UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges -- drafting error in lease apparently entitling landlord to recover about 3000% of relevant expenses -- no application yet made for variation under Landlord and Tenant Act 1987 section 35 and following -- amount recoverable by way of on account payments in respect of service charge -- Landlord and Tenant Act 1985 section 19(2)

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

BETWEEN **THOMAS HOMES LIMITED** **Appellant**

and

COLIN MACGREGOR **Respondent**

Re: 11 Ipsden Court,
Cholsey,
Wallingford,
Oxon, OX10 9GD

Before: His Honour Judge Huskinson

Sitting at: Upper Tribunal (Lands Chamber), Royal Court of Justice,
Strand, London WC2A 2LL
on
1 November 2016

Thomas Talbot-Ponsonby, instructed by Boyes Turner LLP, for the appellant
The respondent appeared in person

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36
Brickfield Properties v Botten [2013] UKUT 0133 (LC)

Decision

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) (hereafter called "the F-tT) dated 25 January 2016 whereby the F-tT gave a decision under section 27A of the Landlord and Tenant Act 1985 as amended in respect of the service charges payable by the respondent (as tenant) to the appellant (as landlord) in respect of his flat at 11 Ipsden Court which he holds upon a long lease at a low rent from the appellant.

2. The application to the F-tT was in respect of three service charge years, namely 2013, 2014 and 2015 -- more precisely the application was for the years 1 April 2013 to 31 March 2014, 1 April 2014 to 31 March 2015, and 1 April 2015 to 31 March 2016. The amounts of service charge which the appellant had demanded from the respondent in respect of these three years were as follows:

(1) for 2013/14: £2124, see page 63 of the bundle -- pages 268 and 269 show a larger figure but then show some credits against this. It appears accepted that the amount demanded was the sum of £2124 which is the same as the sum shown as payable on the budget document for that year at page 389 of the bundle.

(2) for 2014/15: £2046.

(3) for 2015/16: £2230.60.

3. The decision of the F-tT upon the question of what was payable by the respondent for these three years is summarised in paragraph 1 of the F-tT's decision in the following terms:

> "If the service charges claimed from the [respondent] include a subsidy of the "social" housing, they are not reasonable and will have to be re-calculated to exclude any such subsidy before they become payable."

4. The background against which the present dispute has arisen, which shows how the question of social housing has become significant, can be summarised as follows:

(1) The appellant is the registered proprietor and the owner in fee simple of the property known as the former Fairmile Hospital Building, Newlands Way, Cholsey, Wallingford, Oxon. This is a listed building and is described in the respondent's application to the F-tT as a large, rambling structure comprising many blocks and wings linked by corridors.

(2) Planning permission was granted for a major development upon this site and the surrounding site which included the conversion of the former hospital building into 130 units (ranging from one bedroom to four bedrooms) and a large communal hall.

(3) An agreement was entered into between various parties, including the appellant and South Oxfordshire District Council under section 106 of the Town and Country

Planning Act 1990 which contained various provisions including a requirement that there should be a substantial quantity of affordable housing within the development. In fact of the 130 units there are 39 units which are social housing and are managed by Soha Housing and there are 91 units which are the subject of open market private leases. The respondent holds one of the latter.

(4) By a lease dated 16 May 2013 the appellant granted to the respondent (and Florence Mabel MacGregor) a long lease at a low rent of the relevant property, namely 11 Ipsden Court. I will refer to the terms of this lease in due course.

(5) Pursuant to the section 106 agreement, the service charges payable by any occupier of an affordable housing unit (being the aggregate of the two elements of service charge payable on the estate, namely and in brief summary the charge for the maintenance of the grounds and the charge for the maintenance of the buildings) was limited to £522 per annum at the time of first sale, with such cap to be increased annually in line with the retail prices (all items) index.

(6) The section 106 agreement did not make provision regarding who was to bear any shortfall between the service charge payable by any occupier of an affordable housing unit and the cost of the services provided to such occupier. The result of this cap is that as regards affordable housing units (hereafter referred to, as they were referred to by the F-tT, as social housing) the occupiers do not make as great a contribution towards the service charges as they would do if the service charges were divided upon a distribution such as by reference to square footage or number of bedrooms between all the relevant units in the development.

(7) In consequence, in order to secure 100% recovery of expenses, the appellant considers itself entitled to recover from the occupiers of the non social housing units more than would need to be recovered from them if all of the units were open market units and there were no social housing units in the development.

5. No provision was contained within the respondent's lease expressly recognising this potential difficulty and providing for the occupiers of the non social housing units to pay some identifiable surplus (beyond that which would normally have been payable) by way of service charge so as to make good the prospective shortfall arising from the cap upon charges payable in respect of the social housing units.

6. What the respondent's lease did require was, in summary, that the respondent should pay by way of service charge to the appellant (in respect of the buildings -- the service charge for the grounds is dealt with separately) a certain percentage of a certain aggregate expenditure. The percentage presently relevant is stated in the lease to be 10%. The relevant aggregate expenditure to which this 10% is to be applied is stated in the lease to be

> "….. the amount attributable to the costs payable to the Landlord in connection with the matters mentioned in Part B of Schedule 6 and of whatever of the matters referred to in Part D of the said Schedule are expenses properly incurred by the Landlord which are relative to the matters mentioned in Part B of the said Schedule"

As a result the expenditure to which the 10% is to be applied is, in summary, the total cost of repairing etc all of the buildings within the relevant development -- not, be it noted, the total cost of repairing etc the relevant block within which the respondent's unit is located.

7. It is stated in the Statement of Agreed Facts and Issues that it is apparent that there has been a drafting error in drawing up the leases. If there is added together the percentages in all of the leases of the non social housing units (the percentage in the respondent's lease being 10%) one arrives at approximately 3000%, with the result that, if applied literally, the appellant would be entitled to recover through the service charges (and leaving aside it seems any capped payments received in respect of social housing units) approximately 30 times the amount it actually expended in providing the services. That there is an error is obvious. What is not obvious is what the error is. At one stage it was suggested by the appellant that what had been intended was that the 10% should apply to the relevant costs referable to the block within which the respondent's unit was located. However the problem with that is that the lease is not drafted so as to make reference to the individual blocks, such that substantial redrafting would be required to accomplish this. It was in argument at one stage suggested (for the first time) by Mr Talbot-Ponsonby that there had been a typo in the amount of the percentage -- but it was entirely unclear what percentage might have been intended and Mr Talbot Ponsonby accepted that there is no identifiable percentage which was intended and which has been misstated in the lease.

8. The practical solution which the appellant has adopted, to its satisfaction if not to that of the respondent, is explained in paragraph 12 of the witness statement of Mr James Thomas in the following terms:

> 12. What in practice happens is as follows. The service charge budget for the whole building is determined, which for 2015/16 is £123,300. The total figure for all the capped contributions is then calculated, which for 2015/16 is £13,416 (in respect of 39 properties). The remaining figure, namely £109,884, is then allocated to all the remaining private tenants in accordance with a set formula, based on the number of bedrooms in a property. A one bedroomed property is Type 1, a 2 bedroomed property is Type 2, and so on. The Applicant's property has 4 bedrooms, a Type 4 property. Costs are allocated on a per room basis and therefore a Type 4 property pays four times as much as a Type 1 property. As a result of this exercise, 11 Ipsden Court, the Applicant's property has a service charge contribution for Building Common Parts Charges for 2015/16 of £2,230.67, which is 9.52% of the total costs of the Ipsden Court block. The figure of 9.52% has been rounded up to 10% in the Lease.

This calculation can be seen in the estimates and subsequent calculations contained on pages 271 and following in the bundle, especially the calculation at page 279 showing how £2230.67 became attributable as service charge to the respondent's flat for the year 2015/16.

9. The respondent became concerned regarding the amount of service charge he was being asked to pay to the appellant. In broad summary his concerns were or became:

> (1) The fact that the occupiers of the non social housing units appeared to be subsidising the occupiers of the social housing units regarding service charge.

(2) The fact that service charges were being divided upon the basis of bedroom numbers when a substantial element in the relevant buildings constituted the Great Hall (which possessed no bedrooms and as regards which therefore nothing was specifically attributable).

(3) The fact that the amount payable by the occupiers of the social housing units in respect of the gardens maintenance (being a separate payment to Cholsey Meadows Management Co Ltd which was party to the lease) was being paid in full without any abatement to recognise that the overall payments by such occupiers was capped, such that the entirety of the shortfall in payments by the occupiers of the social housing units was being picked up through the service charge payable to the appellant in respect of the buildings.

(4) The fact that the lease contains this drafting error as previously mentioned making the respondent theoretically liable for an absurdly high payment -- by way of example in relation to the year 2015/16 if the respondent was required to pay the full 10% of the relevant sum as provided for in the lease he would have to pay 10% of £123,300, namely £12,330 as opposed to the £2230.60 which has in fact been demanded of him (and which he disputes in these proceedings).

(5) The fact that the social housing units include three flats which have been sold by Soha Housing and which do not continue to constitute units held as part of any social housing scheme. The new private leaseholders of these flats have however inherited the capped management charges through the head lease enjoyed by Soha Housing, despite having bought their leases outright and not as former social housing tenants through some part ownership scheme. As a result of this the 89 private leaseholders are subsidising the management charges of these three privately leased flats -- the subsidy being about £1500 per annum in respect of each of these four bedroomed flats.

10. The respondent has paid all of the service charges demanded of him in respect of the relevant years. He says he has done so in the expectation of a refund once he is successful in the present litigation. It is not suggested that the fact that he has paid the sums demanded in any way prevents him from raising the present challenge as to how much was properly payable in respect of each of these three service charge years, see section 27A(5) of the 1985 Act.

11. The central question raised in these proceedings concerns the proper apportionment under the provisions of the lease to the respondent of the appellant's relevant expenditure on services in connection with the buildings. It is useful to note certain points which are not raised as issues in the present proceedings:

(1) no argument is raised as to whether any item of expenditure which has been included within the appellant's total expenditure upon the buildings is an item which is properly chargeable through the service charge clause;

(2) no argument is raised in relation to any of the costs as to whether such cost was reasonably incurred;

(3) no argument is raised as to whether any relevant services/works provided by the appellant were of a reasonable standard;

(4) accordingly there is no challenge as to the total amount of the appellant's relevant expenditure which it seeks to recover through the service charge provisions (the question instead his how much is properly attributable to the respondent and whether any shortfall should be borne by persons other than the lessees such as by the appellant itself);

(5) no argument is raised as to whether any proper demands for payment of service charges have been made;

(6) no argument is raised as to whether any formality has been omitted by the appellant as a prerequisite of making a valid demand for the payment of service charge.

(7) no argument is raised seeking to complain that the amounts of the demands were for the full amount payable on account for the year in question rather than merely for a half yearly instalments (with the second instalment being payable on 1 October following) -- it is recognised that the relevant 1 October is now past such that all of the second instalments would by now have become payable.

It is also relevant to record that the present case is not concerned with any application under section 35 and following of Landlord and Tenant Act 1987 for the variation of the respondent's lease. It is recognised by the appellant that if such an application were ever to be made by the lessees of the relevant units then, bearing in mind in particular the drafting error mentioned above which allows 3000% recovery of the relevant costs, it would seem that some appropriate variation would be called for having regard especially to section 35(4). However that is a matter for the future and does not arise in the present proceedings.

12. It is important to note is that in respect of all three of the years under consideration the demands for payment of service charge were all demands for the payment of an on account sum. None of the demands were for the payment of a final amount for the year in question after the final working through of such expenses as were in fact incurred for the relevant year. It is also important to note that as regards payments on account of service charge section 19(2) of the Landlord and Tenant Act 1985 provides:

> "(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustments shall be made by repayment, reduction or subsequent charges or otherwise."

13. The issues which the respondent asked the F-tT to decide in his application were as follows:

A] How much of what I pay as a service charge is a contribution to the shortfall under a section 106 agreement relating to the social housing flats?

B] Whether or not the calculation of the shortfall paid by private leaseholders is correct.

C] Whether or not, as a private leaseholder, I should pay part of this shortfall for social housing management services.

D] Whether or not, as a private leaseholder, I should pay part of the same shortfall in respect of 3 flats that have been sold outright by Soha to people who are not, and never were, social housing tenants.

E] Whether or not Thomas Homes should refund excess charges paid for 2013-15.

F] Whether or not the management charges are fairly shared between private leaseholders.

G] Whether or not the treatment of management charges is the same for all Fair Mile private leaseholders in other respects?

H] Whether Fair Mile Management Company levies charges and manages the former hospital, as in its articles of association, or the landlord does so as stated in the lease.

I] Who owns Fair Mile Management Company?

J] Can the landlord be compelled to provide funding for the management charges cap commitment it entered into under the Section 106 agreement?

14. However the present application to the F-tT was made under section 27A of the 1985 Act. Accordingly the jurisdiction of the F-tT (and of the Upper Tribunal upon this appeal) is to do that which is contemplated in section 27A namely to determine 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. Of these it is paragraph (c) which is relevant. In so far as the respondent has sought to raise matters wider than matters which need to be decided for the purpose of reaching a conclusion upon the amount which is payable by way of service charge for each of these three years, it is not appropriate for the F-tT (or this Tribunal on appeal) to purport to decide them.

15. The F-tT in its decision recorded that the question for it to determine was a very narrow question as to whether the respondent was contractually bound by the combined effects of the lease and the section 106 agreement to accept the subsidisation of the occupiers of the social housing units. The F-tT observed that the lease was badly drawn. The F-tT made reference to the *contra proferentem* rule of construction of leases. The F-tT concluded that the answer to the problem required the F-tT to consider whether a court would imply a term into the lease of the subject property (and all the other non social housing units) to the effect that the tenant is bound by the terms of the section 106 agreement to the extent that any shortfall in the total cost of maintaining and insuring the estate caused by the capping provisions should be met by the other tenants. Having posed the question in this form the F-tT concluded that the terms of the lease were clear and that there was no express or implied term to the effect that the respondent should subsidise the occupiers of the social housing units. In consequence the F-tT gave its decision as recorded in paragraph 3 above.

16. Permission to appeal to the Upper Tribunal was granted by the Deputy President of this Tribunal on 3 June 2016. It was ordered that the appeal would be dealt with as a review of the decision of the F-tT.

17. At the hearing before me Mr Talbot-Ponsonby represented the appellant and the respondent appeared in person.

18. The Statement of Agreed Facts and Issues states that the issues for the Tribunal to consider are:

1. Are the contractual terms of the lease clear and unambiguous?

2. If the Appellant has been reducing the Building Common Parts Charge by way of concession to the tenants, or by ad hoc arrangements, does section 27A give jurisdiction to the Tribunal to vary the terms of such concession or arrangements?

3. If so, is the Landlord's apportionment reasonable?

This document also includes a statement of certain issues which the respondent wished to have added to the list of issues but which the appellant did not agree were relevant issues. These additional matters are as follows:

1. The validity of the Section 106 Agreement provisions for limiting the service charges of the tenants in affordable housing units.

2. The validity of the arrangement between the Landlord and "the First Developer" under the section 106 Agreement (Linden Homes) for apportioning the Section 106 Agreement shortfall between the Landlord's tenants with private leases on the one hand and residents of privately held properties built by Linden Homes on the other.

3. The degree of deceit, if any, by the Landlord both before and after signing the lease in failing to disclose that some of the service charges paid by the Respondent are used for purposes other than recovering the cost of managing the former hospital building.

4. Whether or not the Respondent can be held to have agreed to the amount of the service charges.

19. The fact that the parties have agreed three paragraphs regarding the issues for the Tribunal to consider does not mean that this Tribunal is obliged to consider the matters under those headings or indeed to consider those matters at all if they do not arise. I prefer to consider the issues as they appear to me to be relevant and to express them in my own way.

The Lease

20. (1) By the lease dated 16 May 2013 the appellant demised to the respondent (and Florence Mabel MacGregor) the four bedroomed unit known as 11 Ipsden Court for a term of 999 years from 1 October 2011 upon payment of a premium and the reservation of a rent of £100 per annum (subject to review). There was reserved an additional rent in the following terms:

"AND ALSO paying on demand the Tenant's Proportion which shall be treated as further or additional rent"

(2) The expression "Tenant's Proportion" was defined as meaning:
"the proportion of the Maintenance Expenses payable by the Tenant in accordance with the provisions of Schedule 7 SAVE THAT all or any of the said Proportions may be subject to variation from time to time in accordance with the provisions of Paragraph 2 of Schedule 7"
(The provisions in schedule 7 paragraph 2 regarding the variation of proportions can only be engaged in circumstances where it has become necessary or equitable to recalculate the relevant percentages due to any re-planning of the layout of the development or the buildings, which so far as presently relevant has not occurred).

(3) The respondent covenanted with the appellant to pay the rent and also to pay that part of the Tenant's Proportion which is payable to the landlord.

(4) Schedule 7 made provision for the Tenant's Proportion of the Maintenance Expenses. It is not necessary for the purposes of the present case to consider the element of Maintenance Expenses which are referable to the Estate Common Parts Charge (or reserve fund) as these are connected with the maintenance of the grounds, for which Cholsey Meadows Management Co Ltd were responsible and to whom payments for such matters were to be made. Concentrating upon the Maintenance Expenses referable to the buildings (for which the appellant is responsible and in relation to which the present service charges have been demanded on account) it is provided in paragraphs 1.2 of schedule 7 that the Tenant's Proportion means:

> "The Part B Proportion of the amount attributable to the costs payable to the Landlord in connection with the matters mentioned in Part B of Schedule 6 and of whatever of the matters referred to in Part D of the said Schedule are expenses properly incurred by the Landlord which are relative to the matters mentioned in Part B of the said Schedule"

There is also in paragraph 1.3 a provision for the Tenant's Proportion to include the Part C2 Proportion of the amount attributable to certain reserve funds. The Part B Proportion and the Part C2 Proportion are both defined in the lease as 10%.

(5) Accordingly the reservation of the additional rent and the covenant to pay the Tenant's Proportion requires the respondent, so far as concerns payment to the appellant in respect of the buildings, to pay 10% of "the amount attributable to the costs payable to the Landlord in connection with the matters mentioned in Part B of schedule 6" (and certain related expenses and reserve funds if applicable). It is this amount which represents the extent of the respondent's obligation to contribute to service charges.

(6) Part B of schedule 6 makes provision for the Building Common Parts Charge (payable to the Landlord). A substantial list of items of service is here set forth which include in paragraph 7 repairing etc the building common parts. The list is in relation to the whole of the buildings. The Building Common Parts Charge will therefore represent a sum of money which the appellant as landlord spends in relation to the whole of the buildings on its development, not merely the expenditure upon the block containing the respondent's unit. The parties have proceeded in the present case upon the basis of mutually accepting that upon the true construction of the lease as at present worded this requires that the 10% charge payable by the respondent is calculated by reference to this larger sum -- i.e. the expenses relating to the whole of the buildings on the development. It is accepted by the appellant that strictly applied across the development this provision would result in about 3000% recovery of its expenses; that this was never the intention; that a drafting error has occurred; and that any

application to vary the terms of the leases under section 35 of the 1987 Act should ultimately succeed.

21. As regards the mechanism and timetable for the recovery of the service charge (i.e. for recovery more precisely of the share recoverable by the appellant as landlord of the Tenant's Proportion of Maintenance Expenses) provision is made in schedule 7 as follows:

> 5. An account of the Maintenance Expenses (distinguishing between actual expenditure and reserve for future expenditure) for the period ending on 31 March next and for each subsequent year ending on 31 March during the Term shall be prepared as soon as is practicable and the Management Company and/or the Landlord as applicable shall if it so decides or if requested in writing by the Tenant to do so serve a copy of such account and of the accountant's certificate on the Tenant.
>
> 6. The Tenant shall pay to the Management Company and the Landlord as applicable the Tenant's proportion of the Maintenance Expenses in manner following that is to say:
>
> 6.1 In advance on 1 April and 1 October in every year throughout the Term one half of the Tenant's proportion of the amount estimated from time to time by the Management Company and the Landlord as applicable or its or their managing agents as the Maintenance Expenses for the year.
>
> 6.2 Within twenty one days after the service by the Management Company on the tenant of a certificate in accordance with Paragraph 5 of this Schedule for the period in question the Tenant shall pay to the Management Company the balance by which the Tenant's Proportion received by the Management Company from the Tenant pursuant to Sub-Paragraph 6.1 of this Schedule falls short of the Tenant's Proportion payable to the Management Company as certified by the said certificate during the said period and any overpayment by the Tenant shall be credited against future payments due from the Tenant to the Management Company.

The demands for payment of service charges made by the appellant in the present case are all demands for payment on account pursuant to paragraph 6.1 of schedule 7 -- no final accounts have been prepared as contemplated in paragraph 5 and paragraph 6.2.

22. The lease contains covenants on behalf of the appellant as landlord including a covenant to carry out the works and do the acts and things required of it in schedules 6 and 7.

23. The leases granted of units of social housing contain effectively identical provisions, save that the definitions of Part A Proportion, Part B Proportion, Part C1 Proportion and Part C2 Proportion each refer to a fair and reasonable proportion of the relevant expenditure rather than a specified proportion. Also in those leases the definition of Tenant's Proportion contains a cap on the total payable by the tenant so as to comply with the terms of the section 106 agreement.

The appellant's submissions

24. (1) Mr Talbot-Ponsonby submitted that the F-tT started its examination of the problem from the wrong place, namely by asking whether the lease contains an express obligation upon the respondent as tenant to subsidise the occupiers of the social housing units. He submitted that instead the F-tT should have construed the lease and reached a conclusion as to what it is that the tenant is required to do.

(2) Approached upon that basis, he submitted that the terms of the lease were clear. It is true that it is common ground there has been included a drafting error and that the clear and unambiguous meaning of the lease as it stands requires the respondent to pay far more than could ever have been intended. However the present case does not concern a claim for rectification (nor has this Tribunal any jurisdiction to rectify a lease nor is there any evidence that in fact a claim for rectification could succeed). Also this is not a claim for variation of the lease under the Landlord and Tenant Act 1985 sections 35 and following. The fact that a person may have entered into a most unwise bargain, which requires that person to pay far more than contemplated, does not excuse that person from complying with the bargain, see *Arnold v Britton* [2015] UKSC 36.

(3) Therefore the present position is that, upon the clear and unambiguous construction of the lease, the respondent is contractually obliged to pay by way of service charge 10% of the total relevant costs relating to all the buildings on the development which is a very large sum (over £12,000 for 2015/16).

(4) However recognising the drafting error the appellant has declined to demand this large sum by way of service charge but has instead devised and applied a different and reasonable method of division of the overall expenditure between the leases of the non social housing units, namely that described in paragraph 8 above.

(5) The Tribunal is not being asked to make a decision finally as to the precise amount which strictly is payable. The Tribunal can and should proceed on the basis that, bearing in mind the respondent's actual strict contractual liability is to pay a sum which (without being precisely decided) is plainly a much larger sum than the sum which has been demanded, the Tribunal should find that the amounts which in fact have been demanded are recoverable.

(6) There is no separate requirement that the amounts demanded must in some general sense be reasonable. In any event the amounts demanded are reasonable even if there is some such separate requirement. On this point Mr Talbot-Ponsonby recognised that the demands were all for on account payments and that therefore no greater amount than is reasonable was payable. However he submitted that in assessing what is reasonable all the circumstances can be taken into account including the strict legal position under the lease which lays down that, when ultimately final accounts are prepared, the much larger sum will be payable (absent rectification or a variation of the lease).

25. Despite the fact that no point was expressly raised by the respondent upon the following topic, I asked Mr Talbot-Ponsonby whether the appropriate formalities had been undertaken by the appellant so as to make payable a payment on account of service charge pursuant to paragraph 6.1 of schedule 7. He pointed out that there is no formal provision requiring the service (either by any

particular date or in any particular form or at all) of an estimate upon the tenant. What has to be done is that the appellant as landlord should make an estimate in advance of 1 April in each year of the Maintenance Expenses for that year. As regards 2015/16 there is in the bundle detailed documentation regarding this at pages 271 and following. As regards 2013/14 there is in the bundle a copy of the estimates prepared not in relation to the entire development but in relation to the Ipsden Court block (page 389 of the bundle). Mr Talbot-Ponsonby submitted that the Tribunal can and should properly infer that similar such estimates were prepared in relation to the other buildings such that an estimate for the whole development was prepared for 2013/14. As regards 2014/15 he accepted that in the bundle there is no documentation regarding an estimate, but he submitted that I should infer that a proper estimate was prepared just as it had been for the other two years on either side of this year.

26. A demand for 10% of the total estimated expenditure (as per the strict construction of the lease) would have been unreasonable. A demand for an on account payment can only be for no greater amount than is reasonable (see section 19(2)). Accordingly the appellant acted properly, in accordance with the legislation, by not demanding 10% of the total estimated expenditure but instead demanding a much smaller sum as per the demands recorded in paragraph 2 above.

27. As regards the reasonableness of the amounts demanded, Mr Talbot-Ponsonby drew attention to the level of service charge which was made known to the respondent at the very latest at the date of his completion (page 389 is part of his completion statement documentation and shows a service charge contribution of £2124 for the year 2013/14) and on the basis of which it appears the respondent was prepared to purchase the property. He also drew attention to the following point. The amount of the demand for 2015/16 can be seen (page 279) to be for £2230.67 which is stated to be 9.52% of the costs attributable to the relevant block, namely Ipsden Court. Accordingly supposing that the drafting error in the lease could properly be described as one whereby the 10% charge was correct as a percentage figure but whereby that 10% charge was applied to the wrong amount (namely the costs relating to all the buildings rather than merely the costs relating to the relevant block) the position was as follows. The demand on account was only 9.52% (i.e. less than 10%) of a sum which was less than the costs relating to the relevant block, because the calculations show that the respondent is being required to pay 9.52% of £23,424.47, which is a figure referable to the block after the deduction of the contribution made towards it by any relevant social housing unit.

28. In summary the appellant is entitled to recover in full the on account payments for the three relevant years which have been demanded. What if any variation is made to the lease under section 35 of the 1987 Act and what may ultimately be found to be finally recoverable for the relevant service charge years if and when the final accounts are prepared are all matters for the future. The present position is that a reasonable amount has been demanded by way of an on account payment for each year and is properly payable.

29. At the hearing I raised in argument the question of whether, in relation to this lease granted in 2013, the Unfair Terms in Consumer Contracts Regulations 1999 had any application to the provision which it is agreed contains a drafting error and which requires the tenant, if read strictly, to pay far more than can ever have been intended. Mr Talbot-Ponsonby submitted that these regulations did not have application to the price which has been agreed for goods or services. In the present case the provisions were clear and unambiguous as to how much was to be paid. These

regulations were not framed so as to reopen the bargain as to how much should be paid. He drew attention to the examples given in the regulations of unfair contract terms, none of which were concerned with the overpayment for goods or services.

The respondent's submissions

30. The respondent presented a detailed and carefully prepared bundle setting out his arguments and making reference to the bundle of documents before the Tribunal. In oral submissions he developed further these arguments.

31. In summary the respondent advanced the following arguments.

32. South Oxfordshire District Council had failed, when entering into the section 106 agreement, to follow the Department for Communities and Local Government Code of Practice, Delivering Affordable Housing. It had failed to ensure that proper arrangements were made for service charges including failing to deal with any shortfall in service charge receipts arising because of the presence of social housing and failing to make proper arrangements in relation to the service charges payable in respect of units which had been identified for social housing but which had become sold outright. He referred in particular to paragraph 19 in Annex A which lists issues for local authorities to consider, one of which is -

> "the level of management and other charges occupiers will have to pay on a development, and ensuring practical payment arrangements are in place when seeking developer contributions"

33. There is a drafting error in the leases which require tenants to pay far in excess of 100% of the appellant's expenses. This allows the tenants to apply to the F-tT to seek a variation of their leases. Also the tenants had never agreed to pay a subsidy for the social housing units. The service charges should be recalculated. The respondent should be allocated an apportionment which only charges him the cost of services which he receives under his lease.

34. His lease was a standard agreement and it should be fair and transparent under Part 8 of the Enterprise Act 2002. It should comply with the Unfair Terms in Consumer Contracts Regulations 1999. It did not do so. The lease had been offered on a take it or leave it basis. The terms had not been individually negotiated. The 1999 regulations applied. The present service charge provisions were unfair within the meaning of the regulations and could not be enforced against him.

35. The lease is unfair. The respondent (and other open market tenants) are subsidising the service charges referable to the social housing units. However there is no provision in the leases requiring this. Also the appellant has never given clear answers to questions regarding this subsidy. Also it appears that the division of the expenses on a basis by reference to the number of bedrooms in a unit means that a major source of expense to the appellant, namely the upkeep of the Great Hall (which has no bedrooms) is being improperly loaded upon the tenants. Also the service charges payable to Cholsey Meadows Management Company (in respect of maintenance of the grounds etc) have not been reduced by reference to the cap upon the service charges for social housing units.

This means the whole shortfall is born through the service charge relating to the buildings as charged by the appellant.

36. The respondent was concerned regarding lack of disclosure by the appellant's former management company, namely Fair Mile Management Company. Also the tenants had been deprived of their right to manage that company. Also the company had been wound up in a way that contravenes the Companies Act.

37. The respondent was concerned that two persons involved with, respectively, the appellant and its management company were both chartered surveyors but had failed to observe the RICS residential management code in apportioning service charges.

38. The respondent considered that the appellant had misrepresented the position regarding service charges. He sought a refund of the amount overcharged since purchasing his lease in May 2013.

39. The respondent applied for costs of these proceedings against the appellant on the basis that the appellant had behaved unreasonably. Separately he applied for an order under section 20C of the Landlord and Tenant Act 1985 so as to prevent his service charges being augmented by some share in the costs of these proceedings.

40. The respondent invited this Tribunal to dismiss the appellant's appeal and to uphold the F-tT's decision for the reasons it gave.

Discussion

41. This being an appeal by way of review of the F-tT's decision, the first question is whether that decision is wrong or whether it should be allowed to stand.

42. With respect to the F-tT, it is my view that the F-tT's decision is wrong and cannot be allowed to stand. However in support of the F-tT I observe that it was being asked to deal with this case upon voluminous documentation but without any oral argument. The matters in dispute became clearer during the course of oral presentation before me. My reasons for concluding that the F-tT's decision cannot stand are as follows:

> (1) The application to the F-tT was made under section 27A. It was for the F-tT to decide, in relation to each of the three service charge years before it, whether a service charge was payable by the respondent to the appellant and, if so, the amount which was payable. The decision of the F-tT on this point was:
>
> > "If the service charges claimed from the [respondent] include a subsidy of the "social" housing, they are not reasonable and will have to be re-calculated to exclude any such subsidy before they become payable."

This is not an answer to the question posed to the F-tT. It does not constitute a decision upon the amount which was payable in respect of any of the three years.

(2) The F-tT appears to have construed the lease not by examining the meaning of the words which are present in the lease, but instead by starting from an assumption that a service charge which included a subsidy in respect of the social housing units was not payable by the respondent unless there was an express or an implied term to the effect that the respondent was to subsidise the social housing tenants (see paragraph 29 of the F-tT's decision). In my view this is approaching the problem in the wrong way.

(3) The F-tT does not appear to have had drawn to its attention that the three years which were before it for consideration were years in respect of which the appellant had never made a demand for a final payment. Instead what was being demanded for each of those three years was merely the on account payment payable under schedule 7 paragraph 6.1 of the lease.

43. The primary argument advanced on behalf of the appellant is that the present case is not an application under section 35 of the 1987 Act for variation of the lease; that the lease contains a drafting error but is clear in its terms; that the lease requires payment of 10% of effectively the overall costs (i.e. relating to all the buildings in the development); that this means that the respondent is contractually liable to pay very large sums; and that in these circumstances (and without needing to work out exactly how much these very large sums might be) it is open to the appellant, acting as it would contend with moderation and reasonableness, to require the payment of the much smaller sums which have in fact been demanded. These much smaller sums which have been demanded have been calculated on the basis which was originally subjectively intended (at least by the appellant). In short the argument is: if you are contractually obliged to pay a large sum you have no defence to a claim for a smaller sum.

44. I reject this argument for the following reasons:

(1) The argument fails to recognise that the demands for payment of service charge in respect of each of these three years are demands for payment of service charge on account. The appellant has never worked through the accounts and demanded a final payment in accordance with schedule 7 paragraph 6.2.

(2) Accordingly, whatever might ultimately be the position if ever the appellant tried to demand a much larger sum on the basis of a final calculation under paragraph 6.2, this position has not yet been reached. All that the appellant can claim are three on account payments.

(3) The provisions of section 19(2) of the Landlord and Tenant Act 1985 apply in respect of each of these three on account payments and require that no greater amount than is reasonable is payable.

(4) A demand for an on account payment based upon the drafting error, so as to require the respondent to pay about £12,000 per annum and so as to give the appellant (apparently) about 3000% recovery of his expenses, would involve the demand of a greater amount than is reasonable.

(5) The foundation of the appellant's argument is therefore removed. This is not a case where, as the date of the relevant demands, the appellant could say it was owed a very large sum and was being reasonable and moderate in demanding much less. Instead this is a case where, as at the date of the relevant demands, only a reasonable sum was payable in any event.

45. It is therefore necessary to assess for each of these three years whether the sum demanded by way of on account payment was reasonable.

46. I reject the argument that, in assessing the amount that it was reasonable to pay, the Tribunal should have in mind the prospective liability for the much greater sum which (so the appellant argues) can in due course arise on the basis of the drafting error. I reject this argument because I see no prospect that the respondent (and the other lessees) will ever ultimately become contractually liable to pay the very large sum based upon the drafting error, so as to give the appellant about 3000% recovery of its expenses. If the appellant ever attempted, on the basis of finalised accounts under paragraph 6.2 of schedule 7, to recover such sums from the respondent this would inevitably give rise to the making of an application under section 35 of the 1987 Act for a variation of the lease. Upon such an application there can be no prospect that the F-tT would conclude that the lease should remain unvaried and that the appellant should continue to be able to enjoy about 3000% recovery. Any such order varying the terms of the lease could be backdated to the date when the defect in the lease arose, see *Brickfield Properties v Botten* [2013] UKUT 0133 (LC).

47. I note the matters which are not in dispute as recorded in paragraph 11 above.

48. I accept Mr Talbot-Ponsonby's argument as recorded in paragraph 25 above to the effect that the appellant did sufficiently prepare estimates of the relevant expenditure so as to enable reliance upon paragraph 6.1 of schedule 7. It also may be noted that no point has ever been taken to the effect that nothing is payable by way of service charge on the basis that not even an on account payment is payable for want of some prior formal step.

49. The amounts demanded for each of the three years are set out in paragraph 2 above. In my view each of these sums constituted a reasonable sum which was properly recoverable under paragraph 6.1 of schedule 7 and which complied with section 19(2). I reach that conclusion for the following reasons:

(1) The amounts demanded constitute (so far as concerns 2013/14) the amount notified to the respondent at the date of completion when he took his lease. It is not in evidence as to whether he had already been notified of the prospective service charge before contractually binding himself to take the lease, but there is nothing to indicate there was a protest regarding the reasonableness of the amount at the date when he took the lease. As regards the later two years 2014/15 and 2015/16, the amounts demanded are very much in line with the amount demanded 2013/14 (to which, as just noted, no objection was taken at the time). This is some indication that the amounts demanded were reasonable.

(2) The amount demanded in respect of 2013/14 and 2015/16 was in each case less than 10% (which is the stipulated percentage in the lease) of the relevant costs if one assesses

these costs solely by reference to Ipsden Court -- thereby removing the main effect of the drafting error.

(3) What is necessary to determine for the purpose of the present case is the amount which it is reasonable to pay on account for each of these three years. I emphasise that the demands were for on account payments. Therefore there remains the prospect for the future that the amount finally due for the relevant year will be assessed (perhaps in the light of a varied lease after a section 35 application) and for any balancing charge one way or the other to be made.

50. (1) In the light of the drafting error it appears inevitable that, unless appropriate variations can be made by agreement, an application will be made to the F-tT under section 35 for a variation of the leases. That is a matter for the future. The merits of the appellant's and the respondent's arguments upon whether a variation should be made and if so what the variation should be are matters for the future. Also upon any such application there may be numerous other parties involved. Any such application would fall to be decided upon full evidence and argument.

(2) These matters are not before me in the present case. All that is before me in the present case is an appeal, by way of review, from a decision of the F-tT as to the amount payable by way of on account payments of service charge in respect of three specific years.

(3) In these circumstances it would be wrong for me to express any view upon the merits of any argument as to how the lease should be varied and what if anything should be done about the apparent subsidy of the units of social housing.

(4) Also not before me in the present case is any attempt by the appellant to recover from the respondent the very large sum said to be strictly recoverable on the basis of the drafting error. Accordingly it is not necessary or appropriate for me to consider what if any application the Unfair Terms in Consumer Contracts Regulations 1999 (or any replacement legislation) might have in respect of any attempt by the appellant to rely upon the terms of the lease construed upon such a basis.

(5) A further reason why it would be inappropriate for me to comment upon the various other matters raised in argument (including the various matters recorded above raised by the respondent) is that there is the prospect that any decision of the F-tT upon an application under section 35 for variation of the leases might in due course come for decision upon appeal to this Tribunal. I do not consider it necessary for the purpose of the present appeal to decide any matters beyond those which I have specifically decided above.

(6) Finally I should record that both parties agreed that there is a drafting error in the respondent's lease such that, upon the strict construction of his lease (and those of the other tenants who have leases in similar terms) the appellant can recover about 3000% of its expenditure on the buildings. No argument was advanced to me as to whether in schedule 7 paragraph 1.2 (see paragraph 20(4) above) the words "the amount attributable to" mean that the 10% proportion should be applied to something other than the total costs to the appellant of performing its obligations under Part B of schedule 6.

Conclusion

51. In the result I allow the appellant's appeal. I find that the amounts demanded by way of on account payments for the three relevant years, being the amounts set out in paragraph 2 above, were properly payable by the respondent. I note that the respondent has in fact already paid the sums in full.

52. The appellant has been substantially successful in its appeal from the F-tT. I cannot accept the respondent's argument that the appellant has behaved unreasonably in relation to these proceedings before the Upper Tribunal. I therefore dismiss the respondent's application for costs, see rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 as amended.

53. The respondent applied for an order under section 20C. The appellant argued that this should not be granted if the appellant was substantially successful upon the appeal. However I note that the need for this present litigation has substantially arisen because of the drafting error contained within the respondent's lease, being a drafting error for which the appellant must take the primary responsibility. I conclude that it would be just and equitable in the circumstances for this Tribunal to order that all of the costs incurred by the appellant in connection with these proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondent.

His Honour Judge Huskinson

14 November 2016