UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – s196 Law of Property Act 1925 – s 7 Interpretation Act 1978 – service of notices – waiver of invalidity of notices - s20B Landlord and Tenant Act 1985, contents of notices – appeal allowed.

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

BETWEEN:

LONDON BOROUGH OF SOUTHWARK

Appellant

and

(1) RUNA AKHTAR
(2) STEL LLC

Respondents

Re: 11 and 54 John Kennedy House,
Rotherhithe,
Old Road,
London
SE16 2QF

6-7 March 2017

Before: Judge Elizabeth Cooke sitting as a Deputy Judge of the Upper Tribunal

Royal Courts of Justice, London WC2A 2LL

Philip Rainey QC and *Faisel Sadiq*, instructed by London Borough of Southwark Legal Service for the Appellant
Sam Madge-Wyld, instructed by Direct Access for the first and second respondents

The following cases are referred to in this decision:

Akorita v 36 Gensing Road Ltd LRX/16/2008
Arnold v Britten [2013] EWCA Civ 902
Brent LBC v Shulem B Association Ltd [2011] EWHC 1663 (Ch)
Chiswell Estates v Griffon Land [1975] 1 WLR 1181
Chowdhury v Bramerton Management Company Limited [2014] UKUT 260 (LC)
Enfield LBC v Devonish (1997) 29 HLR 691
London Borough of Southwark v Woelke [2013] UKUT 349 (LC)
Postermobile Plc v Kensington & Chelsea RLBC (2000) P & CR 524
Skelton v DBS Homes (Kings Hill) Ltd [2015] UKUT 379
Trafford Housing Trust v Rubenstein [2013] UKUK 581 (LC)
Universities Superannuation Scheme v Marks & Spencer plc [1999] L&TR 237
Wandsworth LBC v Attwell (1995) 27 HLR 536

DECISION

Introduction

1. The London Borough of Southwark appeals a decision of the Residential Property Division of the First-tier Tribunal (Property Chamber) ("the FTT") about the validity and service of notices relating to service charges. The notices were addressed to Miss Akhtar, the First Respondent, and Stel LLC, the Second Respondent, who are the tenants of flats numbered 54 and 11, respectively, John Kennedy House in Rotherhithe, London SE12.

2. The FTT's decision was delivered in two parts. The first part, dated 23 November 2015, involves only the First Respondent. It was a lengthy decision involving a great many issues which are not the subject of this appeal. Amongst the many points raised by the First Respondent was a challenge to the validity of a notice of an estimated service charge (which I shall call "the paragraph 2(1) notice" because it was given under paragraph 2(1) of the lease; see below). The FTT found that the notice was invalid, and also that despite having made arrangements to pay the estimated charge the First Respondent had not waived the invalidity.

3. The First and Second Respondents also challenged two notices given under section 20B of the Landlord and Tenant Act 1985 ("the s 20B notices"), relating to the same works as did the paragraph 2(1) notice. The First Respondent said that the s20B notices were not served on her. Both Respondents argued that the notices were ineffective. The FTT found in their favour, both as to service and as to validity, in the second part of its decision, dated 11 July 2016. The FTT granted permission to appeal both parts of its decision.

4. I heard the appeal on 6 and 7 March in the Royal Courts of Justice. The Appellant was represented by Mr Philip Rainey QC and Mr Faisel Sadiq of counsel and the Respondents by Mr Sam Madge-Wyld of counsel; I am grateful to them all for their very helpful submissions. In the paragraphs that follow I summarise the relevant facts, and then discuss the various grounds of appeal so as to explain why this appeal succeeds. At the hearing Mr Madge-Wyld did not pursue any argument against a number of the Appellant's grounds, but I make a finding on each; the leases here were in a standard form used by the Appellant for thousands of tenants and so it is important to the Appellant and its tenants to have an answer to all the points raised in this appeal.

The factual background

5. The Respondents hold long leases of flats in John Kennedy House, granted pursuant to the right to buy. The leases are in the same form as the one under consideration in *London Borough of Southwark v Woelke* [2013] UKUT 349 (LC), a decision of the Deputy President to which further reference will be made below. The Respondents' leases, like the one in *Woelke,* contain a covenant by the tenant "To pay the Service Charge contributions set out in the Third Schedule hereto at the times and in the manner there set out." The relevant provisions of Schedule 3 are as follows:

"1(1) In this Schedule "year" means a year beginning on 1st April and ending on 31st March

(2) Time shall not be of the essence for service of any notice under this Schedule

2(1) Before the commencement of each year (except the year in which this lease is granted) the Council shall make a reasonable estimate of the amount which will be payable by the Lessee by way of Service Charge (as hereinafter defined) in that year and shall notify the Lessee of that estimate

(2) The Lessee shall pay to the Council in advance on account of Service Charge the amount of such estimate by equal payments on 1st April 1st July 1st October and 1st January in each year (hereinafter referred to as 'the payment days')

3 [Apportionment of expenditure in first year of term]

4(1) As soon as practicable after the end of each year the Council shall ascertain the Service Charge payable for that year and shall notify the Lessee of the amount thereof

(2) Such notice shall contain or be accompanied by a summary of the costs incurred by the Council of the kinds referred to in paragraph 7 of this Schedule and state the balance (if any) due under paragraph 5 of this Schedule

5(1) If the Service Charge for the year (or in respect of the first year hereof the apportioned part thereof) exceeds the amount paid in advance under paragraph 2 or 3 of this Schedule the Lessee shall pay the balance thereof to the Council within one month of service of the said notice

(2) If the amount so paid in advance by the Lessee exceeds the Service Charge for the year (or the apportioned part thereof for the first year hereof) the balance shall be credited against the next advance payment or payments due from the Lessee (or if this lease has then been determined be repaid to the Lessee)

6(1) The Service Charge payable by the Lessee shall be a fair proportion of the costs and expenses set out in paragraph 7 of this Schedule incurred in the year

(2) The Council may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses

7 [A list of costs and expenses]

9 [There is no paragraph 8] The summary of costs referred to in paragraph 4 of this Schedule shall contain an explanation of the manner in which the proportion of those costs apportioned to the flat under paragraph 6 of this Schedule have been calculated."

6. The scheme set out in Schedule 3 is that estimated service charges for each year will be paid in advance in quarterly instalments. The idea is that before 1 April in, say, 2010 the landlord will give a paragraph 2(1) notice setting out the estimated charge for the coming

financial year (April 2010 to March 2011). That sum will be collected in equal instalments on the following four quarter days. Before 1 April 2011 the landlord will give notice of an estimated service charge for 2011-2012. After 1 April 2011 the tenant will be given a final account setting out the actual service charge for the year 2010-2011(clause 4(1)). The quarterly charge paid in instalments from 1 April 2011 will therefore be the estimated sum for 2011-2012 (notified to the tenants before April 2011), adjusted once the clause 4(1) notice is given to take into account the amount by which the actual 2010 charge exceeded or fell short of the 2010 estimate.

7. It can be seen that Schedule 3 gives the tenant advance notice of the level of service charge each year, and enables it to spread its expenditure, while the landlord has an income stream as the year progresses. I think it is fair to say that this works well for what the Appellant calls revenue charges – that is, the regular, more or less predictable charges that are going to be incurred every year. However, as the FTT observed, the Appellant's practice has been to separate out routine or revenue charges from major works service charges, and this appeal arises from that practice – as did the appeal in *London Borough of Southwark v Woelke* [2013] UKUT 349 (LC).

8. The Appellant gave its tenants a paragraph 2(1) notice dated 12 February 2013. It was headed "Estimate Charge: Major Works – 12/150P6 John Kennedy House Refurbishment 2012". The estimates charge was £40,701.57 for Flat 54. That charge was broken down into three as follows:

> Due in year one - £6,530.05 (1 April 2012 to 31 March 2013) Payable in full on 1 April 2013
>
> Due in year two (£31,572.78 (1 April 2013 to 31 March 2014) Payable in four equal instalments [dates set out as in Schedule 3]
>
> Due in year three - £2,598.84 (1 April 2014 to 31 March 2015 Payable in four equal instalments [dates set out as in Schedule 3]

9. This was a paragraph 2(1) notice relating to three financial years, delivered in February and so after the final quarterly instalment date in the year ending 31 March 2013. It required payment for that year (2012 – 2013) on the first day of the next financial year and that next year and the following year (2014-15) in instalments on the usual payment days.

10. On the same date the Appellant also sent to the First Respondent a breakdown of those charges into charges for works, professional fees and administration charges year by year, and another sheet headed "Notification: Service Charge Account 2013 – 2014", relating to the year ahead. It set out the estimated revenue service charge of £1,738.27 for 2013 – 2014, listed the major works charges in three yearly sums as in the clause 2(1) notice, and concluded with a total due for the year 2013 – 2014 of £39,841.10. It will be seen that that figure is made up of

- the estimated major works charge for 2012 – 2013 (£6,530.05)
- the estimated major works charge for 2013 – 2014 (£31,572.78) and

- the revenue charge for 2013 – 2014 (£1,738.27)

11. So it is not difficult to see how the figure of £39,841.10 is derived although it does take a moment's thought; and the breakdown has to be read alongside the paragraph 2(1) notice for the tenant to appreciate that the £6,530.05 for 2012 – 2013 is payable on 1 April 2013 while the rest of that year's service charge is then payable in quarterly instalments.

12. The FTT decided that the paragraph 2(1) notice was not valid and that the First Respondent was not obliged to make any payments in response to it. I shall say more about the FTT's decision when I discuss the detailed grounds of appeal.

13. The paragraph 2(1) notice related to refurbishment works carried out in and around 2012. In respect of the same works the landlord produced, and claims that it served on all its tenants in John Kennedy House, a notice dated 30 May 2014. The notice warned the tenants that the landlord had incurred a cost £4,640,795.80 in respect of the refurbishment. It stated that that figure might include costs for works that were not chargeable to the tenants and said "you will be notified of the actual contract costs and therefore your actual contribution when the final account is agreed". A year later the Appellant gave the tenants another such notice specifying a higher figure. Both notices set out costs actually incurred by the landlord but not yet charged to the tenant, in accordance with section 20B of the Housing Act 1985 which reads as follows:

> (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 of 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.
>
> (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

14. The objective here is to ensure that tenants are not faced with unexpected demands for payment of large sums incurred many months, or years, beforehand. However, if a landlord is aware of a cost that will not be able to be the subject of a service charge demand for more than 18 months after it is incurred, it can preserve its rights to make that charge by serving a notice under s20B(2) so that even if the tenant is not required to pay within 18 months, it has warning of the liability within that period.

15. The First Respondent says that she did not receive either of the s20B notices. The Second Respondent agrees that it received both, but both Respondents say that the notice was invalid for a number of reasons which I discuss under the grounds of appeal numbered 6 and 7 below.

16. Again the FTT found in favour of the Respondents. The Appellant appeals on the basis that the FTT erred in law on a number of grounds, which I now discuss in turn. I take them in

three groups – those relating to the paragraph 2(1) notice, those relating to service of the s20B notices, and those relating to the validity of the s20B notices – and introduce each group of grounds generally before discussing the grounds in turn.

Grounds 1 and 2: the paragraph 2(1) notice

17. The first two grounds of appeal relate to the paragraph 2(1) notice and to the decisions made (among several others) in part 1 of the FTT's decision, which was dated 23 November 2015.

Ground 1

18. The first ground of appeal challenges the FTT's decision that the paragraph 2(1) notice was invalid.

The decision in the FTT

19. The FTT at paragraphs 128 and 130 of its decision of 23 November 2015 said that the separation of major works service charges from revenue charges was "not compliant with the requirements of the lease". This appears to refer to the Appellant's practice of separating estimates of revenue charges from estimates for major works, but I do not understand the FTT to have said that that in itself invalidated the notice. Its reasons for its decision appear to have been twofold.

20. First, it said that the notice together with its attachments was "confused and confusing" (its paragraph 135), and that the tenant was entitled to a clear and unambiguous demand. Second, it said (at its paragraph 137) that it did not accept that the notice could be given after the expiry of the financial period to which it related (FTT paragraph 137). The FTT explained that if the landlord chose not to demand a payment on account as provided for by the lease it must instead make a demand for actual costs incurred in accordance with paragraph 4 of Schedule 3 (set out in my paragraph 5 above), and indeed could still do so in respect of the charges to which the paragraph 2(1) notice related. But it said (FTT paragraph 141) that its finding was "sufficient to dispose of the council's claim that the sum of £40,701.67 is … payable by Ms Akhtar."

21. It therefore appears that the FTT found the whole notice invalidated, first by what it regarded as a confusing format and second by the defect it found in relation to the timing of the charge for 2012 – 2013.

Discussion

22. It is worth keeping in mind the words of Mummery LJ in *Universities Superannuation Scheme v Marks & Spencer plc* [1999] L&TR 237 at p 243:

> "The purpose of the service charge provisions is relevant to their meaning and effect. So far as the scheme, context and language of those provisions allow, the service charge provisions should be given an effect which fulfils rather than defeats their evident purpose."

23. The paragraph 2(1) notice imposed an estimated charge for three financial years, and it is convenient to discuss them in reverse order, beginning with the charge for 2014 – 2015, because the First Respondent does not resist the appeal in respect of that part of the paragraph 2(1) notice. She is right not to do so. There is nothing in the lease to prevent the service of a paragraph 2(1) notice much further ahead than the matter of weeks or months envisaged in my summary of the scheme at paragraph 6 above. Accordingly it is not possible to see why the demand in relation to the year 2014 – 2015 could be objected to; it was made, albeit along with demands in relation to the two previous years, before the start of the financial year to which it related, and it was to be paid in equal instalments on the quarter days of 2014 – 2015. There was nothing confusing in the information given about the estimate for that year. I have no hesitation in finding that the paragraph 2(1) notice was valid insofar as it related to the £2,598.84 was payable in respect of 2014 – 2015, and allowing the appeal to that extent.

24. Of course, that would not be the only estimated charge payable on those quarter days beginning with 1 April 2014. There would be revenue charges as well. There is nothing in the lease to prevent the landlord from serving more than one paragraph 2(1) notice in respect of each year, so long as the tenant knows or can reasonably be expected to work out what to pay. That was the function of the additional notice served with the paragraph 2(1) notice of 12 February 2013 in respect of the year 2013 – 2014; as we have seen, it was served before the start of the financial year and it set out the revenue charges for the coming year and added them to the estimate for major works so that the tenant knew how much it would be paying on the 2013 – 2014 quarter days. I fail to see any procedural defect in respect of that year's estimated charges. The FTT found the demand confusing and the Respondent relies, in resisting the appeal, upon the fact that a number of charges were set out together in the same notice but, as I have said, I do not think that it would have been problematic for the tenant.

25. Accordingly the appeal is allowed in respect of the part of the paragraph 2(1) notice that relates to 2013 – 2014.

26. The real difficulty arises in respect of the estimated charge of £6,530.05 for the year 2012 – 2013. As the FTT said at its paragraph 135, it was "given towards the end of the financial period 1 April 2012 to 31 March 2013"; I take it that that is what the FTT meant when it said at paragraph 137 that it was given "after the expiry of the financial period to which it relates". At any rate, the FTT concluded that the notice was invalid because of the time when it was given.

27. The Appellant refers to a number of decisions about identical or similar leases. *London Borough of Southwark v Woelke* [2013] UKUT 349 (LC) concerned a lease that was in all relevant respects identical to that of the Respondents. The Deputy President had to decide about the validity of two notices; one was a final demand served under clause 4(1) and the other was a notice referring to an estimated charge for the replacement of cold water storage

tanks which had been served in October 2009, after the third but before the final payment date for quarterly instalments.

28. The Deputy President pointed out that the lease states that time is not of the essence so far as the service of these notices is concerned (paragraph 1(2) of Schedule 3 to the lease; and that would in any event be the effect of section 41 of the Law of Property Act 1925). Accordingly, he found, it is not the case that the landlord cannot serve a paragraph 2(1) notice after the start of the financial year, although of course a late notice could not generate an obligation to pay on 1 April in that year which would already have passed. The Deputy President said that he did not express any view on the way the leaseholder's obligation to pay might be analysed in such a case, because the point was not argued in *Woelke;* the notice in respect of the estimate for the storage tanks did not purport to be an estimate for the whole of the forthcoming year and stated – incorrectly and impossibly – that the tenant was to pay by four equal instalments on the payment days. So it was not in accordance with paragraph 2(1) and was therefore found to be invalid.

29. The Deputy President also held in *Woelke* that so far as final demands under clause 4(1) were concerned the landlord was not restricted to one such notice. It might serve supplemental notices about further items of expenditure, so long as the tenant was told the total charge payable. We might compare the Appellant's notice in the present case in respect of 2013 – 2014, where the two charges are put together so that the tenant knows the total payable in respect of that year.

30. Two further cases are referred to by the Appellant, relating to leases that are not identical to the one under consideration here or in *Woelke*. In *Chowdhury v Bramerton Management Company Limited* [2014] UKUT 260 (LC) the Deputy President again had to consider the validity of a notice of estimated charges which was served late. The lease provided for notice to be given prior to any quarter day, and the tenant claimed she had not received the notice under consideration. However, for various procedural reasons the only point that had to be decided, in the end, on appeal was whether the charge had become due by the time that County Court proceedings had been commenced by the landlord. The Deputy President in considering that issue expressed the view that if a notice was served late the estimated charge would become payable either on the next quarter day or within a reasonable time, and said at paragraph 26 "Of these alternatives the language of the lease seems to me to point more strongly to the former because notice was required to be given 'prior to any quarter day' in order to trigger a liability to pay on that quarter day". Either way, the charge was payable by the time the proceedings had been commenced in that case, so that a precise determination of the date when payment became due was not needed.

31. Finally reference was made to *Skelton v DBS Homes (Kings Hill) Ltd* [2015] UKUT 379 where HHJ Huskinson found that a notice of an estimated charge could become payable some years after it was served, once the details originally omitted from it had been supplied to the tenant. The lease in that case was materially different from the one under consideration here; it was badly drafted, and it contained no provision for the landlord to require payment of any shortfall which might emerge once accounts were drawn up after the end of a financial year. Anything not charged as an estimate could not be recovered (although there was provision for an overpayment to be returned to the tenant).

32. None of these decisions addresses the issue in the present appeal, although *Woelke* comes closest. When taken together with *Bramerton* it can be used to argue, as the Appellant does, that a paragraph 2(1) notice relating to major works can be served in addition to the earlier revenue estimate (which was presumably made before the start of the financial year 2012 – 2013), and that the late notice in this case was payable on the next quarter day – as the notice itself stated – or within a reasonable time.

33. However, neither of those cases addresses the position where a demand is made for an estimated charge after the final quarter day of the financial year has elapsed. It might be said that since time is not of the essence it is artificial to have a cut-off date and to say that the landlord cannot recover an estimated charge after the final quarter day. But it appears to me that that is the intention of the draftsman of this lease, because the whole point of the provision of estimated charges – both for the landlord's benefit and for the tenant's – is to require payment by instalments on the quarter days. That gives the landlord a cash flow and the tenant a steady payment obligation. The Deputy President in *Bramerton* (which involved a different lease from this one) took the view that a notice served after the third quarter day would have been payable on the final quarter day. But this case is different. The estimate is to relate to service charges payable "in that year", and the lease specifies the payment days; but in this case the notice was served after the last of the payment days. In those circumstances what the draftsman of the lease appears to have intended was that the landlord would instead issue a final demand after the end of the financial year, and therefore make an adjustment to the payments for the forthcoming quarter. Late service of the paragraph 2(1) notice, after 1 January, does not enable the landlord to take the estimate all at once on 1 April.

34. It was argued for the Appellant that that approach would make time of the essence. I disagree. Time is not of the essence, and so the landlord has flexibility within the year; but that flexibility does not mean that time can be extended indefinitely. I note that rather greater flexibility was given to the landlord in *Skelton* (paragraph 31 above); but that is unsurprising since in *Skelton* there was no provision for the landlord to pick up any shortfall in advance payments by making a demand later. Here the landlord who has missed the paragraph 2(1) boat can recover the charge by using paragraph 4(1).

35. It was held in *Woelke* that the service of a notice under paragraph 2(1) of Schedule 3 is an obligation of the landlord, although failure to fulfil it will not usually give rise to more than a liability for nominal damages (paragraph 52 of *Woelke*). The late service of the paragraph 2(1) notice insofar as it related to 2012 – 2013 seems to me to have the effect that the landlord has failed to give such a notice for those charges in that year and therefore lost the opportunity to have that estimate paid in the way envisaged by Schedule 3. It is free to make a final charge for the major works incurred in 2012 – 2013 in accordance with clause 4(1); it may not be able to do so immediately after the end of that financial year, as the Appellant points out, but it can do so later (subject to the provisions of s20B) of the Landlord and Tenant Act 1985, enacted to operate in just these circumstances).

36. Accordingly the appeal fails as regards the validity of the paragraph 2(1) notice in respect of the £6,530.05 charged for the year 2012 – 2013.

Ground 2

37. Having found the paragraph 2(1) notice to be invalid the FTT considered, and rejected, the Appellant's argument that the First Respondent had waived the invalidity by taking advantage of one of the Appellant's schemes for deferred payment.

The decision in the FTT

38. It seems that one reason why the Appellant separates charges for major works from revenue charges is that in the case of the former it offers favourable payment terms. The paragraph 2(1) notice in this case drew the tenant's attention to this. Some months after the service of the notice the First Respondent agreed to pay the estimated charge on the terms offered – in its total sum of £40,701.57 – by giving the Appellant a charge over her lease. Payment is therefore deferred until sale of her property, although interest accrues meanwhile.

39. In *Woelke* the Deputy President referred to the payment scheme and said:

> "Any leaseholders who availed themselves of the favourable payment terms offered by the Appellant would no doubt be taken to have waived strict compliance with the Third Schedule, so far as it related to the cost of major works."

40. Accordingly the Appellant argued before the FTT that the First Respondent had waived compliance in this case.

41. The FTT disagreed. It found that the terms offered were not favourable; it also found that the landlord had been "pressing Ms Akhtar very hard" to pay, and the FTT declared itself "not satisfied that the taking of the loan was a voluntary act … such that it might amount to a waiver" and that she had paid "under protest|". Accordingly it rejected the Appellant's argument on waiver.

Discussion

42. The Appellant's second ground of appeal was that the FTT erred in that it had insufficient evidence to make such a finding.

43. For the First Respondent, Mr Madge-Wyld made a measured and helpful response conceding that the payment terms were favourable. I agree that it is clear that they were. Payment was deferred for many years; true, it was secured on the First Respondents property, but that is considerably less onerous than the Appellant's right to forfeit for non-payment. Moreover, Mr Madge-Wyld rowed back from the First Respondent's submission, made while she was not legally represented, that she had agreed to pay under duress.

44. However, it was argued for the First Respondent that she had paid under protest, to avoid a court action, and that the Appellant had made things difficult by refusing to mediate. There was no evidence of improper pressure on the part of the Appellant, however, and even the refusal to mediate was qualified, in a letter dated 14 February 2014, by an indication that if the First Respondent made an application to the FTT it would then consider the FTT's mediation scheme.

45. I take the view that the FTTs's finding on waiver was wrong in law. It is well-established that waiver is a representation, usually by conduct, that makes it clear that an irregularity is accepted. Mr Madge-Wyld could not point to anything said or done by the First Respondent at the time she took on the payment plan to make it clear that she did not agree that the estimated charge was payable or to register a continuing protest. There had certainly been correspondence and disagreement about the charge, and the First Respondent was well aware of the possibility of challenge in the FTT. Nevertheless the First Respondent took the step of charging her property with the payment, and her doing so in the context of the preceding disagreement was a clear statement of agreement to pay; the fact that the agreement was preceded by argument, and that the Appellant threatened proceedings to enforce payment, does not detract from that eventual agreement. This was an obvious waiver and ground 2 of the appeal succeeds.

46. That means that the whole of the sum claimed under the paragraph 2(1) notice was and remains payable by the First Respondent.

Grounds 3, 4 and 5: service of the s20B notices

47. The rest of this appeal relates to part 2 of the FTT's decision, dated 11 July 2016. There are two groups of grounds; grounds 3, 4 and 5, relate to the service of the s20B notices and the others to their validity.

48. To prove that a notice has been served it is necessary to prove that it came to the attention of the person to whom it was addressed. In some circumstances it is difficult actually to prove that that has happened, particularly when a notice has been sent by post so that, necessarily, the sender did not see it arrive. So a number of statutory provisions have been enacted to assist.

49. Section 196 (4) and (5) of the Law of Property Act 1925 provides that certain notices are deemed to have been served if sent by registered post:

> (4) Any notice required or authorised by this Act to be served shall … be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned by the postal operator (within the meaning of Part 3 of the Postal Services Act 2011) concerned undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

> (5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

50. Section 7 of the Interpretation Act 1978 goes further and provides that certain notices are deemed to have been served if they have been sent by ordinary post, unless the contrary is proved:

> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

51. The FTT decided that section 196 did not apply to the s20B notices (its paragraphs 26 to 28). Nevertheless it decided that section 7 of the 1978 Act did apply (its paragraph 22). But it did not accept that the landlord had proved that the notices had been properly addressed, pre-paid and posted, and it accepted the First Respondent's evidence that she had not received them.

52. The Appellant appeals this finding. It says that section 196 applies (ground 3), and that the FTT failed to correctly apply the presumption of service contained in section 7 of the 1978 Act (ground 4). Ground 5 is broken down into three sub-grounds which challenge the FTT's finding that the notice was not proved to have been served by post. I now take those grounds in turn.

Ground 3

53. Ground 3 states "The FTT erred in law in finding that the incorporation of s 196, Law of Property Act 1925, into the lease by cl 5(5) did not have the effect of deeming the s20B notices served if served by one of the methods permitted by that section."

54. At the hearing of the appeal Mr Rainey QC argued first that section 196 is made to apply to the s20B notices by section 196(5). That sub-section applies the provisions of section 196 to "notices required to be served by any instrument ", and section 205(1)(viii) of the Law of Property Act 1925 states that "instrument" does not include a statute. The Landlord and Tenant Act 1985 enables the landlord to recover service charges in circumstances where they would otherwise be irrecoverable; can it therefore be said to be required to be served by the lease?

55. In *Trafford Housing Trust v Rubenstein* [2013] UKUT 581 (LC) the Tribunal assumed, but expressly said (at paragraph 29) that it did not decide, that a notice under section 20 of the Landlord and Tenant Act 1985 (which imposes consultation requirements in relation to service charges) was a notice required to be served by the lease. Given the express proviso that the point was not decided, that takes me no further. In my judgment it would be a straining of

language to regard a s20B notice as required to be served by the lease. The notice is created by the statute, which does not impose a requirement but states that certain service charges are irrecoverable unless a s20B notice is served. So I do not accept the argument that s196(5) of the Law of Property Act 1925 has the effect of applying that section to s20B notices.

56. However, clause 5(5) of the lease states:

> "Section 196 of the Law of Property Act 1925 shall apply to any notice under this lease".

57. The FTT did not address the question whether that clause has the effect of applying section 196 to the service of s20B notices. So I have to decide whether a s20B notice is a "notice under this lease".

58. The word "under" might be said to be a metaphor in this context. Literally it indicates position, which is not relevant here, and therefore its meaning is not unambiguous. It is easy to see that a notice referred to in a lease, even if not required by it, is a notice under the lease. But there is no mention of a s20B notice in the lease; it is a creature of statute. A s20B notice could be said to be a notice under, or given under, the Landlord and Tenant Act 1985. But is it also a notice under the lease?

59. The difficulty with saying that it is not is that that leaves clause 5(5) without effect. Neither Mr Rainey QC nor Mr Madge-Wyld could point to any notice "under" the lease to which the clause might apply. It might be argued that the clause merely draws the parties' attention to the statutory provision; but if that was the intention it is strange that the draftsman did not echo the words of the statute and say "notices required to be served by this lease".

60. The purpose of a "section 196 clause" in a lease is generally to widen the operation of the statute. In *Wandsworth LBC v Attwell* (1995) 27 HLR 536 the Court of Appeal held that section 196 did not apply to a notice to quit where the tenancy agreement made no express provision for notice to be served and so could not be said to "require" service. Glidewell LJ at 541 – 542 said:

> "the moral for landlords is clear. If they wish to render valid and effective service of a notice to quit by leaving it at the premises the subject of the lease, without proving it came to the attention of the lessee, they must … make express provision for such a method of service in the tenancy agreement."

61. That is why leases contain section 196 clauses. I note that in construing the lease I must have regard to the principles of construction of contracts set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 HL, at p 912H; I must therefore have regard to the background knowledge available to the parties when the lease was drafted, which would include the purpose of section 196 clauses.

62. I also note that if the words used by the draftsman did clearly leave the provision without a function, or indeed if they clearly generated an unexpected result, that would be the

construction that I must adopt: that follows from the decision of the Court of Appeal in *Arnold v Britten* [2013] EWCA Civ 902. But I take the view that the words "under the lease" do not have to be read in a way that leaves the provision without effect. The word "under" is clearly intended to be wider than "required by"; it is wide enough to encompass "in connection with" or "relating to" in this context. A s20B notice enables the landlord to do something prescribed by the lease, in this case to recover a service charge; contrast a notice given to enable the landlord or tenant to do something not referred to in the lease, for example the exercise of a right to buy under the Housing Act 1985. I find that the s20B notices were notices under the lease and that the FTT erred in law in finding that s 196 did not apply.

63. Accordingly s 196 applied to the s20B notices. However, the Appellant did not make direct use of it; it did not use registered post or recorded delivery but used ordinary post. It is therefore important to the Appellant's case to decide whether s 7 of the Interpretation Act 1978 also applied, although it is the Appellant's case that it has proved service even if section 7 does not apply.

Ground 4

64. I turn now to ground 4, which is that "the FTT failed to correctly apply the statutory presumptions as to service contained in s7 of the Interpretation Act 1978."

65. The FTT found that s 7 of the Interpretation Act 1978 was engaged. The First Respondent argues, as a preliminary issue to ground 4, that that finding was incorrect, while the Appellant argues that it was correct but for different reasons from those given by the FTT. So under this ground I decide two issues. First, was the FTT correct to say that s 7 applied? Second, if it did apply, did the FTT make a mistake of law in its approach to the presumption set up by s 7?

Ground 4 (1) Did s 7 of the Interpretation Act 1978 apply to the s20B notices?

66. The FTT found, at its paragraph 22, that s 7 applied to the s20B notices. It noted that the Landlord and Tenant Act 1985 does not prohibit service by post, and that service by post is permitted at common law; accordingly the FTT said "we infer that section 7 gives an implied authority to give a notice by post where that is permitted at common law." The First Respondent says that that is wrong. Mr Madge-Wyld cites a number of cases, including *Postermobile Plc v Kensington & Chelsea RLBC* (2000) P & CR 524, as authority for the proposition that section 7 is not engaged where nothing is said about service by post. The Appellant does not express any disagreement with this. It seems to me that the First Respondent is right about this.

67. But does s 7 apply for some other reason? The Appellant puts forward four reasons. Its primary argument – and the only successful one of the four – reveals the importance to the Appellant of ground 3 because it relies upon s 196 of the Law of Property Act 125, which I have found did apply to the s20B notices by virtue of clause 5(5) of the lease.

68. The Appellant's argument puts the two provisions together as follows:

a. Section 196 permits the service by registered post or recorded delivery of notices required or authorised by the 1925 Act (sub-section 4) or by "any other instrument" (subsection 5).

b. Section 196 therefore authorises the service of certain documents by post.

c. Therefore wherever section 196 applies, section 7 of the Interpretation Act 1978 also applies.

69. In *Chiswell Estates v Griffon Land* [1975] 1 WLR 1181 the Court of Appeal proceeded on this basis, without discussion but without any suggestion that the point was in doubt, in relation to section 23 of the Landlord and Tenant Act 1927 (which authorises the service by registered post of notices under the Landlord and Tenant Act 1954). So did the Tribunal in *Trafford Housing Trust v Rubenstein* [2013] UKUT 0581 (LC), in relation to notices under section 20 of the Landlord and Tenant Act 1985 and on the basis that section 196 of the Law of Property Act 1925 was applicable as it is here. It seems to me that the Appellant's reasoning is sound and that this interpretation of the effect of the two provisions taken together is correct as a matter of logic. It has the effect of considerably widening the helpful effect of section 196 of the Law of Property Act 1925; the later statute is changing the meaning of the earlier one in a way that accords with modern business practice.

70. Mr Madge-Wyle does not dissent from that reasoning in principle, but argues that while section 7 is engaged by section 196 where that section applies by virtue of its own terms, to a notice authorised or required to be served by the Law of Property Act 1925 (subsection 4) or by any other instrument (sub-section 5), section 7 is not engaged where section 196 applies by virtue of the terms of the lease, as in this case. He argues that section 7 only works in this way where a statute directly authorises or requires service by post and not where it does so by being incorporated into a lease. I do not accept that argument. Where the parties have said that a statutory provision is to apply, they are not applying it in a limited form unless they say so; in the absence of proviso they must be taken to apply it with all its consequences.

71. Accordingly I find that because s 196 applies to the s20B notices, so does s 7 of the Interpretation Act 1978. The FTT was correct to find that section 7 was engaged, and the presumption of service available to the Appellant if it could prove what the section requires, although not for the reason it gave. I deal briefly with the Appellant's three other arguments on this point.

72. First, the Appellant refers to section 233 of the Local Government Act 1972, which authorises service by post of any notice "required or authorised by or under any notice order or under any enactment to be given to or served on any person by or on behalf of a local authority or by an officer of a local authority."

73. The Appellant is a local authority. Does section 233 therefore authorise it to serve any notice, in any context, by post (and thereby also give it the benefit of s 7 of the Interpretation Act 1978), or does s 233 refer only to notices given by a local authority in its capacity as a

local authority? The Appellant says the section means what it says and gives local authorities a specific postal service right.

74. The First Respondent says not. She refers to *Enfield LBC v Devonish* (1997) 29 HLR 691, where it was held that a local authority could not rely on s 233 when serving a notice to quit. Kennedy LJ explained at p 689 that s 233 was inapplicable because a notice to quit is required by the common law, as a condition of determining the tenancy, and was not "required or authorised by any enactment". Accordingly the Appellant says that the ratio of *Enfield* was much more limited. Certainly *Enfield* does not say that s 233 is applicable only where an enactment requires or authorises service by a local authority in its capacity as a local authority. But it seems to me that that is the obvious and natural reading of the provision. Something more explicit would be required if the section were to give all local authorities a blanket authority to serve any notice at all by post.

75. Second, the Appellant refers to - but very candidly does not place much reliance upon – *Akorita v 36 Gensing Road Ltd* LRX/16/2008, where the Lands Tribunal proceeded on the basis that section 7 of the Interpretation Act 1978 applies to notices given under section 20 of the Landlord and tenant Act 1985. HHJ Huskinson said at paragraph 21 "I conclude that the Interpretation Act 1978 applies". Unfortunately in the absence of any reasoning I do not think that this can be regarded as an authority in relation to s20B notices.

76. Finally Mr Rainey QC submitted in his skeleton argument that because s20B was inserted into the Landlord and Tenant Act 1985 by the Landlord and Tenant Act 1987, the service provisions of the latter statute – which authorise service by post, in section 54 – apply to the former statute. He did not pursue this point at the hearing, and I take the view that there is no basis on which section 54 of the Landlord and Tenant Act 1987 can be imported into the Landlord and Tenant Act 1985 simply because the 1987 statute made other amendments to the 1985 Act.

Ground 4(2) If section 7 applied, did the FTT make a mistake of law in its approach to the presumption of service?

77. The Appellant says that – given that, as I have found – s 7 did apply – the FTT made two mistakes in the way it operated the presumption. First of all it says the FTT required the Appellant to prove too much by requiring it to prove time of delivery (its paragraph 46), because s 7 makes time of service the time of delivery in the ordinary course of post. The First Respondent no longer contests this point and I find that the FTT did indeed make a mistake of law here as to the effect of s 7; there is no need for proof of the time of delivery because the section does that work. The FTT did not need to hear specific evidence as to what "the ordinary course of post" would have been in this case, particularly since the relevant deadline (which, for s20B notices, is the period of 18 months after the costs were incurred) was some way away.

78. Turning to the second point the Appellant says the FTT made a mistake of law in finding that the presumption was rebutted by the First Respondent's assertion that she did not receive it.

79. As we shall see when looking at Ground 5 below, the FTT heard a lot of evidence about the posting of the s20B notices. The Appellant had 15,000 to deliver and so, not surprisingly, it did not have them prepared by its staff and put in a post box. It contracted out its postal service to Swisspost Post Solutions Ltd ("Swisspost"), to whom it provided the text of the notice and the details of the tenants so that Swisspost could carry out a mail merge to produce the individual notices, put them in envelopes, frank them with the cost of second class mail and then give them to the Royal Mail for delivery. The FTT found that the Appellant had not proved that the notices were in fact properly addressed, pre-paid and posted. Having said at paragraphs 22 and 23 "…we proceed on the footing that section 7 is engaged. So, the statutory presumption applies…" the FTT at its paragraph 47 said:

> "For these reasons we find that the council has not shown that either notice was actually delivered to Ms Akhtar and it has not shown that the statutory presumption in section 7 Interpretation Act 1978 applies. Further, even if the council could have shown that the statutory presumption applies, we find the contrary is proved because we accept Ms Akhtar's evidence that she did not receive either of the notices.

80. In other words the FTT held (1) that the Appellant did not prove that the notices were in fact properly addressed, pre-paid and posted and therefore could not have the benefit of the presumption, but that (2) even if the Appellant had proved those facts so as to raise the presumption, it would have been rebutted because of Ms Akhtar's evidence that she had not received the notices.

81. I am going to look at the evidence of posting under Ground 5, where the Appellant says that that the FTT made a mistake of law by requiring far too much detailed information about postage, when the evidence it called was sufficient not just to raise the presumption in section 7 but to prove service even in the absence of the presumption. So I take the argument under ground 4 to be simply that the FTT was wrong in finding that Ms Akhtar's assertion would have been sufficient to rebut the presumption even if the Appellant had been able to invoke the presumption.

82. A legal presumption like the one in s 7 has the effect of reversing the burden of proof. Once the landlord has proved that the notice was properly addressed, pre-paid and posted it has nothing further to do – unless the contrary is proved. If the contrary is proved, then the landlord must, as it were, go the long way round and actually prove service without the help of the presumption and must therefore convince the tribunal on the balance of probabilities that the notice was actually received. But it is only required to do that if the contrary is *proved*, and not if the contrary is merely asserted.

83. The evidence given to the FTT by Ms Akhtar was that she did not receive the notice; that she kept all the notices about the lease on a file and would have filed them if she had received them; she did not have them on file and so was confident that she had not received them; and that her lodger would not have intercepted the notices. What the FTT said was that "… we have no reason to believe that Ms Akhtar was not being truthful with us. … We accept Ms Akhtar's evidence and we find as a fact that she did not receive [the s20B notices]."

84. Ms Akhtar's evidence went no further than a bare denial. The absence of the notice in her filing system adds nothing. The evidence about her lodger was not evidence that the notices had not been delivered, but was merely the ruling out of an explanation for her not having seen them. As a matter of law, what Ms Akhtar said was not sufficient to rebut the presumption in section 7 of the Interpretation Act 1978. That is the case even if the FTT was convinced that Ms Akhtar was not telling lies, because memories can fail, envelopes can be mislaid, items of post can be overlooked.

85. As it happens there were reasons for doubting the accuracy of Ms Akhtar's recollection. The FTT said that her answers during cross-examination were "confused and confusing". Moreover, it was already established that she had denied receiving a notice under section 20 of the Landlord and Tenant Act 1985 which was proved to have been served personally. Moreover, the Second Respondent did receive the notices.

86. Accordingly I find that in deciding that the presumption would have been rebutted by Ms Akhtar's assertion the FTT made a mistake of law. That means that the appeal must succeed if I also find that the FTT made a mistake of law in not finding that the Appellant met the requirements for the presumption to apply, by proving that the notices were properly addressed, pre-paid and posted. That is the subject of ground 5 to which I now turn.

Ground 5

87. Ground 5 also relates to the service of the notices and is split into three.

88. Ground 5A relates to the requirement in s 7 of the Interpretation Act 1978 that the notices be "properly addressed". In this case they were sent out in window envelopes, and the address visible in the window did not begin with a direction to "The leaseholder". The FTT found that such a notice was not properly addressed because there was no indication of the intended recipient. The Appellant says that that decision was wrong in law and the First Respondent concedes that that is the case. I agree; to meet the requirements for the presumption in s 7 of the Interpretation Act 1978 to apply the address itself must obviously be set out correctly, but there I no requirement to address the envelope to "The Leaseholder" or any named individual.

89. However, in order to meet the requirements for the presumption the landlord had also to show that the notices were pre-paid and posted, and it is to those requirements that grounds 5B ad 5C relate.

Grounds 5B and 5C

90. Grounds 5B and 5C are so closely related that it is helpful to take them together. They are crucial to my decision on service of the notices because the Appellant is saying two things: first, that it has done all that is needed to raise the presumption of service in s 7 of the Interpretation Act 1978 and second, that even if that presumption was unavailable because s 7 did not apply, it had proved service on the balance of probabilities. In fact the FTT was making

a decision on the basis that s 7 did apply and said nothing about the position if it did not apply, but of course if the landlord did not prove enough to get itself within s 7 then it certainly had not surmounted the higher hurdle of proving service in the absence of that presumption. Conversely if it had proved service in the ordinary way then it certainly met the requirements of section 7.

91. The two grounds 5B and 5C read as follows:

> **Ground 5B:** The FTT erred in law by in effect imposing a more onerous standard of proof on [A] as to service of the s20B notices than the balance of probabilities.
>
> **Ground 5C:** The FTT's decision as to proof of service of the s20B notices was flawed as it gave improper weight to the evidence of [R1] and insufficient weight to the evidence of [A].

92. Both these grounds are about the quantity and quality of evidence produced by the Appellant to show that it had served the notices. Ground 5B is that too much was required; ground 5C is that insufficient weight was given to Appellant's evidence and too much to the evidence of Ms Akhtar that she did not receive the notices.

93. As I explained above, the FTT heard evidence that the Appellant did not have its own employees prepare and post 15,000 notices. Instead it used Swisspost. Evidence was given by Mr Joseph Sheehy about how the process worked, and the FTT said at its paragraph 36: "Mr Sheehy struck us as being a genuine and honest witness. … In general terms we accept his evidence of what he was aware of personally, insofar as that goes, but he was not able to assist as to how Swisspost managed the printing and posting of the batches of notices."

94. The FTT was given a great deal of detail about how Swisspost worked. Mr Sheehy explained that the Appellant would send a template letter to Swisspost, and would review a sample of the notices produced. If the sample was acceptable then Swisspost would produce the whole batch. It would deliver the notices to the Royal Mail and would confirm to the Appellant that it had done so.

95. What Mr Sheehy could not tell the FTT was when and by whom the checks and reviews that he described were carried out. Nor could he say how the notices were given to the Royal Mail, nor how Swisspost confirmed to the Appellant that the notices had been posted. The FTT therefore said (its paragraph 32) "We find that we must treat that part of Mr Sheehy's evidence with caution." It is difficult to see why Mr Sheehy should be disbelieved on this point. It might well have been impracticable to say who checked this batch of notices, or how exactly on this occasion the Appellant got confirmation of posting but it is difficult to see why Mr Sheehy's description of the system should be rejected.

96. The FTT also saw a number of invoices from Swisspost which make it clear that notices were printed (invoice dated 18 June 2014 referring to printing in May 2014, and similarly for 2015), put in envelopes (invoice dated 2 June 2014, referring to work done on 30 May 2014) and that postage was paid (invoice dated 8 July 2015). Costs of both UK and overseas postage

are invoiced. A "Citipost collection sheet" for July 2015 refers to the mailing of s20B notices. This is not a complete set of paperwork, but the invoices track the various stages in the process. No suggestion has been made that the invoices were fraudulent.

97. If the Appellant's own employees had prepared the notices, put stamps on them and put them in the post, it would have been easy to call an employee to say that this was done. But the Appellant, perfectly properly, used another company to do the work, and Swisspost itself used sub-contractors. The point of the arrangement was that the Appellant should not have to manage the detail of the posting process. Instead it produced evidence, from a witness who the FTT regarded as honest, that Swisspost had been used, and quite a lot of detail was given of how Swisspost undertook the task. It is known that the system worked, because the Second Respondent received the notices. It was not necessary for the FTT to require proof of every step in a notice's journey. Nor was it appropriate for the FTT to say that the Appellant had treated the service of the notices "as if they were akin to a junk mailing process" (FTT paragraph 50).

98. This appeal can only be on points of law; it cannot succeed merely on a disagreement as to evidence of fact. But it seems to me that the standard of proof required by the FTT was too high on this point, to an extent that amounts to an error of law. It is known that notices addressed to the First Respondent were produced by Swisspost, because copies are now available. It is very difficult to see how the Appellant has not shown that, on the balance of probabilities, the First Respondent's notices were pre-paid and posted, just as it is known that the Second Respondent's were. And that means that the requirements of section 7 of the Interpretation Act 1978 were met and the presumption applied. The notices are deemed to have been served unless the contrary is proved. Ground 5B succeeds and, in the light of what I have said about the requirements of section 7 under Ground 4, it is clear that the evidence given by Ms Akhtar could not come close to displacing the presumption. Accordingly ground 5C must also succeed.

99. If one looks at the matter hypothetically without the benefit of the presumption, then the evidence of posting by Swisspost has to be weighed against Ms Akhtar's assertion, in the light of the known delivery to the Second Respondent, and of what is known about Ms Akhtar's inaccuracy on another occasion (paragraph 85 above). Even without the presumption the Appellant proved service on the balance of probabilities. The FTT did not consider service in the absence of the presumption and so it is not the case that it fell into error on that point; but the point is relevant because if service was proved on the balance of probabilities in any event then the less stringent requirements of section 7 were also met.

100. Accordingly grounds 5B and 5C succeed.

Grounds 6 and 7; the validity of the s20B notices

101. I turn now to the grounds of appeal that relate to the validity of the s20B notices. Four points are made by the Appellant because ground 7 is split into three. Grounds 7A, 7B and 7C are not contested by the Respondents but I make a finding on them in any event. Ground 6 remains in dispute. It relates to what the notices say about what the tenant will have to pay; the

Respondent argues that the FTT was correct to find the notices invalid because they do not give the tenant enough information, although not for the precise reason that the FTT gave.

Ground 6

102. Ground 6 is that the FTT was wrong to find that a s20B notice must contain the word of s 20B itself, namely "… that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge." This was the principal reason the FTT found that the notice were invalid.

103. Section 20B(2) itself says:

> "Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

104. The two s20B notices did not use those words. The FTT at its paragraph 78 set out what Morgan J said in paragraph 65 of his judgment in *Brent LBC v Shulem B Association Ltd* [2011] EWHC 1663 (Ch):

> "[Morgan J] makes clear that a landlord *"**must** tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge"* (emphasis added). The guidance is that the obligation imposed by 20B is to use those precise words is an imperative. The judge does not qualify his guidance by use of words such as 'or words to similar or like effect'."

105. I do not read Morgan J's words quoted above as imposing a requirement that a notice under s20B should reproduce the exact words of s20B itself. He did not place the words between quotation marks. He gave no indication that the exact words were to be used; indeed, he was discussing in that paragraph the substance of the notice and was not referring to the wording of the notice. The point of the paragraph was the sentence that follows the words quoted: "It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee nor what the resulting service charge demand will be." So I take the view that the FTT misconstrued Morgan J's words and took them out of context. It seems to me that he was conveying a requirement of substance, which is clear in any event from the words of s20B itself.

106. The Respondents agree the FTT's decision is unsustainable on this point but they argue that the notices did not comply with section 20B. They agree, too, that the notices comply with the first requirement of s20B, to inform the tenants that costs have been incurred. They say that the notices fail to tell the tenants that they would subsequently have to contribute to those costs by paying a service charge.

107. What the s20B notices said was this:

> "The details of expenditure are not yet known in respect to your individual service charge implications; you will be notified of the actual contract costs and therefore your actual contribution when the final account is agreed."

108. Did the tenants know from these words used that they would subsequently be required under the terms of the lease to contribute to the cost of the works by the payment of a service charge? Clearly yes. The actual amount to be paid or the proportion to be paid does not have to be stated: s20B makes no such requirement, and in *Shulem B* at paragraph 59 Morgan J makes it clear that there is no need for the notice to state either the amount to be paid, or the proportion of the whole sum to be paid, by an individual tenant nor the proportion. I cannot see any substance in the Respondents' opposition to the ground of appeal and it succeeds.

Ground 7

109. Ground 7 is in three parts, none of which is now contested by the Respondents.

110. **Ground 7A** is that the FTT erred in law in concluding that a s20B notice was rendered invalid if the aggregate figure given for the costs incurred by the landlord included costs that were not chargeable to the lessee under the lease. The 2014 notice said "This amount is a gross figure and may include costs for works that are non-rechargeable to the leaseholders", and the 2015 notice contained very similar words; the FTT regarded this as one reason why the notices were invalid.

111. The Respondents do not resist this ground of appeal, and I find that it succeeds. In *Brent LBC v Shulem B Association Ltd* [2011] EWHC 1663 (Ch) Morgan J observed at his paragraph 58 that where the landlord does not know the precise figure that will be charged to the tenants it is open to it to include a margin, to act as a cap on recovery, provided that the eventual charge is lower than the maximum set out in the notice. The FTT was aware of this but took the view that what was therefore permissible was "a little leeway" to the landlord. It regarded the margin here between the gross figure for the cost of works and the chargeable figure, which was about one third of the total, as being "so ridiculously high as to be unsustainable and plainly wrong and unjustifiable" (FTT paragraph 84). That reasoning appears to me to go some way beyond what is said in s20B itself and in the guidance given by Morgan J in *Shulem B*. The margin was certainly not as high as the FTT thought it was because of the professional and administration fees which I find, and which it is now agreed, were also recoverable within the gross figure (see my paragraph 113 below). The tenant was left well aware that the charge might eventually be lower; the purpose of the notice was fulfilled in that the tenant was not going to be taken by surprise by a charge later – except perhaps for a pleasant surprise if the eventual charge turned out to be lower than that set out in the notice. The Respondents were right not to contest this ground and it succeeds.

112. **Ground 7B** is that the FTT erred in law in concluding that A's professional fees and administration fees could not be recovered unless specifically identified in the s20B notice

even if the aggregate figure in the notice was greater than the aggregate of the actual costs of rechargeable works, professional fees and administration fees.

113. What the FTT said about this was "that the May 2014 notice does not make any reference to or include the substantial professional fees and administration fees that the council had incurred by the time that notice was prepared. Thus in any event the council cannot now seek to recover a contribution to those two items of costs under the May 2014 notice." There is no requirement in s20B to set out different items of expenditure separately and it is difficult to see why the FTT reached the conclusion it did on these items. The Respondents are plainly correct not to challenge this ground of appeal and I find that it succeeds.

114. Finally **Ground 7C** is that the FTT erred in law in concluding that a s20B notice would not be valid if the figure for costs incurred was higher than the costs that were actually rechargeable to the lessees pursuant to the lease. I assume Ground 7C is included only in case Ground 7A fails; it succeeds for the same reasons that Ground 7A succeeds.

Conclusion

115. The appeal succeeds. Even though the Appellant was unsuccessful as regards the validity of the paragraph 2(1) notice insofar as it related to the financial year 2012-2013, the First Respondent in any event waived the invalidity.

Dated: 20 April 2017

Judge Elizabeth Cooke