



Neutral Citation Number: [2025] EWCA Civ 1319

Case No: CA-2024-002282

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Reference: LC-2023-000440 and LC-20223-000441
Upper Tribunal Judge Elizabeth Cooke

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2025

Before :

LORD JUSTICE NUGEE
LORD JUSTICE BIRSS

Between :

LIAM PHILIP SPENDER AND OTHERS

Appellants /
Tenants

- and -

(1) F.I.T. NOMINEE LIMITED
(2) F.I.T. NOMINEE 2 LIMITED

Respondents/
Landlords

Liam Spender representing himself and the other **Appellants**
Tom Morris (instructed by **J B Leitch Ltd**) for the **Respondents**

Hearing date: 10 September 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 17th October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Birss:

1. This is an application for a costs capping order under CPR rule 52.19 in a dispute between tenants and their landlords. The applicants are 70 of the 436 tenants of properties at St David's Square in London E14. The respondents are the landlords. The proceedings concern the reasonableness of aspects of service charges arising from charges for the security system on the estate. The First Tier Tribunal held in favour of the tenants that the sums were reasonably incurred only to the extent of a figure which was 19% of the charges demanded by the landlords. On the landlords' appeal the Upper Tribunal allowed the appeal finding, subject to a concession on one aspect which is irrelevant to this application, that the charges were reasonably incurred. The tenants appealed to this court.
2. In the appellants' notice the tenants had sought an order that both sides bear their own costs of the appeal, which was refused. Nothing now turns on that.
3. The tenants' application under r52.19 is explained in the application notice and supported by a witness statement of Mr Liam Spender, who appears on this application representing himself and the other tenants bringing the appeal. The tenants' case is essentially that the order should be made to facilitate access to justice. They succeeded at first instance and faced an appeal from the landlords to the Upper Tribunal. The Upper Tribunal reversed the finding which had been in the tenants' favour. This leaves the tenants in an invidious position. In order to vindicate their rights they must pursue an appeal to the Court of Appeal, however their appeal will be stifled if the usual costs rules apply. They estimate that the landlord's costs of this appeal are likely to be about £150,000, which would put a burden on the tenants disproportionate to their interests. The overall value of the service charge in issue is about £480,000 which for an individual tenant in the litigation represents on average about £1,500. The tenants also point to the inequality of arms between themselves on the one hand, ordinary home owners, and the landlord companies, which are ultimate subsidiaries of NatWest bank. At the hearing counsel for the landlords gave an estimate of £90,000 as the likely costs. There is no reason to doubt that estimate, which does not change the problem from the tenants' point of view.
4. At one stage another reason given why the appeal would be stifled related to an issue about fire safety certificates concerning the properties, however that has been resolved and plays no part in resolving this application.
5. The evidence from the tenants as to their financial position is not extensive and in other circumstances that might have been important. However while I can understand and sympathise with the tenants' motives for this application, for the reasons explained below, which have to do with the interaction between a costs capping order under the Civil Procedure Rules and the provisions of the Landlord and Tenant Act 1985, I believe this application should be dismissed. To explain why I need to start with the relevant rule, which is as follows:

Orders to limit the recoverable costs of an appeal – general

52.19

(1) Subject to rule 52.19A, in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

(2) In making such an order the court will have regard to—

(a) the means of both parties;

(b) all the circumstances of the case; and

(c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

[r52.19A relates to Aarhus Convention appeals and is irrelevant]

6. A number of cases were cited on this application. It is convenient to run through them in chronological order.
7. In *Manchester College v Hazel* [2013] EWCA Civ 281 a condition was imposed (on paper) on the appellant employer, a college, in an appeal from the Employment Appeal Tribunal that it may only pursue its appeal if it did not apply for costs (Jackson LJ at [20]). The condition had been sought by the respondents, who were teachers working at the college. They also undertook not to seek costs if they were successful. The appellant applied to set the condition aside. At that time (15 March 2013) the rule which is now r52.19, was not yet in force although it was due to come into force on 1 April 2013. At [29]-[30] and [33] Jackson LJ explained the purpose of the new rule as being to overcome a mischief identified in *Eweida v British Airways* [2009] EWCA Civ 1205, namely that the Court of Appeal had no power to make a protective or costs capping order on appeals from jurisdictions in which no costs were awarded. The court decided to maintain the condition. Unlike the position of the college, for the teachers an order for costs against them would be a disaster. The court accepted that the teachers would not pursue their case any further if not protected against the adverse costs risk. Jackson LJ also held that if the application was made once the new rule came in, it would be bound to succeed ([80](vii)).
8. In *JE (Jamaica) v Secretary of State for the Home Department* [2014] EWCA Civ 192 (Laws, Jackson and Black LJ), on appeal from the Upper Tribunal, the appellant applied under the rule for a one way costs shifting order. That was rejected because, as Jackson LJ explained, an order made under the rule applies to the costs of the winning party on the appeal, whoever the winner may turn out to be ([8]).
9. In *Glass v Freyssinet* [2016] EWCA Civ 1120 Floyd LJ made the point that costs capping on appeal was not automatic simply because an appeal is from a costs capped

jurisdiction. The fact the rule is engaged (because the appeal is in proceedings in which costs recovery is limited or excluded at first instance) gives the court a discretion. In response to a submission that the risk of an adverse costs order was having a deterrent effect on the appellant, the judge observed (at [13]) that this risk should always have that effect. On the facts the appellant had not put sufficient information about his means before the court to justify an order under the rule and it was refused.

10. In *Blair v Wickes Building Supplies Ltd (No 2)* [2020] EWCA Civ 17 (Lord Hamblen, Holroyde and Baker LJJ) a cost capping order was sought after an appeal had failed. The appellant (claimant) was a private individual, a single parent with a gross monthly income of £1,500 and the respondent was a major company with a large turnover. The court held it did have a discretion to make the order because r52.19(1) applied. However the discretion would not be exercised in favour of the appellant (claimant) because the appeal had been wholly unmeritorious ([24]-[27]).
11. In *Campbell v NHS Business Authority* [2023] EWCA Civ 1351 (Lewison and Asplin LJJ and Sir Launcelot Henderson) the report of the judgment in the main appeal contains a passage at the end (at [42]-[43]) which deals with and rejects an application to vary a costs capping order limiting the appellant's costs exposure to £25,000 which had been made by Newey LJ when he gave permission to appeal.
12. *Prince of Wales Road RTM v Assethold Ltd* [2024] EWCA Civ 1544 (King, Nugee and Falk LJJ) was an appeal from the Upper Tribunal Lands Chamber by an RTM company against the owner of the freehold and headlease. The judgment in the main appeal notes that a cost capping order had been made in favour of the appellant RTM company (see paragraph 7).
13. In *Shorts International v Google* [2025] EWCA Civ 653 (Lewison LJ) the appellant in a trade mark case in the Intellectual Property Enterprise Court (IPEC) sought a costs capping order under r52.19. Lewison LJ noted at [11] that adverse costs orders are meant to have a potential deterrent effect (citing *Glass v Freyssinet*) and observed at [12] that the rule refers to a "need" to facilitate access to justice, indicating that this should be given substantial weight. At [13] he drew on the Supreme Court's decision in *Goldtrail Travel v Aydin* [2017] UKSC 57 which concerned the factors to consider when deciding whether an appeal would be stifled by an order to pay money into court, identifying the need for full and frank evidence and the scepticism the court will have about bare assertions in evidence. On the facts, Lewison LJ held at [23] that the evidence about the appellant's finances and attempts to raise money showed that refusal of a costs capping order would fail to facilitate access to justice because the appeal would likely have to be abandoned. An order under r52.19 was made.
14. Drawing this together, the applicable principles I would derive from these cases are these:
 - i) The rule applies (and only applies) in appeals in which, at first instance, cost recovery was limited or capped (r52.19(1)).
 - ii) The fact the rule is engaged does not automatically mean an order is warranted (Floyd LJ in *Glass v Freyssinet*). It means there is power to make the order in the exercise of the court's discretion.

- iii) The discretion involves considering all the circumstances, including the means of both parties and the need to facilitate access to justice (r52.19(2)).
 - iv) The fact an appeal is wholly unmeritorious is a reason not to make the order (*Blair v Wickes*).
 - v) Facilitating access to justice is a factor of substantial weight (Lewison LJ in *Shorts v Google*).
 - vi) Simply showing that the risk of adverse costs in the Court of Appeal is a deterrent is not enough, because that risk is meant to be a deterrent (*Glass v Freyssinet*). Bare assertions in the evidence will be treated with scepticism and evidence of means will need to be full and frank (*Shorts v Google*). However evidence demonstrating that a party's modest means has the result that they would not pursue the appeal due to the risk of adverse costs, whereas the other party can take that risk, would support making the order (*Manchester College v Hazel* and *Shorts v Google*).
15. Applying these principles, it is clear that the rule is engaged in this case given the limited costs recovery below. The court has a discretion and all the circumstances fall to be taken into account. These include the nature of the dispute as a matter between a landlord and some, but not all, of the tenants of the relevant property, and the relevant provisions of the Landlord and Tenant Act 1985.
16. Both s19 and s20C of the 1985 Act are relevant because they have a bearing on costs in proceedings of this kind. The starting point is that when there is litigation between a landlord and tenants, the landlord can often (depending on the terms of the lease) recover incurred litigation costs as part of the service charge they charge the tenants. The general provisions of s19 of the 1985 Act apply, so that only costs reasonably incurred could be charged via the service charge, but there is no doubt that such costs can be recovered in a proper case. That was common ground. Section 20C then gives the court power to prevent that recovery from taking place if it would not be just and equitable.
17. It was common ground that orders under section 20C are commonly made where the tenant succeeds. In such a case it is not difficult to see why it would not be just and equitable for the landlord to recover, through the service charge, the costs of unsuccessfully prosecuting proceedings. On the other hand it was also common ground that such orders are rarely made where the landlord wins in the litigation.
18. Turning to r52.19, the purpose of a cost capping order under the rule in this case is to cater for a situation in which the appellant tenants lose the appeal and a costs order is made in the successful landlords' favour. If there is no capping order then the 70 appellant tenants will be liable to pay the landlords' (assessed) costs of the appeal. For the sake of argument one can assume that might be a total of about £75,000 (given the £90,000 estimate) and so each individual would probably have to pay just over £1,000 each.
19. However if there is a capping order, say limiting the adverse costs to £25,000, then the 70 appellant tenants will pay up to that cap and the remainder of the landlord's assessed costs, £50,000 in the example, will be unpaid. In that case no order under s20C of the

1985 Act is likely and so the landlord will be able to recover those unpaid costs as part of the service charge, from the tenants as a whole, i.e. all 436 tenants. In other words the effect of a capping order in these circumstances would be to shift the costs risk of this appeal from the 70 appellant tenants to the whole group of 436 tenants of the property. As a result the tenants who chose not to be involved in this appeal would bear the costs risk. That costs risk is one which the appellant tenants, who did wish to bring this appeal, do not wish to bear. That is not a result which accords with justice or the overriding objective. Therefore even if this was otherwise a proper case in which to make a costs capping order of some kind, the consideration of the operation of s19 and s20C of the 1985 Act in this case undermines that position.

20. It is worth noting that in the landlord and tenant case of *Prince of Wales Road RTM v Assehold* (above) this problem did not arise and so the fact there was a cost capping order in that case does not assist the appellants here.
21. I will refuse the application.

Lord Justice Nugee:

22. I agree.
23. The purpose of the tenants seeking a costs-capping order is to limit their exposure to an adverse costs order if they lose the appeal. But the practical effect of such an order in the present case would, as Birss LJ has so well explained, mean that any costs not recovered from them would (so long as reasonable) be recoverable from the tenants on the estate as a whole. So the real contest in the present case is not between the tenants who are appealing and their landlord; the real contest is between the 70 tenants who have brought the appeal and the other 366 tenants on the estate who have not. Once seen in that light, I think it inevitably follows that it would not be just to make the order that is sought.
24. I too would therefore refuse the application.