that costs can be taken into account in determining the amount of a service charge only insofar as they are reasonably incurred. Absent that provision, the Court of Appeal explained, the FTT can only review the rationality of a landlord's decision to incur a cost because rationality is all that is needed for contractual validity; what the statutory provision adds to the FTT's jurisdiction is the ability to go further and assess the reasonableness of the decision. As to what the difference is, Lewison LJ at paragraph 22 quoted Lord Sumption in *Hayes v Willoughby* [2013] UKSC 17 at 14:

> "Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a notional hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse."

43. Rationality is therefore focused on process, while reasonableness is a higher standard focused on the outcome of that process. Mr Loveday summarised a rationality review as being an assessment of whether the landlord had acted capriciously, and argued that only the lower standard of rationality can be applied by the FTT in determining the contractual validity of a new apportionment made by the landlord in a case such as the present.

44. Mr Grundy KC disagreed. In a lease such as in *Aviva v Williams* the FTT must look at whether the landlord did in fact act reasonably; in the present case the FTT is to review the landlord's surveyor's proposal and determine whether it is just and equitable. That does not mean that the FTT makes its own decision, or can impose the solution that it prefers. It is to review the decision taken by or for the landlord and determine whether what was done meets the requirements of the contract, so that in the present case the FTT is to decide whether the new apportionment is "just and equitable".

45. The Supreme Court in *Aviva v Williams* gave no explicit guidance about this issue. When it came to the decision that had to be taken, Lord Briggs said:

> "33. Applied to the provisions in issue in the present case, the construction which I now consider to be correct applies as follows. Those provisions gave the landlord two relevant closely related rights: first to trigger a re-allocation of the originally agreed contribution proportions and secondly to decide what the revised apportionment should be. In both respects the landlord is contractually obliged to act reasonably. The FtT decided that the landlord had acted reasonably in making the re-apportionment which was challenged, and it is not suggested that it fell foul of any part of the statutory regime, apart only

> from section 27A(6). But that subsection did not avoid the power of the landlord to trigger and conduct that re-apportionment, because the jurisdiction of the FtT to review it for contractual and statutory legitimacy was not in any way impeded. The original question, whether there should be a re-apportionment and if so in what fractions, was not a "question" for the FtT within the meaning of section 27A(6). The question for the FtT was whether the re-apportionment had been reasonable, and that question the FtT was able to, and did, answer in ruling on the tenants' application under section 27A(1)."

46. There is no mention here of rationality. Mr Loveday argued that that was what was meant by the word "reasonably" and "reasonable" in that paragraph. And it is true that there are older cases where "reasonable" is used as a synonym for "rational", although I am not aware that that has happened in decisions since *Braganza*. Mr Loveday argued that the respondents' construction takes us back to the ills identified by Lord Briggs in his paragraphs 19 to 26, where he explains why a landlord's discretionary decisions should not be transferred to the FTT.

The Tribunal's decision about the standard of review now to be applied by the FTT to a decision to change the apportionment of service charges

47. What is not in dispute is that the FTT has to assess whether service charges based on the new apportionment would be payable, and in making that decision it is assessing whether the apportionment has been carried out in accordance with the lease. In other words it is deciding whether the apportionment complies with the requirements of the lease.

48. Essentially the dispute is about what the lease requires.

49. To take a step back, imagine a lease where the apportionment of service charges was left to the landlord without qualification: "The lessee shall pay by way of service charge such proportion of the landlord's expenditure as the landlord shall determine." I think it could not be doubted that the effect of the decision in *Aviva v Williams* would be that the FTT would review the landlord's apportionment on the basis of rationality only. Neither the lease nor the statute requires the apportionment to have been reasonable, fair, or anything else.

50. What is the effect of a qualification such as the one in *Aviva* ("such part as the Landlord may otherwise reasonably determine") or the one in the leases in Heritage Close ("some other just and equitable method to be … determined by the Landlord's Surveyor")?

51. On Mr Loveday's interpretation of *Aviva v Williams* the additional words "acting reasonably" and "just and equitable" have no effect. What the lease requires is that the landlord shall make a decision, and so long as he does so rationally the FTT cannot change the decision.

52. It is very difficult to see that that can be right. It is particularly difficult to see that if the Landlord were to impose an apportionment method devised by its surveyor that was not

"just and equitable" it would not be in breach of contract, since the lease specifically requires that the method be just and equitable.

53. I find that the respondents' interpretation of the standard of review to be carried out by the FTT is correct, for three reasons.

54. First, as just stated, to restrict the FTT to a rationality review would render redundant the additional words that the parties to the lease agreed to include. They wanted a new apportionment to be just and equitable. The parties to the lease in *Aviva v Williams* agreed that the landlord would act reasonably in making the apportionment. The parties to the lease in *Windermere Marina Village Limited v Wild* [2014] UKUT 163 (LC) specified that the tenant was to pay "a fair proportion", as did the parties to the lease in issue in *Sheffield City Council v Oliver* [2017] EWCA Civ 25. It is difficult to see how the landlord would not be in breach of contract if his new apportionment, in the present case, was not just and equitable; and for the landlord to be able to make a conclusive decision that his new scheme was just and equitable is to nullify the anti-avoidance provision of section 17A(6).

55. Second, that approach is consistent with what the Supreme Court did in *Aviva*. That is the inevitable conclusion on reading paragraph 33 of the Supreme Court's decision (set out at paragraph 45 above) – unless one is to re-write it and read "rational" for "reasonable". It is vanishingly unlikely that that is what the Supreme Court intended. It is worth noting that Lord Briggs mentioned *Braganza* and a rationality review only twice, in paragraphs 15 and 16 where he was considering the background law rather than the facts of the case before the court. If he had meant to say that in reviewing this kind of decision the FTT is restricted to a rationality review regardless of the wording of the lease he would have said so and he would have explained why.

56. Third, this construction does not have the ill-effects identified by Lord Briggs in his paragraphs 19 to 26. The position for which the respondents argue is not that the landlord should have no power to make a new apportionment and that the FTT is to take on that task on the application of anyone at any time. Rather, the landlord has a discretion conferred by the contract to decide on a new apportionment, but the FTT in reviewing the decision is to assess whether it is just and equitable. There is no removal of the landlord's decision-making power and no possibility of the FTT being overwhelmed by applications or of the landlord's normal management powers being stymied.

57. To conclude: in assessing the contractual legitimacy of service charges based on the new apportionment that the appellant proposes, the FTT is required to assess whether the method determined by the landlord's surveyor was "just and equitable" as required by the lease.

(2) Did the FTT make the decision that it was supposed to make as the law now stands?

58. We now turn to what the FTT did.

59. It will be recalled that the FTT first decided that the condition precedent to any change in the apportionment had not been met. So the appellant's application fell at the first fence. However, the FTT went on to say that in case it was wrong about that it would decide whether Mr Forrester's method of apportionment was just and equitable, and it decided that it was not.

60. In the circumstances that was a surprising approach. The law as it then stood made the FTT the sole decision-maker about a new apportionment method and so it would appear that the FTT should have made its own decision rather than reviewing the surveyor's decision.

61. However, as it turns out, the FTT *did* do what the Supreme Court has now said it must: it reviewed the landlord's new apportionment (rather than making its own decision).

62. So the approach was correct; the FTT reviewed the landlord's proposed new apportionment and decided whether it met the contractual requirement that it be just and equitable. It decided it was not, and the appellant appeals that decision.

(3) The appeal from the decision that the new apportionment was not just and equitable

63. The new apportionment scheme that the appellant seeks to introduce shares the cost of services in proportion to floor area. It was devised for the appellant by Mr Peter Forrester FRICS, who made an expert witness report and a supplemental report for the FTT and gave evidence at the hearing. No expert evidence was adduced by the respondents.

64. Mr Forrester's original report explained the new apportionment method by floor area in just six paragraphs. He referred to the RICS Professional Statement about service charges in commercial property, and to the RICS Code of Practice for residential charges, and said that apportionment based on floor area is the most common and generally considered the simplest method of apportionment for service charges. He explained that he had not been given access to the respondents' properties and so had taken the floor areas from plans and marketing particulars. He attributed a notional 2% of the floor area to the car park. He concluded that the residential properties together should pay 37.68% of the total service charge.

65. As the FTT pointed out in its decision, Mr Forrester did not refer to the RICS guidance note on managing mixed-use developments, which states at paragraph 4.7 "There can be a difference between benefit and use … A discounted charge may be appropriate in some circumstances, with the costs being weighted towards each occupancy and use type". Mr Forrester gave no consideration to whether there should be any weighting of the residential or commercial service charges in light of their different nature and of the possibility that they made use of the landlord's services in different ways and to different extents.

66. Mr Forrester in his supplemental report adjusted his figures, after he had had the opportunity to take some more accurate measurements and had amended his assessment

of the area of the car park to 1.58% of the whole. He calculated that the residential leaseholders together should pay 34.71% of the service charge.

67. The respondents' unhappiness with the proposed scheme is readily understandable. Whereas under the current apportionment, based on historic rateable values (see paragraph 8) the residential properties together pay 9.74% of the total service charge, while the commercial lessees pay 90.26%, under the new scheme the residential properties together would pay about 34% of the whole. The FTT at its paragraph 54(ii) said that the service charges for Unit 1, for example, would go from £3,376.80 (I think that must be the figure for 2021/22) to about £12,488.79. That is undoubtedly a shocking increase.

68. Mr Forrester's evidence was that had domestic rates not been abolished, the residential leaseholders' proportion of the whole would have gone up because of the rate at which market values of residential properties have risen compared to those of commercial properties. He estimated that had domestic rating continued in force the residential leaseholders would by now by paying about 34% of the service charge for the whole development – an estimate that the FTT (at its paragraph 45) thought was "probably too high", but not by much. In effect the appellant says that the residential tenants have been paying far too little for many years, hence the big increase now.

69. The FTT acknowledged Mr Forrester's expertise and noted the absence of expert evidence from the respondents to challenge his opinion. But it said that "two sets of problems" led it to conclude that the new scheme was not just and equitable.

70. One set related to what the FTT called "historical matters and conduct". It pointed out the scale of the increase: for about 45 years the residential leaseholders had been paying about 10% of the whole, and the new scheme would cause approximately a fourfold increase in the overall residential share with alarming consequences for individual households. The method devised after the abolition of domestic rates had been applied for more than 30 years. For the last 20 years there had been "substantial adverse changes" for the residential leaseholders; the commercial premises had been extended, so that the residential leaseholders had lost their ground floor access and an internal staircase. The commercial units now included licensed premises which stayed open longer and were noisier than retail shops. There was no evidence that the current service charge arrangements were deterring commercial tenants, there being only one vacant commercial unit.

71. The second set of problems the FTT said related to the appellant's "failure to take a more nuanced and co-operative approach, making reasonable allowance for the background and the nature of this mixed-use development". It refused to accept that a more balanced consideration of the extent to which residential and commercial tenants used or benefited from various services was "not worth it" as had been suggested. It suggested that a more balanced assessment should have taken into account key features of the development, such as the extent to which the commercial units might make more use of the site manager, of the car-park and of the basement area. The FTT expressed dissatisfaction with some of the measurement information with which it had been provided. Finally it commented that the service charges for 2022/23 were going to be much higher than usual because of major works, and said "a method which suddenly moves to a much

higher service charge proportion just when these larger major works are planned does not, together with the other factors mentioned, appear just or equitable."

72. The appellant says that the FTT fell into serious error. Whether the new apportionment was a "just and equitable" scheme was to be assessed objectively, and not on the basis of the history of dealings between the parties. The apportionment method should be neutral and was not supposed to provide compensation for perceived losses in the past, nor to punish the landlord or the commercial tenants. As to the need for a "more balanced approach", there was no evidence that the commercial tenants made more use of the car park, of the site manager or of the storage area. Mr Forrester's method followed professional guidance, it is in common use, it closely replicated what the residential tenants would now be paying if domestic rating had continued and reflected changes in the relative rental values of residential and commercial premises since 1990. It could adapt to future changes in area. The timing of the change in apportionment cannot possibly go to whether the new method is just and equitable; if the apportionment is fair then it is fair for the lessees to pay that proportion of the cost of the major works. Finally, if subjective factors were relevant, the FTT's analysis ignored the fact that the residential tenants had had a substantial windfall for many years.

73. Furthermore, the lease did not provide for the apportionment of service charges to be "weighted" to reflect the different nature of residential and commercial leases, and weighting would be contrary to the terms of the lease.

74. Mr Grundy KC for the respondents argues that the factors taken into account by the FTT were all relevant, including historic matters and the fact that the residents were going to suffer a huge increase in costs if the new apportionment came into effect.

75. In considering these arguments and assessing whether the FTT fell into error in deciding that the new scheme was not a just and equitable apportionment I bear closely in mind that it was not open to the FTT to impose its own conception of what would be the fairest method. Nor did it do so. I also bear in mind that the FTT had conducted a site visit and so was keenly aware of the nature and layout of the property and of the relationship between the residential and commercial parts of the building.

76. In one respect I agree with the appellant. It was not appropriate to assess the new apportionment in light of historic events such as the extension of the commercial units. There was no evidence that the appellant was in breach of covenant to the residential lessees or had derogated from its grant to them in allowing various alterations to and amalgamations of the commercial units and I regard those past events as an irrelevant consideration.

77. Leaving those historical matters aside, the major factors that swayed the FTT were, in very broad summary: first, the huge increase in charges that the residential leaseholders would face; second, the lack of weighting in the scheme for different uses; and third the timing of the increase.

78. I do not regard any of these considerations as irrelevant and together they amply justify the FTT's decision even when the irrelevant matter referred to above is disregarded.

79. The most important one is the failure of the new apportionment method to take into account different levels of use and benefit as between the residential and commercial properties. This would not be contrary to the lease. It would be different from the method prescribed in the lease, but there is no stipulation that any new method could not take different use and benefit into account. The point the FTT was making was that a simple floor area apportionment, which might well be appropriate for a purely residential or purely commercial property, was not obviously fair without there being some consideration as to whether the use made of services or the benefit obtained from them was actually proportionate to floor area. In a mixed-use development it might well not be. The FTT did not make any findings of fact that the commercial tenants made more use of the site manager, for instance, or of the parking; it merely made the point (having seen the premises and having an understanding of the range of commercial premises) that they might well do so and that that no consideration had been given to the possibility.

80. The other two main factors (the huge increase and the timing of the increase) are linked and relate to the effect of the apportionment upon the leaseholders, which cannot be irrelevant to the equity of an apportionment scheme. Leaseholders will have bought, or retained, their properties with a particular level of service charges in mind and will have managed their domestic budgets accordingly. I agree with the appellant that a change in the apportionment method is appropriate, but a change that means it is Christmas for the commercial tenants and serious hardship for the residential tenants all in one fell swoop is not equitable.

81. The new scheme must of course be "just and equitable" between both parties to the lease, to the appellant as well as to the leaseholder. There is no evidence that the new method would bring any particular benefit to the appellant. To that extent it is relevant that there is no evidence that any of the commercial tenants is having trouble with the current arrangements and so no evidence of rental voids as a result.

82. Accordingly I find that the FTT did not fall into error. It did take into account some irrelevant historical matters, but leaving those matters aside it gave ample reason for its decision that the new method proposed by the appellant was not "just and equitable" as the lease requires.

Conclusion

83. In conclusion the appeal fails. Although I have set aside the decision of the FTT that the condition precedent to a new apportionment had not taken place, and have found that a new apportionment could now be introduced, I have upheld the FTT's alternative finding that the appellant's proposed new apportionment was not "just and equitable" and that therefore service charges demanded on the basis of that apportionment will not be payable.

84. The FTT made an order under section 20C that the landlord's costs of the proceedings were not to be charged to the lessees as a service or administration charge. The appellant appeals that decision in the event that the substantive appeal is successful. In light of the outcome of the appeal I take the view that that appeal also fails.

Judge Elizabeth Cooke

21 July 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.