



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : **LON/00BH/LSC/2018/0026**

Property : **84 Howard Road, London E17 4SQ**

Applicant : **Ms C King**

Representative : **Mr Thorowgood of counsel**

Respondents : **(1) Alan Matthey Trust Corporation Ltd
(2) Ms S Todd and Mr W Breese**

Representative : **Ms Trisha Cherkas, legal assistant**

Type of Application : **For the determination of the
reasonableness of and the liability to pay
a service charge**

Tribunal Members : **Tribunal Judge Prof R Percival
Mr P S Roberts DipArch RIBA**

**Date and venue of
Hearing** : **24 July 2018
10 Alfred Place, London WC1E 7LR**

Date of Decision : **19 September 2018**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A(1) and (3) of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to her liability to pay a service charge in respect of the repair/rebuilding of an external staircase. The relevant costs have been in part demanded as a service charge (in respect of surveyor’s fees) and in part are intended to be demanded.
2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. In this decision, we refer to the building as a whole, with its garden, as “the property”. The property is a mid-terrace building comprising two maisonettes, one on the first floor (number 82) and the other on the ground floor (number 84). Both have street level front doors. The internal staircase serving number 82 runs from the street level door to the accommodation on the first floor.
4. The back garden of the property is divided into two sections. The part nearer the building is used by the leaseholder of number 84, the applicant. The rear part of the garden is used by the leaseholders of number 82. This section is accessed from an external staircase. The responsibility for the repair or renewal of the staircase forms the subject matter of the dispute.
5. The staircase descends from an external landing which opens onto a door in the kitchen of number 82. The landing is supported on one side by the wall forming the boundary with the neighbouring house, and on the other by a steel post.
6. The first respondent holds the freehold of the building. The second respondents are the leaseholders of number 82.

The hearing and the issues

Preliminary

7. The applicant was represented by Mr Thorowgood of counsel. The first respondent was represented by Ms T Cherkas, legal assistant. The second respondents represented themselves.
8. The only issue before the Tribunal related to the obligation to repair or renew the rear external staircase. At the start of the hearing the parties identified the relevant questions for determination as follows:

- (i) Whether, on a proper construction of the lease, the repair or renewal of the rear staircase is the responsibility of the leaseholder of number 82, or chargeable to the service charge (the construction issue);
 - (ii) Whether an estoppel by convention arises such as to prevent the charging of the repair or renewal of the staircase to the service charge payable by the applicant (the estoppel issue); and
 - (iii) Whether an order of the Tribunal under section 20ZA of the 1985 Act dispensing with the requirements for consultation under section 20 of the Act was effective in respect of the renewal work undertaken, and if not, what prejudice had been suffered by the applicant (the section 20 issue).
9. With the exception of one issue, the evidence was uncontested. We heard evidence from the applicant and from Mr Todd, one of the second respondents.

The leases and the agreement

10. Before turning to the issues between the parties, it is convenient to set out the history of the leases and an agreement between the leaseholders relating to the garden, and to set out the relevant terms.
11. The applicant's interest originates in a lease granted in 1971 for 99 years (from 1970). She acquired the leasehold interest initially, as a joint lessee, in 1988, and, since 1995, as sole proprietor.
12. The second respondents acquired the leasehold interest of number 82 in July 2016. The leasehold interest derived from a lease dated 1981. It was extended by a deed of variation on acquisition by the second respondents.
13. On both original lease plans, the garden is marked as "shared garden". However, it was agreed that the lease of number 84 did not include any rights in relation to the garden.
14. By contrast, the 1981 lease of number 82 included a right to share the garden with the lessees or occupiers of number 84.
15. In 1984, a couple called the Tomlinsons held both the lease of number 82 and the freehold of the entire property. By a deed of variation dated 14 June 1984, the Tomlinsons, as freeholders, agreed to vary the lease of number 84 to include a right to share the garden with the lessees of number 82, in the same terms as that in the lease of number 82.

16. On the same date, the Tomlinsons, as lessees of number 82, agreed with the then lessee of number 84 that the use of the garden would be divided as set out in paragraph 5 above.
17. Both leases (as varied) are in largely similar terms. At clause 2 of the lease of number 84, it is declared to be agreed
“that all interior walls which are common to the demised premises and the upper maisonette in the building including particularly the walls to the entrance hall and staircases leading to the upper maisonette shall be party structures severed medially”
18. The lease of number 82 includes the same provision, except that, in both places in which it appears, the word “upper” is replaced with the word “lower”.
19. In both leases, the lessee’s repairing covenant is in these terms (clause 3(3):
“At all times throughout the said term keep the demised premises and every part thereof and all land fixtures and fittings therein and all additions thereto in good tenable repair including the renewal and replacement of all worn and damaged parts
AND IT IS HEREBY AGREED AND DECLARED:
(i) there is included as repairable by the lessee ...
(ii) there is excluded from this covenant as repairable by the lessee (a) all the main boundary walls of the building including the roofs foundations gutters and rainwater pipes
(b) the external parts of the maisonette (other than windows and the glass therein and the entrance door of the demised premises).”
20. Provision is made in clause 3(15) for a service charge of one half of the lessor’s expenses in (relevantly) discharging its covenants in clauses 4(4).
21. By clause 4(4) the lessor covenants
“... to maintain repair and keep in good and substantial repair order and condition the building, together with the entrance forecourt of the property the boundary walls, sewers, drains, pipes ducts and conduits serving the same (other than those parts for which the Lessee under this lease is responsible) and to replace all worn or damaged parts thereof.”
22. In both leases, the demise is described in the first schedule in similar terms. In each, the flats are distinguished by reference to the floor on which they are situated, the lease plan only identifying the building as a

whole. Again in each case, the schedule sets out the division between the two maisonettes in similar terms, such differences as there are in wording reflecting their respective positions. Thus for number 82, the demise is:

“ ... from and including the floors and the joists upon which the floors rest (but excluding the ceiling plaster (if any) of the flat below) and including the plaster on the internal surfaces of the external walls and further the internal walls dividing the rooms and parts of the flat and one half (severed vertically) of the internal walls of the flat dividing the flat from the lower flat in the building know as 84 Howard Road aforesaid or common parts of the building.”

23. In fact, the evidence was that there were no common parts within the structure of the building itself. While the drafting of clause 3(3) might be thought to suggest that there was a common internal entrance hall and staircase to number 82, we were told that the staircase is enclosed within number 82, and both parties considered that the internal staircase behind the street door was part of the demise of number 82.
24. We note that in the version of clause 3(3) for number 82, the reference is to “staircases leading to the lower maisonette”, which does not appear to reflect the actual layout of the property. Similarly, the version of the first schedule for number 84 appears to have simply substituted “above” for “below” in its reference to the ceiling plaster, which does not appear to have any real application.
25. Finally, in both leases the second schedule sets out rights and benefits granted to the lessee. Following the variation in 1984, both leases specify at paragraph 6
“The right to share the rear garden of the property with the lessees occupiers or tenants of [the other maisonette]”.
26. The agreement of 1984 between the lessees states that:
“NOW IT IS HEREBY AGREED between the parties hereto to the intent that such agreement shall so far as possible enure for the benefit of their respective successors in title that
 - (i) the Upper Lessees shall be entitled to the exclusive use of the rear part of the garden ... and that
 - (ii) the Lower Lessee shall be entitled to the exclusive use of [the rear part] subject to the right of access in favour of the Upper Lessees to the rear part of the garden over the staircase leading from the first floor flat and the right to enter the [rear part] for the purposes only of repair and maintenance of the said staircase”.

The facts giving rise to the application

27. In April 2017, chartered surveyors reported that the concrete slab which formed the external landing from which the rear staircase descended to the garden was subject to severe cracking and distortion, and the wooden steps of the staircase itself were rotten and beyond repair.
28. The respondent applied to the Tribunal in May for a dispensation under section 20ZA of the 1985 Act from the consultation requirements imposed by section 20 of that Act in respect of the replacement of both slab and stairs. The application was granted on the papers (as it happens, by the judge in the constitution of the Tribunal considering this application) on 3 June 2017. The Tribunal's decision noted that the applicant in these proceedings, the respondent at that time, submitted that she did not object to the work being undertaken, but contested (as now) her responsibility to contribute to the expense incurred under the service charge.
29. At the time of the dispensation proceedings, it appears that the plan was that the replacement stairs would be made of hardwood (the previous stairs having been softwood).
30. It appears that the staircase, including the concrete landing, was subsequently demolished. The staircase was replaced in March 2018, but the new staircase was of metal construction, not hardwood.
31. The only evidence as to how long the staircase had been in place was that of the applicant, who said that it had been there when she first acquired a leasehold interest (initially as a joint lessee) in 1988.

The construction issue

32. Mr Thorowgood argued for the applicant that, as a matter of construction of the lease, the external staircase was not within the repairing covenant of the first respondent, and accordingly not chargeable to the service charge. Rather, repairing responsibility lay with the second respondents.
33. The external staircase, Mr Thorowgood submitted, fell within clause 3(3) of the lease to number 82, and it was therefore the responsibility of the second respondents to repair or renew the staircase. Accordingly, it fell outside the respondent's repairing obligations under clause 4(4), in the light of the proviso excluding to repairs that were the responsibility of a lessee.
34. Specifically, Mr Thorowgood submitted that, in the terms of clause 3(3), while the staircase was not part of the core definition of the demise, it was an "addition thereto".

35. In support of his argument, Mr Thorowgood also relied on the provision in the lessees' 1984 agreement in respect of the garden. That agreement limited the exclusive use of the rear part of the garden by the lessee of number 84 so as to allow the lessees of number 82 to enter that part of the garden for the purpose of repair and maintenance of the staircase.
36. Ms Cherkas submitted that the staircase was a common part, and fell within the respondent's repairing covenant. She observed that an alteration, such as the addition of a staircase, would have required the consent of the freeholder, and there was no record of such consent being granted.
37. We prefer Ms Cherkas' submissions.
38. Initially, Mr Thorowgood had referred to the reference in clause 2 to "staircases", and submitted that the use of the plural was merely an anachronistic form of words, and the reference there was to the internal staircase. At this point in the hearing, it had not become clear that the internal staircase serving number 82 was contained within the front door of that maisonette and was treated by all parties as being part of the demise. In answer, Ms Cherkas submitted that the plural was deliberate and included a reference to the rear, external, staircase.
39. The parties' advocates did not return to the issue once the state of affairs in relation to the internal stairs became apparent. The terms of clause 2 are such as to indicate that the "staircases" mentioned therein might be thought to be common parts. If we were to place emphasis on this clause, therefore, it would provide a powerful argument for the respondent.
40. We are, however, reluctant to do so. In the first instance, the clause as a whole does not, as we have observed above, appear to be well matched to the actual layout of the flat – in addition to the "staircases" issue, there is no common entrance hall, as the clause equally might be thought to assume. Secondly, it is not immediately obvious how the specific provision in clause 2 – that the "walls ... to the staircase ... shall be party structures severed medially" – can sensibly be made to apply to the external staircase, which is not contained within walls at all. Finally, we are not called upon to decide whether the understanding of the parties that the internal staircase is not part of the common parts is correct on a strict reading of the lease, but the point may be arguable.
41. Accordingly, we consider that the reference to "staircases" in clause 2 may provide some support for the first respondent's argument, but only to a limited degree.

42. More importantly, we consider that read as a whole, the lease clearly delineates the demise of the two maisonettes as the inner skin of that part of the building which contains each of the maisonettes. The description of that part, in turn, uses the floor upon which the maisonette's living accommodation is located as the fundamental criterion.
43. So read, the addition, in the lessee's repairing covenant (clause 3(3)) of "and all land fixtures and fittings therein and additions thereto" must be read as referring to matters ancillary to the core demise.
44. Mr Thorowgood argues that the rear staircase is just such a matter. We do not, however, find this characterisation plausible. If "addition" is to be given a temporal aspect – that it refers to something added to the core demise after the grant – then the applicant would have to provide evidence that it had, indeed, been added since 1981. There was no such evidence (including, as Ms Cherkas pointed out, any evidence of consent). Indeed, the applicant's evidence was that it was in place in 1988.
45. If, however, it is said that an "addition" to the core demise is to be understood only spatially – that is, that it is added in a physical or structural sense – then we find it unlikely that the parties would not have made express and specific reference to it at the time of the grant. The inclusion of a staircase from first floor to garden in a demise and in an associated repairing obligation is not a minor matter. It is not something we consider the parties would expect to be included within the second item of a sweeping-up provision within an otherwise specific repairing obligation.
46. We are not persuaded by Mr Thorowgood's argument from the lessees' agreement of 1984. An agreement between lessees cannot affect the construction of a repairing obligation in a lease between a lessee and the lessor.
47. *Decision:* The lease is to be construed as not demising the rear staircase to the lessees of number 82, whether as an "addition" to the maisonette or otherwise.

The estoppel issue

48. Mr Thorowgood argued that, if he was not successful in respect of the construction of the lease, an estoppel by convention nonetheless arose, based on the previous history of dealing with the repair and maintenance of the external staircase.
49. The evidence as to previous dealing was given by the applicant.

50. It was the applicant's evidence that she had always considered that the maintenance of their respective parts of the garden were the responsibility of the lessees of numbers 82 and 84, and that this included the external staircase.
51. The effect of her evidence was that this understanding was in fact shared with at least one previous lessee of number 82.
52. Specifically, in 1996 or 1997, the then lessee of number 82, a Ms Emanuel, replaced the staircase. She told the applicant that she was going to replace it, and paid for it to be done. The applicant was not asked to contribute to the expense, and it was her understanding that this reflected Ms Emanuel's responsibility. She said that she had given Ms Emanuel permission to come onto her land to undertake the necessary work. She gave Ms Emanuel a key.
53. The applicant had fenced the left hand side, Northern boundary of her part of the garden in the late 1980s, and replaced this fence when it blew down in 2011. In 2015, she had a picket fence installed between her part of the garden and that in the use of number 82. She paid for these.
54. The applicant had also painted the exterior of her flat and the pillar holding up the landing on a number of occasions. When asked why she painted the pillar in cross-examination by Ms Cherkas, she said that she did not know who the lessees were at a time, the maisonette being let to sub-tenants. She said she was not responsible for various things, but did the things that needed doing.
55. In re-examination, she said she had not contacted the then freeholder because it was a job that needed doing and it was too much to go through the freeholder. She also said that it was her responsibility to do it. She added that because her land was enclosed, she took responsibility for things that were perhaps in common.
56. The only factual dispute on the evidence was in relation to what the applicant had told Ms Todd at or before the time they purchased the leasehold interest in number 82.
57. The applicant said that at some point Ms Todd asked her who was responsible for the staircase, and she said she thought that they – the lessees of number 82 – were. She said that she told her that previous owners had maintained it.
58. Ms Todd's evidence was that before completion on the purchase, when it appears she had access to the flat, she had a conversation with the applicant during the course of which she told her that her solicitors had told her that each flat had to pay half of the cost of repair of the

staircase. She also reiterated her understanding when arrangements were made by the first respondent for the original surveyor's inspection.

59. Mr Thorowgood put it to her in cross-examination that there had been a prior meeting, before the second respondents had exchanged contracts, at which the applicant said that repair was understood to be the responsibility of the lessee. She said at that meeting there was a discussion about the trees and stairs but nothing about repairing the stairs.
60. Mr Thorowgood provided the Tribunal with an extract from the 33rd edition of Snell's Equity, paragraphs 12-006 to 20-016. He drew our attention to the statement of the doctrine of estoppel by convention by Lord Steyn in *Republic of India v India Steamship Co Ltd* ("*The Indian Endurance and the Indian Grace*") [1998] AC 878, 913-914, reproduced at paragraph 12-012:

"[A]n estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. It is not enough that each of the two parties acts on an assumption not communicated to the other. But ... a concluded agreement is not a requirement."

61. The interpretation of the 1984 agreement between the parties was not clear, he argued, and so it was necessary to look at how the parties understood it.
62. Arguing from the terms of paragraph 12-014 in Snell, Mr Thorowgood submitted that not only was there a common understanding between the parties, but that their conducts was such that it had "crossed the line" from a mere common understanding to an agreement or convention by which the parties regulated their dealings.
63. Mr Thorowgood argued that the 1984 agreement was effective to bind the parties' successors in title. We did not hear developed argument on this issue.
64. Ms Cherkas submitted that the 1984 agreement was one between the lessees. The first respondent could not rely on it in determining who was liable for the service charge under the lease.
65. For the second respondents, Mr Breese relied on correspondence at the time that they acquired their leasehold from the first respondent's

solicitors, that they were not prepared to (relevantly) vary the terms of the lease. The second respondents had asked that there be a reference to the external staircase in the first schedule, which the first respondent declined on the basis that it was not mentioned in the lease and would increase the demise. Mr Breese noted that the second respondents were not around when the estoppel was said to have arisen.

66. We reject Mr Thorowgood's submissions.
67. The agreement in 1984 was one between the two lessees. The leases (by that time) granted both lessees the right to share use of the garden. The purpose of the agreement was to allocate exclusive use of the garden between the two lessees to their mutual advantage. The lessor was not a party to the agreement, as is made clear by the preamble, which describes the parties as "the owners of the first floor flat known as 82 Howard Road by virtue of a lease dated 14th of January 1981" and "the owner of the ground floor flat known as 84 Howard Road by virtue of a lease dated 1st of November 1971". As it happens, the lessee of number 82 at the time also owned the freehold, and the garden sharing agreement could have been accomplished in a way which involved the freeholder as a party. But it was not.
68. Whatever the basis upon which the relations of the parties to the 1984 agreement are to be determined, that agreement cannot extinguish the rights and obligations of the lessor under both leases. We have found that on the true construction of the lease, the external staircase is a common part subject to the lessor's repairing obligations. This is so whether or not an estoppel by convention arises out of the lessees' agreement, and it is not necessary for us to find whether the estoppel does or does not arise on the facts of the case.
69. The jurisdiction of the Tribunal under section 27A of the 1985 Act is to determine whether a service charge is payable. Mr Thorowgood argued that that jurisdiction is wide enough to allow us to determine that no service charge is payable by the applicant, because the second respondent is estopped from denying sole responsibility for the repair of the staircase vis a vis the applicant. To decide otherwise would be, he said, formalistic.
70. We disagree. Mr Thorowgood's submission elides two distinct questions. One question is the position in respect of the service charge. On our understanding of the position of the first respondent vis a vis, individually, the applicant and the second respondent under the leases, a service charge is payable by both of them in respect of the repair or replacement of the external staircase.
71. The second question is as to the legal relations between the two lessees as lessees, based on the agreement between them (or their predecessors in title) in 1984, which would include the question of whether an

estoppel by convention arises. That is not a question which falls within the jurisdiction of the Tribunal.

72. We make this finding on the basis of the legal analysis set out above. In her submissions on the issue, Ms Cherkas also made the point that it would create great difficulties for lessors if there were a requirement on them to determine private law issues between lessees in assessing the amount payable under a service charge. We might add that the expense of investigating such issues would also in many cases fall on lessees.
73. We consider this to provide a powerful policy argument against the incorporation of such issues in the jurisdiction under section 27A. If, contrary to our primary finding, there is jurisdiction to do so, we would conclude that this consideration would be decisive in relation to any discretion that the Tribunal might have as to whether to exercise such a jurisdiction.
74. *Decision:* The service charge in respect of the replacement of the external staircase is payable by the applicant in the proportion set out in the lease. This is so regardless of whether an estoppel by convention arises between the two lessees, the applicant and the second respondent, a question which it is not within the jurisdiction of the Tribunal to determine.
75. For completeness sake, we should briefly mention one other issue. The description of issues set out in paragraph 8 above was agreed with the parties at the commencement of the hearing. In his amended statement of case, Mr Thorowgood had also submitted that a term should be implied into the 1984 agreement to the effect that the second respondent was responsible for the repair and maintenance of the staircase. Although he did not argue the point, Mr Thorowgood briefly mentioned the issue during his submissions in respect of the estoppel issue. If the issue was live before us, it falls for the same reasons as the estoppel issue – it relates to the relations of lessee to lessee rather than the applicant and the first respondent. In addition, had the matter been fully argued, we anticipate that it would have been difficult for Mr Thorowgood to satisfy the Tribunal that such an implication would have been necessary for the agreement to have been workable.

The section 20 issue

76. Mr Thorowgood argued that the dispensation from the consultation requirements in section 20 of the 1985 Act was not effective, in the light of the delays in undertaking the work and changes to the specification of the replacement staircase (see paragraphs 28 to 30 above).
77. We consider that the dispensation was effective at the time it was made and its effect has not been overcome by subsequent events.

78. In the first place, as to the urgency point, by its nature, dispensation is forward looking. Dispensation is frequently granted, as in this case, in part because of the apparent urgency of the work said to be necessary. But once a dispensation has been granted, the obligations in section 20 are removed from the point of grant. The fact – if it is a fact - that the matter is not treated as sufficiently urgent by the applicant for dispensation, cannot in law invalidate the initial dispensation. It may be that, depending on the facts, the tenants in such a situation have other remedies, but turning back the clock on the dispensation decision is not one of them. As it happens, in this case, it is not argued that the applicant in these proceedings was adversely affected by such delay as was evident here.
79. Secondly, we accept that in principle it is possible for the works in respect of which dispensation is granted to be so different from those actually carried out that the initial dispensation does not apply to them. On this hypothesis, on a proper analysis the works in respect of which dispensation was granted would never have been carried out, and a further application for dispensation should have been made for the different works that were in fact done (or a section 20 consultation should have been conducted).
80. However, we do not consider that the differences between the specification indicated at the time of the dispensation proceedings comes anywhere near fitting this hypothesis. To change the specification of a staircase from hardwood to metal manufacture is evidently not a fundamental difference in kind.
81. In the result, we conclude that the 2017 dispensation was effective and should not be considered void or retrospectively overturned.
82. Had we concluded otherwise, the respondent would have applied for retrospective dispensation, which we would have been bound to grant, on conditions if the applicant could demonstrate prejudice: *Daejan Investments Ltd v Benson and others* [2013] UKSC 14; [2013] 1 WLR 854.
83. We accordingly considered submissions as to prejudice. In doing so, the applicant identified two bases. One was that the applicant would have sought changes to the design to mitigate the effect of the staircase on her use of the garden (some accommodation was made, it appears, but she would have argued for changes to the dimensions of the landing, Mr Thorowgood contended). We note that this was not an issue raised during the dispensation proceedings. We say no more about it.
84. The second point, however, was that there was a small gap between the landing at the top of the stairs and the wall it was bolted to, as a result of which rain splattered onto the applicant's walls and windows below. The first respondent appeared to accept that some adjustment to deal

with this problem could reasonably be made, in the form either of the attachment of a metal lip or the use of an appropriate sealant.

85. As is evident from our conclusions above, the question of dispensation on terms relating to prejudice is not live. However, this matter we consider could properly be raised as a matter of the reasonableness of the quality of work within the section 27A jurisdiction, unrelated to dispensation.
86. So considered, we conclude that it would be reasonable for the service charge payable by the applicant relating to the external stairs to be reduced by a sum of £75 to reflect the defect. It will, of course, be open to the parties to agree that the first respondent should rectify the defect rather than reduce the service charge.
87. *Decision:* The dispensation from the obligation to consult under section 20 of the 1985 Act granted under section 20ZA of the same Act on 3 June 2018 was effective.
88. Considered as a submission under section 27A as to the reasonableness of the service charge, the service charge payable by the applicant is reduced by the sum of £75 in relation to the failure to provide a lip or seal between the landing of the external staircase and the wall.

Applications under section 20C of the 1985 Act and Commonhold and Leasehold Reform Act 2002, schedule 11 paragraph 5A

89. The Applicant applied for an order under section 20C of the 1985 Act. The first respondent gave an assurance that it did not intend to charge the costs of the proceedings to the service charge, and did not object to the making of an order. To secure that assurance, we make the order.
90. In her application, the applicant also indicated that she was making an application under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002, for a similar order in relation to administration charges. This was not expressly raised orally at the hearing, but remains before the Tribunal. While the first respondent's assurance was given in the context of section 20C, there is no reason to suppose that it was not intended also to cover recovery under an administration charge. We accordingly make an order under both provisions.
91. *Decision:* It is ordered under section 20C of the 1985 Act and under Commonhold and Leasehold Reform Act 2002, schedule 11 paragraph 5A that the costs incurred in connection with these proceedings are not to be taken into account in determining the amount of any service

charge payable by the applicant, and extinguishing any administration charge relating to those costs.

Name: Tribunal Judge Prof Richard Percival **Date:** 19 September 2018

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).