FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BA/LIS/2024/0001**
Property	:	**Flat 5, 52-54 High Street Wimbledon, SW19 5AY**
Applicant	:	**Parkside House Limited**
Representative	:	**Ms Gourlay of counsel**
Respondent	:	**(1) David Leon** **(2) Janet Lindheimer**
Representative	:	**Mr Demachkie of counsel**
Type of application	:	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	:	**Judge Professor R Percival** **Ms M Krisko FRICS**
Venue and date of hearing	:	**10 Alfred Place, London WC1E 7LR** **26 July 2024**
Date of decision	:	**#**

DECISION

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of on-account service charges payable in the 2017/18 service charge year.

2. Proceedings were originally issued in the County Court under claim Number K5QZ32N7, dated 24 April 2023. The claim was for £8,972.27 in relation to the period from 25 September 2017 to 24 March 2018, and contractual interest in the sum of £2,425.63. A defence was filed on 26 May 2023. In due course, an order was made in the County Court at Worthing transferring proceedings to this Tribunal, dated 5 February 2024.

3. That order transferred "all matters falling within the jurisdiction of the Tribunal" in paragraph 1. Paragraph 2 read

> "All or any remaining proceedings including any claim for costs and interest may be disposed of by a Tribunal Judge sitting as a Judge of the County Court exercising the jurisdiction of a District Judge (under section 5(2)(t) and (u) of the County Court Act 1984"

4. Directions were given in the Tribunal on 2 April 2024 by Judge Martyński, who noted that District Judge Henry appeared to have transferred the entirely of the proceedings, with the intention that the Tribunal judge would sit as a judge of the County Court to make any orders necessary outside the Tribunal's jurisdiction. Judge Martyński directed that the Tribunal would only deal with the reasonableness and payability of the service charges in dispute, and that once the Tribunal had made its decision, the case would be sent back to the County Court.

5. The relevant statutory provisions referred to may be consulted at https://www.legislation.gov.uk/ukpga/1985/70/contents

The background

6. The property which is the subject of this application is a flat in a purpose built block comprising 14 flats above shops in Wimbledon High Street.

7. The Respondents held the leasehold interest jointly at the time of the service charge which is the subject of these proceedings. Since that time, the first Respondent has transferred his interest to the second Respondent.

8. During the course of the hearing, there was some discussion of the status of the second Respondent as a respondent, but no application that she be removed as a respondent was made.

The lease

9. The lease is dated 5 April 2005, and is for a term of 125 years from 2004. The Applicant is the original freeholder (the company changed its name from Clearwater Property Company Limited to its current name at some point).

10. The Respondents covenant to pay, by clause 2.5.1.3, on an indemnity basis, the properly and reasonably incurred costs etc of (inter alia) counsel and solicitors for

> "The preparation and service of a notice under the Law of Property Act 1925 section 146 or incurred or in contemplation of proceedings under section 146 of that Act notwithstanding that forfeiture is avoided otherwise than by relief granted by the court"

And for

> "the recovery or attempted recovery of arrears of … service charge …"

11. Provision is made in clause 5.1 for interest to be payable on arrears of service charge at four per cent above Lloyd TSB's base lending rate.

12. The Respondents covenant to pay the service charge (clause 1.3), for which specific provision is made in the fifth schedule.

13. The accounting period is given as the calendar year, but the landlord has a discretion to vary it (fifth schedule, part A, paragraph 2). We were told that the period had been varied to 1 April to 31 March.

14. By Part A, paragraph 3, "Annual Expenditure" is defined as

> "all costs expenses or outgoings reasonably and properly incurred by the Landlord during the Accounting Period in or incidental to providing all or any of the Services …".

15. Part B, paragraph 1.0 of the schedule reads as follows:

> "The Tenant shall pay half yearly in advance on 25th March and 29th September a provisional sum on account of the Service Charge (calculated upon reasonable and proper estimate by the Landlord's … Managing Agent … representing the Proportion of what the Annual Expenditure is likely to be for the Accounting Period".

16. By clause 1.1, the landlord may, in the event of an unforeseeable event requiring substantial expenditure, request an additional contribution at the next half-yearly date.

17. Provision is made for an account showing the annual expenditure to be prepared and certified by an accountant (Part B, paragraph 1.2). The reconciliation process requires that

> "1.3 If the Service Charge for any Accounting Period shall:
> 1.3.1 exceed the provisional sum for that Accounting Period the excess shall be due to the Landlord within fourteen days after the service the Landlord on the Tenant of the Account or
> 1.3.2. be less than such sum the overpayment shall be credited to the Tenant against the next half yearly payment of the Service Charge."

18. The "Services" are defined in Part C of the schedule. There is no dispute that the lift works and the external refurbishment works in issue, are covered by this part of the schedule.

19. Part D of the schedule sets out "other matters in respect of which the tenant contributes". Paragraph 4 includes therein

> "Such sum as shall be fixed by the Landlord or its Accountant or Managing Agent (acting as an expert and whose decision shall be final) towards the Landlord's anticipated expenditure during the Term in respect of
> 4.1 Periodically recurring items whether recurring at regular or irregular intervals and
> 4.2 Such of the Landlord's obligations as relate to the renewal of plant machinery fixtures and fittings and other items installed for the benefit of the tenant of the Building PROVIDED that:
> 4.3 Such reasonable provision shall be determined on the assumption that the cost of replacement of such items is calculated on such life expectancy as the Landlord or its Accountant or Managing Agents may reasonably determine … and that each year the Tenant will be required to pay a reasonable proportion towards the anticipated cost of renewal or replacement to the intent that a fund or funds be accumulated sufficient to cover the cost of renewal or replacement by the end of the anticipated life of each such item"

20. By 4.4, the Landlord is not obliged to establish such a reserve fund. Paragraph 4.5 makes provision for the reserve fund to be held in a separate account from the Landlord's own money, upon trust.

The hearing

Introductory

21. Ms Gourlay of counsel represented the Applicant, with Mr Lazarev, of Lazarev Cleaver LLP, solicitors. Mr Lazarev had provided a witness statement in respect of matters no longer in dispute. Ms Field and Mr Cleaver, of the managing agents Urang Property Management Limited, both of whom had provided witness statements, attended. Mr Cleever, a director of Urang, gave oral evidence.

22. The Respondents was represented by Mr Demachkie of counsel. Mr Leon had been expected to attend. It transpired that he had attended the Southern Region hearing centre in Havant in error, and was travelling back. Mr Demachkie said that, given the distances involved, it was unlikely that Mr Leon would be able to attend the hearing, and that he had been instructed that Mr Leon was happy for the hearing to go ahead in his absence. Mr Leon's own witness statement contained a limited number of factual assertions, he said, and spoke to his belief about the likelihood of work proceeding at the relevant time. Mr Demachkie suggested that, while the Tribunal would take account of the absence of the opportunity for the Applicant to cross examine, it was not a case in which that would be of the first importance. Ms Gourlay said that the Applicant was happy to proceed in the absence of Mr Leon.

23. The proceedings concerned a demand for payment of a half-yearly advance service charge of £10,936.87, demanded on 7 September 2017. It was agreed that the Respondents had paid £1,964.60, leaving the balance in dispute. The Respondents had paid in full the previous half-yearly demand in the same sum, made in March 2017.

24. The service charges demanded represented contributions towards major works to replace the lift and to undertake external refurbishment work. The lift replacement in fact took place in February 2022. The external refurbishments had not started when proceedings were issued.

25. It was agreed that costs remained a matter for the County Court.

The preliminary issue

26. We heard argument as to the scope of the transfer from the County Court as a preliminary issue.

27. The Applicant argued that the matters included in the Respondents statement of case did not fall within the scope of the transfer.

28. Proceedings had been issued in the County Court in April 2023. Mr Leon entered a defence on 9 May 2023. The substance of that defence was as follows:

> "It is admitted that a demand as made. It is not admitted that this demand was made on 7 September 2017 and the Claimant is put to proof in that regard. The Claimant is also put to strict

> proof as to the validity of the demand made. It is noted that the demand was not issued on behalf of the Claimant, who at the material time was the Landlord entitled to the Service Charge."

29. By the time of the hearing before us, it was not contested by the Respondents that the demand was made on 7 September 2017, and that the demand was issued on behalf of the Applicant.

30. We were told that the parties had expected the January 2023 listing in the County Court to deal substantively with the claim, but the County Court judge decided to make the transfer instead.

31. We were provided with a copy of a witness statement by Mr Leon, in anticipation of the January County Court hearing. In that witness statement, Mr Leon conceded that the demand was issued on 7 September 2017. The witness statement went on to refer to the fact that the works did not take place at that time, that the first half-yearly sum had not been credited to him as an overpayment (the service charge collected not having been spent) as required by the lease, and that he "took issue generally with the demands and reasonableness" of the service charges. But, Ms Gourlay argued, there was no application to amend the Respondents' defence to reflect the content of the witness statement.

32. The Respondents' statement of case provided for in the Tribunal's directions included text essentially contesting whether the second half-yearly advance service charge should be paid in circumstances in which it was evident that the lift works were not going to be completed in that service charge year. In its response, the Applicant argued that these were further issues which were not open to the Respondents to raise now. In her submissions, Ms Gourlay referred to the objections being raised now as going to the reasonableness of the service charge demand.

33. Ms Gourlay noted that Judge Martyński's directions referred to the Tribunal dealing with "the issue of reasonableness and payability of Services Charges". That, she said, was a "generic direction", merely indicating the general area of the Tribunal's jurisdiction.

34. Rather, Ms Gourlay submitted, the County Court pleadings determine what is transferred from the County Court. No question of the reasonableness of the service charge was raised in those pleadings. The proceedings do not start again, and the scope of proceedings cannot be expanded.

35. Ms Gourlay drew our attention to paragraphs [15] and [17] of *Cain v London Borough of Islington* [2015] UKUT 117. The first states

> "The jurisdiction exercised by the F-tT is statutory. It has no inherent power to determine any question. In this case its

> relevant jurisdiction is conferred as a result of a transfer of proceedings from the County Court under paragraph 3 of Schedule 12 to the 2002 Act. Where in any proceedings before a court there falls for determination a question falling within the jurisdiction of the First-tier Tribunal (or the leasehold valuation tribunal in Wales), the court is empowered by paragraph 3 to transfer to the appropriate tribunal so much of the proceedings as relate to the determination of that question."

36. In her skeleton argument, Ms Gourlay had also quoted the following passage from *Staunton v Taylor* LRX/87/2009 (an authority cited in *Cain*, obtainable sub nom *Staunton v Kaye* [2010] UKUT 270 on BAILII), at paragraph [21]:

> "It is clear that the power of the LVT in determining the questions in the transferred proceedings is no wider than that of the court. The court is limited by the terms of the parties' pleadings, although it can, of course, give permission to a party to amend. The powers of the LVT in transferred proceedings are necessarily limited in the same way, but the LVT has no power to permit the pleadings to be amended and thus to widen the scope of the questions that it is required to determine under the transferred proceedings."

37. Paragraph [17] of *Cain*, which was also relied on by Mr Demachkie, reads in full as follows:

> The order transferring the proceedings referred only to a determination of the reasonableness of the service charge demanded. As the Tribunal has *explained in Lennon v Ground Rent (Regisport) Ltd [2011] UKUT 330 (LC)* and in Staunton v Taylor LRX/87/2009 , the jurisdiction of the F-tT in a case transferred to it from the County Court is confined to the question transferred and all issues comprehended within that question. I would suggest, however, that that principle ought to be applied in a practical manner, with proper recognition of the expertise of the F-tT in relation to residential service charges. When trying to identify which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred it is not appropriate to be too pedantic, especially where an order transferring proceedings is couched in general terms and where there is no suggestion that the court intended to reserve for itself any particular question. It is not uncommon for orders for transfer to be expressed rather generally, and in practice the tribunals of the Property Chamber sensibly recognise that it would be a disservice to the parties (and to the transferring court) for them to adopt an over-scrupulous approach to their jurisdiction.

38. In exchanges with the Tribunal, Ms Gourlay argued that the Respondent's objection that it was not likely that the funds sought to be collected as a result of the contested demand would be spent in the relevant period was one based on a reasonableness challenge, not whether the charge was payable under the lease. The Respondent's statement of case in the Tribunal proceedings, settled by solicitors, which argued this point, concluded with the statement that the Respondent sought relief under section 19(2) of the 1985 Act.

39. Insofar as the Respondent's defence put the Applicant to proof of the demand's validity, that related to the formal validity of the demand, not whether or not it was payable under the lease. Further, if it was the *amount* demanded that is contested, which is what, she argued, the Respondent was doing, then that goes to reasonableness, not validity/payability under the lease.

40. Mr Demachkie submitted, first, that we should note that the case in the County Court had been allocated to the small claims court. This was important, because the strict rules of evidence did not apply, and the procedure was more informal, which included a less strict approach to pleading points.

41. Secondly, he argued that Judge Martyński's directions indicated that all issues were before us, except for costs. Those directions expressly referred to reasonableness.

42. Mr Demachkie argued that those directions ordered that the Tribunal should deal with reasonableness, and it was that order that dictated what we should deal with. Mr Demachkie put this point as a "pedantic" (in the sense used by the Deputy President in *Cain*) point in opposition to what he described as Ms Gourlay's similarly pedantic jurisdictional approach.

43. Thirdly, Mr Demachkie argued that, as his skeleton argument indicated, while he was arguing reasonableness, that was (at least in part) on the basis that the prior issue of payability under the lease was in issue. Indeed, his primary argument was that it was not likely that the funds collected for the lift works would be spent during that year, and that was the pre-condition for the service charge to be payable under the lease.

44. Fourthly, we should take a practical approach. The parties, including witnesses (save for Mr Leon, but it was practical to proceed without him) were available, and we should go ahead. It would be pedantic to decline to do so, so that the issue went back to the County Court to be dealt with as a small claims matter.

45. We briefly adjourned, and then told the parties that we concluded that the payability of the service charge under the lease remained before the Tribunal, but consideration of at-large reasonableness under section 19

of the 1985 Act did not. We said we would give full reasons in our written decision, which we now do. We did caveat our decision, to the extent that we reserved the possibility that we might come to a different decision following the hearing of all the evidence, but we do not do so.

46. First, it is clear from *Staunton v Taylor* that the scope of a case that can be considered by a Tribunal that is transferred from the County Court is limited by the pleadings in the County Court, as well as by the terms of the transfer order itself. The Deputy President's words in paragraph 17 of *Cain* apply strictly to the way in which the Tribunal should approach the scope of a transfer order. The limitation of the scope of a transfer by the County Court pleadings was not in issue in *Cain*. However, we think his approach to "pedantry" has at least qualified application to limitation by pleadings.

47. We do not think that Judge Martyński's directions were capable of broadening the scope of the transfer, limited as it was by the pleadings. It is inherent in the approach to post-transfer jurisdiction in *Cain* and *Staunton v Taylor* that the Tribunal cannot broaden the scope of a transfer, after the transfer has taken place. In any event, we have no doubt that Judge Martyński was not seeking to broaden the scope of the transfer. He would only have had limited papers before him, and he recorded that it may have been that the defence was amended at the County Court hearing. In referring, as he did, to the Tribunal dealing with "reasonableness and payability", that was in the context of the exclusion of costs, in circumstances in which the defence may have been amended, and no one was arguing the point.

48. We similarly do not agree with Mr Demachkie's submission that, because it was sensible and practical for us to deal with reasonableness now, that we should do so. We do not disagree with his characterisation of the advantages of doing so, but there are limits to abjuring pedantry. If section 19 reasonableness was excluded by the pleadings, it would be going too far to reintroduce it in reliance on that approach.

49. However, we conclude that the construction issue is still before us. The defence as pleaded in the County Court comprised three elements. Two were specific, and were pleaded as going to validity – it was "not admitted that this demand was made on 7 September 2017"; and that it was "noted that the demand was not issued on behalf of the Claimant". Both of these points are now not contested. However, the third element was more general – the "Claimant is also put to strict proof as to the validity of the demand made".

50. We do not agree with Ms Gourlay's argument that this formula was restricted to *formal* validity of the demand as a demand. That a demand is not payable, because outwith the terms of the lease, is properly characterised as an assertion that that demand is not "valid". So without more, we think that formula leaves payability under the lease to us.

51. Further, Mr Leon's witness statement dated 22 January 2024 proceeded largely under a heading "the lease", in which Mr Leon quotes relevant extracts from the lease, sets out that the sums were not spent in the relevant year, resulting in his belief that the payment of the first advance demand should have been credited to him against further demands. He states that the two demands together far exceed the amount spent, and so the September demand would also have properly been credited to him. All of this, in our view, goes to the payability of the contested demand under the lease. Mr Leon then goes on to say that "I also take issue more generally with the demands and the reasonableness thereof". So in the witness statement, Mr Leon is seeking to add consideration of general reasonableness to what precedes that sentence, which again clearly suggests that the foregoing, more detailed points go to payability under the lease.

52. As Ms Gourlay submits, the Respondent did not apply to have his defence amended in the County Court to include the additional element of a challenge to reasonableness, and we consider that it would therefore be going too far for us to consider that section 19 reasonableness is before us.

53. But the preceding terms of the witness statement do, if it is necessary, indicate that payability under the lease was understood to be the central issue at the time, and it does confirm our conclusion as to the way in which the general "validity" term was understood in the defence.

54. That putting to proof is not ordinarily the way in which the Tribunal proceeds in its approach to evidence is not relevant to that phrase's significance in characterising the subject matter of the transfer.

55. We also note that, in *Lennon v Ground Rents (Regisport) Limited* [2011] UKUT 330, the Upper Tribunal adverted to the fact that had been no document formally headed "defence" in the County Court, but a witness statement served in the County Court was treated as the defence by the Upper Tribunal. However, it appears that the issue was not contested then, and that the witness statement had been (it appeared) treated as the defence in the County Court as well. The circumstances in that case were, therefore, somewhat different, but we nonetheless see it as an illustration of (as it was later put in *Cain*) the avoidance of undue pedantry.

56. Ms Gourlay relied on the reference to relief under section 19 in the Respondent's statement of case in the Tribunal. We do not think this has the effect she argues for. It is not in truth a point about the scope of the transfer at all. Just as later directions in the Tribunal cannot broaden a transfer, so later pleadings in the Tribunal cannot narrow the *transfer*. The question, therefore, is whether, as a pleading in the Tribunal, express reliance on section 19 necessarily excludes consideration of payability. It cannot. The approach of the Tribunal is that payability

under the lease is a pre-condition to consideration of reasonableness, and so that issue will always be potentially before the tribunal where section 19 is engaged. We do not think that in the circumstances of this case, it can possibly limit our consideration to reasonableness, in the narrow sense of a challenge to the sum of the charge, that is, an assertion that this contact price is unreasonably high for this work. At no time has the Respondent made such an argument; the argument has always been as to the precondition for payability under the lease, that is, the likelihood that the sums would be expended during the relevant period.

57. It was agreed that costs, including contractual costs, remained a matter for the County Court.

The substantive issue

58. It follows from our conclusion on the preliminary issue that the key substantive issue is whether the pre-condition for the demand – that it related to expenditure likely to be incurred in the relevant period – was satisfied.

59. We turn first to Mr Cleaver's evidence. Mr Cleaver is a director of Urang. He accepted that, as a senior employee, he was responsible for a number of buildings, and was not always directly personally engaged with the building. Urang took over management of the property in 2015.

60. In his witness statement, Mr Cleaver said that, following an inspection of the lift which concluded that the lift needed replacement, a notice of intended works was issued under section 20 of the 1985 Act on 26 April 2016. Statements of estimates were served on 29 May 2018 and on 14 July 2021.

61. External works were also necessary, and on 4 May 2016 a similar notice of intended work was served in respect of them. A statement of estimates was served on 12 July 2016.

62. Initially, the Applicant demanded a service charge that it came to accept had been irregularly made in 2016, and which was subsequently re-credited. Thereafter, the costs of both works was included in the estimated service charge budget for 2017/18, and the two on-account service charge demands for that year included those costs. We note that the demands themselves expressly stated that there was no demand for contributions to the reserve fund.

63. It was undisputed that the Respondent paid the first demand, but the second only in part.

64. Mr Cleaver's evidence was that most of the tenants did not pay the service charge demand, and 10 of the 14 tenants were passed to the Applicant's solicitors for enforcement. As a result of the problem securing service

charge payments, no works could be undertaken in 2017/18 (or, indeed for some time thereafter). Mr Cleaver referred to the requirement set out in the RICS code of practice that ordinarily a managing agent should not contract for major works unless funds were in place.

65. In cross-examination, he said that, at all times since 2017/18, the only thing holding up the works was the failure of tenants to pay the service charge demands. He explained that he received monthly reports from the Urang employees dealing with properties, and at each meeting, the contribution from those responsible for this property was that they were still awaiting finance to proceed with both sets of major works. That so many tenants did not pay was unusual – he described it as "staggering".

66. Mr Demachkie put it to him that, as the 2017/18 year progressed, it must have become less likely that the money would be collected. Mr Cleaver responded that that was not necessarily so – as time passed, it could also become more likely that tenants would pay, albeit late, as they received chase letters etc.

67. Mr Cleaver initially said that it was Urang's position that the estimates and accordingly the twice-yearly on account payments did not require reconsideration mid-year. He went on to say that he could not give evidence as to the actual practice at the building, which he described as a complicated one.

68. The payments that were received in 2017/18 were applied to the reserve fund, until there was sufficient to undertake the works. The lift works were completed in 2022. The external works have yet to be started. Mr Demachkie cross examined Mr Cleaver on the length of time that it had taken for the works to be undertaken, including on how increases in building costs would be taken into account, given the time lapse between the section 20 process and the work.

69. Mr Cleaver said that, had the monies been collected on-account in 2017/18, the work would have gone on. The freeholder, Urang's client, had asked Urang to press on with the work as soon as possible.

70. In his witness statement in these proceedings, Mr Leon outlined some of the history of the management of the property, and his concerns about financial management of the service charge. In respect of the contested demand, he told Urang that he would pay it in full as and when it was needed for the second major works, but was not willing to do so, in the light of the fact that the first set had not been started.

71. The effect of the earlier witness statement referred to at paragraph 51# above is set out there. Broadly, Mr Leon relied on subsequent delays as negativing the likelihood of the works proceeding in 2017/18.

72. In his submissions, Mr Demachkie argued, first, that it was a long time after 2017/18, and the preceding section 20 consultation processes, that the work on the lifts was undertaken, and the external works are still awaited. He referred us to *Jastrzembski v Westminster City Council* [2013] UKUT 284 (LC), where, at [46], the Upper Tribunal referred to the appropriate time between the conclusion of a section 20 process and the undertaking of the work as being months rather than years (as indicated by the other time limits specified for the consultation process). In this case, the section 20 process was much older than that. In these circumstances, he argued, it could only be seen as very *un*likely that the works would have been undertaken in the 2017/2018 service charge year.

73. Further, he argued that we did not have documentary evidence that the work was ready to go, or of contacts between the freeholder and Urang indicating that the freeholder was anxious for the work to be undertaken.

74. There was, Mr Demachkie submitted, no evidence that anyone at Urang had put their mind to whether the works would be completed before March 2018 when the September 2017 demand was made. The lease did not oblige the Respondent to pay a single sum over two periods. Rather, there was a freestanding obligation on the tenants to pay once every six months, he argued. Mr Demachkie referred us to *Knapper v Francis* [2017] UKUT 3 (LC), [2017] L&TR 20 at paragraph [38]:

> "If matters became known after the budget was drawn up, but before a particular payment became due, those could also potentially affect the reasonableness of the sum to be paid. In this case the payment on-account was due on a single date at the start of the year, but such payments are more usually required half-yearly or quarterly. In such cases the fact that money has not been spent, despite provision having been made in an annual budget, may cause a sum which appeared reasonable on the first payment date to become less reasonable (for example where major works requiring periodic payments are delayed). I do not see why, in such a case, s.19(2) should not modify the contractual obligation by reference to circumstances as they are known at the quarterly or half-yearly payment dates. But I would draw a line at the date on which the payment becomes due and would exclude from consideration matters which could not have been known at that date, because they had not yet occurred."

75. Mr Demachkie relied on the principle that the fact that money was not spent was capable of making a sum that may appear reasonable at one time to become less reasonable. By the time of the demand in September, there were only six months left in which the works could be undertaken. The Applicant should have reconsidered the likelihood of the work being done in the service charge year before the September demand as made. Indeed, Mr Demachkie went further and said that the Applicant was *required* to reassess the likelihood of the expenditure taking place in the

remaining six months before the September payment became due. The demand for payment in September re-set the clock on the decision. The budget could have been taken into account in that assessment, but the Applicant should not have been fixated on it. The Applicant failed to make that independent decision. Accordingly, Mr Demachkie said, the Applicant must fail on the basis of contractual liability.

76. As to the reserve fund, Mr Demachkie submitted that, in applying the first payment to the reserve fund, the Applicant was misapplying the funds. The lease is clear that, where a surplus exists at the end of the year, that must be credited to the tenants against the following year's advance payments. He observed that the reserve fund provisions in the lease required that the calculation of contributions must be made on the basis of the life expectancy of the works to which they relate. In this case, he said, that meant they were limited to one sixtieth of the cost of lift replacement (the evidence being that the life expectancy of the lifts was sixty years). What should have happened was that the first payment should have been credited to the Respondent's liability in the next year, which, in the event, would have resulted in his liability for the September demand being discharged.

77. Ms Gourlay started by reminding us of the importance of considering the evidence broadly and in the round, rather than relying unduly on a formal notion of burden of proof (*Yorkbrook v Batten* (1986) 18 H.L.R. 25).

78. To the extent that there was criticism directed at Mr Cleaver in cross-examination, and in Mr Demachkie's submissions, that documentary evidence had not been produced to support some of his statements, Ms Gourlay countered that there was also no supporting documentary evidence for assertions in Mr Leon's witness statement.

79. As to Mr Demachkie's argument in reliance on *Knapper v Francis*, paragraph [38], Ms Gourlay emphasised that it was clear that the determination was one of fact and degree, on the basis of the specific lease in issue.

80. As to the contractual position in this case, Ms Gourlay argued that it was clear from the fifth schedule to the lease that one decision was called for at one time, which then led to the quantification of the half-yearly in-advance payments. The service charge accounting period and the annual expenditure refer to one year. The two half-yearly charges were to be calculated on an estimate, in the singular, made by the landlord (etc), representing the likely expenditure for that "Accounting Period", that is, the year. A single "provisional sum" is to be arrived at at the start of the period. The only significance of the two dates during the year is that the lease allows for the single provisional sum to be paid in two parts, as a benefit conferred on the tenants. It is the machinery of payment, not the basis of estimation, she argued.

81. In making that assessment, Ms Gourlay argued that it was right for the Applicant to base its decision-making on an assumption that the tenants would abide by their obligations to pay the service charge demanded. She referred to Mr Cleaver's reference to the RICS Code of Practice requirement to be in funds before letting major works contracts.

82. Ms Gourlay argued that the demands were made within months of the completion of the two section 20 processes being completed. In both cases, the managing agent accepted the lowest estimates, and no tenant proposed an additional contractor. By November 2016, the landlord had received the estimates for the lift works and provided a tender analysis, and the same by July 2016 in respect of the external works. They were ready to go on an appropriate time scale if the service charges had been paid.

83. It had been Mr Leon's attitude throughout that he would not pay the demand until the relevant sums were needed to carry out the work, not that the lease did not allow a demand in respect of them to be made.

84. We turn to our conclusions.

85. As a preliminary, it is important to distinguish between issues relating to payability under the lease and those relating to reasonableness in the general sense provided for by section 19 of the 1985 Act. We determined on the preliminary issue that the former were before us, but the latter were not. Negotiating the distinction is, however, somewhat fiddly. First, the payability issue is before us in the exercise of our jurisdiction under section 27A in respect of section 19, but in the context of payability being before us as a precondition of the general sense of reasonableness in section 19 that is not itself before us. This is not conceptually difficult – it is accepted that section 19 opens up payability, and the Tribunal routinely deals with cases based only on payability under this jurisdiction. But we must keep in mind that it is payability, not general-sense reasonableness, that is before us.

86. Secondly, however, the lease itself makes use of reasonableness as a contractual qualification – the tenant's obligation is to pay in advance a provisional sum "calculated upon reasonable and proper estimate by the Landlord's … Managing Agent", the proportion being of what the "Annual Expenditure is likely to be". The definition of annual expenditure itself brings in reasonableness – it is costs etc "reasonably and properly incurred" during the relevant period.

87. So *contractual* reasonableness is before us.

88. The first issue is, then, the nature of the decision making process that the lease imposes on the parties.

89. As to the construction of the lease in this respect, we prefer Ms Gourlay's submissions. For the reasons she gave, which we have set out above, it is clear to us that there is a single moment of decision anticipated by the lease, as a result of which the tenants are obliged to pay the two six-monthly on-account demands.

90. That decision must be made on the basis of a "reasonable and proper estimate" by the Managing Agent. In practice, this estimate is that encapsulated in the budget. That estimate is of "what the Annual Expenditure *is likely to be*".

91. As Ms Gourlay argued, that is a forward looking assessment to be made at the relevant time – effectively, the start of the service charge year – governed by reasonableness and propriety, and by the concept of likelihood (there may be some practical issues with the timing of the decision, given that the Applicant changed the service charge year, but did not – and could not – change the quarter dates on which the on-account charges were due, but that is not relevant to the decisions before us).

92. We accept Mr Cleaver's evidence that Urang intended that both sets of works would be carried out in 2017/18 and that what was needed to accomplish that was in place, subject only to the availability of funds. There was no dispute that the works were necessary. On that basis, it was (objectively) likely, considered at the start of the service charge year, that the expenditure on the works would be incurred during that year. And the estimate of the costs themselves were reasonable (and proper, if that adds anything in this context) – indeed, the quantum of the costs themselves have never been disputed. We refer below to the position in relation to the reserve fund (paragraphs [109] and [110]#).

93. We have considered, but reject, Mr Demachkie's argument to the contrary.

94. His submission based on the delay in undertaking the works amounts to the argument that, where works were in fact carried out well in the future, that meant that there could not be a reasonable assessment that they were likely to be carried out, made when the budget was set at the beginning of the 2017/18 service charge year. This argument seems to us to exhibit a form of teleological fallacy. It is a matter of fact whether the Applicant did, in fact, think that the work would likely be carried out in 2017/18; and a matter of objective assessment by us whether that was a (contractually) reasonable decision to have made. Our assessment must be a forward looking one – at the relevant point, at the beginning of the service charge year, was that assessment a reasonable one? Hindsight is not helpful in making that assessment.

95. More broadly, the thrust of Mr Demachkie's argument was more directed towards whether, specifically, the second, September, instalment of the

on-account service charge was payable, given the failure to secure funds from most of the tenants by that time. In doing so, he relied on *Knapper v Francis*, and particularly paragraph [38], which we quote above.

96. *Knapper v Francis* was a case decided specifically on the basis of contractual obligations "modified by section 19 of the 1985 Act":

> "The main issue in this is appeal is whether, in determining the reasonableness of an amount demanded on-account of relevant costs before they were incurred, a tribunal was required or permitted by section 19(2) to take account of facts which were not known as the date of the demand but became known only later" (paragraphs [3] and [4]).

97. It is on that basis that the Upper Tribunal went on to conclude that delay in expending money by a landlord "may cause a sum which appeared reasonable on the first payment date to become less reasonable".

98. The advantage of the statutory overlay of general reasonableness provided in section 19 is, among other things, that it is not tied down by specific contractual terms, and should be applied generally to the quality of a service charge demanded. But in our case, for the reasons set out above, general reasonableness under section 19 is not before us, so that freedom of assessment is not available. We are stuck with contractual reasonableness, which is bounded by the strict terms of the lease.

99. Here, the terms of the lease require one decision to be made at a specific point in time. Mr Demachkie's submissions necessarily require there to be some reconsideration as time goes by after that contractually-bound decision is taken. But there is nothing in the lease to make any provision for that.

100. It follows that we do not consider that the approach in paragraph [38] of *Knapper v Francis* applies here; and that the Applicant's decision was (contractually) reasonable.

101. We may be wrong about the former, so we go onto consider what the position would be if *Francis v Knapper* does apply.

102. In *Avon Ground Rents Ltd v Cowley* [2018] UKUT 92 (LC), the Deputy President, in a case concerning the test of reasonableness in relation to advance service charge demands, considered both *Parker v Parham* (unreported) 6 January 2003, Lands Tribunal (available sub nom *Parker v Beckett* [2003] EWLands LRX_35_2002 on BAILII) and his own judgment in *Knapper v Francis* (quoting paragraph [38]) and concluded that

> "whether an amount is reasonable as a payment in advance is not generally to be determined by the application of rigid rules

but must be assessed in the light of the specific facts of the case."

The Court of Appeal subsequently approved this formulation (Avon Ground Rents Ltd v v Cowley [2019] EWCA Civ 1827, [2020] 1 WLR 1337 [31]).

103. In this case, that question amounts to whether, had there been some reconsideration later in the year, it would have been unreasonable to have persisted with the second demand. There were two competing approaches to the effect of the effluxion of time within the service charge year.

104. Mr Demachkie argued that, as the window for securing funding and starting the work became shorter, the likelihood that the funds would be expended in the service charge year reduced.

105. The contrary position was adopted in evidence by Mr Cleaver, and argued by Ms Gourlay. That was that, as the year progressed, it became more likely that those tenants who had not paid the first payment would do so. Most tenants most of the time pay their service charge demands, and late payment was more likely than no payment. The same would have applied to the September demands, so receipt of funds, and accordingly starting work, remained likely before the end of the service charge year. That this was the more likely course of events is supported by Mr Cleaver's evidence that the scale of failure to pay in this case was very unusual, even "staggering".

106. We consider that both of these positions are capable of being a reasonable assessment on the facts of the case. Accordingly, we cannot characterise a hypothetical assessment made by Urang before the September demand that the works would be undertaken in that year as an unreasonable one.

107. So, in the alternative, if the approach to the reasonableness of on-account service charge demands in *Knapper v Francis* does apply, we do not think, on the specific facts and evidence of this case, that it was unreasonable to persist with the second demand in September 2017.

108. *Decision*: The demand made on 7 September 2017 for on-account service charges is payable in full by the Respondents.

109. That is the principal issue before us for determination. Mr Dematchkie did raise the question of what should have happened if the Respondent's first payment had been treated in accordance with the lease, and the effect of that on his liability for the second payment. He correctly argued that the first payment should have been credited to him, the service charge not having spent, on reconciliation and not applied to the reserve fund. He suggested that the effect of that would be likely to be that his

arrears, consequent on the failure to pay the second demand, would have been eliminated by the credit.

110. The point was made tentatively by Mr Dematchkie, who accepted that we do not have evidence as to the state of the service charge accounts in future years. We do not think we are called upon to take a view on what might have happened. That would depend, as Mr Dematchkie said, on the state of the service charge account, including whether the Applicant would have been justified in contractual terms to issue demands in the same amounts in each subsequent year (and crediting them back each year until the major works took place).

111. There was some, but not developed, submissions on the position of Ms Lindheimer. The 2017/18 demands were addressed only to Mr Leon. Ms Gourlay argued that documents showed that she had been copied into some correspondence, and elsewhere the terms of correspondence from Mr Leon suggested that he was representing both of them. Mr Dematchkie did not make an application that she be removed as a respondent. He did observe that whether she was named as a respondent or not would be immaterial, as she would be jointly and severally liable for liabilities under the tenancy anyway. In the absence of an application to remove her as a respondent, we do not consider we need say more about the question.

112. We add an observation on the reserve fund. It would undoubtably have been preferable if a reserve fund had been available to allow the Applicant to build up funds to undertake the major works over more than one year. It appears that Urang wrongly thought that they could apply underspends to the reserve fund, but we had no evidence about what the relevant employees understood at the time as to whether a reserve fund could have been built up prospectively. We do know that expressly the 2017/18 demands did not include a contribution to the reserve fund.

113. The drafting of the proviso to the clause allowing a reserve fund is unhelpful (see paragraph #20 above). We did not hear developed submissions on the proper interpretation of the clause, and it was not necessary that we should have done so. Nonetheless, we noted the observation by Mr Dematchkie in which he interpreted the clause to mean that reserve fund contributions must be limited to a proportion calculated on the basis of the *total* life expectancy of the "item", in this example, the lift. Whether that is the correct interpretation, or whether the life expectancy that the Applicant "may reasonably determine" is capable of relating to the *remaining* life expectancy of an item, is not for us. But it would certainly benefit both parties if the latter were correct.

Applications for additional orders

114. The Applicant applied for an order under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs

for the purposes of determining a service charge; an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings; and an order for the reimbursement of the application and hearing fees, under Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, rule 13.

115. Insofar as the orders under section 20C and paragraph 5A are concerned, we consider these applications on the basis that the leases does provide for such costs to be passed on either in the service charge or as administration charges, without deciding whether that was the case or not. Whether the lease does, in fact, make such provision is, accordingly, an open question should the matter be litigated in the future.

116. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

117. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course.

118. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

119. The Applicant has been successful before us on what is essentially a binary issue. In such circumstances, we decline to make the orders.

120. *Decision*: The Tribunal makes no orders under either provision.

Rights of appeal

121. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

122. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

123. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application

for permission to appeal to proceed despite not being within the time limit.

124. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

The next steps

125. This matter should now be returned to the County Court for consideration of costs.

Name: Judge Professor R Percival **Date:** #