**Neutral Citation Number: [2024] UKUT 41 (LC)**

**Case No: LC-2023-530**

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)**
**AN APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**
**FTT REF: LON/0022AJ/MNR/2022/0030**

**Royal Courts of Justice,**
**London WC2A**

**19 February 2024**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – RENT DETERMINATION – assured tenancy – FTT restricting rent referable to fixed service charge – reliance on own general knowledge of management charges – whether procedurally unfair – s.14, Housing Act 1988 – appeal dismissed***

**BETWEEN:**

**PEABODY TRUST**

**Appellant**

**-and-**

**MISS CAROLE WELSTEAD**

**Respondent**

**Flat 62 Apsley House,**
**Dickens Yard,**
**Longfield Avenue,**
**London W5**

**Martin Rodger KC, Deputy Chamber President**

**13 February 2024**

*Victoria Osler*, instructed by Devonshires, Solicitors, for the appellant
The respondent represented herself

The following cases are referred to in this decision:

*Al Rawi v Security Service* [2010] 3 WLR 1069

*Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2006] EWLands LRA/72/2005 (31 October 2006)

*Middleton v Karbon Homes Ltd* [2023] UKUT 206 (LC)

*Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 E.G.L.R. 14

## Introduction

1. In this appeal the appellant, Peabody Trust, maintains that the way in which the First-tier Tribunal (Property Chamber) (FTT) determined a new rent payable by the respondent, Miss Carole Welstead, under the assured tenancy of her flat in West London was procedurally unfair.

2. The FTT's decision was first made on 13 October 2022 and subsequently reviewed and confirmed with additional reasons on 29 November 2022. On the same date the FTT refused permission to appeal but the appellant was not informed of that decision until August 2023. Permission to appeal was subsequently granted by this Tribunal.

3. The appeal concerns the rent payable from 4 April 2022 for Miss Welstead's flat at 62 Apsley House, Dickens Yard, Longfield Avenue, London W5, which she has occupied since May 2013 as an assured tenant. Her original landlord, Catalyst Housing Ltd, was a registered provider of social housing. In May 2023 it transferred its property portfolio to Peabody Trust, which is also a registered provider, and it has pursued the appeal.

4. Catalyst had proposed a rent of £191.78 for Miss Welstead's flat, inclusive of a fixed service charge of £48.53.

5. The FTT determined that the weekly rent for the flat in the open market (on the assumptions required by section 14, Housing Act 1988) would be £300, inclusive of a fixed service charge of £39. Because of a government directive limiting the rate at which providers of social housing may increase rents, Peabody is unable to take advantage of the full market rent and the amount which Miss Welstead will in fact pay will be £172.25. The difference between the rent proposed by Catalyst and the rent Miss Welstead will pay is entirely referable to the FTT's conclusion on the fixed service charge, as that is the only part of the rent which is not restrained by government directive.

6. At the hearing of the appeal Peabody was represented by Ms Victoria Osler, who did not appear before the FTT. Miss Welstead attended without a representative and was able to assist the Tribunal with information about the FTT hearing. I am grateful to them both for their assistance.

## The facts

7. Apsley House is a five storey building containing 70 social housing flats. It is the only social housing block in a development known as Dickens Yard which was completed in about 2013 and comprises a number of blocks. I was told that the original developer still owns the freehold and provides services to the other blocks (I assume in its capacity as landlord), but Apsley House is held on a long lease by Peabody, and before it by Catalyst.

8. All 70 flats in Apsley House are let to tenants over the age of 55 on assured tenancies under the Housing Act 1988. The tenants do not have access to the fitness suite, spa, underground car park and 24 hour concierge service provided by the freeholder to the occupiers of the flats in the other buildings at Dickens Yard.

9. Flat 62 is on the fifth floor. It was let to Miss Welstead by a written agreement, initially for a trial period of 12 months from 13 May 2013 but continuing thereafter as an assured tenancy under which rent is payable weekly. In the agreement the landlord is referred to as "the Association".

10. The weekly payments under the tenancy agreement are identified under clause 1(1) as comprising two sums, one referred to as the "net rent" and the other as the "fixed service charge". Together these two sums are referred to in the agreement as the "rent".

11. The agreement records at clause 3(b) that sections 13 and 14 of the 1988 Act apply to any increase in the rent under the tenancy. I will refer to those provisions shortly.

12. Clause 4(a) explains that the rent includes the fixed service charge. The charge is for services listed in a schedule attached to the agreement and it is described as being "fixed for a period of 12 months irrespective of the Association's costs of providing these services". The landlord is given power to add to, remove, reduce or vary the services provided, but only "where there is a reason" and only after consulting the tenants and taking their views into account.

13. Although the tenancy agreement does not explain what the "net rent" means, it is apparent after considering the terms relating to the fixed service charge that the net rent is the payment to be made by the tenant in return for the occupation of the flat and the enjoyment of all of the other rights which go with occupation of the flat, except those which are listed in the service charge schedule which are covered by the service charge.

14. The service charge schedule attached to the agreement shows the charges for the year 2012/13. They are divided into two categories, which distinguish between those "eligible for housing benefit" and those "ineligible for housing benefit". The only service in the second category is the provision of heating and hot water which I was told is not individually metered but is provided at the same rate for all two bedroom flats in the building. The charges in the first category (those eligible for housing benefit) include the costs of cleaning, communal lighting, a door entry system, TV aerial, fire safety and CCTV maintenance, communal water, depreciation and a management charge, but the largest item making up more than half of the total in 2013 (£18.63 out of a total of £30.72) was identified as "superior landlords costs". The agreement does not explain what these costs are for.

15. The uninformative description in the tenancy agreement of the greater part of the services for which the fixed service charge is payable creates a difficulty. Although the landlord is entitled to add additional services to those provided at the start of the agreement (provided it consults the tenants and takes their views into account), and to increase the fixed service charge annually (subject to the tenant's right to refer the total rent to the FTT under section 14), the landlord is not entitled to add a new charge for a service which was already being provided at the start of the agreement but for which no separate charge has previously been made. As I said of a similar arrangement in *Middleton v Karbon Homes Ltd* [2023] UKUT 206 (LC) at [23], (although in that case the service charges were variable rather than fixed):

> "Any costs which were being incurred by the landlord from the commencement of each tenancy and for which there was no corresponding charge in the first service charge schedule, such as repairs to the fabric of the building, were not services for which the landlord was entitled to charge. Payment for those services must be taken to have been included in the rent."

16. Describing the greater part of the services as "superior landlords costs" leaves both parties, but particularly the tenants, in the dark about what those services are and what services are covered by the net rent. As will be seen, however, that lack of transparency may also come back to bite the landlord, as it did in this case before the FTT.

**Rent increases under assured periodic tenancies**

17. Sections 13 and 14 of the Housing Act 1988 are concerned with increases in rent payable under assured periodic tenancies. Where the landlord under such a tenancy wishes to obtain an increase in rent it must serve on the tenant a notice in a prescribed form specifying the proposed new rent to take effect at the beginning of a specified period of the tenancy (section 13(1)-(2)). The proposed rent will take effect unless the parties agree an alternative figure or the tenant exercises the right conferred by section 13(4) to refer the notice to the appropriate tribunal (in England, the FTT).

18. The statutory procedure is contained in section 13(4) which states that the new rent specified in a landlord's notice:

> "shall take effect unless, before the end of the new period specified in the notice-
>
> (a) the tenant by an application in the prescribed form refers the notice to the appropriate tribunal; or
>
> (b) the landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied."

19. It is important to appreciate that a reference to the FTT of a landlord's notice of increase given under section 13, Housing Act 1988 is not an appeal by the tenant. All that has happened up to that point is that the parties have failed to agree on what the new rent should be. Nothing which binds either party has yet been decided and there is no decision to appeal against. That is important because it means that the tenant is under no obligation to present a case which demonstrates that the proposed increase is unjustified (as is usually required of a party who appeals against a decision which would otherwise be binding). All that the tenant is required to do is to refer the notice to the FTT.

20. When the FTT receives a referral of a notice under section 13, it is instructed by section 14(1) to determine the rent at which, on certain assumptions, it considers that the dwelling concerned might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy which is on the same terms and for the same periods as the tenancy to which the notice relates, and which would begin at the beginning of the new period specified in the notice. These instructions are consistent with the point I have made

above about the procedure not being a form of appeal. No special status is afforded by section 14 to the rent proposed by the landlord, and the tenant is under no obligation to persuade the FTT that a different figure is appropriate. In that respect the parties stand before the FTT on a level playing field.

**The notice of increase**

21. On 18 February 2022 Catalyst wrote to Miss Welstead, informing her that with effect from 4 April 2022 her total rent would increase from £171.03 to £191.78, which included an increase in the fixed service charge from £43.03 to £58.53.

22. The letter explained that the amount which Catalyst was entitled to increase the "net rent" was limited by government regulation by an amount equal to the rate of consumer price inflation plus 1%. In contrast, the notice stated that any service charge may increase or decrease depending on the cost of the services provided. The "net rent" element of the rent was therefore proposed to increase by 4.1% to £133.25 per week. The fixed service charge element was to increase from £34.45 to £45.06 per week for what was described as the "service charge" (an increase of just under 31%) while the "personal service charge" was to increase from £8.58 to £13.47 (an increase of 57%). It later emerged that the "personal service charge" was intended to cover what the tenancy agreement refers to as "individual heating and hot water", i.e. that part of the service charge ineligible for housing benefit.

23. The letter appears to have been accompanied by two other documents, although neither of them is referred to in the text. The first was a service charge statement for the year from April 2022. It provided a slightly more detailed breakdown of the proposed new fixed service charge, again dividing it into two categories for "services" and "personal services". The statement includes a comparison of the proposed charges with the charges for the previous year from which the rate of increase can be calculated.

24. The "services" section of the statement contained seven items plus an administration fee of 15% (17.5% in the previous year). At least one of the items, a separate charge for the lift, had not been included in the original schedule of services contained in the tenancy agreement. Others had been renamed or amalgamated. The largest amount, at £30.88 (up from £21.74 the previous year), was described as "managing agent block". This represented more than 68% of the total service charge and an increase of 42% on the same item in the previous year. The statement provided no information about the nature of the services being paid for under the "managing agent block" label.

25. The second "personal service" charge of £13.47 was shown in the statement to comprise a charge of £11.71 for "personal gas" (it was later explained that this is the charge for heating and hot water) plus an "administration fee" of £1.76. The table showed that no administration fee had been added to the cost of heating and hot water in the previous year and no such charge is shown in the service charge schedule attached to the tenancy agreement.

26. The other document which was included with the letter of 18 February 2022 was a statutory notice in the prescribed form proposing a new rent for an assured periodic

tenancy under section 13(2), Housing Act 1988. The notice stated that the landlord proposed that the rent should increase from £171.03 per week to £191.78 per week with effect from 4 April 2022. The fixed service charge included in the rent was separately identified as increasing from £43.03 to £58.53 per week.

**The FTT proceedings**

27. Miss Welstead was unhappy with the proposed increases and on 21 March 2022 she referred it to the FTT.

28. The form Miss Welstead used to refer the notice of increase to the FTT was not included in the appeal papers. Assuming she used the FTT's standard form, she will have been asked only to provide details of her flat and her tenancy and a copy of the notice of increase; she will not have been required to explain why she was referring the notice to the FTT nor even to say that she was dissatisfied with the increase proposed by Catalyst.

29. The FTT issued directions which invited both parties to complete a *pro forma* Reply Form giving details of the property and any further comments they wished the tribunal to take into consideration. The landlord was to go first, followed by the tenant, with the landlord then being allowed a brief response. In rent cases these forms are the only statements of case which either party is asked to supply.

30. Although in this case the FTT gave its standard directions, they were not followed by Catalyst. By an oversight it missed the date for submitting its reply form and Miss Welstead submitted hers first, even though she had not seen what Catalyst wanted to say to explain its proposed rent increase.

31. In her reply form Miss Welstead gave various details of her flat including information about problems experienced with the lift and the main entrance door, as well as the standard of decoration and wear and tear in the common parts. In a separate box for any other comments she gave a brief account of the increases in the service charge since 2013. After covering early years, she continued:

> "As of April 2022, rent is £133.25 (weekly) service charge is £45.06 (weekly) and heating and hot water is now £13.47 (weekly). In the space of a year, the service charge has been increased by 23.6% (£10.61) a week, with heating and hot water being increased by 36.3% (£4.89) a week.
>
> Whilst it is appreciated that the cost of living (inc. heating) has affected everyone during the pandemic, it is unclear how and why service charges should be so significantly increased at this time. The increase in service charge alone represents an additional £551.72 per year (£2,343.12 total service charge per year) and has been issued at a time when the cost of living is at an all time high.
>
> It is also important to note that, as above, Apsley House has seen no improvements (at all) in the time I have lived here, the standard of service we receive is well below that seen in the private buildings that form part of

> Dickens Yard, and unfortunately, it is unclear as to the justification of such a significant increase to rising costs (to the public) at this time.
>
> How is it expected that tenants such as myself will be able to afford these significant additional costs?
>
> I would ask for justification of the significant increase in service charges at a time that most people can ill afford to incur more costs in living."

32. When Catalyst did submit its own reply form it responded briefly to the points made by Miss Welstead concerning disrepair and the unreliability of the lift, saying that the walls would be cleaned and the lift investigated. It made no reference at all to the service charge, despite having had notice of Miss Welstead's concerns from her form of reply.

33. The FTT directed an oral hearing of the reference, for which Catalyst instructed counsel. It also arranged for two members of its staff to attend, a property manager and the legal executive who had prepared the reply form. Miss Welstead also attended.

34. As the FTT explained in its decision, counsel instructed on behalf of Catalyst sought to persuade it that it had no jurisdiction to consider that part of the rent which comprised the fixed service charge. It disagreed (and it was conceded during the appeal that the FTT had been right about that, and that it did have jurisdiction to consider the whole of the rent).

35. Submissions were made on Catalyst's behalf about market rents in the area, including in Dickens Yard itself. Mr McFarlane, the property manager, explained that there had been issues with the lifts since 2013. Mr Shulver, the in-house paralegal, acknowledged that there had been some "mislabelling" of items on the service charge account but said he was not aware how the rent had been set. Mr McFarlane also confirmed that he was not aware how the rent was set because "it was dealt with by a different department".

36. In its decision the FTT recorded its observations on its inspection of Apsley House and the remainder of Dickens Yard. It compared Apsley House unfavourably with the privately owned blocks in the development and addressed the submissions made by counsel about the relative value of flats in the different parts of the development. It then addressed the service charge issue. As it is said by Peabody that the FTT gave inadequate reasons for its decision, I will set out this part of its reasoning in full, as follows:

> "28. The service charge account for 2022-23 listed the items charged to the account. The itemised services are not well explained and not easy to relate to the services described in the tenancy agreement. The management charge appeared to be excessive at £30.88 per week, totalling £1605.76 per year. Even assuming that the charge includes the out of hours service which is provided, the charge is much higher than would be paid in the market for management services. Using its own expertise as the landlord was not able to provide any background to the makeup of the service charge account the Tribunal determines that the service charge, inclusive of the management fee should be reduced to £39 per week based on a reduction in the management charge but accepting all the other charges on the service charge account provided. The Tribunal wishes to emphasise that, in accordance with the

> terms of the tenancy agreement, this is a fixed, not a variable service charge and that it is an integral part of the market rent and not separate from it. Given Counsel's attempt to persuade the tribunal that the service charge element of the rent lay outside its jurisdiction under section 14, and the misleading explanation in the landlord's correspondence with the tenant of the reason for excluding this element of the rent from the cap it has applied to the remainder of the rent increase, it appears that the distinction between fixed and variable service charges has not been properly understood.
>
> 29. Doing the best it can on the limited evidence available the tribunal determines a weekly rent of £300 inclusive of service charges of £39 per week to reflect the location and size of the flat in a social housing block fronting the main road and having no outdoor space."

**The grounds of appeal**

37. Peabody was given permission to appeal on three grounds, each of which is related in one way or another to procedural fairness:

    1. First it is said that Catalyst was denied the opportunity to address a point identified by the FTT, namely the amount of the "managing agent charge" (as it is referred to in the grounds of appeal).

    2. Secondly, Peabody complains that the FTT based its decision on evidence which was not put to the parties for them to comment on.

    3. Finally, it is said that the FTT failed to give adequate reasons for its decision to reduce the amount of the management charge.

**Issue 1: Was the FTT's decision unfair because Catalyst had insufficient notice of the case it needed to meet?**

38. In *Al Rawi v Security Service* [2010] 3 WLR 1069, at [18], Lord Neuberger MR said that the common law had developed a fundamental rule of natural justice that:

> "… a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial."

Peabody's first ground of appeal is that this fundamental rule was not observed by the FTT.

39. The basis of Peabody's case was that what Ms Osler referred to in her skeleton argument as "the quantum of the managing agent charge" was raised as an issue by the FTT itself at the hearing, having not previously been raised by Miss Welstead, and that Catalyst was thereby "denied the opportunity to address the point". It is said additionally that the FTT

erred in not permitting either party to address the point or adduce evidence in relation to the management charge, either at the hearing or after it.

40. Before addressing this submission it is necessary to clarify what was being referred to by the FTT as the "management charge" or "management fee" and by Ms Osler as "the managing agent charge". It is clear from the FTT's decision, where the sum in question is quantified at £30.88 per week, that it is the same figure as appears in the service charge statement, without further explanation, as "managing agent block". No evidence was provided to the FTT to explain what that charge was for and neither of the landlord's employees who participated in the hearing was able to explain how it had been calculated.

41. Ms Osler submitted that before the FTT hearing Miss Welstead had raised "a general point regarding increasing service charges" but she had not raised any issue concerning any specific element of the service charge. For the FTT then to identify a specific component of the charge and to make a determination concerning it was, Ms Osler submitted, "in direct contravention of the requirement to ensure that the parties were fully able to participate in the proceedings".

42. There are at least two answers to this submission.

43. The first is that it overlooks what Miss Welstead actually said in her reply form. The form itself is not a complicated document. In hardly more than a single page of text, Miss Welstead first made four short points about disrepair and building defects, then explained her concern about service charges. Almost all of what she said about service charges is reproduced at [31] above, and as can be seen it is concise and to the point. She set out the quantum of the increases in the charges levied by Catalyst and acknowledged a general increase in the cost of living before stating twice that that it was "unclear how and why service charges should be so significantly increased at this time" before concluding with "I would ask for justification of the significant increase in service charges at a time that most people can ill afford to incur more costs in living".

44. It is quite true, as Ms Osler emphasised, that Miss Welstead did not pick out individual items from the service charge statement she had received with the notice of increase, but it is impossible to suggest that it was not obvious what she was concerned about. The total charge of £45.06 was the sum of eight individual items. One of these was an administration fee representing a proportion of the sub-total of the other items. One of the remaining seven items had not risen at all, and one had reduced compared to the previous year. That left five items which had increased. The aggregate increase in four of these items totalled 75 pence per week. The weekly increase in the fifth item, "managing agent block", was £9.14. That single item accounted for 86% of the total increase in the weekly service charge, including the administration fee.

45. It is therefore difficult to take seriously the suggestion that Catalyst was not put on notice, well in advance of the hearing and before it prepared its own case, that it was being asked by Miss Welstead to explain and justify the substantial increase in service charges, 86% of which was represented by a single item. It is clear that Catalyst gave some consideration before the hearing to the case it wanted to present in relation to service charges, as its counsel came prepared to argue that the FTT had no jurisdiction to investigate them. That

was not a point raised by Miss Welstead, but it seems likely, as the FTT suggested when it refused permission to appeal, that it explains why Catalyst was so woefully unprepared to address the service charge issue. It is disingenuous for it now to be suggested that its lack of preparedness was due to a failure on the part of Miss Welstead to identify the point or a breach by the FTT of the rules of natural justice.

46. The second answer to the submission that Catalyst was not put on notice of the case it had to address is that it simply misunderstands the process of determining a new rent under section 14. As I have explained, that process does not require that the tenant disprove the landlord's entitlement to the increase it has proposed. Whatever material the parties put before it, and whatever issues they choose to contest, the FTT is under a statutory duty, imposed by section 14(1), to determine the rent at which it considers the property might reasonably be expected to be let on the statutory assumptions. The FTT is relieved of that obligation only if the landlord and tenant give notice in writing that they no longer require a determination or that the tenancy has come to an end (section 14(8)).

47. The determination of a rent is not simply the resolution of a dispute between private individuals; it also touches on matters of public administration and the FTT's functions are, in part, concerned with the determination of entitlement to housing benefit and universal credit. A duty is imposed on the FTT by section 41A, Housing Act 1988 to assist in connection with housing benefit and universal credit by noting in every determination under section 14 the amount (if any) of the rent which, in its opinion, is fairly attributable to the provision of services. The Chamber President of the Property Chamber of the FTT is required by section 42A to make information publicly available with respect to rents determined by the FTT (including as to the amounts attributable to services).

48. For these reasons it is probably unhelpful to think of rent determinations in terms appropriate to adversarial litigation or to import the principles and conventions of party and party dispute resolution, but if there is an "evidential burden" on either party in connection with a determination under section 14, it can only be on the landlord seeking an increase in rent. It might be preferable to see that as a matter of practicality rather than as a rule of evidence. But whatever material the parties put before it, the FTT is still obliged to determine the rent according to the statutory directions; it could not determine, for example, that since (as often happens) the landlord had not attended the hearing or provided any information the rent could not be increased at all.

49. In this case Catalyst knew why it wanted to increase Miss Welstead's rent from £171.03 to £191.78 a week, and it was for Catalyst to explain its reasons to the FTT. To the extent that the total increase was attributable to higher costs of services, the only party in a position to explain what those costs were and why they had gone up by so much was Catalyst. It would therefore have fallen to Catalyst to provide the necessary information to the FTT whatever Miss Welstead had said in her reply form (unless she indicated that she was happy to agree a particular item). As it was, she had said more than enough to alert Catalyst to the real issue in the reference, it was not ambushed by the FTT with a new point and its failure to prepare to meet that point involved no procedural irregularity or breach of natural justice.

50. As for the suggestion that the FTT acted unfairly by not allowing the parties an opportunity to deal with the issue of the "management charge" after the hearing, the short answer to that is that Catalyst was professionally represented at the hearing and did not request the opportunity which Peabody now claims it was denied. Miss Welstead explained during the appeal hearing that the FTT had been concerned about the magnitude of the increase in the "managing agent block" charge and that it had asked each of Catalyst's employees if they could assist with an explanation, but neither of them could. This is inconsistent with the application for permission to appeal prepared by counsel who appeared for Catalyst at the hearing in which it is stated that "so far as the landlord can recall, the issue of management charges was not subject to any discussion during the hearing". That is an odd way for someone who was present at the hearing to refer to what they do or do not recall, but whether the point was specifically raised or not, counsel confirmed in her application for permission to appeal that neither Mr McFarlane nor Mr Shulver was able to provide "any information to the FTT about the service charges". Having asked the witnesses whom Catalyst had chosen to provide what they knew and having obtained no useful information, the FTT was under no obligation to adjourn the hearing or await the provision of further information at a later date.

**Issue 2: Was the FTT's decision unfair because it relied on evidence which was not exposed to the parties for comment?**

51. In its decision the FTT said of the management charge that:

> "… the charge is much higher than would be paid in the market for management services. Using its own expertise as the landlord was not able to provide any background to the makeup of the service charge account the Tribunal determines that the service charge, inclusive of the management fee should be reduced to £39 per week".

Ms Osler submitted that the FTT had not been entitled to reach this conclusion without providing the parties with the opportunity to comment on the examples of charges in the market which the FTT had in mind. In failing to inform the parties that it intended to rely on evidence of other charges the FTT acted unfairly, or so it was said.

52. In support of this ground of appeal Ms Osler referred to the decision of the Lands Tribunal in *Arrowdell Ltd v Coniston Court (North) Hove Ltd* [2006] EWLands LRA/72/2005 (31 October 2006), in which the decision of a leasehold valuation tribunal (LVT) on the assessment of the sum payable on a collective enfranchisement of a block of flats was set aside and redetermined because of breaches of the rules of natural justice. At [23], the Lands Tribunal made the following observations:

> "It is entirely appropriate that, as an expert tribunal, an LVT should use its knowledge and experience to test, and if necessary to reject, evidence that is before it. But there are three inescapable requirements. Firstly, as a tribunal deciding issues between the parties, it must reach its decision on the basis of evidence that is before it. Secondly, it must not reach a conclusion on the basis of evidence that has not been exposed to the parties for comment. Thirdly, it must give reasons for its decision."

53. The FTT's explained, when it refused permission to appeal, that the charge proposed by Catalyst was "outside the parameters the tribunal would have expected in a similar block" and said that it had "relied on its own general knowledge of management charges and not on any specific property".

54. The FTT is a specialist tribunal whose members are appointed because of their experience and professional background in residential property matters. While sitting in the FTT its members will acquire further relevant experience and a familiarity with general levels of value or costs in a particular area. The more experienced the panel (and the panel in this case was particularly experienced) the deeper will be its reserves of knowledge and the more reliably it will be able to form an opinion on a matter of assessment within the scope of its expertise. That is one of the key strengths of the tribunal system and it is particularly important in dealing with the numerous cases of modest value in which a decision has to be made on very limited information. Rent assessments are typical of those types of cases.

55. The dividing line between making use of the expertise of the members of the FTT panel in determining an issue and relying on evidence which the parties are entitled to an opportunity to comment on is not always easy to define. But it is an important dividing line. The business of the FTT would grind to a halt if, in every rent case (most of which are decided without a hearing) the panel was obliged to notify the parties of all of the matters it intended to rely on in reaching a determination of the weekly rent for a modest flat and to allow them a chance to comment.

56. Some assistance in identifying where the line should be drawn is provided by *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 E.G.L.R. 14, an appeal to the High Court under section 23 of the Arbitration Act 1950 concerning a rent review arbitration in which it was said that the arbitrator had broken the rules of natural justice by basing his decision to some extent on matters never referred to by the surveyors who had given written evidence, never put by the arbitrator to them, and which appeared for the first time in his award. *Zermalt* was referred to by the Lands Tribunal in *Arrowdell* and it formed the basis of the submissions of counsel which were accepted in that case.

57. Bingham J set aside the award of the arbitrator saying this:

> "Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him."

58. It can be seen that Bingham J emphasised the importance of an arbitrator exposing "specific matters" which are likely to form the subject of decision to comment by the parties before making a decision. Personal experience which is relied on "in a specific way" is also subject to that requirement. Implicitly, and necessarily, the arbitrator's (or tribunal panel member's) general experience and knowledge may be relied on without the parties first being forewarned. The parties already know that the question which divides them is to be determined by an expert tribunal whose members have been appointed because of their relevant experience and there is no obligation on the FTT to catalogue that experience.

59. An example of a specific matter which must be disclosed to the parties is provided by *Arrowdell* where the LVT rejected the evidence of the expert witnesses in favour of its own knowledge of "relativities which have been agreed between parties or their valuers in other similar cases". The panel were referring to specific examples of cases in which agreements had been reached on the same subject matter as had been the subject of evidence.

60. Both *Arrowdell* and *Zermalt* were cases in which tribunal or arbitrator had been provided with detailed expert evidence. In that respect they are unlike this case, in which the FTT was provided with virtually no evidence to assist it in determining the value of the services provided to tenants of Aspley House. Nevertheless, the rules of natural justice still apply and governed the FTT's conduct of the reference. I am satisfied that the FTT did not break those rules. It did not rely on specific examples of management charges, but on its own general experience of the level of charges typical of such blocks. It was not necessary to identify all of the numerous buildings of which the members of the panel are likely to have been aware, nor would it have been practical. It was not possible to identify a sample of buildings since the FTT was not relying on a sample, but on its experience of a wide range. It was entitled to rely, without more, on its general experience of management charges. That is what it was appointed to do and, in the absence of assistance from the parties, there was no other source on which it could rely.

61. It was also submitted by Ms Osler that, had the FTT asked for comments from the parties about the level of management charge which it had in mind, it would have discovered that the item described in the service charge account as "managing agent block" was not a charge for management at all, but included a range of services such as pest control, landscaping, insurance, repairs and testing. Moreover, she suggested, it would have discovered that the sum proposed for 2022/23 was based on an estimated budget for the whole development, which was then allocated to the individual blocks. Finally, it would have been told that the reason the charge increased by almost 50% from the previous year was because the previous year's expenditure had been underestimated.

62. This explanation could have been provided to the FTT at the hearing if Catalyst had sent a representative who was familiar with the service charge. It is unsupported by evidence. For both of those reasons it cannot be relied on in the appeal. If it had been deployed at the proper time it might have led to a different result, but it might not. It would have been necessary to consider whether charges for matters such as repairs are permitted under the tenancy agreement. That would have turned on the composition of the category shown in the original service charge schedule as "superior landlords costs" and would have given rise to the difficulties mentioned at [15]-[16] above.

**Issue 3: Did the FTT fail to give adequate reasons for its decision?**

63. I can deal briefly with Peabody's final complaint. It is said that, from the FTT's decision, it cannot understand the basis on which the service charge was reduced to £39. I disagree. It is clear from paragraph 28 of the decision that the figure represented the level of charge the FTT would expect to see in the market. There was no argument about items other than the management charge and only that part of the total was reduced. It was reduced because, as the FTT said it was "much higher than would be paid in the market for management services". It follows that the total figure allowed by the FTT represents the figure proposed by the landlord with the substitution of a charge for management at the level which would be expected by the market. Ms Osler said that Peabody could not tell what the market comprised, or what buildings were included in it. But the FTT explained that it did not base its determination on individual buildings but on its general knowledge of management charges.

**Disposal**

64. For the reasons I have given I dismiss the appeal on all three grounds.

Martin Rodger KC,

Deputy Chamber President

19 February 2024

**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.