

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – compliance with statutory requirements as to contents of demands – entitlement of RTM company to recover charges – entitlement to recover costs of previous proceedings as costs of “other services” – procedural unfairness and inappropriate reliance on history of non-payment as grounds for order for payment of costs under rule 13(1)(b) – s.20C, Landlord and Tenant Act 1985 – appeal allowed in part

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

BETWEEN:

(1) MR SHANE DOUGALL
(2) MRS OLGA DOUGALL

Appellants

-and-

BARRIER POINT RTM COMPANY LIMITED

Respondent

Re: 27 Barrier Point,
Silvertown,
London E16

Before: Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London WC2A 2LL

on
16 May 2017

Mr Dougall represented both appellants
Jeff Hardman, instructed by Fairweather Law, represented the respondent

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The following cases are referred to in this decision:

Staunton v Taylor [2010] UKUT 270 (LC)

Graham Peter Wrigley v Landchance Property Management Ltd [2013] UKUT 376 (LC)

Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc [1994] 1 EGLR 93

Tedla v Camaret Court Residents Association [2015] UKUT 221 (LC)

Pendra Loweth Management Limited v North [2015] UKUT 91 (LC)

Gilje v Charlegrove Securities Ltd [2003] 3 EGLR 9

Francis v Philips [2014] EWCA Civ 1395

Gilje v Charlgrove Securities Ltd [2002] 1 EGLR 41

Wilson v Lesley Place RTM Co Ltd [2010] UKUT 342 (LC)

Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 290 (LC)

Introduction

1. This appeal is against a decision of the first-tier tribunal (Property Chamber) (“the FTT”) made on 4 July 2016 on an application brought under section 27A, Landlord and Tenant Act 1985 by the appellants, Mr and Mrs Dougall, against the respondent, Barrier Point RTM Company Ltd. The FTT dismissed all but one of the appellants’ challenges to their liability to pay service charges demanded by the respondent for the years from 2012/13 to 2015/16 (inclusive) and determined that a total sum of £13,251.07 was payable by them. The FTT also made an order under rule 13(1)(b) of the Property Chamber Rules 2013 requiring the appellants to pay half of the respondent’s costs of the application in a sum to be agreed by the parties or determined by the FTT, and refused an application by the appellants under section 20C, Landlord and Tenant Act 1985.

2. The appeal was brought with the permission of the Tribunal, permission having previously been refused by the FTT. At the hearing of the appeal Mr Dougall, the first appellant, represented both himself and his wife, while the respondent was represented by Mr Jeff Hardman of counsel. I am grateful to them both for their assistance.

3. The Barrier Point Estate in Silvertown, London E16 comprises eight separate blocks of flats containing 257 separate flats in total. The appellants, Mr and Mrs Dougall, are the long lessees of one of those flats, Flat 27. The respondent, Barrier Point RTM Company Ltd, is, as its name suggests, a right to manage company for the purpose of the Commonhold and Leasehold Reform Act 2002, and has been responsible for the management of the block which includes Flat 27 since 28 November 2011. The appellants are not members of the company.

4. The freeholder of the block is Proxima GR Properties Limited, which is not a party to these proceedings. Urang Property Management Ltd (“Urang”) has been the respondent’s retained managing agents since 2015 having taken over from Essex Properties Ltd (“Essex”) in May 2015.

The Lease

5. The dispute arises under a lease of Flat 27 granted in 1999 by Barratt Homes Ltd to Mr and Mrs Seymour-Griffin, the appellants’ predecessors in title, for a term of 999 years. The Lease was later assigned to the appellants who were registered as proprietors in 2006.

6. The lease was made between three parties: Barratt, as Lessor, Mr and Mrs Seymour-Griffin as Lessee, and OM Management Services Ltd as Manager. The role of the Manager is to undertake responsibility for the supply of services to the Barrier Point development and a covenant by the Manager to that effect is at paragraph 1 of the tenth schedule. The services themselves are described in the sixth schedule and the costs of providing them are referred to in the lease as the Maintenance Expenses. By paragraph 2 of the eighth schedule the Lessee covenants with the Lessor and the Manager to make a contribution to those costs by paying a sum described as the Lessee’s Proportion of the Maintenance Expenses. By paragraph 7 of the seventh schedule that sum is payable by two instalments in advance on 1 June and 1 December each year, each equal to half the estimate expenses for that year, followed by a balancing payment (or credit) after the certification of the expenses actually incurred during the year.

The proceedings

7. In October 2012 the respondent issued proceedings against the appellants in the county court for the payment of rent and service charges which had fallen due during the first year of its management, together with the costs of the proceedings, together totalling £3,769.32. The appellants filed a defence which asserted that no service charges were due from them as the respondent's managing agents had failed to comply with section 47(1), Landlord and Tenant Act 1987, which requires that the name and address of the landlord be included in any demand for rent or other sums payable to the landlord under the terms of the tenancy. The defence further asserted that, as the respondent had no cause of action, it had no right to claim its legal costs.

8. The proceedings were transferred to the leasehold valuation tribunal and on 18 June 2013 the LVT decided that the appellants were liable to pay £2,576.96. It described that sum as comprising interim service charges for the period ending on 30 November 2012 plus a small balancing charge for the previous year. The LVT found that, as an RTM company, the requirements of section 47 of the 1987 Act applied to demands served on behalf of the respondent by reason of paragraph 12(1) of Schedule 7 to the Commonhold and Leasehold Reform Act 2002 and that the demands served before the commencement of proceedings in the county court had therefore been defective. The LVT nevertheless held that the appellants became liable to pay the sums claimed on 13 February 2013, when they received a letter from the respondent's solicitors which provided the missing information.

9. The LVT explained in its decision that it had no jurisdiction to deal with the question whether the county court proceedings had been commenced prematurely, or to determine the respondent's claim for the costs of the proceedings and it directed that those matters should be returned to the court. Despite that indication, the respondent did not restore the claim in the county court but took steps instead to recover the full sum found to have been due from the appellants' mortgagee.

10. Two items representing legal costs incurred in connection with the proceedings before the County Court and the LVT were subsequently added to the appellants' statement of account by Essex, the respondent's managing agent, namely £1,280.00 described as "legal/court fees" and a further £660.00 as "legal recovery fees".

11. After the determination by the LVT the appellants continued to dispute their liability to pay services charges as they fell due. It is not necessary to recount the details of the disagreement except to say that the appellants addressed a number of questions to the respondent's managing agents which they considered were never satisfactorily answered, they disputed their liability to pay certain specific sums including the legal costs associated with the previous proceedings, and they disputed their liability to pay any sum for the year ending 30 October 2013 on the grounds that there had been further failures to comply with the requirements of section 47(1) of the 1987 Act or to provide the information to tenants required by sections 20B and 21B, Landlord and Tenant Act 1985.

12. On 15 February 2016, the respondent's solicitors wrote to the appellants demanding payment of arrears said to total £13,911.07 representing service charges for the whole of the period since the LVT's 2013 decision together with the legal costs which had been added to their account in 2013. Rather than await the service of the threatened proceedings, on 24 February 2016 the appellants made their own application to the FTT under section 27A of the 1985 Act

seeking a determination of the extent of their liability for the period from 1 December 2012 to 31 May 2016.

13. The appellants made numerous challenges to the payability of the service charges, most of which were subsequently determined by the FTT in the respondent's favour. Those items which are relevant to this appeal comprised the 2012/13 service charge totalling £2,918.65, the legal/court fees of £1,280.00 added to the appellants' account in 2013, and costs incurred in each year in respect of the fees of the respondent's managing agents.

14. The decision of the FTT given on 4 July 2016 determined that £13,251.07 was payable, disallowing only £660.00 claimed as a legal recovery fee for which the respondents could not produce an invoice.

The issues in the appeal

15. The following issues are raised in the notice of appeal:

1. Whether the sum of £5,804.49 which the FTT had found to be payable for the year 2012/13 (which included the service charge of £2,918.65 and the legal/court fees of £1,280) was irrecoverable by reason of a failure to comply with the requirements of section 47(1) of the 1987 Act or sections 20B and 21B of the 1985 Act.
2. Whether, in any event, the FTT's decision that the appellants were liable to pay the legal/court fees of £1,280 was correct.
3. Whether the FTT had been wrong to allow the full recovery of the fees of the managing agents, Essex and Urang, and not to apply a cap of £65 per flat which the lease imposed on the fees of the Manager.
4. Whether the FTT had been wrong to order that the appellants pay half of the respondent's costs of the application.
5. Whether the FTT had been wrong to refuse to make an order in the appellants' favour under section 20C of the 1985 Act prohibiting the respondent from adding the costs of the proceedings to the service charge payable by the appellants.

Issue 1: Compliance with statutory requirements

16. In paragraph 14 of its decision the FTT reminded itself that service charge demands must comply with sections 47 and 48 of the 1987 Act by including the name and address of the landlord and must be accompanied by the summary of tenant's rights and obligations required by section 21B of the 1985 Act. It went on:

“If such a demand does not contain the landlord's address and an address for service, the service charges and administration charges demanded are not due until that information is supplied. When the information is provided, the money will, however, be due, see *Staunton v Taylor* [2010] UKUT 270 (LC); *Graham Peter Wrigley v Landchance Property*

Management Ltd [2013] UKUT 376 (LC). It is not clear from the original papers before the tribunal that the statutory requirements had been fulfilled. It is possible that they were but due to the handover of management between Essex and Urang not all copy documents had been passed across. In any event, a summary of rights was again sent to the applicant on 16 June 2015 and once more on 18 December 2015 and I was able to see copies of these documents that remedied the situation.”

The FTT therefore made no finding concerning the date on which any demand for payment had been served on the appellants, and determined only that the summary of rights required by section 21B of the 1985 Act had been supplied on 16 June 2015 at the earliest. Mr Dougall was at pains to emphasise that an earlier demand produced (for the first time, he maintained) on the day of the hearing before the FTT and dated 13 January 2013 had never been received by the appellants, but the findings of the FTT in paragraph 14 of its decision place no reliance on that demand.

17. The FTT’s decision was clearly correct as far as sections 47 and 48 of the 1987 Act are concerned. So far as is relevant to this appeal those sections provide as follows:

47 Landlord’s name and address to be contained in demands for rent etc

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely–

(a) The name and address of the landlord...

(2) Where–

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1)

then...any part of the amount demanded which consists of a service charge or an administration charge...shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant...

(4) In this section ‘demand’ means a demand for rent or other sums payable to the landlord under the terms of the tenancy.

48 Notification by landlord of address for service of notices.

(1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.

(2) Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall (subject to subsection (3)) be treated for all purposes as not being due

from the tenant to the landlord at any time before the landlord does comply with that subsection.

18. In *Dallhold Estates (UK) Pty Ltd v Lindsey Trading Properties Inc* [1994] 1 EGLR 93, 97 J-K, the Court of Appeal held that the effect of a failure to comply with section 48 was suspensory only and that the sum otherwise due became immediately payable when the information required by the statute was furnished by the landlord by notice given to the tenant. In *Tedla v Camaret Court Residents Association* [2015] UKUT 221 (LC) the Tribunal held (at [38]) that all that was required to lift the statutory suspension where section 47(1) had not been complied with was for the relevant information to be provided to the tenant; it was not necessary for previous defective demands to be re-served on the tenant.

19. The 1987 Act includes no equivalent of section 30 of the Landlord and Tenant Act 1985 which provides that “landlord” includes any person who has a right to enforce payment of a service charge. On the contrary, section 60(1) of the 1987 Act stipulates that for parts of the Act including Part VI (where section 47 is to be found) “landlord” means the immediate landlord. In *Pendra Loweth Management Limited v North* [2015] UKUT 91 (LC) the Tribunal held that section 47 therefore has no application to demands for payments of sums due to parties to leases who are not landlords within the meaning of the definition in section 60. In *Pendra Loweth* demands for service charges made by a management company for sums due to it were held to be valid notwithstanding the omission of the management company’s name and address. Nevertheless, as the LVT held in its 2013 decision section 47 applies to demands served on behalf of an RTM company by reason of paragraph 12(1) of Schedule 7 to the Commonhold and Leasehold Reform Act 2002 which provides that references in section 46 to 48 of the 1987 Act to the landlord include the RTM company. It was therefore necessary for section 47(1) to be complied with before rent and service charges became payable by the appellants. The FTT found that such a notice had been given on 16 June 2015 and the appellants do not challenge the sufficiency of that notice.

20. The appellants also relied on the requirement of section 21B(1) of the 1985 Act that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges, and on section 21B(3) which provides that “a tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand”. The earliest demand which could be shown to have been accompanied by the required summary was the demand served on 16 June 2015.

21. The main point which the appellants took on the appeal was that the demand served on 16 June 2015 had been given to them more than 18 months after the end of the 2012/13 service charge year on 30 October 2013 with the result, Mr Dougall suggested, that they were not liable to pay any part of the sums claimed for that year by reason of section 20B of the 1985 Act. Section 20B provides as follows:

20B Limitation of service charges: time limit on making demands

(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.

22. The answer provided to the FTT by Mr Hardman on behalf of the respondent, and which it specifically accepted in paragraph 11 of its decision when considering the respondent's entitlement to recover £1,485.07 as a contribution towards external decoration works, was that the sums claimed in respect of 2012/13 were estimated sums payable on account, rather than sums claimed in respect of costs which had already been incurred, and that section 20B(1) therefore had no application to those sums. The authority for that proposition is the decision of Etherton J in *Gilje v Charlegrove Securities Ltd* [2003] 3 EGLR 9, which has been followed in this Tribunal in a number of cases referred to in paragraph 7.202.1 of Woodfall: *Landlord and Tenant*. In short, section 20B applies only to costs which have already been incurred, and has no application to demands in respect of estimated future expenditure.

23. Mr Dougall did not accept that the sums demanded on 16 June 2015 were payments on account and suggested that there was no evidence to justify treating them as such. He therefore submitted that the FTT had been wrong not to regard recovery of those sums as barred by section 20B.

24. The total sum found by the FTT to be due in respect of 2012/13 was £5,804.49; this was the aggregate of four elements.

25. The first was a service charge of £2,918.65 which was debited to the appellants service charge account on 1 December 2012 and is there recorded as "s/chg 1.12.12 – 30.11.13". Given the structure of the lease, which provides for the service charge year to commence on 1 December and for there to be payments in advance on that date and on 1 June each year, I am satisfied that the sum of £2,918.65 was claimed by the respondents in advance as a payment on account of estimated future expenditure to be incurred after 1 December 2012. It was therefore a charge to which section 20B did not apply. The fact that the anticipated expenditure may have been incurred by the date of the first compliant demand in 16 June 2015 does not alter the nature of the demand which remained a demand for a payment on account, rather than for a cost incurred.

26. The second item which the FTT found due in 2012/13 was a charge of £120.77 in respect of internal redecoration, which first appeared on the appellants' service charge account on 31 July 2013. The appellants' only challenge to this sum before the FTT seems to have been that they had already paid it (a contention the FTT rejected) and no consideration was given to the effect of section 20B on the appellants' liability to pay it. It is not clear whether it was a payment on account or a payment for work already done. If it was on account, section 20B has no application to it for the reason already given. If it was a payment in respect of a cost already incurred, I am satisfied that it is not barred by section 20B(1) because it was included in the periodic service charge statements rendered to the appellants by Essex, including one dated 22 January 2014 to which the appellants responded with a number of challenges. There is no doubt

they received that statement, and the accompanying request for payment of the arrears within 14 days, including the sum for internal decoration. Although the demand was not accompanied by a statement of rights for the purpose of section 21B, it clearly notified the appellants in writing that those costs had been incurred and that they would be required to contribute to them by the payment of a service charge. In my judgment that was sufficient for the purpose of section 20B(2) since it is not suggested that the costs (first billed on 1 July 2013) had been incurred more than 18 months before 22 January 2014.

27. The third component of the 2012/13 charge was a sum of £1,485.07 demanded as a contribution towards external redecoration. The FTT found that this too was a payment on account to which section 20B did not apply (indeed the grounds of the appellants challenge to it was that it had not been incurred). That conclusion was clearly correct.

28. The final element of the 2012/13 charge was the sum of £1,280 claimed as legal/court fees following the 2013 LVT hearing. Although the FTT described that sum as a service charge it was not such a charge but rather was an administration charge to which paragraph 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 applied (i.e. a sum payable by a tenant directly or indirectly in respect of a failure by the tenant to make a payment by the due date or in connection with a breach of a covenant or condition in his lease). Section 20B of the 1985 Act does not apply to administration charges.

29. I am therefore satisfied that the FTT was right in its conclusion that the sums claimed by the respondent in respect of 2012/13 were payable by the appellants and were not rendered irrecoverable by any breach of the statutory requirements regarding information or limitation.

Issue 2: The appellants' liability to contribute towards the respondent's costs of the 2013 LVT proceedings

30. The appellants took an additional point concerning the sum of £1,280 which had been added to their account in 2013 and which represented costs billed to the respondent by its solicitors, JB Leitch, following the LVT's decision of 18 June 2013. The narrative explanation included in the solicitor's invoice referred to the steps taken in the county court proceedings and following the transfer of those proceedings to the LVT. The total time charge was said to exceed £3,750 but this was reduced on the invoice to £600, with the remainder of the charge comprising disbursements (court issue and allocation fees and counsel's fees) and VAT.

31. At the FTT it was submitted on behalf of the respondent that the solicitor's invoice was payable by the appellants pursuant to paragraphs 4 and 8 of the eighth schedule to the lease. In paragraph 13 of its decision the FTT recorded the appellants' submission that the legal fees were not payable by them, but concluded without further explanation that "the monies were properly payable under the lease". The FTT must be taken to have accepted that the legal fees were payable, as Mr Hardman had submitted, either under paragraph 4 or paragraph 8 of the eighth schedule.

32. Mr Hardman did not seek to support the suggestion that paragraph 4 of the eighth schedule was relevant. That paragraph was a covenant by the Lessee to pay all costs incurred by the Lessor or the Manager "in or in contemplation of any proceedings or service of any notice under section 146 and 147 of the Law of Property Act 1925 ... whether or not forfeiture for any breach

shall be avoided otherwise than by relief granted by the Court”. Mr Hardman acknowledged that in view of section 100(3) of the 2002 Act (which provides in relation to the enforcement of tenant covenants that an “RTM company may not exercise any function of re-entry or forfeiture”) costs incurred by an RTM company in seeking to recover service charges could not fall within the scope of paragraph 4.

33. Paragraph 8 of the eighth schedule was a further covenant by the Lessee with the Lessor or the Manager in these terms:

“To keep the Lessor and Manager indemnified in respect of charges for other services payable in respect of the Demised Premises which the Lessor or the Manager may from time to time during the Term be called upon to pay such sums to be repaid to the Lessor or the Manager on demand.”

34. It is also relevant to note that by paragraph 8 of Part G of the sixth schedule the costs of “enforcing or attempting to enforce the observance of the covenants on the part of any lessee” of any of the flats in the Barrier Point development form part of the Maintenance Expenses to which the Lessee is required to contribute by means of the service charge.

35. Mr Dougall took a number of points about the recoverability of the legal costs from the appellants. His strongest point was that in view of the express terms of paragraph 4 of the eighth schedule and paragraph 8 of Part G of the sixth schedule, both of which dealt with legal costs incurred in proceedings, such costs could not be brought additionally within the scope of a reference to “charges for other services payable in respect of the Demised Premises” in paragraph 8 of the eighth schedule.

36. Mr Hardman submitted that the costs incurred in procuring the LVT’s determination in June 2013 that the sum of £2,576.96 had become payable by the appellants was a charge for a service payable in respect of Flat 27. He nevertheless acknowledged that it was difficult to regard costs incurred in connection with the county court proceedings or in the LVT before 13 February 2013 as charges for a service, since those proceedings had been commenced at a time when the respondent had had no cause of action because (as the LVT subsequently found) the requirements of section 47 had not yet been complied with.

37. I do not accept Mr Hardman’s submission. The expectation that clear language will be employed in contractual charging provisions is well known. In *Francis v Philips* [2014] EWCA Civ 1395, the Court of Appeal considered the entitlement of landlords of holiday chalets to recover their costs of management, which turned on the interpretation of a standard form of lease. At paragraph 74, the Chancellor, Sir Terence Etherton, made these observations:

“On the other hand, the reported cases are generally consistent with a broad principle that it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease: see, for example, *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41 at [31] (Mummery LJ). It is to be expected that the tenant will wish to be fully aware of any such additional obligation on which his or her continuing right to possess the land and to occupy it may depend. It is to be expected that the lessor will wish to make such a continuing additional obligation clear because it arises under a lease which will subsist through successive ownerships of the reversion and the tenancy and because the

lessor will not wish to be out of pocket in respect of services provided for the benefit of the tenant...”

38. It does not appear to me that paragraph 8 is couched in language which clearly expresses an intention that the lessee will indemnify the lessor against costs incurred in legal proceedings between them. The term follows immediately after the Lessee’s covenant at paragraph 7 of the eighth schedule to pay all rates, taxes, assessments, charges, duties and other outgoings payable in respect of the demised premises. The reference to indemnifying the Lessor or Manager against “charges for other services payable in respect of the Demised Premises” which they may “be called upon to pay” seems to me to be a reference to charges which the Lessor or Manager are obliged to pay to some third party such as a public authority or utility provider, and not costs which the lessor or manager have voluntarily incurred by commencing proceedings against the Lessee. The expense of litigation is not a charge for a service payable in respect of the demised premises, and the respondent’s legal costs are therefore not recoverable from the appellants under this provision. The respondent will not be out of pocket, since the lease entitles it to recoup the cost of enforcing covenants as part of its Maintenance Expenses to which the appellants and other lessees are required to contribute.

39. I therefore allow the appeal against the FTT’s determination that the appellants are liable to pay the £1,280 fee of JB Leitch, the respondent’s solicitors.

Issue 3: Whether the fees of managing agents are subject to a cap of £65 per flat

40. The standard Barrier Point lease includes a provision in paragraph 12 of Part G of the sixth schedule that the Maintenance Expenses shall include:

“The sum of Sixty Five Pounds (£65.00) per dwelling per annum plus VAT which said sum shall be the Management Fee (which incorporates a profit element) of the Manager or its successors or assigns Provided That the said sum shall be reviewed annually and varied upwards only in line with official inflation figures issued by HM government from time to time.”

41. By paragraph 7 of Part G of the sixth schedule the Maintenance Expenses also include the costs of:

“Generally maintaining and administering the Maintained Property and protecting the amenities of the Maintained Property and for that purpose if necessary employing a firm of managing agents or consultants or similar and the payment of all costs and expenses incurred by the Manager.

42. The respondent has employed managing agents at all times since it acquired the right to manage in November 2011 and the fees of those agents have been included in the Maintenance Expenses at a rate which requires the lessee of each flat to contribute a sum which exceeds £65.

43. The appellants argued before the FTT that the Management Fee referred to in paragraph 12 represented a ceiling above which the lessee was not required to contribute towards the costs of management of the estate. The FTT disagreed and at paragraph 16 it held that the sum in paragraph 12 “relates to the “Manager” being the respondent” but that paragraph 7 allows the

manager to employ a managing agent and “while there is a limit on the charges the respondent can claim there is no such limit on managing agents being an entirely separate party, allowed under the terms of the lease.”

44. In granting permission to appeal on this issue the Tribunal observed that “it is important that there be no confusion over the application of the cap and while it seems likely that the FTT’s decision to allow the agent’s fee is correct, the statement that the respondent RTM company is the Manager is unlikely to be correct and may cause uncertainty.”

45. At the hearing of the appeal Mr Dougall submitted that the FTT was wrong to suggest that the respondent had become the Manager; on the contrary, the Manager was the person who undertook responsibility for the supply of services to the development which, he suggested, was clearly Essex and then Urang, the managing agents. Alternatively, the £65 cap applied not just to the Manager but also, according to paragraph 12, to “its successors or assigns”, and it was appropriate to regard the managing agent as the successor of the Manager in the role of providing services. Mr Dougall relied on the decision of the Tribunal in *Wilson v Lesley Place RTM Co Ltd* [2010] UKUT 342 (LC) in support of his submission that the acquisition of the right to manage does not affect the construction of the lease. He acknowledged, however, that if the Manager employed a managing agent it was entitled to charge the managing agents fees as part of the Maintenance Expenses.

46. As an RTM company, the respondent’s rights and obligations arise under the 2002 Act and are not contractual. On the respondent’s achievement of the right to manage on 28 November 2011, all “management functions” under the Lease passed to it pursuant to section 96 of the 2002 Act. To the extent that those management functions were functions of the Lessor, they became functions of the respondent by section 96(2); to the extent that they were functions of any person who was party to the lease otherwise than as landlord or tenant (i.e. the Manager) they became functions of the respondent by reason of section 96(3). Simultaneously the Lessor and the Manager (OM Management Services Ltd) came under a statutory prohibition imposed by section 97(2) preventing them from doing anything which the respondent was required or empowered to do by section 96.

47. The entitlement to receive payment of service charges in return for the provision of services also became an entitlement of the respondent: in the convoluted language of section 97(4), on the achievement of the right to manage any “function of a tenant” which “relates to the exercise of any function under the lease which is a function of the RTM company” ceases to be “exercisable in relation to” the landlord or other party to the lease and becomes instead “exercisable in relation to the RTM company”.

48. The statutory transfer of management functions did not make the respondent a party to the lease, and the FTT was technically incorrect to suggest that the respondent became the Manager. To that extent I agree with Mr Dougall’s submission.

49. Nevertheless, I disagree with Mr Dougall’s submission that the role of manager under the lease is now occupied by the respondent’s managing agent. The respondent has the rights of the Manager, and the appellants have the obligations towards the respondent which they formerly had towards the Manager. The respondent is entitled to recoup the Maintenance Expenses from the lessees, including the appellants. By paragraph 7 those expenses include the cost of employing managing agents. The cap in paragraph 12 has no application to those costs.

50. I therefore dismiss the appeal on this issue.

Issue 4: costs

51. The issue of the greatest significance in financial terms is the fourth, namely, whether the FTT was entitled to order that the appellants pay half of the respondent's costs of the application in the exercise of its power under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. Despite the significance of the issue I can deal with it relatively shortly in view of the guidance given by the Tribunal in *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC) and in the light of the very sensible concessions made by Mr Hardman.

52. No application under rule 13 for costs was made before the hearing on 21 June 2016. At the end of the hearing, and before the FTT had given its decision (which it did on 4 July), Mr Hardman made such an application and the FTT heard oral submissions.

53. After referring to *Willow Court* and reminding itself of the three stage approach commended by the Tribunal at paragraphs 28 of that decision, the FTT considered at paragraph 29 of its own decision whether the appellants had acted unreasonably. It concluded that they had for the following reasons:

“There is clear evidence of a lengthy history of non-payment and challenges to the payment of service charges. There was a previous hearing mentioned earlier in this dispute arising out of a claim in the county court. Moreover, I was told at the hearing that no service charge payments had been made by the applicant for several years. Furthermore, the applicant has failed in all but one of the claims set out above. Consequently in the light of the conduct of the [appellants] I will make a partial order for costs.”

The FTT then took into account the extent to which the appellants had succeeded in the application (achieving a reduction of £660) and the fact that supporting evidence had been submitted shortly before the hearing by the respondent, and determined that the appellants should pay half of the respondent's costs of the application.

54. Mr Hardman acknowledged that the FTT's decision could not stand, for two reasons.

55. First, because it was procedurally unfair for an order for costs to be made (a) without the appellants first having been given notice in advance of the manner in which their conduct of the proceedings was alleged to have been unreasonable, together with a proper opportunity to consider and respond to that allegation, and (b) for reasons which depended on the FTT's own substantive decision to reject the appellants case that they were not liable to pay the service charges at all, those being reasons of which the appellants necessarily could have had no notice. In *Willow Court* the Tribunal allowed an appeal on exactly these grounds (see paragraph 93).

56. Secondly, because the unreasonable behaviour on which the FTT relied was not “in bringing, defending or conducting” the case, as required by rule 13(1)(b). That was a further reason for the Tribunal's decision to allow one of the *Willow Court* appeals, as we explained at paragraph 95 of the decision:

“The first ground did not relate to the conduct of the proceedings at all. The FTT was entitled to be critical of Ms Sinclair's failure to pay her service charges unless and until she was required to do so in order to participate in the enfranchisement and to obtain her new lease, but it was not entitled to rely on that conduct as supporting the charge that she had “acted unreasonably in bringing, defending or conducting proceedings.” Only behaviour related to the conduct of the proceedings themselves may be relied on at the first stage of the rule 13(1)(b) analysis.”

57. In the same paragraph we added the following qualifications, on which Mr Hardman sought to rely:

“We do not intend to draw this limitation too strictly (it may, for example, sometimes be relevant to consider a party's motive in bringing proceedings, and not just their conduct after the commencement of the proceedings) but the mere fact that an unjustified dispute over liability has given rise to the proceedings cannot in itself, we consider, be grounds for a finding of unreasonable conduct.....”

58. Mr Hardman submitted that the appellants' motive in bringing the application before the FTT had not been to resolve some genuine dispute, but was intended to harass and vex the respondent. The appellants had no intention ever of paying their service charges he submitted. It was therefore appropriate, he suggested, for the Tribunal to set aside the FTT's decision but to substitute a decision of its own requiring the appellants to pay some significant proportion of the respondent's costs of the proceedings before the FTT.

59. I agree that the FTT's order for costs must be set aside, for the reasons helpfully conceded by Mr Hardman, but I do not consider that it would be right for this Tribunal to make any order of its own under rule 13(1)(b). There is no suggestion that the appellants' conduct of the proceedings themselves had been other than efficient and cooperative. Any order could be based only on a finding that the application itself was always an abuse of process and amounted to vexatious and unreasonable conduct. It is impossible to support such a conclusion in circumstances where the FTT itself reduced the service charge bill (albeit by only a modest £660) and this Tribunal has allowed the appeal against the inclusion of the costs incurred in the LVT proceedings, a further £1,280.

60. There is undoubtedly force in the FTT's criticism of the appellants' conduct, and their refusal on ultimately unjustified technical grounds to pay for services which they willingly receive is reprehensible. But in view of the not insignificant degree of success they have achieved in reducing the demand made of them, and in the absence of any ground of complaint relating to the manner in which the proceedings before the FTT were conducted, this is clearly not a case in which it would be just for this Tribunal to take the exceptional course of finding that the applicant's motive for making their application to the FTT was itself abusive.

61. Nor do I consider that it would be just, in the circumstances of this case, to remit the respondent's application under rule 13(1)(b) to the FTT for further consideration. A party which makes an application for costs on the hoof, without giving proper consideration to the grounds it can realistically rely on, and without allowing a proper opportunity for consideration by either the other party or the FTT, cannot legitimately expect to be given an opportunity to put right those deficiencies.

62. I therefore allow the appeal on the issue of costs and set aside the order of the FTT that the appellants pay half the respondent's costs of the application.

Issue 5: Section 20, Landlord and Tenant Act 1985

63. The final issue in the appeal concerns the FTT's refusal of the appellants' application for an order under section 20C protecting them from having to contribute towards the costs of the proceedings through the service charge. I received no submissions on this issue at the oral hearing of the appeal as both sides agreed that the better course would be to await my determination of the substantive issues. Both subsequently took the opportunity to make further written submissions after considering a draft of this decision and I have taken into account all that they have said in those submissions.

64. The question for the FTT was whether it was just and equitable, in the circumstances, that the appellants should be required to contribute through the service charge to the costs incurred by the respondent in connection with the proceedings before it. The FTT exercised its discretion to refuse to make an order exempting the appellants from their contractual obligation in the light of its overall conclusion that the appellants' liability to pay the disputed sums should be reduced by only £660. The balance of £13,251.07 was found to be payable and in those circumstances it is understandable that the FTT regarded it as just and equitable that the appellants should not avoid responsibility for their share of the costs of the proceedings. The respondent had largely succeeded and there was nothing unfair in expecting the appellants, together with all of their neighbours, to contribute towards the costs which had been incurred in fending off their application.

65. The result of the appeal has been that there has been a further reduction in the sum payable by the appellants, as I have disallowed the £1,280 to which the respondent claimed to be entitled as an administration charge arising out of the 2013 LVT proceedings. Despite that reduction I consider that the just and equitable response to the appellants' application under section 20C is to refuse it. On any view, the extent of the success achieved by the appellants has been modest, reducing their liability by about one seventh, or less than £2,000. They chose not to pay sums which were found by the FTT to have been reasonably incurred in providing services of a reasonable standard, and preferred to dispute them on grounds which were largely found to be unsustainable.

66. The appellants have suggested in their submissions that the proceedings were a necessary response by them to a lack of engagement by the respondent's managing agents with their challenges to the service charges. The respondent has suggested that the appellants are serial non-payers and that their challenges were simply a pretext to delay payment. I do not consider that it is necessary for me to consider the appellants' motives for commencing the proceedings, or the behaviour of the managing agents in any greater detail; what matters is that the appellants' challenges were largely unsuccessful and the FTT was satisfied that the fees charged by the agents were reasonable.

67. The fact that the appellants achieved a reduction in two items (both relating to the costs of previous proceedings in which the appellants' liability had been reduced by only a few hundred pounds) does not seem to me to be a sufficiently weighty consideration to justify relieving them

of their contractual liability. I bear in mind that any shortfall in recovery from the appellants is likely to fall on their neighbours who are members of the RTM company.

68. I therefore dismiss the appeal against the FTT's refusal to make an order under section 20C.

Disposal

69. The outcome of the appeal is therefore that the appellants' total liability for sums in dispute for the years 2012 to 2015 is been reduced from £13,251.07 found to be due by the FTT to £11,971.07. The order made by the FTT requiring the appellants to pay half of the respondent's costs of the proceedings before it is also set aside, relieving the appellants of a further substantial but unquantified liability.

70. At the hearing of the appeal the appellants indicated an intention to make an application under section 20C in respect of the costs of the appeal. Their written submissions may have been intended to relate also to that application, but it is not entirely clear that that is the case and the respondent's submissions do not deal with the matter at all. If the appellants wish to pursue an application under section 20C they should so inform the respondent (no formal application is required) and provide any additional representations they wish to make within seven days of the receipt of this decision. The respondent may then make any additional representations within a further seven days.

Martin Rodger QC,
Deputy Chamber President

1 June 2017