1051

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2014/0207**
Property	:	**Flat 25, St Mary's Court, Stamford Brook Road, London W6 0XP**
Applicant	:	**Saydale Investments Limited**
Representative	:	**Mr M Feldman of counsel**
Respondent	:	**Mr Emmil Wayne Seeson Watson**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Tribunal Judge R Percival** **Mr F Coffey FRICS** **Mrs J Hawkins**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**22 December 2014**

DECISION

Decisions of the tribunal

(1) It is more likely than not that the respondent did not receive service charge demands from the applicant after that dated 3 June 2010. On the basis of the determinative "breakdown of arrears" document provided by the applicant, the outstanding arrears are reduced to £3,910.28. If the respondent made payments relating to demands after that date, he should be credited with those sums.

(2) The consultation process under section 20 of the Act undertaken in connection with the repair and redecoration/fire precautions major works in 2008/2009 was flawed. However, there being no demonstrable prejudice to the tenants, the tribunal grants retrospective dispensation under section 20ZA.

(3) We conclude that the payment of £12,972.24 on 20 February 2009 did not constitute a settlement of the respondent's then indebtedness to the applicant.

(4) Whether the applicant has or has not breached its duties under sections 21 and 22 of the Act is not relevant to any question before the tribunal.

(5) The sums charged in respect of legal proceedings (the arrears in respect of which are £940.38) were not payable under the lease. Any sums paid by the respondent on the basis that they were payable should be credited to him.

(6) The applicant's application for costs under rule 13 of the Procedure Regulations is refused.

(7) The respondent's application for an order under section 20C if the Act is refused.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Applicant in respect of the service charge years from that ending on 25 December 2008 to 19 June 2013. Hereafter, the administration charges are to be understood to be included in the term "service charge" for ease of exposition.

2. Proceedings were originally issued in the Liverpool County Court under claim number 3LV30289. The claim was transferred to this tribunal, by order of District Judge Wright on 17 February 2014.

3. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

4. The Applicant was represented by Mr Matthew Feldman of counsel at the hearing. The Respondent appeared in person. The trial bundle submitted by the applicant comprised three lever arch files containing a total of 1,172 pages.

5. The hearing commenced on 28 August 2014, but did not conclude that day. The first day on which both the tribunal and the parties could reconvene was 4 November 2014.

6. Immediately prior to commencement of the hearing on the first day the applicant handed in further documents, namely a statement of costs and supporting schedule, and a consequentially amended bundle index. The respondent handed in additional correspondence between himself and the applicant. The respondent did not object to the admission of the schedule of costs. The tribunal originally understood that the applicant had agreed the admission of the respondent's papers prior to the commencement of the hearing. It later transpired that this was not the case, but Mr Feldman was prepared to allow the material to be put before us after considering it during the course of the day.

7. Between the two days of the hearing, the applicant produced:

   (i) Applicant's further comments on the case dated 17 October 2014, including 12 appendices (375 pages); and

   (ii) Applicant's second further comments on the case dated 24 October 2014 (9 pages).

8. On 23 October, the respondent faxed a note to the tribunal office. He stated that he had not received any of the material served by the applicant. He therefore applied for a postponement of the reconvened hearing. By an emailed letter to the tribunal dated 30 October, the applicant submitted that the respondent had been properly served, but nevertheless re-served the materials. Service had been at the property, as the respondent had requested during the course of the hearing on the first day, although he was not living there.

9. On 30 October, the tribunal rejected the application to postpone, and required both parties to be ready to proceed. The respondent did not seek to renew his application when the hearing reconvened, but he did again outline the difficulties he had experienced as a result of, as he claimed, the failure to serve.

The background

10. The property which is the subject of this application is a flat in St Mary's Court, a de-consecrated Victorian church converted into 25 flats in the 1960s. The flat is on the top floor.

11. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

12. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

13. The respondent's statement of case appeared to raise matters that might constitute a set-off claim. Given that the case had been transferred from the County Court, the Tribunal declined the applicant's invitation to consider the extent to which it enjoyed jurisdiction to consider the set-off, or to consider the claim substantively. The respondent should address such a claim to the County Court.

14. The County Court claim included an element of ground rent. Mr Feldman referred us to a schedule at appendix 9 to the applicant's case statement headed "breakdown of arrears relating to [the property]" (page 162 of the bundle) which encompassed the applicant's claim in the tribunal, both in terms of extent (ie excluding ground rent) and the time period under consideration. The arrears shown in that schedule are £8,698.94.

15. At the start of the hearing the parties and tribunal identified the relevant issues for determination as follows:

    (i) Whether notices of service charges had been properly served;

    (ii) The charges associated with major works (external repairs and redecoration) in 2008, and in particular whether the consultation requirements in section 20 of the 1985 Act and the

Services Charges (Consultation Requirements)(England) Regulations 2003 ("the Consultation Regulations") had been met;

(iii) Whether the landlord had discharged its duties under sections 21 and 22 of the 1985 Act;

(iv) The cost of reminder letters;

(v) The effect of a payment of £12,972.24 on 20 February 2009;

(vi) Whether professional fees arising out of proceedings in 2008 and 2009 were payable under the lease; and

(vii) Whether the respondent should be ordered to pay the applicant's costs.

16. It became clear during the course of the hearing that the respondent also sought to put in issue whether there had been appropriate consultation in respect of other works to which section 20 of the 1985 Act applied.

The lease

17. The lease provides for the tenant to pay a service charge.

18. The lease proceeds by defining (in connection with liability to contribute to the landlord's liability in respect of insurance – clause 1) 4.8% as the "prescribed percentage". By clause 2(e)(1), the tenant covenants to pay 4.8% of expenditure incurred in respect of (a) the lessor's repairing obligations (set out in clause 4(3) and (5)); and (b) (broadly) management and accountancy services. The applicant appears to have treated professional fees as administration charges rather than, strictly, service charges.

19. The amount of the service charge so provided for to be paid on account is defined as the "basic maintenance charge", which is set at £425 per annum. This is the sum that is to be paid by two half-yearly instalments in advance (clause 2(e)(2)-(3)).

20. Should actual expenditure exceed the amount collected by way of "basic maintenance charge" (plus any surplus carried forward), the tenant would be liable for an excess contribution. Should the "basic maintenance charge" exceed expenditure, the excess would be retained by the lessor, and used to adjust any future excess contribution (clause 2(e)(2) and 2(e)(4)).

21. The lessor may increase the charge, if it reasonably anticipates that the expenditure covered by the service charge will exceed the "basic maintenance charge" (or, similarly, decrease it, in the contrary case). In such circumstances, the lessor must have regard to any unexpended surplus in setting the higher charge to the tenant (clause 2(3)(4).

22. During the period under consideration, the landlord invariably did set a charge higher than the defined sum of £425. The effect of the lease, therefore, is that it is a precondition of setting a charge higher than the "basic maintenance charge" that the landlord reasonably anticipates that expenditure will be higher than that otherwise collectable (having regard to any unexpended surplus).

23. The lease also contains a covenant requiring the tenant "to pay all expenses (including solicitors' costs and surveyors' fees) incurred by the lessor incidental to the preparation and service of a notice under section 146 of the Law of property Act 1925 ... " (clause 2(l)).

The service charge generally

24. We heard evidence from Ms Niamh McBride, the Branch Manager of the managing agents, Granville and Company. She became responsible for the building in December 2007. Ms McBride took the tribunal to the service charge demands said to have been made and gave an over-view of the maintenance history of the building since that time and Granville's general management practices. Some additional evidence was given by Ms Katie Catt, the Building Manager, as occasion arose. We refer to the evidence on specific issues as they arise below.

The notices of service charges

25. The applicant's case statement includes, at appendix 10, what are described as "copies of various demands for service charges which were sent by the applicant's professionally appointed managing agents ... to the respondent." The demands that appear purport to have been made in respect of the service charge year to 25 December 2008 (that dated 1 December 2008) to 23 June 2014 (dated 10 December 2013).

26. The demands include the name and address of the landlord and an address for service (Landlord and Tenant Act 1987, sections 47 and 48), and the summary of rights and obligations required by the Service Charges (Summary of Rights and Obligations and Transitional Provision)(England) Regulations 2007, in respect of both service charges and administration charges.

27. Mr Watson said that he did not recall seeing the first demand, dated 1 December 2008. He was not sure if he had seen the demands for 2010 to 2011 – he could not say that he had not – but he positively stated that

he had not had other demands. They were not in a file of relevant documents he maintained.

28. The applicant contends that "all service charges claimed by the applicant from the respondent have been correctly and properly demanded in accordance with the relevant statutory provisions and in strict compliance with the terms of the lease" (case statement, paragraph 13).

29. Ms McBride gave evidence that all notices would have been posted by second class post. No other occupier had claimed not to have received the demands.

30. Ms McBride explained that the copies in the appendix to the statement of case were not photocopies of the demands actually sent to Mr Watson, but rather print-outs from the relevant electronic records.

31. Ms McBride was asked if there was any reason why a demand would not be sent to the respondent. The only reason, Ms McBride answered, was if the account was "with the solicitors". As standard practice, once the two standard warning letters (the "14 and 7 day letters") had been sent, a stop would be put on the issuing of further demands. She believed this was done in order to avoid the conclusion that further demands constituted a waiver in relation to the service charge apparently disputed. Ms McBride was not able to say whether or at what times the respondent's account had, in fact, been subject to a stop.

32. Mr Feldman submitted that the practice of putting a stop on demands in such circumstances would be a normal and prudent step.

33. The document relied on by the applicant as delineating the service charge in issue before the tribunal (the "breakdown of arrears" at page 162 of the bundle), and the "copy" demands, show that the respondent was charged for reminder letters on 21 April 2010 (demand dated 3 June 2010), 26 August 2010 (demand 4 October 2010), 10 November 2011, 27 July 2012 (26 November 2012) and 19 July 2013 (10 December 2013). It appears that the dates given are those on which the letters were sent. The letter referred to in the "breakdown of arrears" document as dated 10 November 2011 does not seem to appear in a "copy" demand. The charge for the letters is in each case described as "administration fee (final reminder)".

34. As a response to a separate challenge by the respondent to the reasonableness of the charges made for the reminder letters, the applicant appended copies of the letters to it's response to the respondent's statement of case (pages 1130 to 1147 of the bundle). These show that in each case, the charged for was the second, "7 day"

letter (that is, the letter demanded payment within seven days), and in each case it had been preceded by a "14 day" letter.

35. The applicant cannot claim before the tribunal for service charges for which a proper claim has not been made of the respondent.

36. The tribunal notes that the respondent's case is that he did not receive a notice for 2009 (by which we take it he means the year ending on 25 December 2009), which is before the first instance of reminder letters provided to us. On the other hand, he allowed the possibility (but no more) that he had received demands in 2010 and 2011. The record shows reminder letters in both years. He denied receiving demands after 2011. We assume that the reason for putting a stop on the account by the applicant would persist as long as a dispute as to the service charge existed, which of course it does to this day.

37. The evidence before the tribunal is slim. We do not have the advantage of greater detail than we have related above on the working of this apparently automatic system for putting a stop on accounts, and how that affected the service of demands. We do not have any evidence from the applicant's solicitors' records which might assist.

38. Nevertheless, Ms McBride, the senior manager directly concerned with the property, has given clear evidence from her perspective that such a system was in operation. We are also aware that we cannot rely on the documents exhibited in appendix 10 of the case statement as being genuine contemporaneous records of the demands that the respondent was actually sent. No doubt they represent what the respondent would have been charged had a demand been sent to him. What they do not do is give us any evidence that a demand was, as a matter of fact, sent. The fact that no other resident in the development complained of not receiving a demand is not relevant, as Ms McBride's evidence was that the respondent was the only leaseholder who had been in arrears, and therefore the only one subject to the stop procedure.

39. We do not place any significant weight on the respondent's specific accounts of his recollection. Remembering a negative (the non-receipt of the 2009 demand) five years later is not plausible. We do place some weight, however, on his general point. He said he had not received demands, at least recently. He adverted to the issue in his case statement. It seems at least to some degree unlikely that he would have alighted on this issue to pursue without *some* cause. As will be evident, however, this is not a major factor in our decision-making.

40. To summarise our understanding of the effect of the evidence, an automatic system was in place for stopping demands being issued after "final warning letters". The respondent received "final warning" letters, at least as early as 2010. If we ask ourselves why the stop system would not have applied to the respondent, the evidence supplies no answer.

41. Accordingly, we conclude that the stop system would have come into operation as a result of the receipt of the relevant letters.

42. The first time it appears that the respondent received both letters was 22 March 2010 ("14 day" letter) and 21 April ("7 day" letter). The charge relating to these letters appeared in the demand dated 3 June 2010, which also covered the half-yearly service charge demand to 24 December 2010. We do not know when the stop procedure would have become effective in relation to that demand. In that state of knowledge, we are prepared to accept that that demand would, in fact, have been served, and the stop effective after that.

43. On that basis, the demands up to and including that dated 3 June 2010 must be assumed to have been served on the respondent; and those after not.

44. *Decision*: It is more likely than not that the respondent did not receive service charge demands from the applicant after that dated 3 June 2010. On the basis of the determinative "breakdown of arrears" document, the outstanding arrears on this basis alone are reduced to £3,910.28. If the respondent made payments relating to demands after that date, he should be credited with those sums.

Major works consultation: external repairs and redecoration

45. During 2008, major works were undertaken under the heading external repairs and redecoration, which in the event included repairs to the roof, and work in connection with fire precautions, including emergency lighting. The consultation process and its relationship with the work actually undertaken is a matter of some complexity.

46. The notice of intention to carry out work (schedule 4, paragraph 8 of the Consultation Regulations) was served by the previous managing agents on 18 October 2005 (bundle page 274). The description of the works included therein was "external repairs and redecoration to all windows and cills ... and entrance doors, repairs to brickwork and rendering and minor repairs to guttering, and flashings ... works to the landlords electrical supply equipment". Observations were invited by 17 November 2005.

47. On 19 February 2008, the statement of estimates in relation to the proposed works was served (schedule 4, paragraph 11(5)(b) of the Consultation Regulations), referring to the 2005 notice of intention. The statement related that there had been no responses to the 2005 notice. The notice accompanying the statement complied with schedule 4, paragraph 11(10).

48. The evidence from Ms McBride was that the contractors who had submitted estimates were asked to revisit the estimates, and some revisions were indeed made. The chartered surveyor engaged by the applicant recommended a contractor called MGP Projects. On 1 April 2008, a notice to that effect was served (schedule 4, paragraph 12(1)).

49. Ms McBride's evidence was that there were some problems with the management of the contract, as it became apparent that the contractor had financial problems. This mean that for long periods, there was no work on site, until funds became available, and then work would recommence.

50. During the currency of the works, it became apparent that more substantial works were needed to the roof than had been anticipated. For the tribunal, Mr Coffey suggested that the roof element of the works may have been mismanaged. The tribunal brought to the attention of the parties that we may rely on the expertise of our survey member in relation to the quality of the management of the contract. Mr Coffey duly suggested that, although it was true that a full and complete survey of the roof could not be undertaken until scaffolding was in place (which occurred at the start of the contract), it would have possible to have made a much more accurate assessment of the works likely on the roof in advance of the contract being agreed. Ms McBride denied that this was the case.

51. In addition, a significant element of work was added to the contract after it started in relation to fire precautions. During this period, the applicant undertook a review of fire precautions in a number of properties in its portfolio. As a result, following a site visit on 4 February 2008, recommendations were made to improve provision in St Mary's Court. This work was, in effect, added to the contract undertaken by MGP Projects, the cost of which was eventually recouped in the service charge.

52. Mr Feldman did not seek to argue that the fire precaution work was separate. Rather, he argued that the expenditure was necessary and it was sensible to undertake it at the same time as the major works, as other work was also being done on the fabric of the building. If we concluded that the addition of this work meant that inadequate consultation had been carried out, he applied for retrospective dispensation from the consultation requirement under section 20ZA of the Act.

53. The addition of the fire precaution work to the repair and redecoration major works should have formed part of the consultation. It renders the consultation on the work as a whole partial and therefore does not fulfil the requirements of section 20 of the Act. This conclusion absolves us from coming to a conclusion as to whether there was mismanagement

of the roof element of the work, and, if there was, whether it had an effect on compliance with section 20.

54. However, we must allow Mr Feldman's application to dispense with the consultation requirements unless satisfied that the tenants were in fact prejudiced by the failure adequately to consult.

55. We cannot conclude that there was such prejudice. The respondent was unable to point to any specific prejudice apart from the fact of being denied the opportunity to give a view on the whole of the works contemplated. We note that there had been no responses to the initial consultation on 2005.

56. We consider that, in practical terms, the addition of the fire precaution works was sensible, and there has been no suggestion that the work actually undertaken was not well advised and appropriate.

57. The closest to prejudice that could be established relates to the length of time it took for the project as a whole to complete. We have Ms McBride's evidence that the project was not completed until "the early part of 2009" as a result of the unsatisfactory performance of the contractor. In principle, the choice of an unsatisfactory contractor could create prejudice for the tenants where an excessively long contract affected their amenity.

58. But to conclude that, had the consultation been properly conducted to include the fire precautions work, another, more satisfactory contractor would have been selected involves an exercise in speculation that the tribunal should not undertake. We have no basis for concluding that consultation would have resulted in another contractor being awarded the contract.

59. *Decision*: The consultation process under section 20 of the Act undertaken in connection with the repair and redecoration/fire precautions major works in 2008/2009 was flawed. However, there being no demonstrable prejudice to the tenants, the tribunal grants retrospective dispensation under section 20ZA.

Other major works: Door entry system

60. The tribunal raised the question of the replacement of the door entry system. An invoice dated 2 February 2009 charging £10,305.15 for the supply and installation of a video door entry system appeared in the bundle at page 359.

61. Ms McBride explained that it was apparent when the applicant took over the development, the entry phone system was leased, at a cost of approximately £6,000 a year. She gave evidence that a consultation

process had been undertaken, with a first notice of intention to undertake the work served on 22 August 2008 and a statement of estimates on 4 December 2008. No date for the statement on award of the contract was given.

62. The tribunal did not consider the question further in the light of the respondent's assertion that he had no points to raise in connection with the door entry system. We only note at this point that there could be no argument as to prejudice, even if there were technical defects in the consultation process.

Major works: lift

63. At some point in 2011, a meeting of residents agreed a three phase programme for "design, manufacture and replacement works" to the lift. The three phases were to end in each of the three service charge years ending on 25 December 2012, 2014 and 2016.

64. As a result of our decision on the failure of the applicant to demand service charges, this issue has become academic for current purposes. However, in case it is of assistance to either party in the future (we are aware that some at least of the relevant service charge may still be demanded following this decision), we will give a brief account of our thinking on the question.

65. A notice of intention to carry out work was, we were told, served on 14 October 2011, and a statement of estimates on 23 April 2012. No statement on award of contract was available, but a letter from the applicant's lift consultancy service letting the contract on their behalf was produced for the second day. That letter is dated 17 July 2012.

66. Although it appears that the original intention was that broadly similar sums would be expended in each phase, in her evidence Ms McBride told us that the decision had been taken to "front-load" the service charge in order to distribute the charge more evenly over all three phases. Thus, in respect of phase 1, £15,000 was budgeted for lift maintenance for the year to 24 December 2011, and £6,86.19 spent, and in the following year, £10,000 was budgeted, but £4,064.04 spent.

67. The applicant submits that the consultation process was properly conducted. Were it not, Mr Feldman would rely in relation to prejudice on the fact that the process was initiated at a meeting of the residents and had been agreed by them in substance. It is unnecessary for us to determine the issue, but had we come to consider prejudice, we would not have found a convincing argument that the tenants were prejudiced by whatever failure of consultation there might have been.

68. However, the more serious problem for the applicant is whether the "front-loading" of the service charge is permissible under the lease. The lease provides for the landlord to increase the amount payable as service charge where it reasonably anticipates that the sum provided for in the lease would not meet actual expenditure. Surpluses are applied to the accounts for the following year. We conclude that it must be the case that the *amount* of the higher charge in any one year must also be referable to the "reasonable anticipation" of the landlord. In other words, if the pre-condition for raising the contribution is reached (because of the landlord's reasonable anticipation that actual expenditure would not otherwise be covered), the landlord is not then free to impose a charge which bears no relationship to the reasonably anticipated level of expenditure. Rather, the increase is limited to that which is reasonably anticipated as necessary.

69. If this is so, then the deliberate over-charging of the service charge in one year in this way, even if the motive is to assist the tenants, is not countenanced by the lease.

The cost of reminder letters

70. The respondent objected to the increase in the cost of reminder letters from £25 in 2010 and 2011 to £120 in 2011 and £144 in 2012. In evidence, Ms McBride said the charges had been increased because £25 did not act as an appreciable deterrent to non- or slow payment. The actual cost of producing the letters by the mail-merge function in a word processing application was negligible.

71. We record the issue, but make no determination in the light of our decision in relation to service charge demands. Were we to have made a determination, we would have concluded that any charge over £25 per letter was excessive. Deterrence has no proper place in the reasonableness of such charges.

The effect of the payment from the mortgagee

72. On 20 February 2009, a payment was made to the benefit of the respondent's service charge of £12,972.24. The funds had been provided by the respondent's mortgagee. The respondent claimed that the payment was made in full and final settlement of his then indebtedness to the applicant, which was in excess of that sum.

73. Quite apart from issues of jurisdiction, the respondent was unable to provide any evidence of a written agreement to support his submission, and indeed he characterised it as an understanding rather than a formal agreement. We consider this wholly implausible.

74. *Decision*: We conclude that the payment of £12,972.24 on 20 February 2009 did not constitute a settlement of the respondent's then indebtedness to the applicant.

Section 21 and 22 of the Act

75. The respondent claimed that the applicant had failed to fulfil its duties under sections 21 and 22 of the Act.

76. The applicant's case was that sections 21 and 22 provided for regulations to be made about, respectively, the provision of statements of account and the inspection of documents by tenants. No such regulations have been made, so there was no provision of which the respondent could be in breach.

77. In any event, the applicant submits that the respondent has never made requests for the documents covered by the two sections; that the applicant has served various statements of service charge and accounts on the respondent; and that all such information is included in the bundles served for the purposes of the hearing.

78. Our reading of sections 21 and 22 differs from that of the respondent. Both Butterworth's Residential Landlord and Tenant Handbook, sixth edition, edited by James Driscoll, and Westlaw, show the Act as containing three section 21s and three section 22s. The first of each relates to the jurisdiction of England and Wales as a whole. The second two relate, respectively, to regulation making powers in relation to England and to Wales respectively (although of course formally extending, in both cases, to the jurisdiction as a whole). The applicant has reproduced the regulation-making power, but not the free-standing obligation. The Court of Appeal noted in *Di Marco v Morshead Mansions Ltd* [2014] EWCA Civ 96; [2014] 1 WLR 1799 that "sections 21 and 22 (or their predecessors) have been on the statute book for over 30 years, and apart from increases in the maximum fine from time to time, no change of substance has ever been made to them".

79. However, the principal point, as is foreshadowed by the quotation above, is that both sections are enforceable by a criminal sanction (section 25 of the Act), and not by a civil court, let alone by this tribunal. *Di Marco* is authority for the proposition that neither section is enforceable in a civil jurisdiction.

80. No doubt the same act or omission that constitutes a crime under sections 21 and 22 can also be relevant to a finding of reasonableness by the tribunal, but they do not themselves add anything.

81. *Decision*: whether the applicant has or has not breached its duties under sections 21 and 22 of the Act is not relevant to any question before the tribunal.

Legal fees

82. Two charges relate to legal fees, and are founded upon clause 2(l) of the lease, which allows recovery of expenses incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925.

83. The first, charged on 27 August 2008, for £674.63, relate to solicitors' fees for initial work in connection with county court proceedings in August 2008. Of this, £146.88 remains outstanding. The second, charged on 1 June 2009, related to work carried out by solicitors in May and June 2009 in preparation of a case before the Leasehold Valuation Tribunal. They amounted to £793.50.

84. It appears that both sets of proceedings related to allegations of noise nuisance involving the respondent's sub-tenants. Neither, it appears, resulted in effective hearings. Both parties agree that the nuisance ceased. The Leasehold Valuation Tribunal proceedings were for breach of covenant under Commonhold and Leasehold Reform Act 2002, section 168(4).

85. The question for the tribunal is whether these costs are properly recoverable under the lease. The respondent's argument in relation to them was linked to his argument as to the effect of the mortgagee's payment, dealt with at paragraphs 72 to 74 above. He has made no independent case that they are unreasonable on their merits; and we do not think that such a case could be made.

86. The clause in this lease is a member of a familiar family of such clauses. Most recently, the Upper Tribunal (Lands Chamber) has considered such clauses in *Barrett v Robinson* [2014] UKUT 0322 (LC), and in doing so defined a rather less extensive approach than was generally understood to be the effect of *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2011] EWCA Civ 1258; [2012] L&TR 4.

87. In that case, the Upper Tribunal said that:

> "such a clause is obviously capable of giving a landlord a contractual right to recover costs incurred in proceedings before ... the First-tier Tribunal, but whether in any particular case such an entitlement exists will depend on the language of the particular clause, on the existence of a breach of covenant and on the nature and circumstances of the proceedings."

88. Mr Feldman submitted that the circumstances of the instance case were readily distinguishable from those of the appellant in *Barrett v Robinson*. The applicant in that case was the tenant, not the landlord. She was, as a result of the decision of the first Leasehold Valuation Tribunal, the expenses of which formed the subject matter of the appeal, in credit on her service charge account, so was in no possible danger of forfeiture. Further, there was no evidence that forfeiture or the service of a section 146 order was, as a matter of fact, contemplated by the landlord.

89. Mr Feldman agreed that there was no express evidence that the applicant, as a matter of fact, contemplated forfeiture of the lease, or the service of a section 146 notice. But, he argued, the nature of the proceedings themselves made it inevitable that such proceedings must have been in the contemplation of the respondent. The proceedings were not for recovery of unpaid service charges (or the determination of liability to pay service charges at the instance of the tenant, as in *Barrett*). Rather, they were for a determination of a breach of a covenant not related to a service charge, under section 168. Whereas proceedings before the tribunal in relation to a service charge can, and frequently do, have as their object the payment of the debt, there could be no reason to seek a determination in relation to a nuisance clause other than, ultimately, to seek (or threaten) the service of a section 146 notice.

90. This is a persuasive argument where the clause in the lease refers to proceedings taken "in contemplation" of a section 146 order. The problem for Mr Feldman is that the clause in the respondent's lease is notably more restricted than that in Ms Barrett's. In the instant case, the clause covers only "expenses ... incurred by the lessor *incidental to the preparation and service* of a notice under section 146 ...". By contrast, Mrs Barrett's lease covered "costs charges and expenses ... incurred by the lessor *in or in contemplation of* any proceedings or the preparation of any notice under section 146 ..." (the Upper Tribunal found in that case that "any proceedings" in the clause was governed by the reference to section 146, and was not a general, open ended indemnity for costs relating to any legal action). The clause in the lease in *69 Marina* also refers specifically to expenses incurred "*in or in contemplation of proceedings* under section 146 or 147 ..."(emphasis added).

91. As the Deputy President made clear in *Barrett*, the question depends, in the first instance, on "the language of the particular clause". We agree with Mr Feldman that the service of a section 146 notice is the logical end point of proceedings that start with an application to the tribunal for a breach of a non-service charge covenant, in that it represents the ultimate mode of enforcement if a breach of such a covenant is found. There is a strong argument that, therefore, any such applicant must necessarily have a section 146 notice "in

contemplation", in that the landlord must have it in mind that the service of a section 146 may become necessary.

92. We do not accept, however, that an application in respect of a breach of covenant *is* the "preparation and service" of a section 146 order. Clearly, that refers to the drawing up and proper service of the notice itself.

93. The extent to which it refers to proceedings consequent on the service of the notice can be doubted. The Deputy President explained in *Barrett*:

> "The real purpose of a clause in the form of clause 4(14) [that in Ms Barrett's lease] can be seen from its concluding words: 'notwithstanding forfeiture is avoided otherwise than by relief granted by the court.' Where a forfeiture is avoided by relief granted by the court, the terms of relief reflect the principle that the landlord should be put in the position it would have been in but for the forfeiture ... . That principle will normally require that the tenant reimburse any costs incurred by the landlord in serving the required section 146 notice and in bringing the proceedings. However, the purpose of a notice under section 146(1) is to allow a tenant who is in breach of covenant the opportunity to remedy the breach. Where a breach has been remedied in reasonable time, the notice will have been complied with and the landlord will have no continuing cause of action, nor any reason to commence proceedings to forfeit the lease. The same landlord may nonetheless have incurred significant costs in the preparation of the notice itself. The object of a clause such as clause 4(14) is to give the landlord the contractual right to recoup the costs incurred in taking those preparatory steps".

94. It is clear from the Deputy President's treatment of the clause in that case that the construction of the clause must start with and concentrate on the activity directly described, the "preparation and service" of the notice.

95. The question for us, therefore, is how far does the phrase "incidental to" extend the reach of the clause? The core definition of "incidental" in the current context is given in the Oxford English Dictionary as "of a charge or expense: such as is incurred (in the execution of some plan or purpose) apart from the primary disbursements". The "plan or purpose" is the narrow one of the "preparation and service" of the section 146 notice. So incidental expenses are those incurred in the execution of preparation and service of a notice, apart from the primary disbursements.

96. It may perhaps be that the expenses of pursing proceedings for forfeiture following the service of the notice could come within the

ambit of "incidental" expenses – although the Deputy President's account of the "real purpose" of the clause does not require it, as the costs of that stage would be dealt with by the court considering the application.

97. But the word cannot be stretched to include proceedings before it is even possible to serve the section 146 notice. Nowadays, the service of such a notice is dependent on a breach of covenant being established under either section 81 of the Housing Act 1996 or under section 168 of the Commonhold and Leasehold Reform Act 2002, depending on the nature of the covenant. In both cases, the proceedings to establish breach are, or may be, substantial judicial exercises which constitute important elements in the regulatory system designed to protect the rights of tenants. It is a mischaracterisation to describe this major substantive decision making process as merely "incidental" to the preparation and service of the notice.

98. This conclusion can be contrasted with the extension to the core description of "preparation and service" of the notice by the phrase "in contemplation". In its relevant meaning, "contemplation" means "have in mind". Clearly, an applicant seeking to determine breach of covenant may very well actually have it in mind that he or she may subsequently need to prepare and serve a section 146 notice. An important point made in *Barrett* is that whether a party had service in mind is a matter of fact requiring to be established by evidence. So it was possible that Ms Robinson did, indeed, contemplate the service of a notice in *Barrett and Robinson*, but the factual nexus was such as to make it clear that she did not.

99. Thus "contemplating" service of a notice is capable of substantially extending the reach of a section 146 notice to include proceeding relating to breach (but whether it does or not is a matter of fact); whereas the inclusion of only things "incidental" to service is not (and that is so as a matter of language, not fact).

100. *Decision*: The sums charged in respect of legal proceedings (the arrears in respect of which are £940.38) were not payable under the lease. Any sums paid by the respondent on the basis that they were payable should be credited to him.

Ancillary applications

101. At the conclusion of the hearing, the applicant made an application for costs. After hearing the applicant and the respondent on the application, the tribunal asked the respondent if we wished to make an application that we order that the costs of these proceedings are not to be regarded as relevant costs for the purposes of a future service charge demand under section 20C of the Act. The respondent, once the nature of the application was explained to him, said that he did want to do so.

102. The tribunal directed that both parties could, within 14 days, submit written submissions on both applications. The tribunal declined to consider a further round of comments on those submissions by each party, however.

103. Written submissions were received from the applicant on 14 November and from the respondent on 19 November.

104. The determinations below reflect both oral and written submissions.

Costs

105. The applicant submitted that the tribunal should order the respondent to pay the applicants costs under rule 13 of the Procedure Rules.

106. Mr Feldman described as his central submission that the respondent had failed to articulate his position clearly or at all. It was, he said, only when the respondent was asked to respond during the course of the hearing that it became at all clear what he was seeking to submit. He described the respondent's first response as being of "embarrassing vagueness". The respondent's vagueness was compounded by the complete lack of evidence for some of his submissions. Mr Feldman specifically pointed to the lack of evidence of his submission in relation to the mortgagee's payment, and (appreciating that the tribunal was not considering the issue) in respect of set-off.

107. The tribunal asked Mr Feldman if it was his position that the respondent's conduct was incompetent or abusive. His response was that the respondent's approach had been so incompetent that it raised hopeless issues. In the context of unreasonable conduct in civil proceedings, he had raised issues that were so potentially hopeless that they were bound to fail. In doing so, he had significantly extended the hearing.

108. When asked by the tribunal if a litigant in person should be held to the same standard as a professional, Mr Feldman said that he should not. He declined to characterise the standard of competence that should be applied to a litigant in person, but invited the tribunal to conclude that the respondent had fallen below that standard.

109. The respondent's conduct had gone beyond incompetence and constituted *mala fides* in respect of his unhelpfulness in facilitating communication. He had refused to provide an email address and had insisted on service at the property, despite not living there and apparently having trouble collecting post. Mr Feldman said that he was not sure that this had had any bearing on the proceedings, but nonetheless it had been unhelpful and potentially vexatious.

110. He went on to suggest that Ms McBride's evidence that the respondent was the only one of 25 leaseholders who had significant arrears of service charge was relevant to the proceedings, because he had sought to resist everything.

111. In response, the respondent submitted that, as a litigant in person, his phraseology might not have been as precise as a professional, but he had tried to indicate his areas of concern. He contended that it was the applicant who had artificially inflated costs by taking proceedings in the county court, and he criticised the decision to initiate proceedings in Liverpool. He rejected the applicant's arguments in relation to service. He had, he said, received other post, including post from the tribunal, at the property address. Some of the costs had been caused by duplication of copying consequent on failed service, for which the applicant was responsible. He did not have an email address.

112. In its written submissions following the hearing, the applicant relied on counsel's oral submissions, which it amplified:

(i) Both the respondent's statement of case and his defence to the county court proceedings were "incoherent, vague and confusing".

(ii) Had the respondent properly pleaded his defence, considerable costs would have been saved.

(iii) The respondent had been uncooperative and difficult to communicate with.

(iv) The applicant had been put to expense by the respondent's applications to postpone (both refused) and to extend his deadline for service (agreed by the parties).

113. The applicant supplied with its written submissions a revised summary of costs, amounting to £20,337.40.

114. In his written submissions, the respondent in substance repeated his oral submissions. It was only the applicant, he stated, who had not understood his position. He characterised the applicant's conduct as "belligerent and obstructive", in particular in taking proceedings in the county court. He submitted that costs had been increased by the failure of the respondent to engage in constructive dialogue.

115. He made further submissions, which in effect amounted to substantive submissions on the issues before the tribunal. We have accordingly taken no account of these submissions, our direction in relation to

further written submissions being limited to costs and the section 20C application.

116. Before considering the substance of the applicant's application, we note that the respondent has enjoyed a significant measure of success before us. In respect of the issue relating to service charge notices, he asserted that service charge notices had not been served on him. In advance of the hearing, it is difficult to see what more he could have said. The key piece of evidence that led us to conclude that service charge notices had not been served was the oral evidence of Ms McBride to the effect that it was standard practice to put a stop on accounts where two warning letters had been issued. That was a factual matter that he could not have anticipated.

117. The second issue on which he was successful was whether the costs of the previous litigation could be recovered through the service charge. Our decision on that was based on a consideration of (very recent) case law and on the construction of the clause in the lease. These are matters we would not expect to be within the knowledge of any litigant in person.

118. The default rule for the tribunal is not to shift costs. Rule 13 of the Procedure Rules confers on the tribunal a broader discretion to award costs than was previously the case. However, costs are still only to be awarded on effectively a penal basis. Rule 13 provides:

"(1) The Tribunal may make an order in respect of costs only–

(a) ...

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in–

(i) ...

(ii) a residential property case, ..."

119. A person acts "unreasonably" in this context not merely if their conduct is inefficient or thoughtless, but, in the words of Sir Thomas Bingham MR, as he then was, in *Ridehalgh v Horsfield* [1994] 3 All ER 848, if it is "conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case." Similarly, in *Halliard Property Company Ltd v Belmonth Hall and Elm Court RTM Company Ltd*, the Lands Tribunal considered Commonhold and Leasehold Reform Act 2002, schedule 12, paragraph 10, where a similar costs jurisdiction is conditional on a party having "acted frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably". The Tribunal found that the first five adverbs describe modes of being

"unreasonable"; and "otherwise unreasonably" was to be construed as describing conduct of the same kind.

120. If follows from this that success or failure before the tribunal is not determinative (either way) of the outcome of a costs application. The fact that both parties have been partially successful before the tribunal does, however, have some relevance in providing the context to the application.

121. Mr Feldman's central submission was that the applicant failed to adequately express his defence. We find against this submission on two counts.

122. First, we do not find that the respondent's conduct in seeking to outline his position can be described as "vexatious" or "designed to harass the other side", nor frivolous, abusive or disruptive. It was not prompted by an improper motive or by an excess of zeal in promoting his case. Rather, the failings in his expression were, we consider, clearly attributable to a lack of knowledge and skill, rather than being ill-motivated. The service of a statement of case by a solicitor in similar terms would, no doubt, be so incompetent as to invite the conclusion that, in reality, it was a deliberate attempt to abuse our process, or otherwise fell under one of the other conventional characterisations. The same does not follow as a matter of necessity for a litigant in person.

123. Secondly, the respondent's statement of case *was* confusingly written and difficult to understand. The same was true of other documents of his, such as his comments on the applicant's further comments received on the second hearing day. It was clear to us that the respondent, while reasonably articulate orally, was not adept at expressing himself in writing. However, at the opening of the first day's hearing, the tribunal had been able to distil from his case statement a number of issues which required consideration, and it was these, when put to the parties, that structured the hearing. For the applicant, Mr Feldman charged us with having taken a "generous" approach to the respondent's case statement.

124. The tribunal is emphatically not an advocate for a litigant in person, and will not aim to substitute for his or her lack of legal training by moulding their case as a legal advisor might. However, the tribunal will be astute to discern a proper issue from the ill-expressed writings of an untrained, and often unsophisticated, litigant in person, where it can properly do so.

125. We do not suggest that a professionally advised party is under an equivalent duty. However, if such a party chooses to take an ungenerous approach, to adopt Mr Feldman's terminology, to the case as put by a litigant in person, it cannot expect to rely on accusations of

vagueness or unclarity in making an application for costs on the basis of unreasonable conduct by the unrepresented party.

126. The one area where it is at least arguable that the respondent's conduct has been unreasonable in the necessary sense is in his insistence on service at the property, despite the evident difficulties that has created. We do not accept that the applicant has improperly failed to effect service, as is apparently implied by certain of the respondent's statements.

127. The respondent's conduct in this respect does appear to have been unhelpful. The respondent has not advanced a cogent reason for not accepting service at wherever he is in fact living, or at another more convenient address. However, we accept his evidence that he did seek to check the post at the property from time to time, and did receive post from the tribunal at that address. In the circumstances, we are not prepared to find that his conduct was deliberately obstructive or abusive, rather than inefficient.

128. In any event, both applications to postpone were refused, and the application to extend time for the respondent to serve his case statement was agreed. As Mr Feldman volunteered in his oral submissions, it is unlikely that the failures of the respondent to receive material served at the address had had any effect on the hearing. Any additional expense incurred by the applicant is, accordingly, likely to be marginal in the context of the case as a whole.

129. *Decision*: The applicant's application for costs under rule 13 of the Procedure Regulations is refused.

Section 20C application

130. In written submissions, the applicant first objects to the application on the grounds of procedural irregularity, referring to Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003, regulation 5(1).

131. Secondly, the applicant seeks to persuade the tribunal that it would not be just an equitable to make such an order on general principles, and in the light of the conduct of the respondent.

132. In particular, the appellant relies on:

(i) The primary circumstance where a section 20C application would be granted is where a landlord is unsuccessful, but could otherwise use the service charge to recoup its costs (*Iperion Investment Corporation v Boardwalk House Residents Ltd* [1995] 2 EGLR 47).

(ii) There is no necessary expectation of an order, even if a landlord is unsuccessful; and it requires some unusual circumstance to justify an order here a tenant is unsuccessful (*Tenants of Langford Court v Doren Limited* (LRX/37/2000); *Schilling v Canary Riverside Development Limited* (LRX/26/2005); and

(iii) The matters relied on in respect of the respondent's conduct in the cost application are again relied on to resist the application.

133. The applicant's procedural challenge fails. The regulations mentioned by the applicant have been superseded by the Procedure Rules, having been revoked by the Transfer of Tribunal Functions Order 2013, schedule 2(1), paragraph 27. The submission was in any event misconceived: the word "application" in regulation 5 means applications listed in schedule 1, which does not include section 20C (see Regulation 2). The list of "applications" refers to originating substantive proceedings, such as applications under sections 27A or 20ZA. The slightly differently worded definition in paragraph 1(3) of the Procedure Rules is to similar effect, and governs paragraph 26. We consider that our case management powers are sufficient to allow us to direct, as we did, written submissions on the question following an oral application; and in substance that afforded the applicant an appropriate opportunity to make its case.

134. We agree with the applicant's submission that these proceedings were clearly undertaken with forfeiture "in contemplation" by the applicant. However, our determination in respect of the recoverability of the costs of the earlier proceedings is based on a construction of the lease that would preclude the use of clause 2(l) to recover the costs of these proceedings. They may be "in contemplation" of forfeiture, but they are not "incidental to the preparation and service of a notice under section 146".

135. The applicant submits that it may, nonetheless, properly charge the costs of proceedings to the service charge. It relies on the catch-all sub-clause (e) added at the end of clause 4(3), the landlord's covenant to repair and maintain etc, for which recover may be made through the service charge under clause 2(e)(1). That sub-clause requires or mandates the lessor to "provide such other services for the benefit of the building or tenants ... as the lessor shall from time to time consider necessary".

136. For the purposes of the section 20C application, we assume, without deciding, that clause 4(3)(e) is sufficiently wide to allow recovery of the costs of these proceedings. Our reason for taking this course is set out below.

137. We do not accept that the effect of the cases cited by the applicant is to create even a presumption in law as to the outcome depending on the success or failure of the parties. But even if that were the case, the extent of success of each party in these proceedings is reasonably balanced, so any such presumption would not assist.

138. However, we have concluded that, taken overall, it would not be just and equitable in the circumstances of the case to make an order.

139. The applicant has not behaved unreasonably in taking these proceedings. It may have been undone in some respects by its own management practices (the stop on demands) or by the inadequacies of its lease (the drafting of the section 146 clause). Nevertheless, the respondent has not paid a substantial sum in the form of service charge reasonably payable by him, and the applicant was not unreasonable in believing that he had not paid a larger sum still.

140. The reasonableness of the applicant's conduct is not necessarily determinative of an application under section 20C. In this case, however, this consideration leads us to the conclusion that the applicant should not be shut out of attempting to recover what are capable of being proper costs associated with the management of the development.

141. We are conscious that, if the applicant does seek to recover the costs of these proceedings, the respondent, or another tenant or tenants upon whom the service charge would fall, may challenge that in an application to this tribunal under section 27A of the Act. We consider it would be clearly more appropriate for a tribunal considering that challenge to determine whether as a matter of construction the lease allows such recovery.

142. It may also be for such a tribunal to consider what may be a tension between our costs jurisdiction and the review of the recovery of costs through the general service charge (or, in another case, the section 146 notice clause). On the face of it, a costs award may be reduced on the basis that it is disproportionate, even if the costs were reasonably and necessarily incurred. Proportionality, however, is not engaged, at least in the same way, by the tribunal's jurisdiction to review a service charge under section 27A. That raises at least the prospect that it might turn out to be better for a tenant that a costs order is made against him or her than that he or she prevails in resisting a costs order but fails to resist the collection of the expenses under the lease.

143. *Decision*: The respondent's application for an order under section 20C if the Act is refused.

Name: Tribunal Judge Richard Percival **Date:** 22 December 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).