UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0639 (LC)
UTLC Case Number: LRX/140/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – legal costs – litigation by leaseholder against landlord to enforce repairing obligation – whether landlord's costs of advice and representation and costs paid to leaseholder in settlement of claim recoverable through service charge as costs of management and administration – appeal allowed

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

BETWEEN

MRS PATRICIA FAIRBAIRN

Appellant

and

ETAL COURT MAINTENANCE LIMITED

Respondent

Re: 34 Etal Court,
North Shields,
Tyne & Wear,
N29 OHH

Before: Martin Rodger QC, Deputy President
Sitting at: North Shields
on
12 October 2015

Mr Alan Ridley, with the permission of the Tribunal, for the appellant
Mr Jonathan Rodger, instructed by Hay & Kilner, solicitors, for the respondent

The following cases were referred to in this decision:

Arnold v Britton [2015] UKSC 36

Assethold Ltd v Watts [2014] UKUT 0537 (LC)

British Telecom v Sun Life Assurance Society [1996] Ch 69

Iperion Investment Corporation v Broadwalk House Residents Ltd [1995] 2 EGLR 47

Introduction

1. This appeal concerns the entitlement of the respondent landlord, Etal Court Maintenance Ltd, to recover from the appellant leaseholder as part of a service charge payable by her, both its own legal costs and sums which it paid in settlement of proceedings brought against it by another leaseholder for the enforcement of the company's repairing obligations under the leases of the flats at Etal Court.

2. By a decision given on 30 September 2014, after consideration of the written representations but without a hearing, the First-tier Tribunal (Property Chamber) (the "F-tT") determined the total amount of the relevant costs which could be taken into account in calculating service charges payable by the leaseholders of flats at Etal Court in the three accounting years commencing on 1 May 2011, 2012 and 2013. For each year the F-tT included sums which, in aggregate, amounted to £26,980 in respect of legal and professional fees relating to a dispute with the leaseholder of flat 29, Mrs Stevenson. On 9 January 2015 the Tribunal granted permission to appeal that part of the F-tT's decision to Mrs Fairbairn, who is the leaseholder of one of the flats. Mrs Fairbairn's request for permission to appeal other aspects of the decision was refused.

3. Mrs Fairbairn was represented at the hearing of the appeal by a friend, Mr Alan Ridley. The respondent was represented by counsel, Mr Jonathan Rodger.

The relevant facts

4. The Tribunal directed that the appeal would be determined as a re-hearing. Having heard representations on behalf of both parties and considered the documents relied on (which are incomplete), the relevant facts are not significantly in dispute. I base my determination of the appeal on the following findings.

5. Etal Court is a development of 39 flats arranged in three attached blocks, set in landscaped grounds at North Shields. The buildings were constructed in about 1970 and a lease of flat 34, Mrs Fairbairn's flat, was granted by the respondent, Etal Court Maintenance Limited, on 16 December 1970. The lease of flat 34, which I was shown, is for a term of 999 years and reflects an intention that all of the other flats at Etal Court were to be let on similar terms.

6. The respondent landlord is a company all of whose members are leaseholders of flats in the development. The company's purpose, as its name suggests, is the maintenance of Etal Court. The respondent is itself a lessee of Etal Court under a headlease granted to it in July 1969 by the developer.

7. Mrs Fairbairn purchased the lease of her flat in 2001. At that time Mrs Fairbairn acquired her flat the grounds of Etal Court included a number of large trees. Between 2000 and 2005 several of these trees were felled, and it has been the firm conviction of Mrs Fairbairn and Mr Ridley that the

decision to fell the trees caused or contributed to structural damage to the ground floor of the building. All I need say about that belief is that there is no convincing evidence to support it.

8. In 2010 Mrs Stevenson, the leaseholder of flat 29 Etal Court, which is on the ground floor, noticed damage to the floors in her lounge, kitchen and hallway, which was caused by ground heave. As described in April 2011 in a report prepared on her behalf by CSN Consulting, a firm of chartered building surveyors, the floors of the flat were ground bearing concrete slabs topped by a screed. In the main lounge the screed had cracked perpendicular to the external wall and was displaced by 10mm with cracking extending into the room. The room exhibited other signs of distortion which caused the building surveyor to conclude that the damage was consistent with the incorporation of a sulphate contaminated fill below the solid concrete ground floor at the time of construction. The recommended solution involved breaking up the floor, removing and replacing the contaminated material with an inert substitute before reinstating the floor.

9. When Mrs Stevenson first notified the respondent of the damage caused to the floor of her flat she was told that the repair of the flat was her responsibility and that the damage was not covered by the buildings insurance policy maintained by the respondent. In March 2011 she took legal advice. Her solicitors, Stockdale & Reid, commissioned the CSN Consulting report which they sent to the respondent on 12 May 2011, pointing out that the structural parts of the buildings, including the foundations were retained by it and that it was responsible for their repair. Mrs Stevenson's solicitors called on the respondent to discharge its obligation without further delay and to meet the consequential costs which would be incurred by her in having move out of her home to enable repairs to take place. The solicitor's threatened proceedings if no action had been taken to remedy the damage within 14 days.

10. The respondent's reaction on receiving the letter before action was to instruct solicitors in August 2011 and to commission an investigation of its own. It was initially advised that there was doubt about the suggested cause of the damage, but the presence of a high concentration of sulphate contaminated fill material was eventually confirmed by a surveyor's report obtained in September 2011. In November 2011, having first taken advice from counsel, the respondent admitted its liability to carry out remedial work.

11. Having accepted that it was responsible for carrying out remedial work the respondent initiated a statutory consultation as required by section 20ZA, Landlord and Tenants Act 1985. The respondent first wrote to all leaseholders on 11 November 2011, asking for observations on the proposed remedial work within 30 days. The need for remedial works, and the process of obtaining quotations for the work, was subsequently discussed at regular open meetings of the company's members; the hope was expressed that work could be completed quickly. By 22 May 2012 it was reported that it was hoped that work would begin on 11 June 2012. It was reported to the same meeting that Mrs Stephenson's solicitors were asking for damages of £5,000 but that it was intended to make an offer of £1,000.

12. The required remedial work was carried out in the summer of 2012 at a total cost of £27,279.94. The comprehensive insurance policy under which Etal Court was insured apparently

excluded cover for damage caused by sulphate contamination and a claim presented by the respondent to its insurer was repudiated.

13. Despite the admission of liability in November 2011 and the apparent willingness of the respondent to carry out the necessary works, Mrs Stevenson's solicitors commenced proceedings in the North Shields County Court on 1 March 2012 claiming specific performance of the respondent's repairing obligation, damages (including compensation to meet the costs of alternative accommodation) and costs. It may have been impatience or a lack of confidence on the part of Mrs Stevenson and her solicitors in the progress being made by the respondent which prompted the commencement of proceedings. A letter from Stockdale & Reid to the freeholder written on 4 April 2012 complained of the delay in carrying out the necessary work and suggested that the respondent's own solicitors were "doing their utmost to slow it down". The same letter also noted that there had been no offer of compensation nor any firm commitment to carry out the remedial work which Mrs Stevenson had been advised was necessary.

14. Very few documents concerning the county court proceedings were produced by the respondent to the Tribunal, but a limited picture of what was in issue and how the claim proceeded can be derived from the bill of costs subsequently prepared by Mrs Stevenson's solicitors. The proceedings were initially defended, apparently on the basis that Mrs Stevenson was not entitled to damages and that a reasonable time had not yet elapsed since the need for works had been notified to the respondent so that it was not yet in breach of covenant.

15. The defence of the claim was relatively short lived and did not continue for long after the remedial work had been carried out. A settlement of the claim was negotiated between solicitors and incorporated in an order of the North Shields County Court made on 21 January 2013. I have not seen a copy of that order but it appears to have provided for a payment to Mrs Stevenson of £2,500 in damages together with her reasonable costs, which were to be the subject of a detailed assessment if not otherwise agreed. It was not until 5 December 2013 that a sum of £13,357.98 was agreed in respect of those costs (a figure which included interest and the cost of steps taken in the assessment). Payment of that sum was made on 18 December 2013.

16. In total, over a three period, the respondent had incurred fees of £12,176 in instructing its own solicitors in relation to the disrepair claim, and had agreed to pay £13,358 in costs to Mrs Stevenson. In total, therefore, professional fees for which the respondent was liable as a result of a dispute with Mrs Stevenson totalled £25,534, a sum which was only a little less than the cost of the remedial work itself. It appears that the sum of £2,500 agreed to be paid in compensation to Mrs Stevenson in December 2012 has not yet been paid.

17. The respondent subsequently sought to recover these costs as part of the service charge for the three years 2011, 2012 and 2013. Mrs Fairbairn disputed her liability to pay and proceedings were commenced against her in the county court. It appears that the respondent was eventually directed by the county court to bring a separate application before the F-tT to determine how much, if anything, Mrs Fairbairn was obliged to pay.

The Lease

18. Under the terms of the standard form of lease in use at Etal Court the premises demised do not include the main structural parts of the building; only the floor screed is part of the demise, while the underlying floor structure is retained by the lessor (see the detailed description of the demised premises in the Third Schedule). The lease requires the respondent, as lessor, to maintain the retained premises in good and substantial repair and condition (paragraph 2 of the Fifth Schedule).

19. The Fifth Schedule imposed other conventional obligations on the lessor but it is necessary to mention only one other specific provision of the schedule, at paragraph 10, which required the respondent, as lessor:

> "To do all other acts and things for the proper management administration and maintenance of the blocks of flats as the Lessor in its sole discretion shall think fit."

20. The lease included terms requiring the payment of an annual service charge. By paragraph 3(1) of the Fourth Schedule the leaseholder covenanted to pay a sum equivalent to a 39th part of the expenditure certified in each year as having been incurred by the lessor in respect of the performance of its obligations contained in the Fifth Schedule. Two half yearly payments on account were provided for, with a balancing charge to be paid within one month of the receipt of the required certificate of expenditure.

21. The lessor was also obliged to keep proper records of the costs charges and expenses incurred by it in carrying out its obligations under the Fifth Schedule, paragraph 12 of which stipulated that an account of such expenditure should be taken in every year. That account was required by paragraph 13 to "be prepared and audited by a competent chartered accountant who shall certify the total amount of the said costs charges and expenses (including the audit fee of the said account) for the period to which the account relates and the proportionate amount due from the Lessee to the Lessor pursuant to clause 3 of the Fourth Schedule." By paragraph 14 the lessor was required to serve a notice in writing in the lessee stating the total expenditure and the proportionate amount so certified within 4 months of the date to which the account was taken.

The F-tT's Decision

22. On 8 May 2014 Brannen & Partners, the respondent's newly appointed managing agents, applied to the F-tT for a determination of the service charges payable by the 39 leaseholders of flats at Etal Court for the years 2011 to 2013 and the sums payable on account for the year commencing on 1 May 2014. In a statement presented to the Tribunal the agents asked in particular for consideration whether the legal charges and costs which had been paid in settlement of the claim brought by Mrs Stevenson could be passed on, either to the leaseholders under the terms of their leases or to the members of the company under the respondent's memorandum and articles of association. In its subsequent decision the F-tT properly limited itself to a consideration of the liability of leaseholders under the terms of their leases.

23. Out of an abundance of caution, because it had not been provided with a comprehensive set of documents, the respondent's managing agents applied to the F-tT not only for a determination under section 27A, Landlord and Tenant Act 1985 of the sums payable by way of service charges, but also for a dispensation under section 20ZA(1) of the 1985 Act in respect of the consultation requirements which had preceded the carrying out of the remedial work. Having considered the steps which had been taken, the F-tT concluded that Mrs Fairbairn had not demonstrated any failure of compliance with the statutory consultation requirements. The issue of dispensation and the expenditure incurred on the remedial works themselves form no part of this appeal.

24. Mrs Fairbairn was the only leaseholder who challenged the entitlement of the respondent to add the costs of the dispute with Mrs Stevenson to the service charge. The F-tT noted that a large number of other issues had been raised which were outside its jurisdiction. It quite properly declined to deal with those issues and confined itself to a consideration of whether the service charges, and in particular the legal costs, had been reasonably incurred and whether they had been properly demanded in accordance with the terms of the lease.

25. The F-tT determined the total amount of the service charge expenditure for each of the years in question, and the sum which it was reasonable for the leaseholders to contribute on account for 2014. It reaching its conclusion on the total figures the F-tT recorded that the following sums had been incurred in connection with the claim by Mrs Stevenson:

> in 2011-12 £4,476 in legal fees;
>
> in 2012-13 £5,500 in legal fees; and
>
> in 2013-14 the final settlement figure of £13,358 and a further contribution of £2,200 towards the fees of the respondent's own solicitors.

26. Before the F-tT Mrs Fairbairn challenged her liability to contribute towards these costs on three grounds: first that the directors of the claimant had been negligent in their handling of Mrs Stevenson's claim; secondly that solicitors originally appointed by the respondent had advised but their advice had been ignored; and thirdly that the respondent had failed in the legal action and so should not be entitled to pass its costs on to the leaseholders. The only point taken by Mrs Fairbairn in relation to the validity of the service charge demands issued by the respondent was a suggestion that they did not comply with section 47 of the Landlord and Tenant Act 1987 which requires that the name and address to the landlord must be included in any written demand for payment. The F-tT was satisfied that this element of the dispute was unfounded.

27. In Paragraph 47-53 of its decision the F-tT considered the dispute over the respondent's own legal fees and the settlement figure. At paragraph 49 it identified and discussed the question which it felt had to be considered:

> "However, the question for the Tribunal to consider is not whether the litigation concerning flat 29 was won or lost, or whether it could have been handled better, but whether the costs were reasonably incurred. In this respect it appears that the claim was initiated by Mrs Stevenson and that it was therefore appropriate for the [respondent] to instruct its own

solicitor to represent it in the interests of the leaseholders as a whole. The [respondent] cannot be faulted for that."

28. The F-tT was satisfied that the fees charged by the respondent's own solicitors were reasonable and that, contrary to Mrs Fairbairn's suggestion, no other firm of solicitors had advised in relation to the dispute with Mrs Stevenson. The F-tT then referred to paragraph 10 of the 5th schedule and the obligation or entitlement of the respondent to "do all other acts and things for the proper management administration and maintenance of the blocks of flats as the [respondent] in its sole discretion shall think fit"; it concluded that each element of the legal and professional fees identified by the respondent in its application under section 27A had been incurred under this term and that the costs were therefore recoverable.

29. Mrs Stevenson herself was not asked to contribute to the recovery of the legal costs through the service charge; thus, rather than being divided by 39 as required by paragraph 3(1) of the 4th schedule to the lease, this element of the total expenditure was instead divided by 38, with Mrs Stevenson's contribution being apportioned equally amongst her 38 neighbours. The F-tT remarked that it did not have sufficient information about the terms of the settlement with Mrs Stevenson to know whether that apportionment was appropriate. It may have been justified as part of an agreement between the company and one of its members, but it was clearly contrary to the terms of the lease which govern the relationship between the company and the same members in their capacity as leaseholders.

The appeal

30. In granting permission to appeal the Tribunal observed that it was arguable that the costs of unsuccessfully defending a claim for damages for breach of a landlord's repairing covenant were not recoverable in reliance on a clause entitling the landlord to recover the costs of acts done for the proper management, maintenance and administration of the block of flats. The reasonableness of the decision to incur the costs of litigation was also arguably called into question by its outcome although, as the F-tT had noted in reaching its decision, it had been provided with relatively little information about the dispute. In particular it had been provided with no documents from which it could judge whether the settlement achieved with Mrs Stevenson represented a success or a failure from the perspective of the respondent.

31. I sympathise with the position in which the F-tT found itself, because the material provided to it was incomplete in important respects but also contained a great deal that was irrelevant, unhelpful and provocative. The same is true of the material provided by the appellant for the appeal. Despite the relatively narrow terms in which permission to appeal was granted Mrs Fairbairn, and her representative, Mr Ridley, bombarded the Tribunal with a whole catalogue of ill-considered and irrelevant complaints about the behaviour of the directors of the respondent and, in particular, about the role of the respondent's new managing agent. Mr Ridley appeared to view these proceedings as an opportunity to ventilate grievances of his own concerning other premises also managed by the same managing agent. He made it clear in his written submissions in advance of the appeal that he also wished the Tribunal to investigate the corporate governance of the respondent company which he denounced in extravagant language, and he made serious allegations against professionals and

private individuals involved in the management of Etal Court, including both of the firms of solicitors involved in the litigation over repairs to flat 29.

32. The Tribunal made it clear, as had the F-tT, that Mr Ridley's written representations strayed very far beyond the proper scope of the current appeal. The only legitimate points which Mr Ridley raised on Mrs Fairbairn's behalf concerned the recoverability of the service charge under the terms of the lease and the respondent's compliance with the requirement to provide service charge certificates prepared by a chartered accountant.

Issue 1: the costs of the litigation and settlement

33. On behalf of the respondent Mr Rodger submitted that paragraph 10 of the Fifth Schedule to the lease was sufficiently broad to render recoverable the legal fees of the respondent itself and the sums which it agreed to pay in settlement of the dispute with Mrs Stephenson. The same expenditure had also been reasonably incurred and its recovery in full was not precluded by section 19(1) of the 1985 Act. The defence of the proceedings had not in itself been an unreasonable step for the company to take. It had instructed solicitors and counsel and, so far as could be inferred from the narrative of the proceedings contained in the bill of costs provided by Mrs Stephenson's solicitors, that advice had been conservative. A defence was filed, but no further steps were taken in the litigation other than to negotiate a settlement. Given the prior decision to accept liability for the remedial works themselves, and the subsequent settlement of the claim, there was no reason to believe that the advice received had not been followed.

34. Mr Rodger acknowledged that expenditure on litigation, even where the litigation was about the respondent's repairing obligations, could not in itself be regarded as a cost incurred for the maintenance of the block of flats. Nonetheless, the steps which the respondent took and the costs it incurred should be seen as having been for the proper management and administration of the block. The respondent's own solicitors' fees were, he submitted, clearly within the scope of paragraph 10 of the Fifth Schedule: a limited company can only act through agents, and when sued, through solicitors. It must have been anticipated that the management of Etal Court might from time to time require that legal advice be taken, or that litigation be engaged in with a leaseholder. The merits of the particular dispute did not affect the scope of the respondent's discretion, or its entitlement to recover the costs of taking the steps which it decided upon if they required litigation.

35. As for the costs incurred by Mrs Stevenson, and which the respondent had agreed to pay as part of the settlement, it could not be suggested that the decision to compromise the claim was an unreasonable one. Without compelling evidence of obvious incompetence on the part of the company's solicitors the company could not be criticised for following the advice which it received. The mere fact of having to make a payment to settle the litigation did not provide any grounds for suggesting that the payment was not an expense incurred in the proper management and administration of the block of flats. There was nothing in the material available to suggest that the respondent had acted outside the range of behaviour of an ordinary litigant acting reasonably.

36. The Tribunal should be slow, Mr Rodger suggested, to conclude that the costs of unsuccessful litigation should be irrecoverable through the service charge, especially where, as in this case, the landlord was a company which undertook no commercial activity, existed only to manage the blocks on behalf of its members, and had no assets of its own.

37. I have not found this appeal straightforward, but although Mr Rodger presented his submissions persuasively, I have decided that I do not accept them.

38. The Tribunal's task is to interpret the language of the standard form of lease and to ascertain whether the costs sought to be included in the service charge properly fall within the scope of expenditure incurred "for the proper management administration and maintenance of the blocks of flats". As the Supreme Court has recently confirmed in *Arnold v Britton* [2015] UKSC 36, the task is to identify what the language used by the parties means by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language to mean. As Lord Neuberger PSC emphasised, at para 17, what the parties meant is most obviously to be gleaned from the language of the provision, over which the parties had control. He also emphasised that there was nor reason to apply any different approach to the interpretation of service charge provisions, at para 23:

> "Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there"."

39. I have no real difficulty in accepting Mr Rodger's analysis of the various steps which the respondent took after receiving the letter before action in May 2011, and especially after the proceedings had been commenced by Mrs Stevenson in March the following year. It was obviously reasonable to take professional advice and to follow it. The lapse of time between the letter before action and the formal admission of liability in November 2011 was not excessive, especially when it is remembered that the first report received by the respondent from its own surveyor was inconclusive as to the cause of the problem. I think the F-tT was correct to find that the costs had been incurred in taking reasonable steps in response to the proceedings.

40. Where I have greater difficulty in accepting Mr Rodger's argument is at an earlier stage of his argument, when asking whether the litigation expenses fall within any of the heads of expenditure which the respondent is entitled to recoup through the service charge. No matter how reasonable it was for the respondent to follow the advice of its lawyers and seek an early settlement of Mrs Stevenson's claim, the expense of that settlement, and the fees charged by its own lawyers in procuring it, will only be recoverable as a service charge if they can be brought within the scope of

paragraph 10 of the Fifth Schedule to the lease. Thus, only if the expenditure can be regarded as having been incurred in acts done "for the proper management administration and maintenance of the blocks of flats" will it be payable by Mrs Fairbairn in her capacity as the leaseholder of flat 34.

41. I will deal first with Mr Rodger's submission that the nature of the respondent, as a leaseholder owned company, is relevant to the construction of the covenant. I do not accept that it should be, and I do not in any event see that there are alternative readings of the relevant obligation. I accept that the respondent was intended to be owned by the leaseholders of the 39 flats at Etal Court from the outset, and that is part of the relevant background circumstances against which the meaning of the lease has to be considered, but it does not justify a radical departure from the natural meaning of relatively standard words.

42. Nor do I consider that it is of practical significance to the interpretation of the lease that the respondent is apparently a company without means other than those available to it directly from its members in that capacity, or through the service charge from the same people in their capacity as leaseholder. In particular it cannot be assumed that all expenditure by the respondent company must have been intended to be reimbursed through the service charge. If a liability is incurred which cannot be met through the service charge it will be for the members either to fund that liability voluntarily or face the risk of the respondent becoming insolvent. That is a characteristic of all leaseholder owned landlords or management companies.

43. A general charging provision such as paragraph 10 is, in principle, wide enough to cover expenditure on legal advice or even, in an appropriate case, on the conduct of litigation. Thus, in *Iperion Investment Corporation v Broadwalk House Residents Ltd* [1995] 2 EGLR 47 the Court of Appeal accepted that legal costs incurred in connection with proceedings brought in response to a tenant's breach of covenant could be recovered as part of the expenses of managing a building. In *Assethold Ltd v Watts* [2014] UKUT 0537 (LC) the Tribunal reached a similar conclusion and allowed a landlord to recover the cost of proceedings for an injunction to restrain the owner of a neighbouring development site who threatened to undermine the party wall; such expenditure had been "necessary or desirable for the proper maintenance safety amenity and administration of the Development". In each of those examples, the court or tribunal considered that the language of the charging provision was sufficiently clear to enable it to conclude that the expenditure which it was sought to recover fitted within it.

44. The underlying difficulty with fitting the expenditure in issue in this appeal into a charging covenant such as paragraph 10 is that the steps required to be taken by the respondent were the result of a breach by the respondent of its own obligations under the lease. It was because the proper management and administration of the building had been neglected, although possibly only for a relatively short time, that proceedings were commenced by Mrs Stephenson. The respondent's repairing covenant obliged it to maintain the retained premises, including the foundations and structure of the buildings, in good and substantial repair and condition. As a matter of strict legal analysis that covenant was broken as soon as the structure of the building fell out of repair, whether the respondent was aware of its condition or not (see *Woodfall: Landlord and Tenant,* at paragraph 13.066, and *British Telecom v Sun Life Assurance Society* [1996] Ch 69 (CA)). But even ignoring the strictness of the respondent's legal obligations, at the most practical level considerations of proper

management required the respondent to take reasonable steps to investigate any problem with the structure of the building of which it was given notice. By 2010 at the latest the structure was in disrepair and at some point during that year the respondent was put on notice of the problem, but the initial reaction of the respondent was to deny liability to do anything about it. It did not instruct its own surveyor to inspect the floor until it was forced to do so in May 2011 after it received the letter before action from Mrs Stevenson's solicitor accompanied by the report of her building surveyor.

45. It is obviously necessary to distinguish between the costs incurred in investigating and remedying the defective floor, and the costs of litigation over the respondent's failure to appropriate action. This appeal is concerned only with the latter but no submission has been made by the respondent that any part of the legal costs incurred in the relevant years was for advice on whether the work was within the respondent's covenant. It seems to me likely that, at the outset, there was advice on the meaning of the lease, but it is for the respondent (which initiated the application under section 27A) to demonstrate what the cost it incurred were for. From the uninformative invoices which have been produced it is impossible to identify how much, if any, of the professional fees were for advice relating what the respondent was obliged by its covenant to do, rather than in dealing with the consequences of a failure of compliance.

46. I can see no other justification for distinguishing between the various components of the respondent's expenditure on professional fees arising out of the proceedings. Mrs Stephenson's claim was for the enforcement of the respondent's obligation and for damages for breach of covenant. It seems to have been a valid claim in principle, as the respondent eventually accepted, although its true value may have been very modest. All of the costs were referable to that claim. A sum paid in satisfaction of a successful claim for damages for beach of covenant does not readily fall within the scope of expenditure on proper management and administration of the buildings. It seems to me just as inappropriate to classify the reasonable legal costs incurred in minimising such an award of damages, or payable as a condition of a settlement of a valid claim, as having been incurred in proper management and administration of the buildings. Each element of the payment was either part of, or a consequence of, a valid personal claim by the leaseholder against the defaulting landlord. Such payments have nothing to do with the management and administration of the building, they are cost incurred by the landlord in protecting itself from the consequences of its own previous omissions. The costs in this case could quite appropriately be described as having been incurred in the management and administration of the respondent company, but that is not enough to make them recoverable through the service charge.

47. I am therefore satisfied that the F-tT was wrong in its conclusion that the settlement sum, and the legal costs incurred in securing the settlement, may form part of the service charge.

Issue 2: certification

48. Having reached that conclusion I can deal briefly with the second issue.

49. Evidence was given by Mr Mears of Brannen & Partners, the respondent's managing agents, that before their taking over management of Etal Court with effect from 1 April 2013 the company's

own accounts had been prepared by its accountant, without any separate service charge accounts being compiled. It had not been the practice either before (as far as he was aware) or after the appointment of professional managing agents for the certification procedure envisaged by paragraph 13 of the Fifth Schedule to the Lease to be followed. That informality reflected the fact that the members of the company were all leaseholders, and that the respondent has no other business than managing Etal Court on their behalf.

50. It is clear that, at Etal Court, no real distinction has been made between, on the one hand, the rights and liabilities of the shareholders in the respondent company and, on the other, the rights and obligations of the same people in their capacity as leaseholders. That is understandable and appropriate in a situation such as at Etal Court, but any departure from the accounting and certification requirements of the leases carries the risk that, if a dispute arises, one or more individuals may do as Mrs Fairbairn seeks to do in this case, and insist on compliance with procedures which have fallen into disuse while relations were more amicable. No case was advanced on behalf of the respondent that Mrs Fairbairn had acted in such a way as to waive her entitlement under paragraph 13 of the Fifth Schedule to require that service charge accounts be prepared and audited by a competent chartered surveyor whose certificate is a condition of her own obligation to pay the service charge.

51. Permission to appeal was not granted in relation to any other component of the service charge and it is therefore unnecessary to consider whether the balance of the service charge was properly demanded in each year. I would suggest for the future, however, that the terms of paragraphs 12 to 14 of the Fifth Schedule concerning certification of expenditure be complied with, unless the respondent can obtain from every leaseholder an explicit waiver of the need for a certificate prepared and audited by a competent chartered accountant.

Disposal

52. I have recalculated the annual expenditure in each of the three years in issue by deducting the expenditure referred to in paragraph 25 above. The appellant is liable to pay one thirty-ninth part of that expenditure. In place of the F-tT's determination of the total annual expenditure which may be taken into account in quantifying the service charge, I therefore substitute a determination that the appellant's service charge liability in each of those years was as follows:

2011/12 1/39 of £17,572 = £450.56

2012/13 1/39 of £46,312 = £1,187.49

2013/14 1/39 of £26,721 = £685.15

53. The FTT's determination in relation to other charges, and of the sum which may be taken into account in calculating the estimated charge for 2014/15 is unaffected by this decision.

Martin Rodger QC,
Deputy President

30 November 2015