UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges -- landlord's failure to serve a copy of its budget estimate when demanding on account payments -- whether nothing payable by tenants -- construction of an unusually drafted lease

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

BETWEEN **MARK SKELTON AND OTHERS** **Appellants**

and

DBS HOMES (KINGS HILL) LIMITED **Respondent**

Re: 1,4,5,8 and 9 Burton Pynsent House,
West Common Road,
Bromley,
BR2 7BY

Before: His Honour Judge Huskinson

Sitting at: Upper Tribunal (Lands Chamber), Royal Court of Justice,
Strand, London WC2A 2LL
on
29 June 2015

Mark Skelton, the first named appellant, appeared on behalf of all of the appellants
Denis Minns MSc FRICS appeared on behalf of the respondent

The following cases are referred to in this decision:

London Borough of Brent v Shulem B Association Limited [2011] EWHC 1663 (Ch)
Warrior Quay Management Limited v Joachim [2008] PLSCS 56
Akorita v Marina Heights (St Leonards) Limited [2011] UKUT 255 (LC)
Leonora Investment Company Limited v Mott Macdonald Limited [2008] EWCA Civ 857
The London Borough of Southwark v Woelke [2013] UKUT 0349 (LC)
Burr v OM Property Management Limited [2013] EWCA Civ 479
Gilje v Charlegrove Securities [2003] EWHC 1284 (Ch).

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") whereby the F-tT decided that the service charges payable by the appellants for the service charge years 2010-11, 2011-12, 2012-13 and 2013-14 were payable in full as demanded. The present appeal is not concerned with the year 2010-11.

2. So far as concerns the years 2011-12, 2012-13 and 2013-14 the dispute between the parties was not upon any question such as regularly arises under section 19 of the Landlord and Tenant Act 1985 as amended regarding whether costs had been reasonably incurred, or had been incurred in relation to the provision of items to a reasonable standard. Instead the question was whether anything was payable at all by the appellants (as lessees) to the respondent (as lessor) in respect of their premises for these years. In summary the argument that nothing was payable was based upon the contention that the respondent had failed to comply with the provisions of the lease regarding service charges, that therefore such demands for payment as had been made were invalid and that it was now too late to make any fresh demand having regard both to the provisions of the lease and also, separately, to the provisions of section 20B of the Act.

3. The appellants are all lessees of their respective flats at Burton Pynsent House. I was told at the hearing that this is a luxury block of flats surrounded by grounds which has been recently constructed – the works being completed in about 2010. Mr Skelton, the first named appellant, is the original lessee of flat 4 pursuant to a lease dated (apparently) 4 February 2011 between the respondent as lessor and himself as lessee whereby flat 4 was demised to him for a term of 125 years from 29 September 2008 upon the terms and conditions therein contained. I shall refer to certain provisions of Mr Skelton's lease in due course. The case proceeded before the F-tT and before the Upper Tribunal upon the basis that the position of the other appellants is effectively exactly the same as Mr Skelton's position and that there is nothing in their leases or in the facts relating to them which indicates there should be any different result as between the respondent and them as compared with the position between the respondent and Mr Skelton.

4. At the hearing Mr Skelton represented himself and spoke also on behalf of the other appellants. The respondent was represented by Mr Denis Minns MSc FRICS. There was therefore no legal representation on behalf of either party.

5. The problems in the present case arise principally from a combination of two factors, namely:

   (a) the fact that the service charge provisions in the lease are in various respects ill-drafted and in other respects curiously drafted; and

(b) the fact that the respondent has failed to comply with these provisions.

The Lease

6. I have said that the lease is apparently dated 4 February 2011 because, as one of the leases various deficiencies, this date is written on the cover page but under the heading of Particulars on page 5 the date of the lease is stated as being 4 January 2011.

7. The lease contains various definitions including the following:

Accounting Date	The 1st day of April in each year or such other date as the Landlord may from time to time substitute for that date.
Accounting Period	The period commencing on the day immediately after each Accounting Date and ending on the following Accounting Date
Estimate	An Estimate prepared under the provisions of paragraph 3.1 of part 1 of schedule 6.
Interim Charge	The Tenant's Proportion of the amount of the Estimate for each Accounting Period
Services	The Services and works specified in part 3 of schedule 6
Service Charge	The Tenant's Proportion of the amount of the Service Costs for each Accounting Period
Service Costs	The amounts and items specified in part 2 of schedule 6

8. The lease reserves a rent and the payment of the Service Charge (clause 4.4). The lease in clause 5.1.2 contains a covenant by the tenant with the landlord to pay the Service Charge to the landlord in respect of each year of the term on the basis set out in part 1 of schedule 6. The lease contains in clause 6 certain covenants by the landlord in favour of the tenant including in clause 6.4 a covenant to provide the Services for all the occupiers of the building upon the basis there set forth. The covenant to provide the Services is not made conditional upon the receipt by the landlord of monies by way of payment of the Service Charge. The landlord is to provide the services to a standard consistent with the use of the building as high class flats.

9. Schedule 6 makes provision regarding the payment of service charge. It is appropriate to set out the whole of paragraphs 1-5 of part 1 of schedule 6:

Schedule 6
Provisions relating to Service Charge
Part 1
Computation, certification and payment

1. Purpose of Service Charge

1.1 The Tenant shall pay to the Landlord a Service Charge (and an Interim Charge on account) in accordance with the provisions of 1.2 and 1.3 hereof, the purpose of which is to enable the Landlord to recover from the Tenant the Tenant's due proportion of all expenditure overheads and liabilities which the Landlord may incur in and in connection with carrying out works on the Building and providing present and future services to its occupiers (but not including expenditure on those parts of the Premises which the Tenant is liable to repair and maintain under the terms of this Lease and the corresponding parts of the other Lettable Areas in the Building).

1.2 **Service Charge** all the expenditure overheads costs and liabilities incurred by the Landlord in carrying out its obligations under clauses 6.3 and 6.4.

2. Definitions

In this Schedule the following definitions apply in addition to the definitions set out in clause 1 of this lease:

Accountant	an accountant or firm of Accountants who shall be Qualified as specified in s28 of the LTA 85
Certificate	a certificate issued by the Accountant under the provisions of paragraph 5 of this schedule
Estimate	an estimate prepared under the provisions of paragraph 3.1 of this schedule
Independent Surveyor	a surveyor appointed by the landlord but he shall not be member or employee of the Landlord or its managing agents.
Payment Days	1st April and 1st October in each Year
Reserve Fund	a fund that the Landlord may decide to establish in order to meet future expenditure which it expects to incur in maintaining replacing rebuilding or renewing those items which it is obliged or

	entitled to maintain replace rebuild or renew under the terms of this lease;
Supplemental Interim Charge	the payment mentioned in paragraph 4.4 of this Schedule

3. Preparation of the Estimate

3.1. On or before (or, if that shall be impractical, then as soon as practicable after) each Accounting Date the Landlord shall prepare an Estimate in writing of the Service Costs which it expects to incur or charge during or in respect of the Accounting Period commencing immediately after that Accounting Date.

3.2 The Estimate shall contain a summary of those estimated Service Costs.

3.3 Within 14 days after preparation, a copy of each Estimate shall be served by the Landlord on the Tenant together with a statement showing the Service Charge payable by the Tenant on account of those estimated Service Costs.

4. Payment of Service Charge

4.1 The Service Charge for each Accounting Period (together with VAT, if payable) shall be paid by the Tenant by two equal instalments on the Payment Days during that Accounting Period.

4.2 If at any time during an Accounting Period it appears to the Landlord that (whether due to the need arising to incur a cost which was not included in the Estimate, or for any other reasonable reason whatsoever) the Interim Charges payable by the Tenant shall be insufficient to meet the Service Charge for that Accounting Period, the Landlord shall be entitled to serve on the Tenant a demand for a Supplemental Charge of such reasonable amount as the Landlord may specify, accompanied by a written explanation of the reason and computation for it, and the Tenant shall pay the amount demanded within 14 days of service of the demand.

5. Preparation and Service of the Certificate

5.1 The Landlord or its managing agents shall keep proper books and record of the Service Costs for the Service Charge and as soon as practicable after each Accounting Date the Landlord or its managing agents shall prepare a certificate of the Service Costs in respect of the Service Charge for the Accounting Period ending on the Accounting Date. The Certificate shall contain a summary of the Service Costs in respect of the Service Charge.

5.2 If a Reserve Fund exists or is to be established, the Certificate shall also state any amount in the Reserve Fund at the commencement of the Accounting Period, any expenditure from the Reserve Fund during or in respect of that Accounting Period, and any sums included in the Service Costs in respect of the Service Charge to be added to the Reserve Fund.

5.3 The Certificate shall be signed by an Accountant and shall include a certificate by the Accountant that the summary of Service Costs in respect of the Service Charge set out in the Certificate is a fair summary and that the Service Costs are sufficiently supported by accounts, receipts and other documents which have been produced to the Accountant.

5.4 Within 14 days of signing by the Accountant, a copy of each Certificate shall be served upon the Tenant.

10. Paragraph 6 makes provision as to the proportion of the service costs to be payable in respect of various flats. So far as Mr Skelton's flat 4 is concerned the percentage is 9.091% of the Service Costs.

11. Paragraph 7 of schedule 6 makes provision that any dispute arising under schedule 6 or under section 19 of the Landlord and Tenant Act 1985 is to be referred to the determination of an arbitrator. This is surprising bearing in mind the provisions of section 27A(6) of the 1985 Act. Paragraph 7 is the last paragraph in part 1 of schedule 6.

12. Part 2 of schedule 6 makes provision as to what the Service Costs are and how they are to be calculated. Part 3 of schedule 6 makes provision as to what the Services to be provided by the landlord are to be. These include maintaining cleaning repairing redecorating etc various matters including the retained part of the development and keeping electrical and mechanical equipment etc in good repair and working condition etc and keeping the open areas etc clean and lit and keeping the grounds in a generally neat and tidy condition etc.

13. The reason why I have criticised the drafting of the lease so far as concerns the service charge provisions is because these provisions include the following errors and curiosities:

(1) There is a contradiction as to the date of the lease (but this does not matter).

(2) Paragraph 1.1 of schedule 6 provides that the tenant is to pay to the landlord:

"… a Service Charge (and an Interim Charge on account) in accordance with the provisions of 1.2 and 1.3 hereof…"

However there is no paragraph 1.3. Also paragraph 1.2 appears incomplete – as a matter of English grammar it is not a self-standing sentence and it scarcely fulfils the task apparently intended to be given to it by the words I have quoted above from paragraph 1.1.

(3) The draftsman apparently had in mind in paragraph 7 of schedule 6 that any dispute in relation to service charges would be determined by an independent surveyor acting as an arbitrator. This is a remarkable provision bearing in mind the jurisdiction conferred upon the appropriate tribunal by section 27A of the 1985 Act and bearing further in mind that section 27A(6) provides that an agreement by the tenant of a dwelling (other than a post dispute

arbitration agreement) is void in so far as it purports to provide for a determination in a particular manner or on particular evidence of any question which can be the subject of an application to the appropriate tribunal under section 27A (1) or (3).

(4) The definition of Supplemental Interim Charge in paragraph 2 makes reference to paragraph 4.4 of the schedule – but there is no paragraph 4.4.

(5) Paragraph 7.5 (which I have not set out above) makes reference to "a determination under paragraphs 8.1 to 8.3 of this schedule" – but those paragraphs have nothing to do with any determination. It may be this is a misprint for paragraph 7.1 to 7.3.

(6) The schedule appears to proceed on the basis that the landlord will have money in advance for the purpose of defraying the Service Costs by way of payment on 1 April and 1 October in each calendar year in respect of the relevant Accounting Period. However the Accounting Period is a period which begins on 2 April and ends on the following 1 April. Accordingly the two Payment Days during any relevant Accounting Period are 1 October (about half way through the Accounting Period) and the following 1 April (i.e. the very last day of the Accounting Period). It is possible that this was intentional, but it is curious if this was so. Also it appears that the parties in the present case have all proceeded on the assumption that what was intended was a payment in advance on 1 April and then a further payment on 1 October in respect of the relevant Accounting Period.

(7) Remarkably, there is no provision for the payment to the landlord of any shortfall which may emerge once accounts are drawn up after the end of the relevant Accounting Period. It is normally standard practice for a service charge provision to require the payment of an interim service charge on account (based on estimates) and for there then to be a reckoning after the end of the year and a provision for the tenant to make payment of any shortfall (if the amount paid based on the estimates is too little) or for the tenant to be repaid (or to be credited with) the amount of any overpayment. In the case of the present lease there is to be found in paragraph 7.5 a provision that if a tenant has made an overpayment then the landlord is to repay the amount of overpayment within 14 days. However there is no provision entitling the landlord to obtain payment of any shortfall. It is true that there is in paragraph 4.2 a provision enabling the landlord to demand a Supplemental Charge in certain circumstances, but that appears to be time limited in that the landlord can only do this if during the Accounting Period it appears that the Interim Charges payable will be insufficient. It may be that it was intentional that there should indeed be no provision entitling the landlord to claim any shortfall if there turned out, upon the reckoning after the end of an Accounting Period, to have been an underpayment. If this was intentional it is curious. If it was not intentional then it is a further defect in the drafting of the lease. The fact remains that there is no provision for the payment of any shortfall.

The F-tT Decision and the relevant facts and issues

14. The parties have helpfully provided a statement of facts and issues for the Upper Tribunal. Certain facts were not entirely clear to me, but I was given further information at the hearing which was agreed by both sides and which I incorporate below.

15. The respondent did prepare an Estimate in writing of the Service Costs which it expected to incur during the Accounting Period 2011-2012. In fact the document is entitled "Budget for year ending 31 March 2012", whereas in fact the Accounting Period is defined as a period commencing on 2 April and ending on 1 April, so the budget should have been for the year ending 1 April 2012. However it was not suggested to me that this was relevant and in my view nothing turns upon this error. This document set out a budget for various specific separate categories of expenditure and came to a total of £32,623. It indicated that for three bedroom flats which paid a 9.091% proportion this meant that the amount payable for the year was £2965.76.

16. The landlord wrote to the appellants by a letter dated 30 March 2011 stating that there was enclosed therewith a copy of the budget for the year 1 April 2011-31 March 2012. The letter also stated that there was enclosed a demand for the first half year service charge. There was a dispute between the parties as to what documents were enclosed with this letter. The appellants accepted that the demand for payment of the half yearly instalment in the sum of £1482.85 was enclosed, but they said that the copy of the Estimate was not enclosed. This was a disputed point of fact before the F-tT. The F-tT decided on balance that there was an oversight and that the estimated budget was not included with the letter. The F-tT was however satisfied that by 30 March 2011 the respondent had prepared this Estimate for 2011-12 in compliance with paragraph 3.1 of schedule 6 and was also satisfied that the service charge demands were based upon that Estimate and were duly served on 1 April 2011 and 1 October 2011. The F-tT concluded that the service of the Estimate on the appellants as provided for in paragraph 3.3 was not a condition precedent to their liability to pay the service charge. The F-tT was satisfied that the service charge demands sent for 2011-12 were valid demands, based as they were on an Estimate, and were valid despite the fact that a copy of the Estimate had not been served on the appellants. The F-tT further held that in consequence no issue arose under section 20B.

17. So far as concerns the subsequent years 2012-13 and 2013-14 it was common ground that the respondent did not prepare any new Estimate specifically directed towards the anticipated Service Costs in respect of those years. What happened was that the respondent appears to have concluded that the Estimate which it had already prepared in respect of the year 2011-12 was an appropriate calculation which was equally applicable to the years 2012-13 and 2013-14. The respondent gave effect to that apparent conclusion by continuing to invoice the appellants at half-yearly intervals (i.e. two demands for the year 2012-13 and two demands for the year 2013-14) in the sum of £1482.85, which was the identical half-yearly instalment as was demanded for the year 2011-12. As regards these two years the F-tT concluded in paragraph 21 that these were valid demands and accordingly no issue arose under section 20B.

18. It is agreed that no certified accounts, as contemplated in paragraph 5 of schedule 6 have been provided for any of these three years. On 6 March 2014 the respondent's

managing agents produced accounts for the years 2011-12 and 2012-13, but those accounts had not been certified by an accountant. No accounts have been provided in relation to 2013-14.

19. The parties have prepared a statement of the agreed issues in the following terms:

> Whether the Landlord has complied with Schedule 6, Part 1, para 3 for the financial years 2011-2012, 2012-2013 and 2013-2014;
>
> If not, whether the interim Service Charge Demands/invoices rendered for the financial years 2011-2012, 2012-2013 and 2013-2014 were valid demands for the purposes of Schedule 6, Part 1 para 3;
>
> If the Interim Service Charge Demands/invoices are not valid demands for the purposes of Schedule 6, Part 1 para 3, whether the Freeholder is now out of time to raise a Demand for the period pursuant to s20B of the Landlord and Tenant Act now

20. Permission to appeal to the Upper Tribunal was granted by the Deputy President on 8 December 2014 by a document that stated that the appeal was limited to the issue of the legal consequences of the omission to serve annual estimates in accordance with paragraph 3 of schedule 6 to the lease and that the appeal also was to include the question of whether fresh compliant demands are required and, if so, whether the respondent is now out of time to raise such demands. The appeal was ordered to be dealt with as a review of the F-tT's decision.

The appellants' submissions

21. Mr Skelton advanced arguments on behalf of the appellants both by way of written submissions and orally at the hearing. In summary he submitted that the landlord had not complied with schedule 6 paragraph 3 (because no Estimate was served) in respect of any of the service charge years; that the invoices sent for the payment of service charges were therefore invalid; that nothing was at present payable in respect of any of the demands for service charge so far submitted for the relevant years; that it was too late now to submit valid demands (backed by a copy of an Estimate) in respect of any of these years, because such a belated demand would not be within the terms of the lease; and quite apart from the foregoing any such belated demand would be too late having regard to the terms of section 20B(1) of the Act (the documents so far served being insufficient to comply with section 20B(2)).

22. In support of these arguments Mr Skelton added various points. He submitted that the provisions of the lease were clear and easy to follow, namely that the landlord had to serve a copy of the Estimate on the tenants. The respondent had not done so. If the respondent had done so it could have recovered payments in accordance with the provisions of the lease. Having not done so it was not entitled to recover payment in accordance with the provisions of the lease. The provision of the Estimate was an important protection for the tenants. He made reference to *London Borough of Brent v*

Shulem B Association Limited [2011] EWHC 1663 (Ch); *Warrior Quay Management Limited v Joachim* [2008] PLSCS 56; *Akorita v Marina Heights (St Leonards) Limited* [2011] UKUT 255 (LC); *Leonora Investment Company Limited v Mott Macdonald Limited* [2008] EWCA Civ 857; *The London Borough of Southwark v Woelke* [2013] UKUT 0349 (LC) and *Burr v OM Property Management Limited* [2013] EWCA Civ 479.

23. He preferred not to treat his argument as an argument in favour of a condition precedent to any liability on the part of the tenants, but rather an argument which merely pointed out that payment could only be demanded in accordance with the terms of the lease and that this had not occurred. He referred to the minimum requirements identified by the Upper Tribunal in *London Borough of Southwark v Woelke* which must be satisfied before a tenant became liable to pay a service charge. The same approach can be adopted in the present case. The minimum requirements had not been satisfied. The appellants were prejudiced by not having the Estimate as they could not properly form a view as to whether the amount demanded was payable.

24. Mr Skelton pointed out that the lease was a recent lease; that it was drafted by the respondent's advisers and that any ambiguity should be construed against the respondent.

25. He pointed out that there is no provision in the lease enabling the respondent to raise a final or year-end service charge demand, e.g. by way of demanding such shortfall as might exist between what had been paid on account and what was finally found to be payable.

26. As regards demands for the interim service charge (rather than a demand for payment of a shortfall) the lease contemplates that these will be made during the relevant Accounting Period, supplemented possibly (once again within the relevant Accounting Period) by a demand for a Supplemental Interim Charge under paragraph 4.2. Once an Accounting Period has ended the respondent is no longer able to submit a valid demand for the payment of an Interim Service Charge or a Supplemental Interim Charge for that particular Accounting Period. He submitted that the fact that the demand for payment was in respect of what might be described as routine services (rather than major works) was irrelevant. Whatever the demands might be for they must be made in accordance with the provisions of the lease. If they had been in respect of major works there may have been further formalities by way of consultation under section 20 to undertake, but that is not relevant for the present case.

27. Mr Skelton agreed that the absence of certified accounts with a counter-signature by way of further certification from an accountant, prepared after the end of the relevant Accounting Period, was not relevant in the present case. That is because there is no provision for payment to the respondent of any shortfall. The respondent's case stands or falls upon the demands for the Interim Charges. The fact that paragraph 5 of schedule 6 has not been complied with by the respondent is merely a further example of the

respondent's inability or unpreparedness to comply with the terms of the lease, but is not of actual significance for the issues in the present case.

The respondent's submissions

28. On behalf of the respondent Mr Minns had prepared a written statement which he amplified in oral argument. He submitted that the F-tT's decision should be upheld for the reasons it gave.

29. He submitted that the service of an Estimate at the beginning of an Accounting Period did not determine the extent of liability and was not a pre-condition to the liability for service charge – the liability for the payment of service charge for a particular year was to be determined at the year end.

30. Mr Minns pointed out that these service charges were not for major works; that they were for routine items of service; that the appellants have not been prejudiced by not having received the Estimate; that the provisions of paragraph 3 of schedule 6 are a convenient mechanism for the payment of monies on account but are not exhaustive of a tenant's obligation to pay service charge.

31. He submitted that although the procedure followed by the respondent was not in accordance with the strict terms of the lease it was sufficient to give rise to liability. The demands already served were valid. Section 20B was therefore inapplicable.

32. He submitted that the appellants should not be absolved from all liability to make any payment of service charge by reason of an omission to put in an envelope a copy of the Estimate. It would create an absurdity to absolve them from any obligation to make any payment towards proper services which had actually been provided. The tenants could have asked for a copy of the Estimate. (In relation to this latter point Mr Skelton pointed out that he had on various separate occasions over the years written to the respondent or its agent drawing attention to their failure to comply with the terms of the lease and asking for a copy of the relevant estimate. Mr Skelton said that a copy of the Estimate for 2011-12 was not made available to the appellants until some time during the course of these proceedings in the F-tT, i.e. well after 1 April 2014.)

Discussion

33. I have already drawn attention to certain mistakes in the drafting of the lease and certain curiosities (if they were intended) in the drafting.

34. I consider the following matters to be of significance as regards the proper construction of the lease:

(1) The lease does not make time of the essence so far as concerns the time periods referred to in schedule 6 and in particular in paragraphs 3 and 4, nor is any consequence laid down for failure to comply with any time period.

(2) The respondent as landlord is under an unqualified obligation to provide the services. Thus the respondent is not entitled to say that its obligation is conditional upon proper receipt of a due proportion of the costs by way of service charge from the tenants.

(3) Paragraph 1 in schedule 6 was apparently intended to make provision for how the tenant was to pay the service charge and the interim service charge – see the reference to the provisions of 1.2 and 1.3. But 1.3 has been omitted and 1.2 is deficient. What however is clear from paragraph 1.1 is that the purpose of the service charge provisions is to enable the landlord to recover from each tenant a due proportion of all expenditure, overheads and liabilities which the landlord might incur in connection with complying with its obligations in relation to the building. This being the clear intention of the parties, the Tribunal should in my view be slow to construe the service charge provisions in a way which results in the respondent being obliged to provide the services but being entitled to receive no payment in respect thereof. However if the lease truly has made provisions such that (leaving aside any operation of section 20B) the respondent may become disentitled to receive any payment at all for an Accounting Period despite having been obliged to provide (and having provided) services for that year then of course effect must be given to such provision in the lease.

(4) There is no provision in the lease for the landlord to claim payment of service charge in respect of any shortfall between the amounts actually spent on Service Costs during the relevant year and the amounts actually received by way of interim payment. The only payments the landlord is entitled to demand in respect of service charges are the payments on account (as contemplated in paragraphs 3 and 4.1 of schedule 6) and the supplemental charge (as contemplated in paragraph 4.2).

35. Having regard to paragraph 34(4) above the fact that the respondent has omitted to comply with the terms of paragraph 5 of the lease, by preparing final accounts certified by an accountant in respect of each year, does not impact upon the question before me. This question is whether the demands which have been made for payment of service charge on account, which were demands based upon an Estimate which was never served on the appellants until long after the close of the relevant Accounting Period, are valid demands pursuant to which the appellants are obliged to pay the amounts demanded.

36. I will consider first the year 2011-12. What the respondent should have done in respect of that year is as follows. On or before 1 April 2011 it should have prepared an Estimate in writing of the Service Costs which it expected to incur or charge during or in respect of the Accounting Period commencing on 2 April 2011. The respondent did this. I have already stated that I do not find any significance in the fact that the Estimate was

prepared for the period 1 April 2011 – 31 March 2012, rather than for 2 April 2011 – 1 April 2012. The respondent should then within 14 days have served on each appellant a copy of the Estimate together with a statement showing the Service Charge payable by the appellant on account of the estimated Service Costs. The respondent did serve a statement showing the service charge payable by the tenant namely a demand for a half-yearly payment in the sum of £1482.85. However the respondent did not enclose a copy of the Estimate. A copy of the Estimate was before me. It was not suggested by the appellants that the Estimate was in any way deficient in its form. Accordingly the demand for payment made by the respondent was a demand for payment made in accordance with a properly prepared Estimate. The only defect was that the respondent omitted to enclose a copy of the Estimate. The question arises as to what is the consequence of this demand made in these circumstances.

37. The position may be different if a demand was made in circumstances where the respondent had omitted even to prepare a proper Estimate. However in the present case, as noted above, there was a proper Estimate and the demand was in accordance with this Estimate and the only relevant way in which the respondent was at fault was in omitting to enclose a copy of the Estimate. If the mistake had been noticed after say a fortnight, perhaps because one of the appellants had contacted the respondent and asked for a copy of the Estimate, and if a copy of the Estimate had then been sent out, I consider that as from the date of receipt of the Estimate the demand for payment would have been valid. I accept the appellants' argument that immediately after receipt of the demand without the copy of the Estimate the demand was not yet valid. The service of a copy of the Estimate was a matter of importance to the appellants and they were entitled to see a copy of it before being required to pay a demand prepared in accordance with that Estimate. However I do not consider that the proper construction of the lease would require the respondent to go through the formality of re-issuing the demand for payment. Accordingly in my example if after a fortnight the copy of the Estimate had been served on the appellants they would as from that date have become liable to pay in accordance with the demand for the interim service charge.

38. Bearing in mind the absence of any ability in the respondent to claim any shortfall in the service charge receipts after the end of the relevant year and bearing in mind the respondent's unqualified obligation to provide the services, I cannot read the provisions of paragraphs 3 and 4 of schedule 6 as requiring that the respondent must strictly comply with those provisions so far as concerns the demanding of service charge on account by way of Interim Charge or must otherwise go without any payment at all.

39. The appellants have eventually been provided with a copy of the Estimate for 2011-12. I do not overlook the fact that this was not until a date well after 1 April 2014, namely at some time during the course of these proceedings before the F-tT. It is surprising that this document was not provided earlier despite complaints from Mr Skelton as to the absence of any Estimate for any of the relevant years.

40. In my judgment once the copy of the Estimate was provided, albeit woefully late, the appellants each then had all the information they were entitled to so far as concerns the demand for on account payments for the year 2011-12. As from the date of receipt

of the Estimate in 2014 I conclude that the appellants each became obliged to pay the amount of the two demands for payment of an instalment of interim service charge (£1482.85 for each demand) for the year 2011-12. It would of course have been open to the appellants to seek to raise arguments under section 19 as to the amount of such demand, but that is not a live point in the present case. The question in the present case is whether anything is payable at all. Leaving aside for the moment the question of section 20B, I conclude that under the terms of the lease the two instalments of interim service charge for 2011-12 became payable, albeit belatedly, on the date in 2014 when eventually the appellants received a copy of the Estimate for 2011-12. It was not necessary for any fresh demand to be issued. I have considered all of the authorities referred to in paragraph 22 above (two of which are decisions of my own). I do not find anything in them to assist me in the construction of the unusual service charge provisions in the present lease.

41. These two demands made in 2011 for the on account payments for the year 2011-12 thus became effective demands in 2014. These were demands not in respect of costs which had been incurred. They were demands in respect of estimated costs to be incurred. Accordingly section 20B can have no application to these demands. Further, even if I were wrong and a fresh demand was required to be served either together with or after the belated service of the Estimate in 2014, these fresh demands would still not be within section 20B because these demands would still be demands, albeit belated, in the nature of demands for payment of estimated service charges on account of costs to be incurred in the future. Section 20B(1) provides:

> "(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment for the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred."

The only demands the respondent has sent to the appellants for the year 2011-12 are the demands for on account payments in advance. There appears to be no power under the lease for the respondent to serve a demand, by way of a claim for payment of a shortfall, in respect of costs which have actually been incurred for the relevant period. As these demands are in respect of estimated future costs rather than in respect of any relevant costs which "were incurred" more than 18 months before the demand, section 20B does not apply, see *Gilje v Charlegrove Securities* [2003] EWHC 1284 (Ch).

42. I therefore conclude that the two demands, each for £1482.85, served upon each appellant in respect of the year 2011-12 became valid demands upon the date on which the appellants belatedly received a copy of the Estimate, which was during about the summer of 2014. The sums were not payable prior to that date.

43. In my view the analysis regarding the years 2012-13 and the years 2013-14 is exactly the same as in respect of the year 2011-12. It is true that the respondent did not prepare a separate Estimate specifically in respect of these two years. What the respondent did is to adopt and apply the Estimate for the year 2011-12. I consider that the respondent was entitled to proceed in this manner. Once again it would have been

open to the appellants, had they thought appropriate to do so, to challenge the amounts of these demands under section 19 as part of the proceedings before the F-tT. The appellants have not done so. Accordingly when eventually in 2014 the respondent provided a copy of the Estimate for 2011-12 the sums demanded in respect of these two later years thereupon became payable. It is true that the Estimate was headed with the reference to the year 2011-12, but it was clear that this was also the relevant Estimate relied upon in respect of the two later years because the demands for on account payments for the two later years were in precisely the same sum as had been demanded for the year 2011-12. Once again the sums demanded by these demands for interim payments on account of service charge only became due when in 2014 the Estimate was served on the appellants. Once again section 20B(1) can have no application because these demands were demands for payment on account rather than demands in respect of costs which had actually been incurred.

44. In the result therefore the appellants are not entitled to make no payment in respect of the demands for service charge on account for the three relevant years and to do so notwithstanding that services have in fact been provided for those years. If the appellants' argument on this point had been successful, questions could have arisen as to the operation of paragraph 8.1.11 of schedule 6 and whether the respondent could include within the Service Costs for some Accounting Period(s) the cost of financing the amount by which the monies in hand from the appellants for these three years (i.e. nil upon the appellants' argument) was insufficient to cover the actual expenses.

Conclusions

45. In the result therefore, albeit for reasoning different from that adopted by the F-tT, I conclude that the F-tT was correct in finding that the service charges demanded on account for the years 2011-12, 2012-13 and 2013-14 are payable. However the date from which they became payable is the date when the copy of the Estimate was eventually provided to the appellants in 2014 rather than the date referred to in the demands themselves. Subject to that point (namely the point regarding the date when these sums became payable) the appellants' appeal is dismissed.

46. The appellants made an application under section 20C of the 1985 Act for an order that all of the costs incurred by the respondent 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 appellants. Mr Minns resisted this application and pointed out that in any event the respondent had minimised the costs incurred by not instructing lawyers in respect of the appeal to the Upper Tribunal.

47. My jurisdiction under section 20C(3) is to make such order on the application as I consider just and equitable in the circumstances. The problem which had arisen in the present case has arisen because of the combination of the poor drafting of the provisions in the lease regarding service charges and the respondents' failure to follow these provisions. Although the ultimate outcome is one which is favourable to the respondent,

I have no hesitation in concluding that it would be just and equitable in all the circumstances to make the order sought. Accordingly I order that all of the costs incurred by the respondent 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 any of the appellants.

His Honour Judge Nicholas Huskinson

Dated: 6 July 2015