Neutral Citation Number: [2020] EWCA Civ 795

Case No: C3/2019/2273

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Judge Martin Rodger QC (Deputy President) and Judge PD McCrea FRICS
LRX/31/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE PETER JACKSON

- -

Between :

POINT WEST GR LIMITED	**Appellant**
- and -	
RITA BASSI AND OTHERS	**Respondent**

- -
- -

Timothy Morshead QC and Jonathan Wills (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant**
Daniel Dovar (instructed by **Wallace LLP**) for the **Respondents**

Hearing date : 16 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Wednesday 24th June 2020.

Lord Justice Lewison:

1. The background to this appeal is a dispute about service charges; but the main issue is procedural. Its principal focus is the power of the First Tier Tribunal ("the FTT") to review one of its decisions, following an application for permission to appeal to the Upper Tribunal ("the UT"). The immediate decision under appeal is that of the UT (Martin Rodger QC, Deputy President and PD McCrea FRICS). Their decision is at [2019] UKUT 137 (LC).

The dispute

2. The Point West Building ("the Building") at 116 Cromwell Road, London SW7 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.

3. The service charge is calculated in accordance with the Fifth Schedule to each lease. Paragraph 1 (1) (a) (ii) of that schedule provides that if the landlord fulfils 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". Paragraph 1 (1) (c) of the same schedule 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. These two items are clearly notional costs rather than actual costs that the landlord has paid. For the accounting periods in dispute this provision has been taken by the landlord to allow it 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).

4. Until 4 July 2014 the head lessee of the complex was Point West London Ltd ("the old landlord"). As a result of a dispute with one of the lessees, the old landlord entered administration on 22 June 2012. Point West GR Ltd ("the new landlord") acquired the head lease from the old landlord on 4 July 2014. Shortly afterwards the old landlord went into creditors' voluntary liquidation. The disputed service charges relate to the period between the old landlord's entry into administration and the acquisition of the head lease by the new landlord. The amount of the charge itself arose in the context of another dispute: this time over the administrators' fees and disbursements. The allegation was 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.

5. That dispute was eventually settled. It was a term of the settlement that payment would be made from the service charge account to the liquidators of the old landlord of the sum of £363,000 which the new landlord would then seek to recover from the leaseholders through the service charge.

6. The amount of the service charge in dispute was £557,557. It was made up of three elements:

i) disbursements relating to additional professional fees for accountancy and surveying.

ii) an additional charge 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 previously been levied. The additional management charge for 2012 was £24,871, for 2013 it was £59,398, and for 2014, £35,087.

iii) a notional rent for offices in the building used by staff employed by a former Landlord. Under this heading £68,908 was included in the restated accounts for 2012, £91,460 for 2013, and £46,356 for 2014.

The original hearing in the FTT

7. On 15 December 2015 the leaseholders applied to the FTT for a determination of their liability to pay service charges for the 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. The relevant areas of dispute were that 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.

8. The jurisdiction of the FTT arises under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). That enables an application to be made for a determination "whether a service charge is payable" and, if it is "the amount which is payable". The amount of a service charge payable is governed, in the first place, by the lease under which it is levied. If there is no contractual liability, then the charge is not payable. But the 1985 Act overlays the lessee's contractual liability by the imposition of a cap. That is expressed in section 19 (1) of the 1985 Act:

> "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period
>
> (a) only to the extent that they are reasonably incurred, and
>
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly."

9. The expression "relevant costs" are the costs or estimated costs to be incurred in connection with the matters for which a service charge is payable. Whether costs have been "reasonably incurred" requires the FTT to consider two questions:

i) Whether it was reasonable to incur any costs at all on the service charge item in question; and

ii) If it was, whether the amount actually incurred was a reasonable amount.

10. Although not a precise analogy, the FTT must consider both liability and quantum.

11. The hearing before the FTT occupied three days in July 2016. It heard evidence from a number of witnesses. In its decision of 15 August 2016 ("the original decision") the FTT dealt with the disbursements in a number of places. It considered a redundancy payment made to a staff member and found at [36] that it was reasonable and payable. It then considered the fees charged by a Mr Nicholson, which the leaseholders said should have been included in the management fee. The FTT found at [39] that those fees were not covered by the management charge; and at [41] that they were reasonable and payable. At [65] the FTT recorded that the disbursements had not been challenged and allowed them in full. As the UT pointed out at [53] the FTT did not explicitly identify which "disbursements" had not been challenged. It seems, however, that in so far as disbursements had not already been dealt with in previous parts of the decision, they related to additional accountancy and surveying fees.

12. The FTT next considered the management fee charged. The landlord's argument, recorded by the FTT at [42], was not that it had actually paid the amount claimed; but that the management charges were "reasonable and value for money". The FTT referred to the RICS Service Charge Residential Management Code and said that it was not mandatory to charge a fixed fee. It concluded at [49] that, having regard to the complexity of managing Point West, the management fees claimed were "within a reasonable range" and that "they were payable". In the light of the way that the landlord put its case and the terms of the lease, it seems to me to be clear that the FTT understood that this was a charge as opposed to a cost.

13. 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 the company managing the building on behalf of the landlord ("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.

14. Having considered the management fee and allowed it in full, the FTT went on to consider what it described as "The administrators' fees". The FTT found at [64] that the administrators had spent no more than half of their time in managing Point West (rather than simply managing the insolvency administration of the old landlord) and at [65] disallowed half of what had been claimed. In considering what time the administrators had spent on managing Point West (rather than dealing with insolvency process of the old landlord) the FTT said that it had taken into account the matters covered by the management fee (which it had already decided was reasonable).

15. It is the FTT's decision on the "administrators' fees" that has given rise to the problem. As the UT pointed out again at [53] the reference to "the amount claimed" did not assist, because no claim was made under the heading of administrators' fees.

16. As the UT pointed out at [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."

17. The leaseholders also took a point under section 20B of the Landlord and Tenant Act 1985. That section makes irrecoverable relevant costs taken into account in calculating a service charge where the costs were incurred more than 18 months before a demand for payment. The FTT decided that point in the new landlord's favour.

The application for permission to appeal and the decision to review

18. Faced with this unsatisfactory decision, the leaseholders applied for permission to appeal. In their application for permission, the leaseholders said that they wished to appeal against two determinations in the decision. The first (and only relevant one for present purposes) was:

> "… that part of the Administrators' fees could be attributed as "management fees" in the service charge (para. 51-65)"

19. The grounds of appeal made the following points:

    i) It was wrong in principle that if a landlord goes into administration or liquidation, the fees of the office holders are charged to the service charge (para 5).

    ii) Those fees were levied in addition to the "ordinary" management fees. What the FTT did was to allow an aggregate management fee (staff + administrators) which is far above a reasonable fee (para 6).

    iii) Because the FTT allowed a 10% management fee (which was not pursued in the appeal) there was no headroom to pay the administrators as well (para 7).

    iv) The additional fees had not been justified; and the administrators' fees ought to have been disallowed entirely (paras 8 to 11).

    v) The effect of the FTT's decision was that 50% of the administrators' fees were held to be reasonable management fees. But the FTT lost sight of the aggregate amount claimed for management if any part of the administrators' fees was allowed (para 13).

vi) The treatment of any part of the administrators' fees as an element of service charge costs raises novel issues of law, for which permission to appeal was sought (para 15).

20. The UT described what happened next:

> "[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."

21. The key is in the last sentence: the FTT had in effect allowed double recovery of the same costs. It is important to note, however, that a decision of the FTT that costs have been reasonably incurred does not necessarily mean that they are actually recoverable by the landlord. A decision of the FTT creates no liability to pay. The liability to pay is created by the lease. All that a decision of the FTT does is to remove a potential statutory cap on the liability created by the lease. It follows, therefore, that if the landlords had actually sued the leaseholders for unpaid service charge, the latter's liability would not have exceeded the amount that the landlord had actually demanded.

22. Where an application is made to the FTT to appeal to the UT, a power to review the decision is triggered. Section 9 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides:

> "(1) The First-tier Tribunal may review a decision made by it on a matter in a case, other than a decision that is an excluded decision for the purposes of section 11(1) (but see subsection (9)).
>
> (2) The First-tier Tribunal's power under subsection (1) in relation to a decision is exercisable–
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> (a) of its own initiative, or
>
> (b) on application by a person who for the purposes of section 11(2) has a right of appeal in respect of the decision.
>
> …
>
> (4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following–
>
> (a) correct accidental errors in the decision or in a record of the decision;

> (b) amend reasons given for the decision;
>
> (c) set the decision aside.
>
> (5) Where under subsection (4)(c) the First-tier Tribunal sets a decision aside, the First-tier Tribunal must either–
>
> (a) re-decide the matter concerned, or
>
> (b) refer that matter to the Upper Tribunal.
>
> …
>
> (8) Where a tribunal is acting under subsection (5)(a) or (6), it may make such findings of fact as it considers appropriate.
>
> …
>
> (10) A decision of the First-tier Tribunal may not be reviewed under subsection (1) more than once, and once the First-tier Tribunal has decided that an earlier decision should not be reviewed under subsection (1) it may not then decide to review that earlier decision under that subsection.
>
> (11) Where under this section a decision is set aside and the matter concerned is then re-decided, the decision set aside and the decision made in re-deciding the matter are for the purposes of subsection (10) to be taken to be different decisions."

23. Section 9 (3) of the 2007 Act confers a power to restrict the right of review by tribunal rules. Rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the tribunal rules") provides:

> "(1) The Tribunal may only undertake a review of a decision—
>
> (a) pursuant to rule 53 (review on an application for permission to appeal); and
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> (b) if it is satisfied that a ground of appeal is likely to be successful."

24. The right to appeal from the FTT to the UT is conferred by section 11 of the 2007 Act, exercisable upon obtaining permission.

25. It is common ground, rightly in my judgment, that the statutory power to review is a power to review a decision "on a *matter* in a case." That is distinguished from the whole of the decision. If, following the review, the FTT decides to set aside the decision it must either re-decide "the matter" or refer "that matter" to the UT. It follows that the mere fact that the FTT's power to review has arisen does not without more entitle the FTT to start all over again. The power to review is a discretionary power. That power is vested in the FTT. It follows that it is for the FTT itself to determine the scope of any

review that it is willing to undertake. It is not for the parties to define that scope. The FTT must not allow a decision to review to degenerate into a free-for-all.

26. Having received the grounds of appeal the FTT responded 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 tribunal 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." In other words that was the determination contained in paragraphs 51 to 65 of the decision.

The review

27. There was some dispute between the parties about the scope of the review. The FTT thus issued a case management decision on 10 April 2017. In that decision, 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 had been the landlord'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. There was no appeal against that ruling. But as Mr Morshead pointed out, this case management decision did not, at least expressly, widen the scope of the review to encompass parts of the original decision other than that contained in paragraphs 51 to 65.

28. The leaseholders' statement of case identified the invoices in question. Under the heading "Grounds of challenge" it made the following points:

    i) Administration fees (i.e. the fees of the administrators acting in that capacity) were not recoverable through the service charge (paras 44 and 45).

    ii) The sums claimed were in fact administration charges, but had been relabelled (paras 48 and 49).

    iii) The charges were not incurred by the new landlord. They were incurred (if at all) by the old landlord, and the new landlord had no obligation to pay the old landlord (para 51).

29. These were all points of principle. Importantly, there was no challenge to the quantum of any of the amounts claimed if, contrary to the leaseholders' contentions, they were valid items of service charge. It is also to be particularly noted that:

    i) Even at the original hearing the leaseholders had accepted that the landlord was entitled to charge a notional office rent. The only dispute was whether the amount charged was reasonable; and the FTT had decided that it was.

    ii) The application for permission to appeal had said in terms that what the FTT had awarded by way of management charge (i.e. the 10 per cent) would not be pursued on appeal;

iii) There never had been any challenge to what the FTT had allowed under the heading of disbursements; and

iv) Nothing was said about the FTT's decision about the effect of section 20B of the Landlord and Tenant Act 1985.

30. In the result, however, the FTT set down the review for a three day hearing in December 2017. That was the same length of hearing as the original hearing. It promulgated another decision ("the review decision") on 23 January 2018.

31. On the review the first dispute between the parties related to the scope of the review. That issue is also live on this appeal. The landlord contended that the scope of the review having been triggered by the leaseholders' application for permission to appeal, the scope of the review was necessarily limited to what was covered by the grounds of appeal. Since it had not intended to make a charge for administrators' fees over and above the sums that the FTT had already determined were reasonably incurred and payable, the leaseholders could not challenge the recoverability of those sums. The leaseholders, on the other hand, argued that the FTT's case management decision had broadened the scope of the issues to be considered on review. The FTT quoted at length from its case management decision. It concluded that the effect of that decision was that the scope of the review was to be determined by the submissions made by each party which had been incorporated into single statements of case.

32. The FTT did not (at least explicitly) redetermine its conclusions that the notional rent, the disbursements and the management charge were unreasonable in amount. Instead it decided the case on a completely new point (not mentioned in the grounds of appeal) which it allowed the leaseholders to take. What it decided was that the new landlord had no contractual liability to pay the amounts (because they all related to a time when the landlord's interest had been vested in the old landlord, and which the new landlord had no liability to pay to the old landlord). At [88] it said:

> "… the Tribunal is not satisfied on the evidence that the [new landlord] 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 [new landlord] 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."

33. The UT, correctly in my opinion, held that this part of the FTT's reasoning was wrong. It said at [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."

The effect of the review

34. The question thus arises: what is the status of the FTT's original findings that notional rent, the disbursements and the management charge (apart from the administrators' fees) were reasonably incurred?

35. Where the FTT undertakes a review of one of its own decisions, it must make it clear which parts (if any) of that decision it is prepared to review and, following the carrying out of the review, which parts (if any) of that decision it intends to set aside. Otherwise one is left in the thoroughly unsatisfactory situation that has arisen in this case, where the parties are at odds about what exactly the FTT intended to do.

36. The UT held that none of the FTT's conclusions on the reasonableness of the notional rent, the disbursements and the management charge could stand. At [83] it said:

> "Ms Bhaloo [counsel then appearing for the landlord] 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."

37. I agree with the last quoted sentence; but the reason why the FTT intended to relieve the leaseholders of that liability was because of the new point of law that it had permitted the leaseholders to take. In other words, the FTT had revisited liability but not quantum.

38. Nevertheless, the UT held at [101] that the landlord was entitled to challenge the scope of the review undertaken by the FTT. I agree.

39. It seems to me that the scope of the review must, in the first instance, be determined by the FTT's decision to review. What it said in paragraph [4] of its decision to review was:

> "The Tribunal being satisfied … that a ground of appeal is likely to be successful, it hereby determines that it will review *that part* of its decision dated 15th August 2016 in which it concluded that part of the administrators' fees could be attributed as "management fees" in the service charge." (Emphasis added)

40. I agree with Mr Morshead QC that by this decision the FTT did not decide to review any other part of its original decision. The FTT's decision in that respect is entirely consistent with the grounds of appeal which, in its view, were likely to succeed. So the next question is whether the FTT expanded the parts of its original decision that it was prepared to review. If the FTT decides to expand the scope of a review, elementary

fairness requires that it makes clear to the parties which parts of its decision are vulnerable to being set aside.

41. The UT held at [113] that, as a matter of construction of section 9 of the 2007 Act, 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 of the 2007 Act). I agree. It went on to decide at [121] that the FTT had jurisdiction to undertake a review on the grounds stated in the application for permission to appeal filed by the leaseholders in September 2016. It said:

> "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."

42. But these complaints were all directed to the administrators' fees or were points of principle. They were not directed to the quantum of the notional rent, the disbursements or the management charge (apart from the administrators' fees).

43. The UT held that the FTT's mistaken understanding that administrators' fees were claimed on top of the other items permeated the structure of the decision. The UT correctly pointed out at [86] that when the FTT decided to exercise its power of review, there was no suggestion that the other heads of expenditure were to be investigated further, having been allowed in full in the original decision. At [87] the UT continued:

> "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"."

44. At [97] the UT said:

> "The [case management] 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."

45. In my judgment, these paragraphs overstate the scope of the review. Although it is true that the FTT decided that the review would be conducted on the basis of the submissions that had been filed, it also made the important direction that the submissions "shall be incorporated into single statements of case". Although the filing of formal statements of case is not obligatory in the tribunal system, the FTT has wide powers to regulate its own procedure. Where, as here, the FTT directs that statements of case are to be prepared, the normal expectation must be that the issues are limited by those statements of case. To the extent that the arguments raised in the leaseholders' solicitors' letter of 10 March did not reappear in the statement of case, they must be taken to have been abandoned or superseded.

The exercise of the power to review

46. The exercise of the power to review a decision of the FTT was considered in *R (RB) v First-tier Tribunal (Review)* [2010] UKUT 160 (AAC) by a strong panel of the UT (Administrative Appeals Chamber) presided over by the then Senior President of Tribunals, Carnwath LJ. They held:

    i) that the power of review on a point of law is intended, among other things, to provide an alternative remedy to an appeal. In a case where the appeal would be bound to succeed, a review will enable appropriate corrective action to be taken without delay;

    ii) It was not intended that the power of review should enable the FTT to usurp the UT's function of determining appeals on contentious points of law. Nor was intended to enable a later FTT judge or panel, or the original FTT judge or panel on a later occasion, to take a different view of the law from that previously reached, when both views are tenable. Both these considerations demonstrated that if a power of review is to be exercised to set aside the original decision because of perceived error of law, this should only be done in clear cases;

    iii) There were occasions when it would be desirable for a case to be reconsidered by the FTT so that further findings might be made even if it was likely to go to the UT eventually.

    iv) The key question was what, in all the circumstances of the case including the degree of delay that may arise from alternative courses of action, would best advance the overriding objective of dealing with the case fairly and justly.

47. Thus the primary purpose of the power to review is to avoid an unnecessary appeal to the UT, where the FTT has made an obvious error of law. In this context an "error of law" would undoubtedly include a case in which the FTT had reached a factual conclusion which had no evidence to support it; or which was contrary to the only reasonable conclusion on the evidence. In this context a point of law is widely defined. In *Railtrack plc v Guinness Ltd* [2003] EWCA Civ 188, [2003] 1 EGLR 124 at [51] Carnwath LJ said:

> "This case is no more than an 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…. 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 … 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."

48. But as the UT held in *Vital Nut Co Ltd v HMRC* [2017] UKUT 0192 (TCC), a review is not an occasion on which the FTT can reconsider the whole case. They said:

> "(7) Of course, the fact that the 2007 Act and FTT Rules say nothing about the substance of a review of a decision once the "gateway" requirements are met does not mean that the FTT can – through the review – re-write its original decision in an unfettered way. In *JS v Secretary of State for Work and Pensions* [2013] UKUT 100 (AAC), the Upper Tribunal made this clear. The Upper Tribunal conducted a thorough review of the relevant authorities, which we adopt and do not repeat.
>
> (8) We consider the position, as regards the FTT, to be as follows: (a) The purpose of the review is clarificatory. The process is intended to give the FTT a second chance to provide adequate reasons for its decision without the inconvenience that might be involved were the Upper Tribunal to allow a reasons challenge and then have to remit the case… (b) The FTT should avoid the temptation to advance arguments in defence of its decision and against the grounds of appeal. The FTT should not engage or appear to engage in advocacy rather than adjudication….
>
> (9) In short, whilst it is perfectly permissible for the FTT to use the review process to clarify what has *already* been decided, the FTT should refrain from seeking to justify its decision on other, even better, grounds or from seeking to defend its decision in advance from an attack that is anticipated in an appeal." (Original emphasis)

49. I agree, subject to one qualification. If, having considered the grounds of appeal the FTT is satisfied that that one or more of the grounds are likely to succeed, it may set aside its decision (or part of its decision) and re-decide the matter. That may require the FTT to promulgate a decision based on different grounds in relation to that part of the decision that it has set aside.

50. Mr Dovar relied on the power given to the FTT by section 9 (8) of the 2007 Act to make further findings of fact. But in my judgment that does not give the FTT *carte blanche* to re-open all its factual findings. *Scriven v Calthorpe Estates* [2013] UKUT 0469 (LC) provides a good example of when a decision to review a decision might require the finding of further facts. An application was made to vary an estate management scheme. The LVT decided, on the basis of a previous decision of the LVT, that it had no jurisdiction to do so. It did not, therefore, consider the merits of the application. Unknown to the LVT, however, the decision on which it relied had been successfully appealed to the Lands Tribunal. So the LVT's decision on the question of jurisdiction was wrong in law. In the UT, the Deputy President said that that would have been a clear case for a review, which would have resulted in the original decision to be set aside, thus clearing the way for the determination of the application on its merits. Precisely how the merits would be decided would be a matter for the FTT to consider.

51. I do not overlook the possibility that an appeal may sometimes be mounted on the ground that fresh evidence has come to light. Such an appeal may be allowed where the evidence satisfies the principles in *Ladd v Marshall* [1954] 1 WLR 1489. If a party applies to the FTT for permission to appeal to the UT on that basis, and the FTT considers that the appeal is likely to succeed, then it may decide to review its factual findings in the light of the new evidence. But that is not what happened in this case; not least because there was no attempt to demonstrate that the evidence that the FTT did consider fell within the scope of the *Ladd v Marshall* principles.

52. In addition, a finding about the reasonableness of an amount included in a service charge (at least so far as quantum is concerned) is not a question of law. But even if it could be so described, the FTT's conclusion was not *obviously* wrong. If the FTT had intended to re-open those questions, it would in my judgment have been wrong to do so.

53. As far as the ground on which the FTT eventually absolved the liability of the leaseholders to pay anything is concerned, I do not consider that the FTT ought to have allowed the leaseholders to take an entirely new point on a review. In so doing, the FTT (and for that matter the UT) lost sight of the important principle of finality in dispute resolution. That principle was endorsed in ringing tones by Lord Wilberforce in *The Ampthill Peerage case* [1977] AC 547, 569:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide.

> The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

54. The importance of finality, even in tribunal proceedings, was emphasised by Elias LJ in *Ministry of Justice v Burton* [2016] EWCA Civ 714, [2016] ICR 1128 which concerned the power of an employment tribunal to review its own decision where it was necessary in the interests of justice. He said at [21]:

> "An employment tribunal has a power to review a decision "where it is necessary in the interests of justice": see rule 70 of the Employment Tribunals Rules of Procedure 2013. This was one of the grounds on which a review could be permitted in the earlier incarnation of the rules. However, … the discretion to act in the interests of justice is not open-ended; it should be exercised in a principled way, and the earlier case law cannot be ignored. *In particular, the courts have emphasised the importance of finality* … which militates against the discretion being exercised too readily; and in *Lindsay v Ironsides Ray & Vials* [1994] ICR 384 Mummery J held that the failure of a party's representative to draw attention to a particular argument will not generally justify granting a review. In my judgment, these principles are particularly relevant here." (Emphasis added)

55. At [25] he added that:

> "… to allow a case to be reopened in order for further argument or cross-examination would undermine the important principle of finality. Moreover, if a party wished to adduce more evidence, as again seems likely if the review application had been granted, that would conflict with the principle that it will only be in the interests of justice to allow fresh evidence to be introduced on review if the well known principles in *Ladd v Marshall* [1954] 1 WLR 1489 have been satisfied. The first of these is that the evidence could not have been obtained for the original hearing. Plainly that would not be the case here."

56. The new point that the FTT entertained was not consequential on a review of that part of the decision that the FTT had decided to review. It was, as both sides acknowledged, a new and free-standing point. Nor was it a ground of appeal against the original decision. It was not, therefore, a case like that postulated in *Scriven* where setting aside

a mistaken legal conclusion necessarily opened up a line of factual enquiry which the tribunal had erroneously not undertaken. Nor was it a case of obvious error, as the decision of the UT on the same point plainly shows. Dealing with cases "fairly and justly" (which is part of the overriding objective in rule 3 (1) of the tribunal rules) includes respecting the principle of finality: see *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 at [239]. Far from clarifying what it had already decided (as *Vital Nut* expressed it), the FTT in effect reopened the question of liability, and re-decided the case on what appeared to it to be "even better" grounds. In my judgment it should not have done so. But whether it was right or wrong for the FTT to entertain that new point, it did not reopen the question of quantum.

57. In addition, although it is possible for a new point of law to be taken on an appeal there are well-settled principles on which the court acts. They have been set out recently in *Singh v Dass* [2019] EWCA Civ 360. One of those principles is that permission to take a new point will not generally be granted where the new point would have affected the course of the evidence in the lower court. In this connection it is to be particularly noted that in the leaseholders' statement of case for the review hearing they asserted that:

> "For [the new landlord] to be able to claim such fees, [the new landlord] must at the very least have some obligation to incur those costs; i.e. through the terms of the assignment of the reversion. [The new landlord] has not produced a copy of any assignment and does not appear to rely on one."

58. Since the new point (i.e. the lack of any obligation as between the new landlord and the old landlord) was not taken at the original hearing, it is not surprising that no assignment of the reversion or contract for its transfer was produced. The new point potentially opened up a new area of evidential inquiry; and for that reason also the FTT should not have allowed it to be taken.

59. Because the UT allowed the appeal against the FTT's mistaken conclusion that the new landlord could only recover the charges if it had an obligation to pay the old landlord, no lasting harm has been done by the FTT's decision to allow that point to be taken. It has, however, increased costs for both sides, and has added to the procedural complexity of the case.

The decision of the Upper Tribunal

60. Section 9 (11) of the 2007 Act makes it clear that, in the case of a review, the original decision and the decision on review are separate decisions. The only decision under appeal to the UT was the review decision.

61. Because, in my judgment, the FTT did not re-open the question of quantum (as opposed to liability) in its review decision, I do not consider that it was open to the UT to do so. As I have said, although the UT was correct in saying that the FTT intended to relieve the leaseholders from liability for the sums in the invoices, its sole reason for doing so in its review decision (as the UT recognised) was because of the new legal point.

62. I am also bound to say that I have serious misgivings about the way in which the UT went about its assessment of reasonableness. It was common ground that there was no discussion in the UT about the right way forward in the event that (as it turned out) the

UT came to the conclusion that the FTT's conclusions on reasonableness could not stand. In my judgment, this was a procedural irregularity. Despite Mr Dovar's strenuous submissions to the contrary, I do not consider that the question of quantum, item by item, formed part of the leaseholders' cross-appeal. The FTT had based its assessment, at least in part, on the oral evidence that it heard at the original hearing. That evidence does not appear to have been before the UT, and the UT did not give the landlord the opportunity to call evidence again. Instead the UT took the view that the question of reasonableness could, in effect, be decided on the papers. But that assessment, in my judgment, was a conclusion that could only have been properly reached if, having heard the evidence that the landlord wished to call, the UT decided that it was of no value.

63. As far as the FTT's original decision on the application of section 20B of the 1985 Act was concerned, that was not one of the grounds of challenge, either in the application for permission to appeal, or in the leaseholders' statement of case prepared for the review. That question, in my judgment, simply formed no part of the review; so it is not surprising that the FTT said nothing about it in the review decision.

64. In their application for permission to cross-appeal to the UT the leaseholders sought to raise the question whether section 20B was engaged. But that question had already been determined by the FTT in its original decision, back in August 2016. The applicability of section 20B did not form part of the leaseholders' statement of case on the review. The FTT recorded at [74] of its review decision that the leaseholders had asked for permission to raise the point. But the FTT did not grant that permission. If it had done so it would have had to set aside its original decision on that point. But it could only have done that if it considered that an appeal against that decision was likely to succeed; and there was no formulated ground of appeal before it. To seek to rely on section 20B as an additional reason for upholding the review decision necessarily involves an attack on the FTT's conclusion on section 20B in its original decision. I therefore agree with Mr Morshead that the question whether section 20B precluded recovery of service charges that would otherwise have been due was not a question that could properly have been raised before the UT, except by an appeal long out of time against the FTT's original decision. I consider, therefore, that the UT was also wrong to embark upon a consideration of that issue. It follows that the substantive answer to that question forms no part of this appeal. Accordingly, I express no view on it, one way or the other.

65. It follows, therefore, that although the reasoning of the UT on that point has persuasive value it has no precedential value: *Balabel v Air-India* [1988] Ch 317, 325; *Al-Mehdawi v Secretary of State* [1990] AC 876, 883.

Result

66. I would allow the appeal, and reinstate the original findings of the FTT about the reasonableness of the notional rent, the disbursements and the management charge, as well as its decision on section 20B. As with the decision of the UT on section 20B, I express no view, one way or the other, on whether the FTT's decision on the section 20B point was correct.

Lord Justice Floyd:

67. I agree.

Lord Justice Peter Jackson:

68. I also agree.