UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 243 (LC)

UTLC No: LC-2022-474

Royal Courts of Justice,
Strand, London WC2A

2 October 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

LANDLORD AND TENANT – SERVICE CHARGES – lease providing for annual apportionment of cost of services by landlord's surveyor – whether surveyor's role void – whether surveyor's apportionment irrational – s.27(6), Landlord and Tenant Act 1985 – appeal dismissed

BETWEEN:

DR LELLIS FRANCIS BRAGANZA

Appellant

-and-

THE RIVERSIDE GROUP LIMITED

Respondent

Re: 345D Stretford Road,
St Georges II,
Hulme,
Manchester M15 4AY

Martin Rodger KC, Deputy Chamber President

Determination on written representations

© CROWN COPYRIGHT 2023

The following cases are referred to in this decision:

Aviva Ground Rents v Williams [2020] UKUT 111 (LC)

Aviva Ground Rent Investors GP Ltd v Williams [2023] UKSC 6; [2023] AC 855

Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] 1 WLR 1661

Gater v Wellington Real Estate Ltd [2014] UKUT 561 (LC); [2015] L & TR 19

Hayes v Willoughby [2013] UKSC 17; [2013] 1 WLR 935

London Borough of Brent v *Shulem B Association Limited* [2011] EWHC 1663 (Ch)

Oliver v Sheffield City Council [2017] EWCA Civ 225; [2017] 1 WLR 4473

Southwark LBC v Woelke [2013] UKUT 349 (LC)

Windermere Marina Village Ltd v Wild [2014] UKUT 163 (LC); [2014] L & TR 30

1.

Introduction

1. Sections 27A(1) and (3), Landlord and Tenant Act 1985 create a right to apply to a tribunal to determine the amount of a disputed residential service charge. That right is protected by an anti-avoidance provision at section 27A(6), which says this:

> "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)."

2. In *Aviva Ground Rent Investors GP Ltd v Williams* [2023] UKSC 6 the Supreme Court gave definitive guidance on the meaning and effect of section 27A(6). Unfortunately, the parties to this appeal cannot agree how the Supreme Court's decision affects their dispute.

3. The appellant, Dr Braganza, owns a flat in a development at Hulme in Manchester. The development is known as St Georges II and comprises a mixture of flats and houses, all of which are let on long leases which require the leaseholder to pay a service charge. Dr Braganza purchased his lease in April 2018 and up to April 2021 he paid all the service charges claimed by his landlord, The Riverside Group Ltd (Riverside), which totalled £4,725.

4. In February 2021 Dr Braganza applied to the First-tier Tribunal, Property Chamber (the FTT), under section 27A, 1985 Act, asking it to determine whether the service charges he had paid had been properly due under his lease.

5. In its decision given on 30 November 2021, and re-issued with additional reasoning on 12 April 2022, the FTT confirmed that all of the charges claimed by Riverside had been due. It dismissed various criticisms made by Dr Braganza about the information provided to him and the way in which charges had been calculated and demanded.

6. Dr Braganza was dissatisfied with the FTT's decision and applied for permission to appeal on a number of grounds. It was in response to that application that the FTT re-issued its decision, providing additional reasons to meet new points which Dr Braganza had raised. It refused permission to appeal on all grounds.

7. The only issue which remains live, and for which permission to appeal was given by this Tribunal, concerns the role of Riverside's surveyor in determining the apportionment of the service charges between the flats and the houses on the development. The appeal has been determined on the basis of the parties' written representations.

8. In order to understand the issue it is necessary to refer to the terms of Dr Braganza's lease and to explain why, in relation to service charges, it does not operate in practice as the person who first drafted it might have anticipated.

The Lease

9. Dr Braganza's lease (or rather, his underlease, as it was granted out of a headlease) is in the standard form used for all 50 flats on the development. I understand that the leases of the 29 houses on the development are slightly different (in particular, whereas Riverside is responsible for maintaining the structure of the blocks of flats, the individual leaseholders of the houses are responsible for their own repairs and maintenance).

10. In the Particulars which appear at the start of the lease the whole of St Georges Place II, including both flats and houses, is referred to as "the Development". Among the obligations assumed by the landlord is a covenant to maintain the buildings in the Development, except to the extent that one of the leaseholders is liable to do so. The effect of that exception is that Riverside is not required to incur expenditure on repairing the structure of the houses, which are the responsibility of their own leaseholders.

11. The leaseholder covenants to pay a service charge calculated in accordance with clause 7 of the lease, which begins with a number of definitions. The "Service Charge" is a sum of money equal to "the Specified Proportion of the Service Provision" (clause 7(1)(d)).

12. So far as relevant, the "Service Provision" is an annual sum comprising the expenditure estimated by the landlord's surveyor as likely to be incurred in the provision of services for the Development in the forthcoming account year, plus a contribution towards a cyclical repair fund (clause 7(5)).

13. The "Specified Proportion" means "the proportion specified in the Particulars as amended from time to time under sub-clause 7(7) hereof".

14. The definitions in clause 7(1) might cause the reader to expect that the Specified Proportion would be expressed as a proportion or percentage which would be applied every year to the Service Provision in order to ascertain the Service Charge. That is how I assume the drafter of the lease intended the arrangement to operate. But the "Specified Proportion of Service Provision" defined in the Particulars at the start of the lease is not a percentage at all, but rather is a sum of money, £35.68 per month.

15. The Landlord's Surveyor (who must be professionally qualified, but who may be an employee of the Landlord) is given power to amend the Specified Proportion. In clause 7(1) the relevant power is said to be in clause 7(7), but in fact it is in clause 7(8) (clause 7(7) is about certifying annual expenditure). The power to change the Specified Proportion is in these terms:

> "(a) If in the reasonable opinion of the Surveyor it shall at any time become necessary or equitable to do so he may increase or decrease the Specified Proportion

(b) The Specified Proportion increased or decreased in accordance with sub-clause 7(7) hereof shall be endorsed on this Underlease and shall be substituted for the Specified Proportion set out in the Particulars of this Underlease."

16. Clause 7(8) confirms the impression that the lease was drafted in the expectation that the Specified Proportion would be a proportion or percentage rather than a quantified sum of money. But, whether consciously or inadvertently, the original parties adopted a different approach when they completed the Particulars and executed the lease. Rather than agreeing a percentage which would be applied to all of the Service Provision to arrive at the Service Charge, and which would be variable by the Surveyor only if it became "necessary or equitable to do so", they agreed that the Specified Proportion would be £35.68 per month, a sum which must have related to the Service Provision in the year the lease was granted. Since it was unlikely that exactly the same expenditure would be incurred in the following year, this approach effectively guaranteed that the Specified Proportion would have to be amended each year. As a result, the role of the Riverside's Surveyor is rather different from what might have been anticipated by the original drafter of the lease; rather than being called upon infrequently, perhaps because of some change of circumstances, the Surveyor is required to determine a new Specified Proportion every year. That Specified Proportion is, in effect, the Service Charge itself.

17. Under the draft lease, before the Particulars were filled in and the document was executed, a single proportion would have been applied to the whole of the Service Provision to arrive at the Service Charge. As between the leasehold flats and the leasehold houses different proportions might have been agreed to reflect the different obligations, but that single relevant proportion would then have been applied to the same expenditure in each case. But in the lease as agreed and executed the Specified Proportion for the first year was the Service Charge for that year and in each subsequent year the Specified Proportion determined by the Surveyor becomes the Service Charge. The Surveyor is given no guidance on how the Specified Proportion should be calculated.

18. The approach adopted by the Surveyor in practice, apparently for at least the last 13 years, has been to apportion the various heads of expenditure incurred by Riverside between the leaseholders of the flats and the houses in the Development having regard to whether they derive any benefit from that expenditure. Thus, the cost of insurance is apportioned to all 79 properties, since all benefit from the cover obtained by Riverside; so too is the cost of management. But only the flat owners contribute to the cost of cleaning the common parts, carpets and windows of the buildings containing the flats.

19. Although the parties appear not to have followed the scheme for which the template they were using was originally designed, it is of course the form of lease which they executed which determines their rights and obligations, and not the incomplete draft.

The issue and the FTT's decisions

20. The main issue between the parties concerns the effect of section 27A(6), 1985 Act, on the role given to the Surveyor by clause 7(8)(a) of the lease. Dr Braganza maintains that the statute deprives the Surveyor of any function and that it was the job of the FTT to

determine for itself, for each year in dispute, what the Specified Proportion should be. Riverside maintains that section 27A(6) has no application, and that the Surveyor is entitled to determine the Specified Proportion; the FTT's task was then to consider the contractual question whether the Surveyor's opinion of the reasonable apportionment was "rational" and, if it was, then to address the statutory questions posed by section 19(1), 1985 Act, namely, whether the expenditure had been reasonably incurred on services of reasonable quality.

21. The FTT's task was made difficult by the way in which this issue emerged. In his submissions to the FTT, both in writing and orally at the hearing, Dr Braganza did not refer to section 27A(6). He argued instead that the surveyor's method of apportionment "was not rational, accurate or clear". In its decision issued on 30 November 2021 the FTT relied on *Southwark LBC v Woelke* [2013] UKUT 349 (LC), a decision of this Tribunal long before *Aviva*, which suggested that, in a similar case, the question of what was a fair and proper proportion for a leaseholder to pay was "one for the Landlord's Surveyor, acting reasonably and not for the court". Provided the Surveyor's decision was reasonable the Tribunal said that "it does not matter that other reasonable decisions could have been taken." Following that lead, at [52] of its original decision, the FTT directed itself that:

> "… [W]e have to assess what is fair and proper proportion in the light of the surveyor's reasoning. As long as the explanation is rational we cannot ordinarily substitute our own alternative rationale."

22. Consistently with that direction, the FTT then considered only the Surveyor's approach and stated (at [53]) that: "we do not need to consider if there are other reasonable methods available." It then found that the Surveyor's apportionment was fair. The underlying principle on which it was based was that the leaseholders of houses should not be expected to contribute towards expenditure from which only the leaseholders of flats derived any benefit. The FTT decided that this was "a long standing method of allocation … [which] balances a workable simple method with clarity and a fair apportionment" ([60]).

23. It was only when Dr Braganza applied to the FTT for permission to appeal that he relied on section 27A(6) and referred to this Tribunal's decision in *Aviva Ground Rents v Williams* [2020] UKUT 111 (LC). He submitted that a line of authority beginning with *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC), of which the Tribunal's decision in *Aviva* was then the most recent example, required that a clause purporting to provide for an apportionment by a landlord or a landlord's surveyor be treated as one which provided for a determination, in a particular manner, of a question which could be the subject of an application to the FTT. For that reason the clause was rendered void by section 27A(6).

24. In *Windermere Marina Village* the leases of apartments on a marina complex provided for the leaseholders to pay "a fair proportion (to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding) of the expense of all communal services". The Lessors' surveyor decided that leaseholders of flats, houses and house-boat moorings should contribute towards the expense of communal services in different proportions. In particular, the surveyor decided that it would be fair for the owners of apartments to pay four times as much as the owners of moorings for the

provision of ground maintenance and security services. Some of the leaseholders disagreed and they asked the FTT to direct that each occupier should pay the same proportion, irrespective of the type of property they leased; the FTT agreed that an equal apportionment would be fair and substituted it for the surveyor's apportionment. On the lessors' appeal to this Tribunal the first issue was whether the FTT had had jurisdiction to adjust the apportionment of the service charge determined by the surveyor.

25. The possibility that section 27A(6) of the 1985 Act rendered void an agreement for the apportionment of service charges in accordance with a binding determination of a third party had been identified by Morgan J, but not decided, in *London Borough of Brent* v *Shulem B Association Limited* [2011] EWHC 1663 (Ch). It was considered for the first time in *Windermere.* The Tribunal held that the FTT's jurisdiction under section 27A(1) to determine "the amount which is payable" as a service charge included determining the fair proportions in which expenditure was to be apportioned amongst those who were to contribute towards it. On that basis the question of apportionment was one which could be the subject of an application to the FTT, and because the lease purported to oust that jurisdiction by making the apportionment by the landlord's surveyor final and binding, that provision was void.

26. *Windermere* was followed by the Tribunal in *Gater v Wellington Real Estate Ltd* [2014] UKUT 561 (LC), and both were approved by the Court of Appeal in *Oliver v Sheffield City Council* [2017] EWCA Civ 225. The Court of Appeal held that a provision which gave contractually determinative effect to a discretionary decision of the landlord about service charges was avoided by section 27A(6), whether or not it provided expressly for the landlord's decision to be final and binding.

27. In *Aviva*, the Tribunal and the Court of Appeal both adopted the same approach (although the Tribunal and the Court of Appeal disagreed in the result). The Court of Appeal followed its own decision in *Oliver* and decided that section 27A(6) deprived the landlord of the opportunity to vary the fixed percentage contributions payable by leaseholders and left any variation to the FTT. When the issue was finally determined by the Supreme Court it interpreted section 27A(6) differently and disagreed with the approach of the Court and tribunals below.

28. The FTT's decision in this case was made before *Aviva* reached the Supreme Court.

29. Where the FTT receives an application for permission to appeal it is required by rule 53(1) of its procedural rules first to consider whether it should review its decision. Rule 55(1) provides that the FTT may only review a decision if it is satisfied that a ground of appeal is likely to be successful. The FTT's powers when it reviews a decision are prescribed by section 9(4), Tribunals, Courts and Enforcement Act 2007. They include power to amend the reasons given for the decision, or to set it aside. Thus, if the FTT believes that an appeal against its original decision is likely to be successful, it is entitled to amend the reasons it gave for the decision. That is what the FTT did in this case.

30. The FTT's amended decision, issued on 12 April 2022, came to the same conclusion as far as Dr Braganza's liability to pay all of the charges demanded of him was concerned. But it removed part of the original reasoning and added a new explanation of the original

outcome. The most important part of its original reasoning which it removed was the sentence: "we do not need to consider if there are other reasonable methods available." It then added a discussion of *Aviva* (in the Court of Appeal) and noted that the Court of Appeal had said that the function of determining what was a reasonable proportion was transferred from the landlord to the FTT. It directed itself, at [59], that "we have to decide if in the reasonable opinion of the tribunal it has become necessary or equitable to increase or decrease the Specified Proportion". Finally, as it was satisfied that it was necessary to do so, it considered the method of apportionment adopted by the Surveyor and the alternative method proposed by Dr Braganza (in which all expenses were apportioned equally) and decided that the Surveyor's method produced "a reasonable and equitable split, taking into account the different types of properties" whereas Dr Braganza's method did not.

31. The FTT therefore arrived at the same answer but for different reasons. Whereas, in its original decision, it had considered only whether the Surveyor's method was rational, which it was satisfied it was, in its amended decision it appears to have considered for itself that the apportionment which it preferred, and which should be applied, was the same as the one adopted by the Surveyor.

The appeal

32. In view of the fact that permission to appeal to the Supreme Court against the Court of Appeal's decision had been granted in *Aviva*, the Tribunal granted permission to appeal on the issue of apportionment. The determination of the appeal was postponed until the final appeal in *Aviva* had been determined.

33. When it was, the Supreme Court reversed the decision of the Court of Appeal and took a narrower view of the scope of the FTT's jurisdiction in sub-sections 27A(1) and (3), 1985 Act, and therefore of the scope of the anti-avoidance measure in section 27A(6). At [13], Lord Briggs JSC explained:

> "An application under subsection (1) will necessarily be about the payability of an actual (i.e. already demanded) service charge. Under section 27A(3) it will be about the payability of a prospective service charge (i.e. before the costs are incurred). Questions arising under such an application are, presumably, questions of contractual entitlement and statutory regulation. To the extent that they are regulated neither by contract nor by statute, such as management decisions which the landlord is contractually entitled to make, they would not appear to fall within "questions" which may be the subject of an application under section 27A(1) or (3)."

34. Lord Briggs explained that although section 27A(6) rendered void any attempt to deprive the FTT of its jurisdiction to determine the questions identified in sub-sections (1) and (3), it did not have the effect of expanding that jurisdiction beyond "questions of contractual entitlement and statutory regulation". It did not make the FTT the primary decision maker for the host of discretionary management decisions which would usually have to be made before a service charge could be collected, including what work should be done, and by whom, and (in some cases) in what proportions different leaseholders

should be charged for it. At [15] he explained the boundaries of the FTT's jurisdiction and its limited role in relation to discretionary decisions:

> "[T]he 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 v BP Shipping Ltd* [2015] UKSC 17."

35. In his written argument for the appeal Dr Braganza addressed three issues. The first was whether, as he put it, the FTT had "preserved its jurisdiction under section 27A(6)". I take that to mean whether the FTT had properly understood the effect of section 27A(6) on its jurisdiction. Dr Braganza asserted that in the light of *Aviva*, it was incumbent on the FTT to simply ignore the role of the landlord's surveyor and he complained that it did no such thing and instead derogated its responsibility for determining an apportionment by relying on the determination of the landlord's surveyor. He relied in support of that submission on paragraphs 46 and 52 of the FTT's original decision of 3 December 2021. In those paragraphs the FTT had satisfied itself that the apportionment had been made by the Surveyor in accordance with the terms of the lease and directed itself that, so long as the apportionment was rational, it was not for the tribunal to substitute an alternative approach.

36. As the respondent has pointed out, in submissions prepared by Mr Justin Bates, Dr Braganza's first proposition is precisely the opposite of what the Supreme Court decided in *Aviva*. It would have been a legitimate criticism of the FTT's original decision at the time it was made, on the understanding of the law reflected in the Court of Appeal's decision in *Aviva*, but the Supreme Court has now determined that the Court of Appeal was wrong. On the law as it has now been explained by the Supreme Court the approach taken by the FTT in its original decision can now be seen to have been correct.

37. But, of course, the FTT amended its original decision when the Court of Appeal's judgment in *Aviva* was brought to its attention. Although the excisions and additions it made in its reviewed decision of 12 April 2022 are not always consistent with the original text which remained, it is clear enough that, conscientiously following what it then understood to be the law, the FTT decided for itself what a fair apportionment was to be.

38. Unfortunately for the FTT, the approach it took in its revised decision has now been found by the Supreme Court to have been wrong, and its original approach to have been correct.

39. Does that mean that the appeal should be allowed? I do not think so. The right of appeal is against the FTT's decision, not against its reasons. The decision was that the service charges demanded by Riverside were payable in full. The FTT's final reasons can now be seen to have been wrong, because it asked itself the wrong question; but when it had asked itself the right question, in its original decision, it had come to the same answer. It was satisfied both that the Surveyor's decision was fair and rational, and that the method of apportionment adopted by the Surveyor was the one which it would adopt if it was left to make the decision for itself. In those circumstances it does not seem to me that there is any reason for this Tribunal to interfere with the FTT's determination that the service charges were payable by Dr Braganza in full.

40. Dr Bragaza's second submission was that contrary to the FTT's original conclusion, the Surveyor's apportionment was not rational. Mr Bates suggested in his response that this was not an issue for which permission to appeal had been requested or granted. Leaving that objection to one side for the moment, I will consider the various different ways in which Dr Braganza has put this point. But before doing so it may help if I briefly recap on the background to Lord Briggs' statement *Aviva* at [15] (see paragraph 32 above), that the FTT might, at most, have a jurisdiction to review a landlord's discretionary decision "for rationality"? The concept of a rational or irrational discretionary decision had been explained by the Supreme Court in the case to which Lord Briggs referred, *Braganza v BP Shipping Ltd.*

41. *Braganza* was a claim brought by the widow of a sailor who had fallen from his ship and been lost at sea. The sailor's contract entitled his widow to financial benefits if he died in service, but these were not payable if, in the opinion of his employer or their insurers, his death was the result of his own wilful act. After a lengthy investigation the employer concluded that the most likely explanation of the sailor's death was that he had jumped overboard intentionally and had taken his own life. The employer therefore concluded that the death benefits provided for by the contract were not payable but the widow challenged its decision.

42. The parties agreed that when the contract gave the employer the power to decide if the death was the result of a wilful act, it required that the employer's decision must be a reasonable one, and that if it was not the widow would be entitled to succeed in her claim. The main issue considered by the Supreme Court was what it meant to say that the decision of a contractual decision-maker must be "reasonable".

43. There was agreement that the court was not entitled to substitute its own view for that of the person charged by the contract with making the decision; instead it had to conduct a "rationality review". Lord Hodge explained what that involved (at para 52):

> ""the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."

> Like Lady Hale, with whom Lord Neuberger agrees on this matter (para 103), I think that it is difficult to treat as rational the product of a process of reasoning if that process is flawed by the taking into consideration of an irrelevant matter or the failure to consider a relevant matter."

44. Lady Hale also discussed the difference between rationality and reasonableness, quoting, at [23], the explanation given by 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. ... 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."

45. It follows that, after *Aviva*, the FTT's only task when a leaseholder challenges a discretionary apportionment made by a landlord or its surveyor will be to consider whether the apportionment was "rational", in the sense that it was made in good faith and not arbitrarily or capriciously, and was arrived at taking into consideration all relevant matters and disregarding irrelevant matters. Unless for one of those reasons the decision was not one which any reasonable landlord could make, the FTT must apply it, and may not substitute an alternative apportionment of its own.

46. I can now consider the various ways in which Dr Braganza says the Surveyor's apportionment was not rational.

47. First, he points out that in their leases all of the leaseholders of flats and houses were granted the same rights over the "common areas" of the Development. That is true, but it does not make an apportionment based on unequal contributions an irrational one. Whatever rights may have been granted to the leaseholders of houses, in practice it is inevitable that they will make much less use of the common parts of the blocks of flats that the leaseholders of flats. It is also the case that the landlord is obliged to repair and maintain the structure and exterior of the blocks of flats, whereas the householders are liable to repair and maintain the structure of their own properties. There is nothing arbitrary or capricious in taking those considerations into account in determining an apportionment.

48. Secondly, Dr Braganza argues that nothing in the lease authorises the landlord's surveyor to apportion some heads of expenditure to leaseholders of flats only, and other expenditure to all leaseholders. The lease requires all leaseholders to contribute to all services. I do not agree. The lease requires the leaseholder to pay the Service Charge, which is to be the Specified Proportion of the Service Provision. As I have explained, by completing the lease in the form they did the parties agreed that the Specified Proportion was to be a sum of money rather than a proportion. They also agreed that the Surveyor was to have the

discretion to vary that sum of money, thereby leaving it to that person to determine how that amount was to be ascertained. In my judgment, although the way in which the lease fits together leaves something to be desired, the FTT was right to decide that the apportionment was in accordance with the terms of the lease. Once again, there was nothing irrational in the determination.

49. Thirdly, he suggests that an irrational method of apportionment which does not comply with the covenants in the lease cannot be reasonable within the meaning of section 19(2), 1985 Act. That submission confuses the operation of the contractual provisions for ascertaining the service charge with the statutory restrictions on what costs may be taken into account. It also assumes that the method of apportionment is irrational and provides no reason why that should be.

50. Contrary to Dr Braganza's submissions it seems to me to be incontrovertible that a method of apportionment which takes account of the benefits which, in practice, different leaseholders enjoy as a result of the landlord's expenditure is a reasonable method. It is an approach which is often adopted by reasonable landlords and tenants. It has never been suggested that the Surveyor was motivated by some improper purpose or took account of some irrelevant consideration. The FTT was therefore right to adopt the Surveyor's apportionments when determining the amount payable by Dr Braganza.

51. The third and final question addressed by Dr Braganza in his submissions concerned the effect of section 20B, 1985 Act. His point was that, as the demands issued by Riverside were based on an irrational apportionment and were not contractually valid for that reason, it was now too late for new demands to be issued and all of the service charges paid by Dr Braganza should be refunded. That was not a ground of appeal for which permission was given by the Tribunal, but, in any event, as the apportionment was not irrational, none of the suggested consequences need be considered.

Disposal

52. The appeal is therefore dismissed.

53. Dr Braganza asked for an order that the tribunal fees he has paid, here and in the FTT, be reimbursed by Riverside. In view of the dismissal of the appeal, I refuse that application.

Martin Rodger KC,
Deputy Chamber President

2 October 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.