Landmark Chambers

Welcome to Landmark Chambers'

'Service Charges in the Supreme Court' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

David Holland KC (Chair)

Topic:
The construction of service charge provisions in leases after *Sara & Hossein*

Camilla Lamont

Topic:
Service Charges in the Supreme Court: Themes and Practical Considerations

Simon Allison

Topic:
Aviva Investors Ground Rent GP Ltd (Respondent) v Williams and others (Appellants) [2023] UKSC 6

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The construction of service charge provisions in leases after *Sara & Hossein*

David Holland KC

Lord Neuberger in *Arnold v Britton*

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…reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation.

ICS v West Bromwich BS

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Any claim (whether sounding in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society in which you claim an abatement of sums which you would otherwise have to repay to that society.

ICS v West Bromwich: Lord Hoffmann's 5th principle

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The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191 , 201:

> *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

Chartbrook v Persimmon

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"23.4% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value less the costs and incentives."

Chartbrook v Persimmon: Briggs J

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"ARP means 23.4% of something. To the question '23.4% of what?' the clear answer is the excess of the price achieved for each residential unit over the MGRUV, less the costs and incentives."

Chartbrook v Persimmon: Lord Hoffmann

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It clearly requires a strong case to persuade the court that something must have gone wrong with the language and the judge and the majority of the Court of Appeal did not think that such a case had been made out…It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another..The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening. It is fortunately rare because most draftsmen of formal documents think about what they are saying and use language with care. But this appears to be an exceptional case in which the drafting was careless and no one noticed.

Chartbrook v Persimmon: Lord Hoffmann (again)

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I do not think that it is necessary to undertake the exercise of comparing this language with that of the definition in order to see how much use of red ink is involved. When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties…The fact that the court might have to express that meaning in language quite different from that used by the parties… is no reason for not giving effect to what they appear to have meant.

Rainy Sky v Kookmin: Sir Simon Tuckey

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If the language of the bond leads clearly to a conclusion that one or other of the constructions contended for is the correct one, the court must give effect to it, however surprising or unreasonable the result might be. But if there are two possible constructions, the court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense.

Rainy Sky v Kookmin: Lord Clarke

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Where the parties have used unambiguous language, the court must apply it.

It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.

Arnold v Britton

To pay to the lessors without any deduction in addition to the said rent a proportionate part of the expenses and outgoings incurred by the lessors in the repair maintenance renewal and the provision of services hereafter set out the yearly sum of £90 and VAT (if any) for the first three years of the term hereby granted increasing thereafter by ten pounds per hundred for every subsequent three year period or part thereof.

Arnold v Britton: Lord Neuberger (1)

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First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101 , paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed.

Arnold v Britton: Lord Neuberger (2)

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Secondly…[the process of construction] however…does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning.

Arnold v Britton: Lord Neuberger (3)

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Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

Arnold v Britton: Lord Neubreger (4)

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A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.

Wood v Capita: Lord Reed

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Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement.

Sara & Hossein v Blacks

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The landlord shall on each occasion furnish to the tenant as soon as practicable after such total cost and the sum payable by the tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive.

Sara & Hossein v Blacks

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- “mathematical error” and “Fraud” narrowly confined
- “manifest error” =
  - one that is obvious or easily demonstrable without extensive investigation.
  - “oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion ”.

Sara & Hossein v Blacks: statement of principles

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(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.

(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.

(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated.

Sara & Hossein v Blacks

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Adopting an iterative approach, this interpretation is consistent with the contractual wording, it enables all the provisions of the leases to fit and work together satisfactorily and it avoids surprising implications and uncommercial consequences

Sara & Hossein: Lord Briggs (minority)

But it is well-settled that the uncommerciality of the prima facie meaning of contractual words only yields to a more commercial alternative if there is some basis in the language of the contract as a peg upon which that alternative can properly be hung…I have been unable to find any peg, within the language of the lease, upon which to hang the construction that "shall be conclusive" at the end of paragraph 3 means only conclusive as to the requirement to make a balancing payment on the next quarter day following the furnishing of the certificate, but leaving ultimate liability up for grabs, if disputed on any ground.

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Aviva Investors Ground Rent GP Ltd (Respondent) v Williams and others (Appellants) [2023] UKSC 6

Simon Allison

Starter for 10

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- Landlord and Tenant Act 1985:
  - Statutory overlay to the contractual provisions in the lease

    (s19, s20, s20B, s21B etc etc….)

- s.27A(1): An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

  (a)the person by whom it is payable,

  (b)the person to whom it is payable,

  (c)the amount which is payable,

  (d)the date at or by which it is payable, and

  (e)the manner in which it is payable.

Section 27A(6)

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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).

Life was good up to 2013….

- We all thought we knew how this all worked in an apportionment context
- s19 (“reasonableness” test) has no impact on apportionment:
  Schilling v Canary Riverside (LRX/26/2005)
- Tribunal purely exercising a review function – has LL apportioned in accordance with the contractual mechanism?

The catalyst…

Morgan J in *Brent LBC v Shulem B Association* [2011] EWHC 1663 (Ch) at [39]

'The fourth point is that the amount of the proportion, in the case of a difference, is to be settled by the surveyor of the lessor, whose decision is stated to be final. It may be that this reference to the finality of the surveyor's decision is no longer contractually effective in view of section 27A(6). If did not hear specific argument on that point…'

Windermere Marina Village v Wild [2014] UKUT 163

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The entire role of the landlord's surveyor in deciding the fair and reasonable proportion was held to offend s.27A(6) because it "*had the effect of providing for the manner in which an issue capable of determination under s.27A(1) was to be determined, namely by a binding decision of the appellant's surveyor*" (at §42).

'I cannot accept Mr Gilchrist's submission that the apportionment of service charges is not a question which arises under subsection (1) or that sub-section (6) is directed only at provisions which purport to make a determination of the relevant expenditure by the landlord's surveyor or accountant determinative.'

Windermere and Gator affirmed in: Sheffield CC v Oliver [2017] EWCA Civ 225

Meanwhile, back in sunny Southsea

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Aviva v Williams – the Lease deed

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- we are the Landlord
- your apartment is the Property
- the rent is £250.00 per annum
- your share of the insurance costs is 0.7135% or such part as the Landlord may otherwise reasonably determine
- your share of building services costs is 0.7135% or such part as the Landlord may otherwise reasonably determine
- your share of estate services costs is 0.5427% or such part as the Landlord may otherwise reasonably determine

Aviva v Williams – a potted and very brief history

Landmark Chambers

FtT:

54. The lease provides for the landlord to apply a reasonable alternative apportionment. The Applicants say that this is an avoidance clause which outs the jurisdiction of the Tribunal and is therefore a nullity and they cite the *Windermere Marina* and *Gater* cases in support of their argument. The Tribunal disagrees with the Applicants on this point. What those cases say is that the Tribunal's jurisdiction to determine a reasonable apportionment is not ousted by wording purporting to provide that the matter is one for the landlord or the landlord's agent. But in this case the Respondent is not trying to say that the landlord can alter the apportionment at its own discretion and that the Tribunal has no say in the matter. On the contrary, the Respondent accepts that the Tribunal does have jurisdiction to say whether the apportionment applied is reasonable or not. So, the two cases quoted by the Applicants do not have the effect of nullifying the lease provision.

58. The Tribunal has considered whether the current apportionments are reasonable and finds that they are. It is reasonable for the estate costs to be apportioned equally between those benefitting from the services

Aviva v Williams – a potted and very brief history

Landmark Chambers

UT:

19. That is a misunderstanding of the decision in *Windermnere* and in *Gater*. Those decisions say that a clause purporting to provide for a determination of apportionment by the landlord or the landlord's agent is void. It is void whether or not it provides that the landlord's decision is "final and binding" or similar, and whether or not the landlord agrees to submit to the jurisdiction of the Tribunal.

20. Accordingly in the leases in question in this appeal the words "or such part as the Landlord may otherwise reasonably determine" are void. They are deleted. They no longer appear in the lease.

Aviva v Williams – a potted and very brief history

Landmark Chambers

UT:

> 23. The deletion of the void wording in *Windermere* and *Gater* created a vacuum. There was still a determination to be made, because the tenants had to pay a "fair proportion" of the service charge. In the absence of the agreed method of determination it was for the FTT to decide what a fair proportion was; and it had to make its own decision, rather than reviewing the landlord's apportionment. Similarly in *Fairman and others v Cinnamon*

> 24. In the present appeal the remaining wording is different. The Vista leases set out a fixed percentage, to which the landlord's discretionary apportionment is an alternative. There is no provision for a "fair proportion" or the like. Without the void wording the lease obliges the tenant to pay a stated percentage of the service charge. There is nothing left to decide. The FTT has no jurisdiction to amend the stated percentage as a result of section 27A(4).

Aviva v Williams – a potted and very brief history

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CA (Lewison LJ):

28. There is no doubt in my mind that the conclusions in these paragraphs followed logically from the premise that, as she held at [20], the effect of section 27A (6) was that the words "or such part as the Landlord may otherwise reasonably determine" were treated as having been excised from the lease. But that was not what HHJ Gerald decided in *Fairman*; and Judge Cooke did not say that he was wrong. The alternative approach is to hold that the effect of section 27A (6) was that the lease was to be read as if it had said "or such part as … may otherwise reasonably determine." If that is the true effect of section 27A (6) then there would be a void which the FTT could fill. In short, by the time that she got to paragraph [23] Judge Cooke had already painted herself into a corner.

Aviva v Williams – a potted and very brief history

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CA (Lewison LJ):

35. What we are concerned with, in my judgment, is not the form of drafting but the substance of the impugned provision. As Lindsay J put it, it is a question of the effect and enforceability of agreed provisions, not their language or form.

36. In the present case the service charge provision envisages that the lessee may be liable to pay (as an alternative to the fixed percentage) a different percentage (a) which is to be identified by someone acting reasonably and (b) that that someone is the landlord. In my judgment, only the second component is invalidated by section 27A (6). To put it another way, the "particular manner" in which the percentage is determined is by the landlord. All that is necessary for compliance with section 27A (6) is to deprive the landlord of its role in making the determination.

Aviva v Williams – Supreme Court - key arguments

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- If the effect of s27A(6) is to render all the words void, for all purposes, then the Tribunal is being denied jurisdiction. That's not the statutory purpose.

- The Tribunal / LVT has always been a review jurisdiction. Prior to *Windermere*, the authorities were wholly consistent on that.

- Matter of statutory construction. If Parliament had intended the Tribunal to make (impose) its own decision on a discretionary matter, it would say so.

- In *Windermere*, the wrong 'question' was identified.

The SUPREME COURT

Aviva v Williams – Supreme Court - key arguments

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Aviva v Williams – Supreme Court judgment

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What were the ‘questions’ the FtT can decide under s27A? At [13]:

> 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).

The SUPREME COURT

Aviva v Williams – Supreme Court judgment

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On whether the FtT should be making discretionary decisions, at [15]:

> relationships), the jurisdiction of the FtT under section 27A(1) to decide whether a service charge demand is payable will extend to the contractual and/or statutory legitimacy of these discretionary management decisions. Thus, where the service charge enables the landlord to recover its cost of performing its repairing obligations under the lease, the replacement of a roof may give rise to questions whether replacement fell within the landlord's repairing obligation (or rather whether it was an improvement) and whether, if it was a repair, the costs incurred satisfied the statutory reasonableness test in section 19. But, leaving aside section 27A(6) for the moment, it would not be a part of the FtT's task to make those discretionary decisions itself, let alone for the first time. It would be too late, on an application under section 27A(1), and there would be no warrant either contractually in the lease or in the statutory regulatory regime under the 1985 Act for it to do so. If the landlord's discretionary

Aviva v Williams – Supreme Court judgment

Landmark Chambers

Discretionary management decisions under leases are not ‘questions’ for the purpose of s27A(1): [18]

- If they were, the jurisdiction of the FtT would be substantially enlarged from the existing review jurisdiction. It would confer an original jurisdiction on the FtT to determine all aspects of the SC. That is not lightly to be assumed given s27A(6) is at heart just an anti-avoidance provision: [19]

- If discretionary decision making did pass to the FtT it would produce ‘the most bizarre and surely unintended results’: [21]

The SUPREME COURT

Aviva v Williams – Supreme Court judgment

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No basis for treating apportionment decisions differently from the other discretionary decisions affecting the amount of timing of service charges. All would be caught: [24].

On the CA's construction, all those problems exist PLUS by substituting the FtT for the landlord they created – knowingly – a provision where any tenant could also apply to the FtT any number of times for re-allocation, thus opening a '*veritable Pandora's box of disputes about allocation which was plainly not contemplated by the lease*' [26]

The SUPREME COURT

Aviva v Williams – Supreme Court judgment

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SCJ Briggs overturning himself?

30. I have to acknowledge, with embarrassment and contrition, that the above analysis cannot be reconciled with the trilogy of cases already mentioned, culminating in *Oliver v Sheffield City Council* (supra). They clearly decided that where the relevant

The SUPREME COURT

Conclusion

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32. I have come to the conclusion that to allow subsection (6) to enlarge in that way the nature and type of "questions" before the FtT under section 27A(1) and (3) is to put the anti-avoidance cart before the jurisdictional horse. In my judgment it was not the purpose or effect of section 27A(6) to deprive that form of managerial decision-making by landlords of its ordinary contractual effect, save only to the extent that the contractual provision seeks to make the decision of the landlord or other specified person final and binding, so as to oust the ordinary jurisdiction of the FtT to review its contractual and statutory legitimacy. I therefore consider, for the reasons given above, that the *Oliver* case, and the two decisions that the Court of Appeal followed in that case were, to that extent, wrongly decided.

Conclusion

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At [33] – we focus on the meaning of the contract and review the landlord's exercise of any discretion:

> any way impeded. The original question, whether there should be a re-apportionment and if so in what fractions, was not a "question" for the FtT within the meaning of section 27A(6). The question for the FtT was whether the re-apportionment had been reasonable, and that question the FtT was able to, and did, answer in ruling on the tenants' application under section 27A(1).

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Service Charges in the Supreme Court: Themes and Practical Considerations

Camilla Lamont

At face value very different cases

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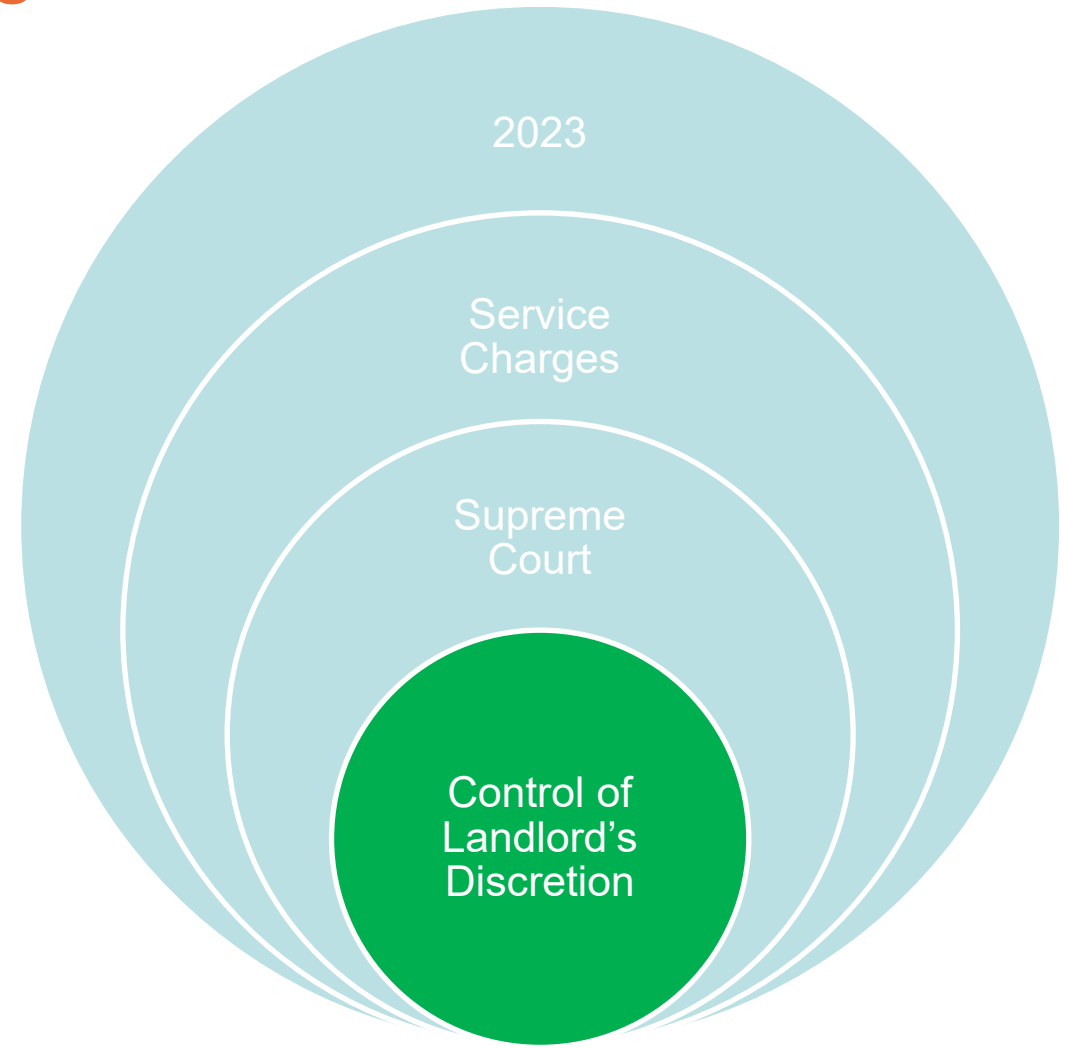
Sara & Hossein v Blacks	Aviva v Williams
Contractual Interpretation	Statutory Interpretation
Intention of the parties	Intention of Parliament
Commercial interests	Policy considerations
Commercial lease	Residential lease
Short term	Long lease
Certification of costs	Apportionment

Common Themes



Balancing Acts

- Concern to avoid abuse by landlords of contractual discretions
- Tension between preserving landlord autonomy and protecting tenants
- Pragmatic responses by Supreme Court – searching for the middle ground
- Also an important theme in *Braganza*

Sara & Hossein v Blacks
Once upon a time…

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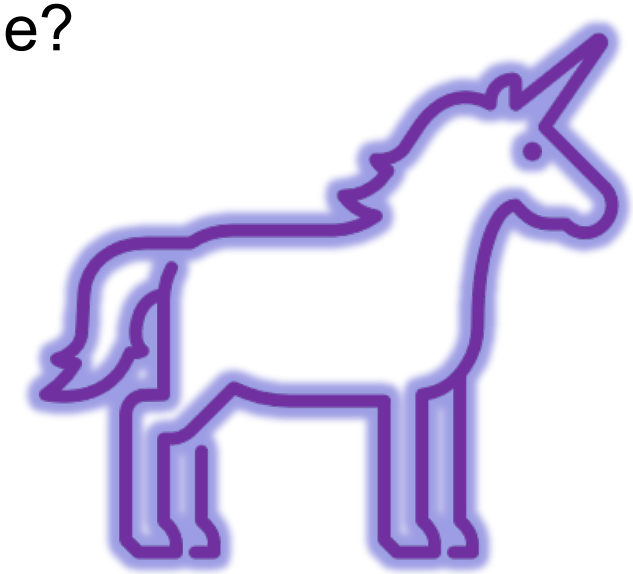
- Contractual interpretation in a land of make believe?
- A one off or the start of (a lot) more to come?
- Drafting back to reality?
- A cow for beans?
- How do tenants get their money back?
- The ogre of insolvency



Aviva v Williams
Conventional wisdom restored …

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- Landlords/ agents can get on with the day job
- How will the FFT undertake a review of the exercise of a contractual discretion?
- Apportionment – Not governed by s.19 reasonableness
- What if there is no contractual criteria regarding the landlord's powers of apportionment? – *Braganza* to the rescue
- When does a contractual discretion cross the line of usurping the FFT's function?

Spinning plates

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- What if the wording in *Sara & Hossein v Blacks* (or similar) was contained in a residential lease? "Pay now argue later" or jurisdictional ouster?

- What about resolving apportionment disputes in commercial leases?

The End

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Thank you for listening

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