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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – reasonableness of sums payable in advance – relevance of NHBC warranty – whether necessary that receipt of funds from NHBC be guaranteed before being taken into account in determining reasonableness of advance payments – ss.19(2), 27A Landlord and Tenant Act 1985 - appeal dismissed

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

BETWEEN:

AVON GROUND RENTS LIMITED

Appellant

and

(1) MRS ROSEMARY COWLEY and others

(2) METROPOLITAN HOUSING TRUST LIMITED

(3) ADVANCE HOUSING AND SUPPORT LTD

(4) MAY HEMPSTEAD PARTNERSHIP

Respondents

Re: The Interchange,
63-67 Dalston Lane,
London E8 2NG

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand. London WC2A 2LL

12 March 2018

Justin Bates, instructed by Scott Cohen Solicitors for the appellant
T.J. Clarke, instructed by in-house solicitors, for the second respondent
The first, third and fourth respondents did not appear and were not represented

The following cases are referred to in this decision:

Knapper v Francis [2017] L&TR 20

Parker v Parham (2003) Lands Tribunal LRX/35/2002

Oliver v Sheffield City Council [2017] 1 EWCA Civ 225

Continental Property Ventures Inc v White [2007] L&TR 4

Introduction

1. How likely must it be that the cost of remedial work to a building will be recouped under an NHBC warranty before a residential service charge payable in advance in respect of that work may be reduced to reflect the anticipated receipt? That, in essence, is the issue raised by this appeal from a decision of the First-tier Tribunal (Property Chamber) ("FTT") given on 4 June 2017.

2. The appeal concerns a building known as The Interchange, 63-67 Dalston Lane, London E8. The Interchange is a mixed use development on basement, ground and four upper floors arranged around a central courtyard. It was completed in 2008 and the building was then let to a variety of lessees on terms requiring them to contribute through a service charge to its repair and maintenance.

3. The freehold reversionary interest in the building was acquired by the appellant, Avon Ground Rents Ltd, in March 2015. Soon after its acquisition the appellant discovered that water was penetrating through the surface of the central courtyard into Commercial Units 1 and 2, the basement premises let to the third and fourth respondents. It is common ground that liability for repairing this defect falls on the appellant and that, in principle, it is entitled to recover the cost of the remedial works from the two commercial tenants and from the lessees of the 49 residential flats on the upper floors of the building.

4. The first respondent, Mrs Rosemary Cowley, is the long leaseholder of one of those flats. She has acted in these proceedings as a representative of the leaseholders of another 34 flats, all of whom are private individuals.

5. The second respondent, Metropolitan Housing Trust Ltd, is the leaseholder of the remaining 15 flats, which it holds under a single lease.

6. At the hearing of the appeal the appellant was represented by Mr Justin Bates and the second respondent by Mr Tim Clarke, both of counsel. Although Mrs Cowley and a representative of the third respondent had participated in the original proceedings before the FTT but they did not appear at the appeal.

The standard form of lease

7. The leases of the different units of occupation at the development are in substantially the same form so far as service charges are concerned. Each leaseholder is required to contribute towards expenditure by the landlord in connection with the repair, management and maintenance of the building and the provision of services. The services are divided into three categories, with leaseholders contributing a different "specified proportion" of expenditure in either two of these categories, or in all three, depending on usage. To take the lease of one of the private residential flats as an example, the leaseholder of Flat 10 is required to pay 1.93% of the "Building

Provision", 1.44% of the "Estate Provision" and 2.94% of the "Residential Common Parts Provision".

8. In the private residential leases and in the third respondent's lease of Unit 1 the required contribution to each category of expenditure is a fixed percentage, as is the contribution of the second respondent to the Building Provision. The second respondent's contribution to the Estate Provision is not fixed, but is to be a "fair and reasonable proportion." Similarly, the fourth respondent, as leaseholder of Unit 2, is required to pay "a fair proportion" of both the Building Provision and the Estate Provision.

9. By clause 6.2 of each of the leases the leaseholder has covenanted to pay the Service Charge by quarterly payments in advance. The amount payable is the aggregate of the specified proportions of the Building Provision, the Estate Provision and (in the case of the private residential leases) the Residential Common Parts Provision, which are to be estimated at the start of the "Account Year" beginning on 25 June. Each of the component Provisions is to comprise "the reasonable and proper expenditure estimated by the landlord as likely to be incurred in the Account Year by the landlord upon the matters specified in sub-clause 6.5." At the end of each Account Year the appellant is required to determine "the amount by which the estimate … shall have exceeded or fallen short of the actual expenditure in the Account Year" (clause 6.5); each leaseholder is then required to pay its specified proportion of any shortfall or is entitled to an allowance reflecting any surplus as the case may be.

10. The matters specified in sub-clause 6.5 as being the subject of service charge expenditure include the cost of repairs and other usual services. They also include "any interest and fees in respect of money reasonably borrowed to finance the provision of the services."

The facts

11. In July 2015 it was reported to the appellant's agents that water was leaking into the basement of Commercial Unit 2 located under the central courtyard. The cause of the leak was investigated and the appellant was advised that the water proof membrane separating the courtyard from the basement was defective and ought to be replaced.

12. In January 2016 the appellant's agents gave the residential leaseholders notice under section 20, Landlord and Tenant Act 1985, that it intended to carry out remedial work to cure the defect, and invited their observations. In response Mrs Cowley suggested that the appellant should make a claim on the building's NHBC warranty.

13. As subsequently became clear, the building is the subject of three separate NHBC warranties which apply to different parts of the structure. A "Buildmark" warranty covers the private residential flats owned by the first respondents and gives

cover for defects above a certain minimum value but without any uninsured excess. A separate "Buildmark Choice" warranty provides cover for the 15 flats held by the second respondent, but applies an irrecoverable excess totalling £14,595 for all 15 units. The two commercial units are covered by a third warranty, "Buildmark Link", with an excess of £3,880 per unit.

14. On 20 January 2016 the appellant's agents notified NHBC of a claim under the warranties.

15. When the second stage of the statutory consultation was undertaken on 9 March 2016 the leaseholders were informed that a claim had been made and that the consultation was only proceeding in case that claim was not accepted for any reason by NHBC. Despite that assurance, on 10 June 2016 the appellant's agent issued demands for the first instalment of service charges for the year beginning 25 June 2016 which included each leaseholder's apportioned part of the cost of the remedial works which was estimated to be £291,008.

16. In subsequent exchanges between the appellant's agent and NHBC it sought to identify under which of the three Buildmark warranties the claim was being made, as that was relevant to the amount of the excess which would be applied. Possibly because of difficulty in ascertaining exactly where the defect had occurred, that question was not one which the appellant was immediately able to answer. It was also of concern to NHBC to establish in what proportions each of the leaseholders were obliged to contribute; it is less clear why so much importance was placed on this.

17. NHBC does not appear at any stage seriously to have disputed its liability to contribute towards the cost of the necessary remedial works, but it has not yet been prepared to commit itself to paying a specific sum. Its position before the first instalment of the advance payments fell due can be seen from the following extract from an email sent on 8 June 2016 to the appellant's agents:

> "In principle we find the claim to be valid as there is damage caused by a defect which is principally what all three policy types cover. What we cannot do at this stage is confirm our liability on each policy type, the excess owed on each policy type and our contribution to each policy types' liability. Once the tribunal has ascertained apportionment I can advise exactly what NHBC will be liable for."

18. NHBC's reference to the tribunal was to the FTT, at which the appellant had issued two applications under the Landlord and Tenant Act 1985 on 31 March 2016. The first was under section 27A(3) and raised specific questions concerning the appellant's proposed remedial scheme and the liability of the leaseholders to contribute towards it, while the second sought dispensation under section 20ZA from the statutory consultation requirements in the event that they had not been completed properly.

19. The appellant's section 27A(3) application asked the FTT to consider its entitlement to a service charge if it were to incur the costs of the proposed remedial works, estimated to be a little over £291,000, and to determine the liability of each respondent to pay their due proportion of those costs. The determination was said to require consideration of the proportions applicable to each respondent, the reasonableness of the proposed costs, and the adequacy of the section 20 consultation procedures.

20. In its statement of case and evidence for the FTT the appellant did not make it clear under which category of expenditure it considered the cost of the remedial works fell. Nevertheless, in the estimate of expenditure provided with the demand for the first instalment of the advance service charge served on 10 June 2016 the apportionment appears to have followed the proportions applicable to the Estate Provision. It certainly did so in the case of the second respondent, which was charged 25.95% of the total, that being the percentage which had always been treated by the appellant as the second respondent's fair and reasonable contribution towards Estate matters. The basis on which the other leaseholders were charged is less clear, as only the demands themselves have been produced and not the breakdown, but it seems reasonable to assume that the same principle was applied.

21. Applying the Estate Provision proportions to the total of £291,000 which the appellant sought to recover in advance by quarterly instalments from June 2016, each of the private residential leaseholders would be required to contribute between £3,114 and £6,286 (£778 to £1,571 per quarter) while the second respondent was asked to pay £75,514 (or £18,878 per quarter). These are relatively substantial sums, especially for the individual leaseholders.

22. The appellant has made it clear at each stage of the proceedings that it is willing to apply the proceeds of the NHBC warranty to the service charge account when they were received.

The FTT's interim decision

23. After a hearing in September 2016 the FTT issued what it described as an "interim decision" on 14 November 2016. It recorded that agreement had been reached at the hearing on two issues. The appellant and the first and second respondents were able to agree that the remedial works fell within the Estate Provision category under each of their leases, and the appellant also agreed with the second respondent that a fair and reasonable apportionment of the Estate Provision was 25.95%. (Since the fixed contributions of the first and third respondents for Estate expenditure were 49.05% and 12% respectively, the result of the agreement was that up to 13% of the cost of the works would remain to be paid by the fourth respondent, but there was no agreement with the fourth respondent to that effect).

24. The FTT was satisfied that the remedial works proposed by the appellant were reasonable and made a determination that, if the estimated costs of £251,954.64 were incurred together with surveyor's fees of 8% and managing agent's fee of 5% (rather

than the 7.5% proposed), these would be recoverable through the service charge payable by each respondent "subject in each case to deductions first in respect of insurance receipts from NHBC." Since two instalments of the advance service charge had already fallen due for payment by the time the FTT issued its interim decision, but no sum had yet been received from the NHBC, it is unclear whether the FTT considered that the sums already demanded were payable.

25. The FTT considered that it was part of its function under section 27A to determine the amount which each leaseholder was obliged to pay, but it was unable to make such a finding until the contribution to be made by NHBC was known. In paragraph 58 of its decision it gave directions requiring the appellant to apply to the FTT within 2 months with details of its case on that issue, so that a final determination could be made of the specific sums which each of the first and second respondents was required to contribute.

26. The FTT made a number of other determinations: it found that it had no jurisdiction to consider the amounts payable by the third and fourth respondents; it found that statutory consultation notices had not been served on the second respondent, but that it was nevertheless appropriate to grant dispensation under section 20ZA from compliance with the consultation requirements. It reserved its consideration of applications made by the respondents under section 20C of the 1985 Act for orders limiting the extent to which they must contribute through the service charge towards the appellant's costs of the proceedings.

NHBC's position

27. With the benefit of the FTT's interim decision the appellant took further steps to try to reach agreement with NHBC over its contribution to the cost of remedial works. On 17 March 2017 NHBC acknowledged liability for the full cost of the repair, £251,954, and said it would offer a further 7.5% for project management plus a 10% contingency on the understanding that its offer would be in full and final settlement. There remained some uncertainty about the position of the third and fourth respondents, but NHBC provided a table showing its own assessment of amounts payable under each of the different policy types.

28. The aggregate sum which NHBC proposed to offer was £296,046. In the case of the first respondents the total value of their claims under the warranty was £145,210 which NHBC said it would meet in full because their Buildmark warranty was not subject to an excess. The second respondent's entitlement was reduced by the amount of the Buildmark Choice excess to leave a net contribution by NHBC of £62,228. In the case of the commercial occupiers it was assumed they would be liable in equal proportions and on that basis, having made an allowance for the excess under the Buildmark Link policy, NHBC indicated its intention to contribute £33,125 for each unit.

29. In a subsequent email on 12 April 2017 NHBC made it clear to the appellant that, before it would be prepared to make a cash settlement in the proposed amounts, it would require confirmation from all parties that the apportionments were agreed.

30. On 25 April 2017 the appellant's solicitors wrote to the FTT confirming that any payment from NHBC was dependent on the agreement of all parties to their respective apportionments. They pointed out that, following the agreement with the second respondent, only the contribution of the fourth respondent was unascertained; as the aggregate of the contributions of all other respondents totalled 87%, the appellant's solicitors considered that 13% was attributable to the fourth respondent. The FTT was informed that the appellant's agents had invited the fourth respondent to agree its contribution but that no agreement had been reached.

31. The appellant did not provide any further information to the FTT about the state of its negotiations with the fourth respondent, nor was Mr Bates able to inform the Tribunal of the nature of the difficulty over agreeing its contribution.

32. In their letter of 25 April the appellant's solicitors repeated their previous assurance that the proceeds of the NHBC warranty would be applied to the service charge account when they were received. Pending those receipts they nevertheless invited the FTT to determine that the contributions of each of the leaseholders (so far as they were within its jurisdiction) were payable in full without taking into account the anticipated NHBC receipts.

The FTT's final decision

33. The FTT's final decision was given on 4 June 2017. It began by reminding the parties that the application was in respect of the reasonableness and payability of service charges for costs which had not yet been incurred. Once the costs had been incurred the parties would have the right to make further applications under section 27A.

34. The FTT acknowledged the appellant's intention to give credit for sums received from NHBC, but in paragraph 6 of its decision it said this:

> "The Tribunal does not accept the applicant's latest position as set out in its letter of 25 April 2017. This is because the determination of outstanding issues with the commercial tenants (if any) is within the control of the applicant, as their landlord."

35. Paragraph 6 of the FTT's decision has been understood as a rejection of the appellant's request that each of the leaseholders be required to contribute towards the estimated cost of the works without any allowance being made for the anticipated receipt from NHBC. That is consistent with the next paragraph of the decision in which the FTT said that credit must be given for £296,046 in so far as it was

apportioned to the first and second respondents and was not subject to further deductions.

36. On that basis the FTT determined that the contribution required from the first respondents towards the cost of the remedial work was nil since the NHBC was liable to pay the full amount apportioned to the private residential leases. Taking into account the NHBC contribution net of the excess, the second respondent was liable to pay £11,697.98 to the appellant.

37. Finally, the FTT considered an application under section 20C of the 1985 Act. Having regard to the extent of the parties respective successes, it concluded that the just and equitable order was that not more than half of the costs incurred by the appellant in connection with the proceedings should be able to be passed on to the first and second respondents through the service charge

The appeal

38. The FTT subsequently refused an application for permission to appeal, but permission was granted by this Tribunal in relation to two issues. The first was whether the FTT was entitled to find that nothing was payable by the first respondents and only £11,697.98 was due from the second respondent in circumstances where no payment had been received from NHBC nor had any binding settlement yet been reached with it. The second issue concerned the FTT's order under section 20C, which both counsel accepted was a subsidiary issue which would depend on the outcome of the appeal on the main issue.

39. Mr Bates submitted that the FTT had been right in its interim decision when it said that the liability of each leaseholder was subject to NHBC "receipts" (meaning sums actually received) but it had been wrong in its final decision to limit the sum recoverable from the first and second respondents on the basis that credit ought to be given in advance for funds which it assumed would eventually be received from NHBC but which were not yet confirmed receipts. The service charges themselves were payable in advance and by reason of section 19(2) of the 1985 Act no greater amount than was reasonable was payable. But section 19(2) provided for adjustment of any advance payment after the amount of the leaseholder's final liability was known and it was wrong in principle to assume that liability would be reduced by third party receipts when those were not yet certain.

40. The only fair reading of the FTT's interim decision, Mr Bates suggested, was that the full estimated cost of the works, £291,008, was reasonable except for a modest reduction in the managing agent's fee. It followed that each leaseholder was liable to pay their defined or agreed proportion of the total costs by quarterly instalments as requested by the appellant in June 2016. It had been unnecessary for the FTT to determine that credit would need to be given for any sum recovered from NHBC because that had been the position of the appellant throughout and was required by section 19(2) in any event. The appellant's section 27A application had not requested a determination of the sum payable by each leaseholder and the FTT

should, therefore, have stopped after concluding that the proposed works and their costs were reasonable.

41. Mr Bates drew a distinction between, on the one hand, a sum which had already been paid or for which NHBC had accepted liability, or which had been the subject of a finding of fact by the FTT that it would have been paid if a claim had been made, and, on the other hand, a sum which was expected to be paid but which was not yet certain. It was not open to the FTT, he submitted, to decide for itself what a third party would contribute towards the total cost of the works in circumstances where the third party had not yet definitively committed itself to any such payment. The FTT had to determine the reasonable sum payable in advance towards the cost of works having regard to the facts as they were when the payment fell due, and not as they might subsequently become, as the Tribunal had decided in *Knapper v Francis* [2017] UKUT 3 (LC).

42. In his response to the appeal Mr Clarke submitted that the FTT had been entitled to come to the conclusion it did. It was clear enough that NHBC would make a contribution in an amount which would make it unnecessary for the first respondents to make any contribution at all, and which would leave the second respondents having to pay only the relevant excess. In those circumstances a reasonable amount for the respondents to be required to pay ought to be calculated taking into account the anticipated NHBC receipts. Mr Clarke referred to two decisions of the Tribunal, *Parker v Parham* (Lands Tribunal), 6 January 2013, LRX/35/2002 and *Knapper v Francis*, in support of the submission that it does not automatically follow that the sum which may reasonably be required to be paid in advance is the full amount of a landlord's anticipated expenditure.

Discussion

43. The contractual position in this appeal is clear, as Mr Bates submitted. Each of the leaseholders is required to pay, by quarterly instalments, its specified proportion of "the reasonable and proper expenditure estimated by the landlord as likely to be incurred in the Account Year." At the end of the year the leaseholders are required to meet any amount by which the estimate is shown to have fallen short of the actual expenditure, or is entitled to a credit or allowance for any surplus.

44. It is common ground that the appellant must, as it has always said it will, give credit to the leaseholders for sums it receives from NHBC. It cannot have been intended by any of the parties to the various leases that the appellant would be entitled to recover the cost of the remedial works both as a service charge and under the NHBC warranties. In *Oliver v Sheffield City Council* [2017] 1 WLR 4473 all three members of the Court of Appeal agreed that a way had to be found to prevent all forms of double recovery by a landlord entitled to recoup its expenditure both through a service charge and from a third party (as in this case). They disagreed over precisely how, as a matter of interpretation of the lease they were considering, effect ought to be given to that presumed intention of the parties, but all were satisfied of the need "to treat the avoidance of double recovery as a necessary objective in seeking to

construe the lease" (*per* Briggs LJ at [51]). The particular language of the leases in this appeal does not seem to me to allow for the application of either of the solutions favoured by the members of the Court of Appeal in *Oliver,* but fortunately it is not necessary to consider the issue of how double recovery is to be avoided here because Mr Bates agreed that, by one route or another, it must be avoided and credit for the NHBC receipts must be given.

45. By whatever contractual method the NHBC contribution falls to be credited against the cost of the works, it does not seem to me that clause 6.4 of the various leases requires that credit must be given by the landlord in advance of the receipt of the expected funds. If the appellant anticipated that expenditure on the necessary remedial work was "likely to be incurred in the Account Year" then, as a matter of contract, it was entitled to include it in the estimate and to recover it by quarterly instalments from the leaseholders, whether or not it also expected to receive the same sum from NHBC at some point during the same year. I do not accept Mr Clarke's submission that, in estimating the reasonable and proper expenditure likely to be incurred, the appellant must take account of the expectation of receipt from NHBC. The anticipated expenditure will still be incurred, whatever source it is ultimately met from.

46. As far as the liability of the first and second respondents is concerned, the analysis does not, of course, stop with the contractual position. Both the individual private leaseholders and the housing association are "tenants of a dwelling" within the meaning of section 18(1), 1985 Act, and the contributions which they are required to make towards the appellant's expenditure are therefore subject to the detailed regulatory scheme in sections 18 to 30 of the statute.

47. As the FTT reminded the parties when it gave its final decision, the sums in issue in this appeal are payable in advance, based on an estimate of anticipated expenditure made before any of the remedial work has been done. They are therefore sums to which section 19(2), Landlord and Tenant Act 1985 applies; it provides as follows:

> "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 adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

48. Guidance on the application of section 19(2) has been given in a number of decisions of the Tribunal and its predecessor, the Lands Tribunal. *Parker v Parham* (2003) EWLands LRX/35/2002, to which Mr Clarke referred, was not strictly a case concerning section 19(2) at all, but section 19(2B)(c) (since repealed and replaced by section 27A) which gave the leasehold valuation tribunal jurisdiction to determine in relation to the costs of services "what amount payable before costs are incurred would be reasonable". At paragraph 22 the Lands Tribunal (George Bartlett QC, President) explained that the purpose of section 19(2B) was to limit the amount that is payable in advance to such amount as may be reasonable; it presupposed an obligation to make a

payment in advance, and was not concerned with the reasonableness of that contractual obligation, but only with the reasonableness of the amount of the proposed payment. The same is clearly true of section 19(2).

49. In *Parker v Parham* the Tribunal went on in paragraph 23 to reject a submission, similar to that made by Mr Bates in this case, that once a tribunal has decided that it would be reasonable to incur costs on a particular service, it necessarily followed that it ought to determine that the full amount of those costs was a reasonable advance payment. The matter was not nearly so cut and dried as that. Considerations which a tribunal either ought, or may properly, have regard to in determining the question of the reasonableness of an advance payment included the time at which the landlord would, or would be likely, to become liable for the costs, how certain the amount of those costs was, and whether there was certainty that the works would in fact be carried out and paid for during the period covered by the advance payment. The Tribunal then mentioned a number of matters it considered to be of lesser, or of no, significance:

> "It is possible, in my view, that the financial position of either the landlord or the tenant could be a relevant consideration, although I think that it would usually not be relevant. The fact that the landlord would be able to fund the works without an advance payment does not seem to me to be a matter of significance. Nor, in the present case, does the fact that the tenants have had to pay high service charges in the previous year constitute, in my view, a consideration that suggests that the advance payment would be unreasonable."

50. The other decision on the scope of section 19(2) to which I was referred was the more recent decision of the Tribunal in *Knapper v Francis* [2017] UKUT 3 (LC) on which Mr Bates relied. The issue in that case was whether in deciding on the reasonable amount of an advance payment a tribunal may take into account facts which were not known when the payment fell due (such as that the work which the payment was intended to fund would not, in the event, be carried out in the year to which the payment related). At paragraph 38 I suggested that events which occurred after the landlord had set its budget for the year could be taken into account in determining the reasonableness of the amount of the payment, but events occurring after a payment fell due could not be (although they might in respect of a future instalment):

> "I do however agree with Mr Crozier's submission that section 19(2) allows matters not known to a landlord when its budget was set to be taken into account in determining a reasonable sum to be paid in advance. In this case, for example, even if the landlord was unaware that a site manager could be employed for a significantly lower salary than it anticipated, there would be no reason to ignore that information since it would clearly be relevant to the reasonableness of the sum demanded. If matters became known after the budget was drawn up, but before a particular payment became due, those could also potentially affect the reasonableness of the sum to be paid. In this case the payment on-account was due on a single date at the start of the year, but such payments are more usually required half-yearly or quarterly. In such cases the fact that money has not been spent, despite provision having been

> made in an annual budget, may cause a sum which appeared reasonable on the first payment date to become less reasonable (for example where major works requiring periodic payments are delayed). I do not see why, in such a case, section 19(2) should not modify the contractual obligation by reference to circumstances as they are known at the quarterly or half-yearly payment dates. But I would draw a line at the date on which the payment becomes due and would exclude from consideration matters which could not have been known at that date, because they had not yet occurred."

51. It is clear from both *Parker* and *Knapper* that whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules, but must be assessed in the light of the specific facts of the particular case. Mr Bates' submission that an anticipated receipt from a third party may only be taken into account if the receipt is certain is therefore too inflexible. It is not inconsistent with the Tribunal's decision in *Knapper* for the likelihood of a particular event occurring during the period covered by an advance payment to be taken into account in determining the reasonableness of the amount of the payment. In *Parker* the Tribunal mentioned at several points that the certainty that works would be carried out, and thus the certainty of the anticipated costs, were matters which it was permissible to take into account in considering the reasonableness of the advance payment: "if the cost of the works is uncertain, so that there is a wide range of possible outcomes around the amount that the LVT has found to be reasonable, that could well be something that could affect the reasonableness of an advance payment" (*Parker*, paragraph 23).

52. With that guidance in mind it is possible to consider whether the FTT was entitled to take into account the sums which NHBC had indicated it was willing to pay, subject to the final agreement of all leaseholders, in determining the amount of the advance payment.

53. I agree with Mr Bates that the fact that a landlord's expenditure may be covered by a warranty or insurance policy does not mean that a landlord may never include that expenditure as part of an advance payment. The decision of the Lands Tribunal (Judge Rich QC) in *Continental Property Ventures Inc v White* [2007] L&TR 4 is not authority for that proposition. In that case a landlord had elected not to make a claim under a guarantee and had sought to recover the cost of remedial works through a service charge. The tribunal found as a matter of fact "that the landlord could have had the Guarantee Works carried out under the Guarantee at no charge" (paragraph 8). The tribunal had therefore been right to conclude that the cost had not been incurred reasonably, but the case had nothing to do with payments in advance.

54. Nevertheless, I see no reason why the prospect of a receipt from a third party must be certain before it may be taken into consideration in determining the reasonableness of an advance payment. In this case by the time the first advance payment was demanded there was no uncertainty over NHBC's attitude to its own liability, it having said on 8 June 2016 that "in principle we find the claim to be valid." There was some remaining uncertainty between the appellant and NHBC over

the apportionment of liability to the particular policies, which could affect the amount which would be received (because the excesses were different under each policy). There was also uncertainty over the date on which payment would be received, since NHBC took the attitude that it wanted all leaseholders to agree that the payments in respect of their units would be in full and final settlement of its liabilities under the warranties.

55. As to the uncertainty over apportionment, the appellant had formed a view of its own that the work fell within the Estate Provision and had allocated the cost to each of the leaseholders on that basis. There was, in reality, no disagreement between the appellant and the second respondent over the proportion in which it was obliged to contribute towards Estate Provision, and the liabilities of the first and third respondents were fixed. The only disagreement was concerning the contribution of the fourth respondent. The appellant chose to tell the FTT (and the Tribunal) nothing about the state of negotiations between it and the fourth respondent (if indeed there were any), and there was therefore no reason to assume that they would present a stumbling block to a final agreement within a reasonable time.

56. With the benefit of hindsight it is apparent that no agreement has been reached between the appellant and the fourth respondent, and no payment has yet been received from NHBC. Mr Bates criticised the FTT for saying that the determination of outstanding issues with the commercial tenants was within the control of the appellant, since it could not compel agreement, but that would be a more weighty submission if the appellant had disclosed anything which suggested that there was a dispute of substance with the fourth respondent. It has chosen not to do so and cannot therefore complain if the FTT treated the resolution of the NHBC claims as a relatively straightforward matter.

57. In my judgment, therefore, the FTT was entitled to conclude that, as at June 2016, a contribution equal to the full cost of the remedial works was not a reasonable advance payment, in circumstances where a payment of a near-equivalent amount was anticipated from NHBC and there was no reason to believe it would be delayed. The reasonable amount of the advance payment was a matter of judgment on which different views are possible, but this Tribunal will not interfere with a judgment of the FTT of that sort unless it has taken into account something irrelevant, or failed to take into account something relevant, or has otherwise reached a conclusion which was not open to it. In *Oliver* the Court of Appeal said that it would not depart from a similar assessment by this Tribunal which was "within the range of fair outcomes available to the decision maker" (*per* Briggs LJ, at para. 58). This is not such a case.

58. One further matter seems to me to be potentially of relevance to the reasonableness of an advance payment, although it was not mentioned by the FTT and it does not affect my conclusion on the appeal. Each of the leases in this case allowed the appellant to include in the service charge any "interest and fees in respect of money reasonably borrowed to finance the provision of the services." If the appellant chose not to include the cost of the remedial work in the advance payment, but instead to borrow the money required to fund the works, with the benefit of the NHBC's

indication that its liability was not disputed in principle, it would have been able to recoup the cost of such borrowing through the service charge. In *Parker* the Tribunal said that the fact that the landlord would be able to fund the works without an advance payment did not seem to it to be a matter of significance in determining the reasonableness of an advance payment. That may be the case if the alternative to raising an advance payment is that the landlord would be required to fund the necessary works at its own expense, but the position would seem to me to be different if the lease gives the landlord the power to borrow at the expense of the leaseholders who would otherwise be required to make a significant capital payment to cover the cost of works until funds were received from NHBC. In those circumstances it may well be relevant that the landlord had a less burdensome alternative to recovering the cost of works in advance through the service charge.

59. Having concluded that the appeal fails on the main issue, there is no reason for me to interfere with the FTT's exercise of its discretion in relation to the section 20C application.

60. For these reasons I dismiss the appeal.

Martin Rodger QC
Deputy Chamber President

21 March 2018