You can read Part I of this case here. It covers the background and the first three points of appeal before Martin Rodger QC, including analysis of the lessees’ right of set off.

In this post, we have arrived at the BIG issues.

**Issue 4: conditions precedent to payment**

Was provision of the accountants’ certificate a condition precedent to payment?

I have the impression that Martin Rodger QC relished this point.

Section 27A, he observed, required a determination of when service charges were payable. Although the lessees had not raised the issue, Urban Splash’s appeal was predicated on the FTT’s failure to make a complete section 27A determination, and the issue was accordingly live before him.

Urban Splash’s case was twofold.

First, that the service charge accounts did what the certificate was supposed to do, and therefore complied with the lease. Martin Rodger QC gave that argument short shrift.

I will not dwell on his reasons because the second limb of Urban Splash’s argument is, frankly, the more interesting.
That second limb was that production of the certificate was not a condition precedent to a lessee’s liability to pay. It referred to three cases:

- **Pendra Loweth Management Ltd v North** [2015] UKUT 91 (LC): on the terms of the lease before it, the Upper Tribunal decided that the preparation and certification of the annual accounts was not a condition of the tenants’ liability to pay the estimated service charge;

- **Elysian Fields Management Company v Nixon** [2015] UKUT 427 (LC): again, the Upper Tribunal interpreted the lease in that case to mean that there liability to pay service charges was not conditional on the preparation of certificates showing the actual expenditure in any previous year;

- **Clacy and Nunn v Sanchez** [2015] UKUT 0387 (LC): here the Upper Tribunal reviewed many cases, some identifying a condition precedent, some not. On the wording of the particular lease however, it held that there was no condition precedent to liability to pay. Martin Rodger QC noted that the decision:

  “was reached because the provision for certification was described in the lease as being “without prejudice” to the primary obligation to pay the service charge on written demand, and because copies of the certificates were only to be supplied by the management company to the tenant on written request. These features indicated to the Tribunal that the certificates were not critical to the tenant’s liability to pay, but were simply “machinery”.”

He concluded however that none of the above established “any principle of general application”.

The textbooks did not help either:

- **Emmet & Farrand on Title**, paragraph 26.596, cited **Clacy and Elysian Fields** for the proposition that:

  “the provision of certified accounts will not generally be a condition precedent to liability to pay service charges.”
Woodfall: Landlord and Tenant, paragraph 7.180, however, had the opposite:

“Where a lease provides for the amount payable to be certified by the landlord’s surveyor or accountant, the issue of a valid certificate will usually be a condition precedent to the tenant’s liability to pay.”

Martin Rodger QC’s view was that Emmet was – ahem – wrong to draw a principle from the case law: the specific wording of each lease is key to each case.

He therefore allowed himself a little time to think things over.

Pendra Loweth and Elysian Fields showed that liability to make on-account payments was less likely to be conditional on certification of past expenditure. On-account payments generally looked to future expenditure.

Rexhaven Ltd v Nurse and Alliance & Leicester Building Society (1996) 28 HLR 241 showed however that a certification condition might apply to on-account payments.

Unsurprisingly therefore:

“In every case the function and significance of the certificate will depend on the terms of the agreement”.

The Urban Splash lease

So saying, Martin Rodger QC turned to the lease before him. He dealt first with the lessees’ liability to pay balancing, as opposed to on-account charges. The lease provided that:

- The service charge was payable “at the times and in the manner stipulated in the Fifth Schedule”, and
- The Fifth Schedule provided that the service charge was to be “ascertained and certified by a certificate ... signed by an independent qualified accountant”.

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Therefore:

- It was not open to Urban Splash or its managing agent to quantify the service charge themselves. That must be done by an independent qualified accountant;
- It was only on certification by the accountant that the amount, if any, payable as a balancing charge, would only be quantified authoritatively;
- Liability to pay could not crystallise until that amount was known;
- Under the lease, liability to pay arose “forthwith” on service of the certificate on the lessee.

The purpose of the certificate was to reconcile payments made on account by the lessee with actual service charge expenditure, so as to establish whether the lessee should make a balancing payment or receive a credit.

The lessee’s obligations pay any shortfall between total on-account contributions and the total service charge depended on the certificate.

No certificate: no obligation.

The FTT had therefore been wrong to say that service of the accountant’s certificate was not a condition precedent to the liability to pay.

On the other hand, the lessees’ liability to make on account payments depended on the lessee being notified of the landlord’s surveyor’s estimate of annual expenditure.

The accountant’s certificate had no impact on that liability.

**The validity of the certificates**

Urban Splash’s woes did not end there.

As the FTT had decided that the certificates did not dictate liability to pay, they did not measure them against the requirements of the lease.

Martin Rodger QC did. He found them wanting.
Consequently, none of the balancing charges demanded had yet become payable by the lessees, and would not fall due until service of a compliant accountant’s certificate.

Again, liability to make the on-account payments was unaffected.

**Issue 5: administration charges**

Martin Rodger QC introduced the fifth issue thus.

“A substantial grievance underlying the respondents’ application to the FTT for a determination of their service charge liability was the practice of the appellant’s agents in adding fees and charges to the respondents’ statement of account whenever it wrote requiring payment of disputed sums”.

This issue related solely to the administration charges levied by RMG, the managing agents who had taken over on 01 November 2010.

RMG had added the following fees to the lessees’ account:

- Reminder fees of £83.00;
- Fees for Land Registry fees of £126.00;
- Legal fees of £1536.00;
- Court fees of £455.00, and
- Administration charges of £384.00.

Those were not service charges. They were, if anything, administration charges, as defined in Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

The FTT has the power to determine the payability of administration charges in much the same way as it does service charges.

In this case, it held that the charges were not payable, because the management agreements between RMG and Urban Splash had never been signed and there was therefore “no unequivocal evidence” that Urban Splash was required to indemnify RMG.
Yes. An odd, not to say unsustainable, reason.

To start with, the FTT set the standard of proof too high: it is not to the “unequivocal”.

Next, although the management agreements had never been signed, it seemed common ground that RMG had provided services to Urban Splash on the terms of the agreements and had been paid the management fee specified in those agreements.

The FTT should have considered whether the (unsigned) management agreements entitled RMG to apply the charges of which the lessees complained.

Martin Rodger QC put on his wellingtons and waded in.

The management agreements entitled RMG to claim from Urban Splash sums “in respect of costs and expenses incurred by [it, RMG] in performing its duties under the Agreement”.

Between 2011 and 2015, those duties included:

- Using all reasonable endeavours to collect all unpaid monies owed to Urban Splash by the lessees. Urban Splash agreed to reimburse the costs and expenses incurred by RMG in that respect, and
- With Urban Splash’s consent, instructing solicitors to bring proceedings where necessary.

After 2015, RMG’s management fee included its costs of “using [its] best endeavours to collect current and on-going routine service charge arrears but not action requiring legal work or tribunals”.

Therefore, RMG:

- Was not entitled to claim fees supplementary to those set out in the management agreement so far as they were connected with collecting rent and service charges, but
- Was entitled to reimbursement of any expenses of its own that it incurred, including instructing solicitors.
Given that analysis, it was probable that the reminder fees and administration charges fell outwith RMG’s entitlement. The management agreement did not impose any obligation on Urban Splash to indemnify RMG against those charges, which, at the very least, required a proper explanation.

As to the other fees – HM Land Registry; legal and court fees – Martin Rodger QC was unable to determine their recoverability. Two points needed to addressed:

- Whether the costs had been incurred, and
- Whether the amount of the charge was reasonable, pursuant to paragraph 2 of Schedule 11 to the 2002 Act

He reminded himself – and his audience – of the county court and the FTT’s wider powers over variable administration charges for cases issued after 06 April 2017. Rather than simply determine the reasonableness of a variable administration charge, the court/tribunal how has the power to reduce or extinguish a tenant’s contractual liability if it considers it just and equitable to do so.

He then indulged in a little postulation.

“If”, he said, “it transpires that costs were incurred in pursuing the respondents for service charges which they were not yet liable to pay, because the appellant had failed to have the amount of the Service Rent certified as required …, so that proceedings in respect of which the legal and court fees were incurred were premature, any charge is likely to have been unreasonable”.

There are no prizes for deducing the outcome of this ground of appeal.

- The FTT’s refusal to allow the administration charges was set aside;
- The appeal on the issue was allowed, but
- The point was remitted to the FTT for “further consideration”.

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Issue 6: the section 20C order

The FTT made a section 20C order, protecting Mr Ridgway and Ms Cunningham from any liability to pay costs incurred by Urban Splash in the proceedings through the service charge.

It described Urban Splash’s conduct, including the failure to execute a written management agreement with RMG, as “tantamount to it washing its hands of the development to the detriment of the owners”.

It expressly excepted RMG from its criticism.

Urban Splash complained that the order was too harsh.

Martin Rodger QC did not agree.

“In my judgment”, said he, “the FTT was entitled to make the order it did for the reasons it gave, although I would not myself attribute weight to the failure to conclude a written management agreement with RMG. Because I have set aside parts of its substantive decision it is necessary that I reconsider whether the order is still appropriate, but having done so I am entirely satisfied that it is”.

Even though the FTT’s decision had been set aside on some issues, that had not always been to Urban Splash’s advantage:

- He had disallowed the £3,894.50 claimed under issue 1, whereas the FTT would have given it a second chance of justifying it;
- The 2011 service charge had been quantified at £3,281.37, but no balancing charges were payable because no valid certificates had been produced;
- The balancing charges for the years 2012-2015 were not payable for the same reason;
- The 2016 service charge was neither yet determined nor payable: it was to be remitted to the FTT, and
- It remained to be seen whether any the administration charges were justified.
Martin Rodger QC was not happy with Urban Splash:

“This inconclusive state of affairs”, he observed, “is profoundly unsatisfactory.

“Three days of hearings have been devoted to these proceedings in this Tribunal and in the FTT, not to mention the very substantial time and expense committed to preparation by the parties. Responsibility for the state of uncertainty which persists lies very substantially with [Urban Splash], which failed to procure the certificates required by the lease and failed to provide the evidence required to substantiate its case.

“In all these circumstances it is just and equitable that the respondents should not be liable to contribute towards [Urban Splash’s] costs incurred before the FTT”.

As I say, not happy.

**The bonus issue: exit fees**

In making a section 20C order, the FTT took into account Urban Splash’s failure to collect “exit fees”. These were sums payable when flats were sold, and paid into the sinking fund for pay for major works.

Urban Splash argued that it was not obliged to collect exit fees.

The FTT agreed, but determined that the failure to collect exit fees was evidence of mis-management. Had Urban Splash collected the exit fees, the sinking fund would have been more buoyant.

It could not determine the amount by which the buoyancy would have increased because, it said, the lessees had not produced any evidence of the amount that Urban Splash should have collected.
Not so, said Martin Rodger QC:

- The parties agreed that no exit fees had been charged before 2014;
- The lessees had prepared a schedule showing 18 transfers between 1999 and 2014;
- Using HM Land Registry information, the lessees had calculated that the sinking fund was £21,000 short.

Given those three points:

“It is not clear to what evidence the FTT was referring [when it held that the lessees had produced no evidence of the shortfall], nor is it clear why the respondents were not given the opportunity to adduce such evidence in the way that the appellants were given that chance in relation to the issue of certification”.

And that was not all that was not clear.

It was “far from clear” to him that Urban Splash had a discretion as to whether to collect the exit fees. Under Mr Ridgway and Ms Cunningham’s lease Urban Splash had covenanted:

- That all of the leases in the Building would be on the same terms;
- That it would provide the services identified in the lease, one of which was the enforcement of covenants on the part of other lessees, and
- That it would, “as far as it considered practicable” keep the service charge at a regular level by “creating reserve funds and in subsequent years expending such sums as it considers reasonable”.

If Urban Splash did not collect the exit fees therefore, it was not clear either why it should not:

“take the sums it had voluntarily foregone into account when determining what contribution it could reasonably expect the continuing leaseholders to make towards the major works”. 
Having vented those thoughts, Martin Rodger QC reined himself in. The lessees had not sought permission to appeal the FTT’s decision on the exit fees and “I therefore express no further view on it”, said he.

Save that he could not quite resist…

“… the sum which [Mr Ridgway and Ms Cunningham] may be required to contribute towards expenditure on the major works in future years will require to be considered on its own merits; if the matter comes back before the FTT it should address the terms of the lease and the evidence provided by [Mr Ridgway and Ms Cunningham] in greater detail”.

I cannot help thinking that he regretted not having the opportunity to do so himself in this appeal.

**Disposal of the appeal**

It was time to review the result of the appeal:

1. The £3,894.50 carried forward from the previous managing agent was not recoverable;
2. The 2011 service charge was £3,281.37, but any balancing charge beyond payments on account would only become payable on service of the accountant’s certificate as required by the lease. If disputed at that stage, a further application to the FTT may be needed;
3. The FTT’s determination of the service charge for 2012-15 stood, but the same point applied about balancing charges as applied to 2011;
4. Quantification of the 2016 service charge was remitted to the FTT;
5. Liability to pay and quantification of any administration charges were remitted to the FTT, and
6. The FTT’s section 20C order stood.
Observations

Evidence

I have written about evidential poverty in the past. I bewail it again here, not, I suspect, for the last time.

I may be feeling rather jaundiced at the moment – evidence, particularly in relation to cladding, is not my favourite subject just now – but I found it, well, surprising that the FTT decided to grant the landlord permission to re-apply for a determination of the 2010 service charges once it had all of its evidential ducks in order, so to speak.

Martin Rodger QC described the decision as “generous”. I will be bolder, and say that it runs contrary to principle.

Finality in litigation is important: see for example Henderson v Henderson (1843) 3 Hare 100 and Johnson v Gore Wood & Co (No1) [2000] UKHL 65. No court, without compelling reason, would decline to determine a dispute because the claimant’s evidence was insufficient to make out its case, and then grant permission to that same claimant to bring a fresh claim on the same dispute. I can hear the cries of abuse of process from here.

To my mind therefore, it was simply wrong of the FTT to adjourn its determination of the 2010 service charges until Urban Splash was able to produce adequate evidence to support its case. That is all the more so because Urban Splash had initiated the proceedings. It is not unreasonable to assume that at the date of issue of the claim, it had prepared itself for litigation and had collected sufficient evidence to see the case through to a successful conclusion.

And yet it was unable to produce the further evidence required, which brings me on to my second set of observations.
Changing managing agents

It would appear, at least partly, that Urban Splash was unable to produce the relevant evidence because it was caught in that change-of-managing-agent twilight zone that so often results in the disappearance of documents.

In my experience, it is regularly the case that managing agents struggle through dense financial and management fog when they take over management of a building, and yet the RICS has produced a guidance note on handing over service charge information. It applies to commercial property, but why limit its scope? It’s no fun for anyone to flounder in figures that cannot be substantiated.

Further, it must be possible to build into a management agreement provisions that relate to the end of the relationship and the handover of meaningful information. A form of pre-nuptial agreement for landlords and their agents, if you will.

**What is the difference between a service charge and an administration charge?**

This is a question that has not been fully examined in the Upper Tribunal, so far as I am aware. Martin Rodger QC comes close to it in this case, interpreting as he does certain costs as falling under a collective, service charge liability as opposed to an individual, administration charge liability.

There is however a problem in distinguishing service charges from administration charges on the basis of collective rather than individual liability. Neither section 19 of the 1985 Act nor Schedule 11 of the 2002 Act make a distinction between a cost to which the collective contributes, or one for which an individual is entirely liable.

A service charge is not defined as a cost borne by the many, and an administration charge is not defined as a cost borne by the individual.

Where there is an overlap therefore, how is the distinction to be drawn?
And finally

This was, as I noted at the outset of my first post on this case, the paradigm landlord and long lessee dispute. It covers:

- The quality of evidence required to support a case;
- Set off;
- Conditions precedent;
- Administration charges;
- Section 20C;
- What to do when the FTT does not decide the questions asked of it, and
- Exit fees, nearly.

To my mind, it also contains a practical warning for everyone involved in matters leasehold:

- Landlords, beware the temptation to demand costs that cannot be evidenced;
- Managing agents, beware the temptation to add administration charges to service charge accounts without contractual justification;
- Lessees, beware the temptation to run a case without detailed knowledge of the lease, and
- Lawyers, beware the temptation to argue weak points in the FTT. The teeth are sharper in the Upper Tribunal.