UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 239 (LC)
Case No: LRX/76/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT - service charges – building with residential use of upper parts and commercial use below – landlord holding headlease of upper parts (so far as non-structural) from freeholder – headlease requiring landlord to contribute to a freeholder's sinking fund – landlord's ability to recover such contributions from tenant – reasonableness of amounts claimed

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

BETWEEN:

SYED BALKHI

Appellant

- and -

SOUTHERN LAND SECURITIES LTD

Respondent

Re: 18/6 Maddox Street,
London
W1S 1PL

Before His Honour Judge Huskinson and Peter McCrea FRICS
On
9 May 2016

Royal Courts of Justice
- -

Dafydd Paxton, instructed on a Direct Access basis for the appellant
Nicholas Grundy QC, instructed by S L S Legal Department on behalf of the respondent

No cases are referred to in this decision

DECISION

Introduction

1. This is an appeal, with permission, from the decision of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") dated 28 April 2015 whereby the F-tT decided that certain amounts demanded by the respondent as landlord from the appellant as tenant by way of service charge (being sums demanded in connection with what was called the Landlord Estate Charge) were payable and reasonable.

2. The matter had been transferred to the F-tT by the order of the Northampton County Court. The respondent had issued proceedings against the appellant in the Northampton County Court for a sum of £11,815.51 said to be payable by way of ground rent, service charges and other charges as at 6 August 2013. The appellant had lodged a defence in response to those proceedings raising various matters regarding the recoverability of certain sums and the reasonableness thereof. This led to the transfer to the F-tT.

3. The claim is in relation to Flat No. 6 (which is on the fourth floor) at 18 Maddox Street, London W1S 1PL. The appellant holds the flat from the respondent upon an underlease dated 11 January 2007 whereby the flat was demised to him for 125 years from 13 December 2006 at the rents and upon the terms and conditions therein contained.

4. It may be noted that the appellant held the flat upon an underlease. There was a headlease held by the respondent as tenant from the freeholder as landlord. The headlease was not of the whole building at 18 Maddox Street but instead related only to the upper residential parts. Upon the ground floor (and perhaps also basement) there are commercial premises at the building which are held by commercial tenants from, we understand, the freeholder. As there is this dual use, namely residential premises on the four upper floors and commercial premises on the ground (and basement) floors, the freeholder, namely The Pollen Estate Trustee Company Limited ("Pollen"), has retained the structure of the building and has only demised the internal parts thereof. Thus so far as concerns the upper residential parts there is a headlease between Pollen and the respondent's predecessor in title whereby what are demised are the non-structural upper parts of the building. This headlease which is dated 13 December 2006, contains within clause 4.2 (which was entitled quiet enjoyment) a covenant by Pollen.

> "THAT the Tenant paying the rents hereby reserved and performing and observing the covenants conditions and agreements herein contained and on the part of the Tenant to be performed and observed
>
> 4.2.1 [covenant for quiet enjoyment]
>
> 4.2.2 the Landlord shall comply with the obligations set out in the sixth schedule hereto."

The sixth schedule contained paragraphs headed "Landlord's obligations". These included in paragraphs 1 and 2 the following provisions:

> "To keep the Retained Premises (except the Lettable Parts of the Retained Premises) in good repair and condition and in whole or in part to rebuild or renew the same in so far as necessary to keep the same in good and substantial repair and condition.
>
> From time to time as often and in such manner as the Landlord shall reasonably consider desirable or necessary to redecorate treat clean and preserve the exterior of the Building."

5. The headlease made provision for the recovery by Pollen from the respondent of a service charge which was reserved as one of the additional rents and in respect of which there was a covenant to pay the service charge (including an estimated service charge) in clause 3.3 of the headlease. The detailed provisions regarding the recovery of this service charge do not need to be examined. What must however be noted is that the fourth schedule included the various categories of landlord's expenses and outgoings which could be included within the service charge. These matters included the cost of repairing maintaining etc the retained premises (i.e. effectively the structure of the building) and also the cost of treating preserving decorating etc the retained premises. The fifth schedule set down further terms and provisions relating to the service charge and its calculation. Paragraph 5 provided as follows:

> "The expression "the expenses and outgoings incurred by the landlord" as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditure which have been actually disbursed incurred or made by the Landlord during the relevant Service Charge Year but also such provisions as the Landlord or its Surveyors shall in their discretion consider prudent to make in any Service Charge year towards expenditure which the Landlord or its Surveyors reasonably expect will be incurred by them in respect of expenses outgoings or expenditure recurring at intervals greater than a Service Charge Year whenever disbursed incurred or made or to be disbursed incurred or made PROVIDED that when such expenditure is incurred the Landlord shall allow in the Building Service Charge such proportion of the unexpended part of such provision as the Landlord shall fairly attribute to the relevant item in respect of which such expenditure was incurred and such interest thereon at such deposit rate as the Landlord shall in their discretion consider fair and reasonable."

6. The underlease between the respondent's predecessor in title as lessor and the appellant as lessee reserved by way of an additional rent the amount attributable to the flat in respect of the service charge due from the appellant in accordance with the sixth schedule. The underlease made clear that it was indeed an underlease and there was express reference within the body of the document to the Head Lease and also to the Superior Landlord. By clause 5 the Landlord (i.e. the respondent's predecessor not the Superior Landlord) gave various covenants including in clause 5(e) a covenant (subject to the payment of rents):

> "… to use all reasonable endeavours to procure the Superior Landlord to carry out provide manage and operate the Services."

7. The fifth schedule made provision for the Services in respect of which the tenant was to make a contribution and included the maintaining in good and tenantable repair and condition the main structure of the building and also including external and certain internal decorations. The sixth schedule made provision for the service charge payable by the appellant. In summary this

was an appropriate proportion (in fact 20.04%) of what was defined as the "Total Expenditure". Paragraph 1.2 of the sixth schedule provided as follows:

> "Total Expenditure" - means the total expenditure incurred or payable by the Landlord in any Accounting Period in carrying out its obligations under this Underlease including (for the avoidance of doubt) all costs and expenses payable to the Superior Landlord under the Head Lease in respect of insurance and services relating to the Building and any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder.

It should further be noted that one of the items mentioned in the fifth schedule as being services in respect of which the tenant was to make a contribution was described in paragraph 14 of the fifth schedule as follows:

> "Set aside (which setting aside shall for the purposes of the Sixth Schedule hereto be deemed an item of expenditure incurred by the Landlord) such sums of money as the Landlord shall reasonably require to meet such future costs as the Landlord shall reasonably expect to incur in replacing maintaining and renewing those items which the Landlord have hereby covenanted to replace maintain or renew (such sums set aside to form a sinking fund)."

8. As explained below the details of the issues between the parties were by no means easy to understand. At present it is necessary merely to summarise them by saying this, namely that the respondent included in the statement of anticipated service charge expenditure for various years an item called the Landlord Estate Charge which, it transpired, was an amount which the respondent as landlord had paid to Pollen as freeholder under the terms of the headlease in respect of various matters including a sinking fund as contemplated under paragraph 5 of the fifth schedule of the headlease. During certain earlier years the amount of the Landlord Estate Charge included within the total anticipated service charge expenditure (20.04% of which was allocated to the appellant) was a fairly small sum and the appellant raised no objection in relation thereto. However from 2011 onwards the sums became larger and objection was raised.

The Proceedings

9. By a claim form (which does not bear a claim number or issue date but which bears an internal date of 21 August 2013) the respondent issued proceedings in the Northampton County Court against the appellant alleging that the defendant was in arrears with payment of ground rent and service and other charges accruing due under the terms of the underlease up to and including 6 August 2013 in the aggregate sum of £11,815.51. The defendant served a defence (which complained among other matters that the particulars of claim were wholly unparticularised). It appears that District Judge Johnson on 4 February 2015 made an order that "the matter be transferred to the Leasehold Valuation Tribunal", but we have not seen a copy of this order.

10. The matter was, by the agreement of the parties, decided by the F-tT on the basis of written representations and without an oral hearing. The F-tT observed that it was unable to reconcile the claim (for £11,815.51) with the figures attached to the respondent's statement and that this statement appeared to include charges falling outside the period of claim. The Tribunal said it found the way the parties had presented the case confusing (we have sympathy with that observation). However the F-tT said that it was able to make a determination in connection with the payability and reasonableness of the charges made by way of Landlord Estate Charge which the F-tT considered to be at the centre of the dispute between the parties.

11. As regards the entitlement of the respondent to make the claim for a payment in respect of Landlord Estate Charge (which included a sinking fund) the F-tT concluded that the respondent was entitled to recover such a charge having regard to the provisions of paragraph 14 of the fifth schedule to the under lease. As regards the reasonableness of these demands the F-tT determined that the sums charged to date were reasonable. It gave the following reasons for its decision:

> "24. While the building was only converted in 2007/8 the structure of the building is over 100 years old. Moreover the surveyor's report provided by the Respondent indicates that there is a need for works to the exterior which may well be extensive and expensive.
>
> 25. The Tribunal therefore considers (i) that it is reasonable to build up a sinking fund in connection with the maintenance of the structure and exterior of the building and (ii) that it is reasonable for the Applicant to collect a relatively substantial sum of money towards the costs of carrying out currently planned repairs. It also considers that the sum collected to date appears to be reasonable.
>
> 26. This is not to say that any monies demanded by the Landlord in connection with a sinking fund will automatically be reasonable and it may well be that the Landlord will be able to reduce its demands for contributions to the sinking fund having reflected upon the anticipated costs of the works and the sum collected to date. However at this stage the Tribunal is neither required to make a determination on future reasonableness nor is it able to do so without more information."

The F-tT noted that the appellant had argued that there had been an absence of the statutorily required consultation procedures, but the F-tT determined that there was no requirement of consultation because consultation requirements were triggered by qualifying works and not by contributions to a sinking fund.

12. The appellant sought permission to appeal, which was granted by the Upper Tribunal by a decision dated 22 October 2015 whereby permission was granted upon one ground but only one ground (various other matters had been raised in the application for permission to appeal) namely:

> "The First-tier Tribunal's decision does not determine why the sums required by the landlord for the sinking fund were reasonable. In particular it appears to have misconstrued the report of the tenant's surveyor, which did not indicate any need for extensive or expensive works at present, nor indeed any major repair for another 10 to 15 years. The First-tier Tribunal refers at paragraph 25 to the landlord's currently planned repairs but there is no indication of what these were nor of the reason why, by reference to those plans, the sums demanded were reasonable."

It was ordered that the appeal should proceed by way of a re-hearing.

The re-hearing before the Upper Tribunal

13. At the outset of the hearing before us we enquired of the parties what precisely were the matters which were before us for decision. Various further points, beyond the single point in respect of which permission to appeal had been granted, were raised in documentation submitted on behalf of the appellant including contentions that the respondent was disabled from recovering the service charges it claimed because of failure to comply with section 153 of the Commonhold and Leasehold Reform Act 2002 and failure to comply with section 47 of the Landlord and Tenant Act 1985 and by reason of some alleged failure in the statutory consultation procedures. However bearing in mind the terms in which permission to appeal to the Upper Tribunal was granted and bearing in mind also the state of the pleadings in the county court proceedings, it appeared to us (and it was ultimately agreed between the parties) that the only matter before the Upper Tribunal for decision was as follows, namely the extent (if at all) that the respondent was entitled to recover from the appellant, as part of the service charge for the accounting years 2011, 2012 and 2013, an amount in the respect of the sum paid by the respondent to Pollen which was referred to as the Landlord Estate Charge in the respondent's accounts.

14. It became possible to put figures upon what was therefore in dispute in the following manner. It was accepted on behalf of the appellant that the documents at pages 74-79 of the bundle, which were copies of service charge accounts (or extracts therefrom) prepared by Crawford's Chartered Accountants on behalf of the respondent, showed that during the calendar years 2011, 2012 and 2013 (which were also the relevant accounting years) the respondent paid to Pollen by way of Landlord Estate Charge the following sums namely:

(1) For 2011: £25,397.56

(2) For 2012: £16,691.80

(3) For 2013: £19,648.53

15. The question before this Tribunal is whether the appellant is obliged to make any payment in respect of his proportion (20.04%) of these sums for any of these three years and, if so, how much is he obliged to pay.

The Evidence

16. As this was an appeal which was proceeding by way of a re-hearing we enquired of the parties what evidence they proposed to lay before us. Oral evidence was given to us by the appellant himself (as to which see below). The appellant relied upon a building surveyor's report from Mr D Rogers MRICS which was based upon an inspection carried out on 18 June 2013. This report was before the F-tT and had been in the possession of the respondent for a substantial period and the respondent raised no objection to the contents of this report being taken into account, notwithstanding that Mr Rogers was not called to give evidence and that there was no

declaration by an expert in the usual form acknowledging his duty to the court/tribunal. There was also a later report dated 20 December 2015 from James Barry, Chartered Surveyors. As regards this report it may be noted that by order of the Deputy President dated 26 February 2016:

> "The evidence which may be relied on at the hearing of the appeal is accordingly limited to evidence which was relied on at the hearing before the First-tier Tribunal (Property Chamber) and the report of Mr Barry. If it is intended that Mr Barry should give opinion evidence in his capacity as a Chartered Surveyor he should file an expert's declaration in accordance with paragraph 8.2 of the Tribunal's Practice Directions."

No such expert's declaration was given and we were told that Mr Barry was not able to be called to give evidence as he was ill. In these circumstances Mr Grundy QC asked that we should place no or no significant weight on the contents of Mr Barry's report. So far as concerns evidence on behalf of the respondent Mr Grundy called no oral evidence. There were witness statements before us (with the exhibits thereto) from Mr Brendan Milward dated 5 March 2015 and 16 April 2015. These statements and exhibits were before the F-tT. Mr Milward is employed within the legal department of the respondent. Mr Milward was not available for cross examination. We must bear that matter in mind when deciding what weight to give to Mr Milward's evidence, but it may be observed that the principal function performed by his statements was to exhibit various documents rather than to give contentious evidence regarding matters of fact.

17. Mr Balkhi gave evidence orally to us during the course of which he confirmed the truth of the two statements from him in the bundle commencing at pages 12 and 61. So far as is relevant to the matters before the Tribunal the following aspects of his evidence may be noted:

(1) Mr Balkhi noticed from his service charge demands that the Landlord Estate Charge was many multiples of the agreed ground rent so he raised the matter with the managing agents in early 2012. He then discovered that, unbeknown previously to him, the managing agents had been collecting a "sinking fund" for what he described as arbitrary external repairs at some future date. He explained that he was led to understand that the fund was targeted to reach in excess of £125,000.

(2) He contended that the building was effectively a new build, having been converted about 7 years ago.

(3) He said there was no evidence that had been provided to him or the Tribunal as to how the respondent or Pollen could reasonably expect to incur so large a bill (in the order of £125,000) in repairing a building that effectively was only just over 7 years of age with a mere six apartments.

(4) He said that despite repeated requests the respondent had failed to provide details of what amount was being charged by Pollen to the respondent for this sinking fund, where the money was being stored and whether it was generating interest.

(5) He drew attention to a letter from the managing agents dated 28 April 2014 in relation to the service charge year 2014 which recorded that they had revised the amount to be included for the Landlord Estate Charge and that it had been decreased from £18,124 to £6,759. He contended that this was an admission that far too much had been charged in respect of this topic in the previous years.

(6) He also raised various matters, not currently relevant to the determination of this Tribunal, regarding alleged lack of consultation; disputes about certain matters he perceived himself to have been charged by way of administration charge; and regarding the contention that he had made payments to such an extent that, upon his case, he was entitled to repayment of an over payment – an order for which he sought.

(7) He said that he was confused by the service charge accounts produced by the respondent, that the Landlord Estate Charge was the only aspect which he raised concern about, and that he informed the respondent that he would pay all the service charge demands except for the Landlord Estate Charge.

(8) He said that no substantial works had in fact been done at any relevant time – only minor repairs.

(9) He drew attention to the conclusions in Mr Rogers' report and Mr Barry's report.

(10) He contended that the costs of building works in Mayfair, although they may be more expensive than in provincial towns, would not be so very much more expensive.

(11) He said that no one had at any stage explained to him how anything like £55,000 worth of repairs might be required at the building (this £55,000 was a reference to the total of the three sums referred to in paragraph 14 above – these were mistakenly suggested by counsel during cross examination to total £55,737.89 whereas in fact they total £61,737.89).

18. As regards the report from Mr D Rogers MRICS, he inspected the building on 18 June 2013. In his conclusions he said that the property has been maintained reasonably well but that there were some minor repairs required. He said that most of the works could be safely done as part of an ongoing programme of routine maintenance and upgrading as opposed to an obtrusive (sic) programme. Having regard to the purpose for which it was eventually (in the course of the hearing) identified as being why Pollen was collecting the sinking find (namely for external decorations), it is only necessary to note certain of the further comments by Mr Rogers. He said of the external joinery that the fascias and soffits were of soft wood construction and that it was difficult fully to ascertain their condition from ground level but that they would benefit from some rubbing down and redecorating on a periodic basis. He also said that external decorations were reasonable but the external joinery would require rubbing down and redecorating. He did not give any estimate of the likely costs of external redecorations.

19. Mr Balkhi also relied upon the report of James Barry, BSc MRICS dated 20 December 2015 and prepared as a result of an inspection on 17 December 2015. Mr Barry stated in his summary that the building overall is in an excellent condition and that the refurbishment and conversion of the building into six apartments and shops was done to a very high standard. He did not envisage any major building works being required to the building for the next 15-20 years. He drew attention to certain minor repairs which he considered to be needed which he estimated would cost no more than about £2,500 and could be done as part of regular maintenance. So far as concerns finishes and decorations he said:

> "The interior and exterior of the property needs some redecoration. The external woodwork will need regular redecoration, typically on a 3-5 year cycle, depending on the quality of paint or stain coatings, exposure factors, and condition of the surfaces beneath. This is part of routine maintenance."

He did not however give any estimate as to the likely cost of a proper external redecoration.

20. As regards Mr Milward's statements, he principally merely produced documents. The documents he produced are by no means easy to follow and have not been presented in a helpful manner. As he did not give evidence there was no witness on behalf of the respondent who could be asked any questions to explain any of the documents produced. Doing the best we can, what seems to have happened is as follows:

(1) Pollen prepared service charge accounts for a year which commenced on 1 November and ended on the following 31 October. It seems that the demands by Pollen for, for instance, the year 1 November 2010 – 31 October 2011 have been dealt with by the respondent as an expense in the year 2011. We do not think that for present purposes anything relevant turns on this disparity between the accounting year for the headlease and the accounting year for the underlease (which is the calendar year).

(2) For the year 2010/11 (the respondent's year 2011) Pollen's service charge budget included the following item "Exceptional Expenditure External Redecorations £20,000." There was a note stating "collection 1 of 2 for external redecorations to be carried out the year commencing 2012". The service charge account was prepared by a firm of chartered surveyors namely Drivers Jonas Deloitte who appear also to have prepared some explanatory text for the relevant service charge budgets. The explanatory text for the service charge budget for the year 2010/11 recorded that for some buildings on the Pollen Estate the budget will include allowances towards major items of expenditure in future years so that they will not impact heavily on tenants in a single year. The text included the following comment in paragraph 5.4.3 regarding what was described as the key variations and other matters that require comment (i.e. as compared with previous budgets). Against the heading "Exceptional Expenditure" there is the following comment:

> "We have included a collection of £20,000 for external redecoration works. So that we are no (sic) charging tenants the full cost in one year, we will make a further collection in the year commencing 1 November 2011 with the works to be carried out the following summer."

(3) Pollen's budget for 2011/12 included against the heading "Exceptional Expenditure External Redecorations" a figure of £30,000 with the following note "collection 2 of 3 for external redecorations to be carried out the year commencing 2013. In the commentary on the budget Drivers Jonas Deloitte include the following:

> "External Redecoration works are schedule for the summer of 2012. We have already collected £20,000 in the current budget and have included a further £30,000 in this new budget."

(4) For the year 2012/13 there was included as an item of Exceptional Expenditure External Redecorations a sum of £20,000 with the following note "collection 2 of 3 for external redecorations to be carried out the year commencing 2013." In the accompanying text the surveyors commented, against the heading "Exceptional Expenditure – External Redecorations":

> "External Redecoration works are scheduled to be carried out next summer and we have made a further collection in this year's budget."

23. There is no explanation given by Drivers Jonas Deloitte (or indeed anyone else) as to the contemplated extent of the external decorations or how the costs were made up or why an originally contemplated two collections (first at £20,000 and by inference the second at £20,000) were transformed into three collections totalling £70,000.

The Appellant's Submissions

24. On behalf of the appellant Mr Paxton in summary advanced the following arguments:

(1) Upon the proper construction of paragraph 14 of schedule 5 to the underlease (which was the provision relied upon by the F-tT and by the respondent before the F-tT) there was no power to collect any form of sinking fund in respect of expenditure to be incurred by Pollen as Superior Landlord. The lease drew a clear distinction between the Landlord and the Superior Landlord. Paragraph 14 was only directed towards a sinking find towards expenses such as the Landlord might reasonably be expected to incur in replacing maintaining and renewing those items which the Landlord has covenanted to replace maintain or renew. This did not permit the respondent to collect monies for a sinking fund not towards future expenditure by the respondent as Landlord but instead in respect of future expenditure by Pollen as the Superior Landlord.

(2) Mr Paxton noted that the respondent had now changed the basis of its argument and was contending that it was entitled to recover monies paid to Pollen in respect of Pollen's sinking fund by reference to a definition of Total Expenditure in paragraph 1.2 of the sixth schedule. Mr Paxton submitted that the draftsman of the lease had expressly contemplated the underlessee (i.e. the appellant) making a payment towards a sinking fund and the draftsman had made provision for this obligation only in paragraph 14 of the fifth schedule. On the proper construction of the lease that was the full extent of the obligation on the appellant to make any payment towards any sinking fund. The provisions of paragraph 1.2 of the sixth schedule were not sufficient to justify any contrary conclusion.

(3) Even if, contrary to points (1) and (2) above, the respondent was in principle entitled to recover through the service charge monies which it had paid to Pollen in respect of Pollen's sinking fund, such money could only be recovered by way of service charge if the expenditure had been reasonably incurred. He submitted that the monies paid by the respondent to Pollen in respect of the Landlord Estate Charge had not been

reasonably incurred and that therefore nothing was payable in respect of the Landlord Estate Charge.

(4) In any event the amount recoverable through the service charge in respect of the Landlord Estate Charge was limited to such sum as was reasonable. The respondent had called no evidence as to what was reasonable. Accordingly nothing was recoverable alternatively a reduced amount (to be assessed by the Upper Tribunal as reasonable) was recoverable.

25. As regards points (1) and (2) above Mr Paxton expressed surprise that (as was the case) the respondent now no longer relied upon paragraph 14 of the fifth schedule but instead relied upon the definition of Total Expenditure in paragraph 1.2 of the sixth schedule. It appears that this change of argument was first communicated by the respondent in a document entitled "Respondent's Grounds of Opposition" dated 23 November 2015 and lodged with the Upper Tribunal. Mr Paxton had not seen this document and Mr Balkhi said he had never received it. However as it only contained matters of argument rather than any fresh evidence we saw no procedural difficulty in this fact. Mr Paxton was shown the document and was asked whether he had any further submissions in respect of it. He said he did not. Accordingly although Mr Paxton accepted that this change of argument was one which had been identified by the respondent in November 2015 rather than merely in Mr Grundy's skeleton argument, Mr Paxton maintained his submission that it was a bad argument. The only provision for contribution towards a sinking fund was paragraph 14 of the fifth schedule and this did not assist the respondent.

26. As regards point (3) above, Mr Paxton submitted that it was not sufficient, in circumstances where a tenant's landlord was itself not the freeholder but held the property from a superior interest, for the landlord unquestioningly to pass on to the tenant through the service charge arbitrary sums which have not been justified. He submitted that such expert evidence as there was, namely that contained in Mr Rogers' report and Mr Barry's report, indicated that such works as were needed or may become needed at the building could be done as part of the normal repairs budget during the course of routine maintenance. Bearing in mind the evidence regarding the state of the building and the lack of necessity for expensive works he submitted that the expense incurred by the respondent (namely the expense of paying over the Landlord Estate Charge to Pollen) was an expense which was not reasonably incurred and in consequence was not recoverable at all.

27. As regards point (4) above, Mr Paxton submitted that in any event the amount charged by the respondent to the appellant through the service charge in respect of the Landlord Estate Charge must be reasonable in amount. This necessarily followed from section 19(2) of the Landlord and Tenant Act 1985. In the present case the appellant had produced evidence through the report of the two surveyors to raise *prima facie* the argument that the amount charged was unreasonable. The burden then became upon the respondent to show that the amount charged was reasonable. The respondent had called no evidence in support of this. Accordingly nothing should be payable in respect of the Landlord Estate Charge, alternatively a reasonable sum (which he submitted would be much less than that sought by the respondent) would be payable – such reasonable sum to be assessed by the Upper Tribunal.

The Respondent's submissions

28. Mr Nicholas Grundy QC confirmed that the respondent did not rely upon paragraph 14 of the fifth schedule anymore.

29. He referred to the sixth schedule and in particular to the definition of "Total Expenditure" in paragraph 1.2. The underlease provided that the amount payable by the appellant by way of service charges was 20.04% of this Total Expenditure. The only point in dispute is the element of this Total Expenditure represented by the amount paid during the relevant three years (2011, 2012 and 2013) by the respondent to Pollen in respect of the Landlord Estate Charge.

30. The headlease expressly provided for the payment by the respondent to Pollen of monies including monies in respect of a sinking fund, see paragraph 5 of the fifth schedule to the headlease. The respondent did as a matter of fact make the relevant payments to Pollen as recorded in paragraph 14 above.

31. Accordingly the respondent was contractually liable to Pollen to make these payments and as a matter of fact did make these payments. These payments therefore fall within the definition of "Total Expenditure". On the proper construction of the underlease the respondent is entitled to recover these sums, provided they are reasonable.

32. Mr Grundy pointed out that it was recognised by the respondent that what was sought from the appellant was the payment of sums which included payments towards a sinking fund. The contemplated works (for which Pollen was gathering the sinking fund) were not carried out during any of the relevant years – and indeed they still have not been carried out (formal consultation documents have very recently been issued by Pollen concerning substantial works including in particular external redecoration). Accordingly all the appellant's rights are reserved and are for the future regarding consultation matters and regarding whether the expenditure eventually incurred was reasonably incurred and whether the works eventually done were done to a reasonable standard. Possible future arguments by the appellant upon these points do not justify the refusal to pay service charges calculated so as to include the appellant's share (20.04%) of the Landlord Estate Charge provided that the amounts included in the on account payments in respect of this Landlord Estate Charge were reasonable.

33. As to whether the amounts sought to be recovered by the respondent in respect of Landlord Estate Charge were reasonable, Mr Grundy drew attention to the age of the building (over 100 years which was converted 7 years ago – it is not a 7 year old building) and also to the size of the building and the location of the building. Works are likely to be expensive. He drew attention to various passages in Mr Roger's report which he submitted indicated the potential need for works. However bearing in mind the documents eventually identified in the bundle as to what Pollen's sinking fund was in respect of (namely external redecoration) these observations regarding certain items of potential disrepair appear no longer to be of central relevance.

34. Mr Grundy submitted that the whole of the amounts claimed were recoverable. Alternatively the Upper Tribunal, being an expert tribunal, could for itself decide what was reasonable in the absence of any evidence from the parties regarding the likely cost of external redecorations.

Discussion

35. We consider regrettable the lack of particularisation of the respondent's claim. It is unclear how the amount claimed in the County Court proceedings in the sum of £11,815.51 is made up. In particular it is unclear what sums became allegedly due when and how they were calculated and on what basis they were said to be payable. Such documents as were included in the bundle, upon analysis, appeared incapable of producing figures which matched the respondent's overall claim. We note that one of the complaints made by the appellant throughout these proceedings is that the respondent's claim was inadequately particularised. We also note the observation made by the F-tT that the way the parties presented their case was confusing.

36. The following was eventually agreed between the parties (and in so far as it was not agreed we find the following to be the facts):

36.2 As regards the respondent's accounting year 2011 (i.e. the calendar year 2011)

36.2.1 The respondent paid to Pollen £25,397.56 (which it called Landlord Estate Charge) a substantial proportion of which constituted a contribution in respect of Pollen's sinking fund.

36.2.2 The respondent included 20.04% of this sum, namely £5,087.67, in the amount demanded from the appellant as service charge for the year 2011.

36.2.3 The appellant paid his service charge save for this £5,087.67 which he withheld

36.2.4 The respondent's County court claim includes a claim for this £5,087.67. (Note: this is subject to the note at the end of paragraph 37 below).

36.2.5 It is for this Tribunal to decide whether any or all of this £5,087.67 is properly payable by the appellant to the respondent.

36.3 As regards the respondent's accounting year 2012 (i.e. the calendar year 2012)

36.3.1 The respondent paid to Pollen £16,691.80 (which it called Landlord Estate Charge) a substantial proportion of which constituted a contribution in respect of Pollen's sinking fund.

36.3.2 The respondent included 20.04% of this sum, namely £3,345.04, in the amount demanded from the appellant as service charge for the year 2012.

36.3.3 The appellant paid his service charge save for this £3,345.04 which he withheld

36.3.4 The respondent's County court claim includes a claim for this £3,345.04. (Note: this is subject to the note at the end of paragraph 37 below).

36.3.5 It is for this Tribunal to decide whether any or all of this £3,345.04 is properly payable by the appellant to the respondent.

36.4 As regards the respondent's accounting year 2013 (i.e. the calendar year 2013)

36.4.1 The respondent paid to Pollen £19,648.53 (which it called Landlord Estate Charge) a substantial proportion of which constituted a contribution in respect of Pollen's sinking fund.

36.4.2 The respondent included 20.04% of this sum, namely £3,937.56, in the amount demanded from the appellant as service charge for the year 2013.

36.4.3 The appellant paid his service charge save for this £3,937.56 which he withheld

36.4.4 The respondent's County court claim includes a claim for this £3,937.56. (Note: this is subject to the note at the end of paragraph 37 below).

36.4.5 It is for this Tribunal to decide whether any or all of this £3,937.56 is properly payable by the appellant to the respondent.

37 As regards the extent of the dispute before the Upper Tribunal we record that the parties agreed (and in any event we find) that the full extent of the dispute raised in the present case, so far as it falls within the jurisdiction of the F-tT and this Tribunal, is as recorded in the previous paragraph namely the extent (if at all) that the appellant owes the sums claimed of £5,087.67 and £3,345.04 and £3,937.56. (Note: it will be seen that the total of these three sums is £12,370.27 which is more than the amount claimed in the County court proceedings namely £11,815.51, which is said to include some ground rent which is not part of the consideration of the F-tT or this Tribunal. The matter was presented before us on the basis that the sums we have set out above in paragraph 36 were in issue between the parties. The parties did not notice the fact that these sums exceeded the amount claimed in the County court proceedings. However as the case was presented to us in this manner we consider we must decide the extent if at all that these sums are payable by the appellant. If any amendment to the County court pleadings is required that will be for the County court to consider).

38 It is unclear to us whether the respondent's claim for allegedly unpaid service charge is a claim for an on account payment which it is alleged the appellant failed to make or is instead a claim for the final service charge calculated after the conclusion of the relevant year. So far as concerns the claim relating to 2013 the claim cannot be of the latter type, because the County Court proceedings were issued in August 2013 which is before the end of the relevant year. There is no evidence before us to show that the claim for unpaid service charge is made on any different basis as regards the years 2011 and 2012. We therefore proceed on the basis that the respondent's claim in respect of each year is for an on account payment of service charge.

39 We do not accept Mr Paxton's argument that the appellant is not liable to make any payment of service charge which includes an element in respect of the sinking fund unless that

liability arises under paragraph 14 of the fifth schedule. We consider that sums properly payable by the respondent to Pollen under the headlease can properly be charged to the appellant through the service charge (having regard to paragraph 1.2 of the sixth schedule and the definition of Total Expenditure) notwithstanding that such payments include a payment towards Pollen's sinking fund. The wording of paragraph 1.2 is clearly wide enough to permit this.

40 Section 19(2) of the Landlord and Tenant Act 1985 provides

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

41 The present case is one where a landlord, who itself holds under a headlease, seeks to recover service charge payments from a residential tenant holding his flat from the landlord upon an underlease. In such a case questions may emerge (as here) as to the reasonableness of amounts demanded by the landlord from the tenant by way of on account service charge payments where the amounts demanded are based (in part) upon sums which the landlord has paid over to the freeholder. In our view it is not sufficient for the landlord merely to say: I have paid this sum to the freeholder and so it is reasonable for me to recover it from you through the service charge. In such a case where a tenant raises a question regarding the reasonableness of the amount claimed and where the tenant (as here) produces material suggesting the amount claimed may not be reasonable, then it will be for the landlord to justify the reasonableness of what is claimed. This may involve landlord producing evidence – and in producing such evidence the landlord may have to seek assistance from the freeholder or the freeholder's managing agent so as to justify the reasonableness of the sum which the landlord has paid to the freeholder and a proportion of which the landlord wishes to recover from the tenant through the service charge.

42 In the present case the report from Mr Rogers is sufficient to raise a serious question regarding the reasonableness of the disputed sums claimed by the respondent as recorded in paragraph 36 above.

43 From the respondent we have received no oral evidence nor have we received any witness statement from anyone with expertise in building maintenance justifying the reasonableness of the amounts claimed. We reject the suggestion that in these circumstances it is appropriate for the respondent, without evidence, to say to the Upper Tribunal: the building is substantial and on a corner in Mayfair so a substantial sinking fund is reasonable and you (the Upper Tribunal) are an expert tribunal and can decide for yourself what is a reasonable sum to include in the service charges demands in respect of the sinking fund contributions.

44 Eventually during the hearing attention became focused on some documents which Mr Milward had produced regarding Pollen's service charge budgets. We have recorded in paragraph 20 above what these stated. These documents show that an experienced firm of managing agents appear to have considered it appropriate in 2011 to include a sum of £20,000 as a sinking fund towards external redecoration, such sum of £20,000 being stated to be 1 of 2. The clear inference

is that Drivers Jonas Deloitte considered two separate instalments of £20,000 to be the appropriate sinking fund to set aside, i.e. a sinking fund of £40,000 for the stated purpose of carrying out external redecoration in 2012. We have received no direct evidence from Drivers Jonas Deloitte either orally or by way of a witness statement, but we consider that we can take this document as evidence that that firm addressed its mind to the question of external decorations and an appropriate sinking fund and concluded that £40,000 was appropriate.

45 In these circumstances, and bearing in mind the nature and location of the building, we accept that a sinking fund of £40,000 was a reasonable sinking fund to build up for the purpose of the prospective external redecoration.

46 However there is no (or certainly no satisfactory) explanation given as to why the position changed from there being a contemplated sinking fund of £40,000 with works to be carried out in 2012 to there being a contemplated sinking fund of £70,000 without the works being done in accordance with the previously contemplated timetable.

47 We are not satisfied that £70,000 was a reasonable sinking fund or that the respondent acted reasonably in paying over money to Pollen based upon a £70,000 sinking fund without obtaining justification for it. We conclude that the reasonable amount which the respondent was entitled to seek to recover through the service charge in respect of its contribution to Pollen's sinking fund over the years 2011, 2012 and 2013 was an amount based upon a £40,000 sinking fund rather than based upon a £70,000 sinking fund.

48 The respondent's obligation under the head lease to make payments of service charge (including sinking fund) to Pollen was an obligation to pay 63.56% of relevant sums in so far as they were sums to be attributed the whole building rather than merely to the residential part. Over the relevant three years therefore the respondent included within its payments to Pollen (being payments which it then sought to recover from the tenants) payments in respect of a sinking fund which amounted to 63.56% of £70,000, i.e. £44,492. The reasonable amount for it to have paid (and to have sought to recover from the tenants) would have included payments in respect of a sinking fund amounting to 63.56% of £40,000, i.e. £25,424. Accordingly the amount which the respondent has sought to recover from the appellant is greater than a reasonable amount by the appellant's proportion (namely 20.04%) of the difference between these two figures, i.e. 20.04% of £19,068 which is £3,821.23

Conclusion

49 Doing the best we can upon unsatisfactory material, we conclude that the amounts claimed by the respondent from the appellant as referred to in paragraphs 36 and 37 above were unreasonably high. The amount over the three relevant years which it would have been reasonable for the respondent to claim from the appellant by way of on account payments of service charge was less than the amount actually claimed by the sum of £3821.23. The amount recoverable is therefore £12,370.27 minus £3,821.23 which is £8,549.04.

Dated 18 May 2016

His Honour Judge Huskinson

P D McCrea FRICS