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LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SCHEDULE 11 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference: LON/00AP/LAC/2011/0014

Premises: Flats 3 and 10, Standard Apartments, Crescent Road, London N8 8AW

Applicant: Standard Apartments Limited

Representative: Mr Carl Fain- Counsel- instructed by Harbottle & Lewis LLP

Respondent(s): (i) Alexander Christoforou – Flat 3
(ii) Diogenis & Costas Diogenous – Flat 10

Representative: Mr Paul Letman-Counsel
Instructed by YVA Solicitors

Date of hearing: 12 January 2012

Attendance on behalf of the Applicant Tim Bamford, Harbottle & Lewis
Mr M Forrester
Mr Christo of Christo & Co Managing Agents

Attendance on behalf of the Respondents: Mrs Pagel
Mr M Ackillea

Leasehold Valuation Tribunal: Ms M W Daley LLB(hons)
Mr P Roberts DipArch RIBA
Mrs L Hart

Date of decision: 19 March 2012

Decisions of the Tribunal

- (1) The Tribunal makes the determinations as set out under the various headings in this Decision, namely paragraphs 52-81.

The application

1. The Applicant seeks a determination pursuant to paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to whether variable administration charges in the sum of £6944.37 (in respect of the first respondent) and £6944.37 (in respect of the second respondents) are reasonable and payable to the Applicant. The Applicant alleges that those charges having been incurred in respect of the Applicant's entitlement to claim administration charges pursuant to the Respondents non-payment of service charges for the 2006, 2007 and 2008 service charge years.
2. The Applicant's claim is that the Respondent failed to pay any of the demanded service charges for the years ending 31 December 2006 and 2007 and the estimated service charges for the year ending 31 December 2008. In consequence the Applicant applied to the Leasehold Valuation Tribunal for a determination.
3. Directions were given by the Leasehold Valuation Tribunal on 15 November 2011.
4. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

5. At the hearing, the Applicant was represented by Mr Carl Fain of Counsel, and the first and second Respondents were represented by Mr Paul Letman.
6. Immediately prior to the hearing the parties handed in further documents, namely, skeleton argument together with authorities.

The background

7. The property which is the subject of this application is a modern 4 storey block, with 16 separate self contained flats served by a lift. The property is situated in a quiet residential road immediately west of Crouch End Road. The frontage is set back from the footpath and to the rear there is a car parking area.
8. The Respondents hold long leases of the property. The lease 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 will be referred to below.

The issues

9. At the Directions hearing the Tribunal identified the issues relevant for determination as follows:
- (i) Whether or not the Applicants costs of the previous proceedings are recoverable from the Respondents under the terms of their respective leases.
 - (ii) Whether the sums claimed are reasonable.

The Respondent also sought to rely upon Paragraph 10 sub paragraph 4 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 as preventing the Applicant recovering the cost of the hearing. It states -: "A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph."

10. Counsel for the Applicant referred the Tribunal to the decision of the Tribunal in the Application No LON/00AP/LSC/2008/0461 where a claim was brought against the lessees of flats 3, 9 and 10 for a determination under section 27A of the Landlord and Tenant Act 1985 by the same Applicant.
11. A summary of the Tribunal's decision dated 26 March 2009 is found in paragraph 9.1 of that decision which states "*...For the reasons indicated above, the management charges in this case are reduced to the extent referred to at paragraph 4.6 above, and such other reductions as have been conceded on behalf of the Applicant and as are referred to within the Applicant's Statement of Case in Reply should be made to the service charge account. No other deductions are made by the Tribunal and the sums claimed are otherwise reasonable and payable by the Respondents to the Applicant.*"
12. Counsel for the Applicant stated that the only reduction of any significance was that the management charges were reduced by 20% so that the charges for 2005, 2006 and 2007 did not exceed £300 per unit inclusive of VAT.
13. The Tribunal were informed that the Respondents' applied for leave to appeal the decision and leave to appeal was refused. The Applicant subsequently applied to enforce the determination in the county court. Of the three original leaseholders, who were respondents, the leaseholders, Ioannis & Erato Athanaslou (flat 9) paid their share of the cost of the application in full.

14. The Tribunal asked Mr Fain what the position was concerning whether an order under section 20C had been applied for as part of the 2009 hearing. Mr Fain confirmed that no application had been made and there was nothing that dealt with the question of costs in the original determination.
15. Mr Fain in his submissions before the Tribunal stated that the relevant legal issues that he would deal with as part of his application were:
 - (i) whether paragraph 10 sub section 4 of schedule 12 prevented the landlord from recovering the cost (save for vexatious cost)
 - (ii) whether the landlord could recover his costs (as a variable administration charge) pursuant to clauses 3 (21) and (22) of the lease, and
 - (iii) if those costs are recoverable is it reasonable to allow the sums sought.
 - (iv) whether the charges could be considered to be variable administration charges.
16. The Tribunal asked the Respondents' counsel to confirm whether there was any issue concerning the reasonableness of the cost. Mr. Letman confirmed that the reasonableness of the cost was in issue.

Paragraph 10(4) of Schedule 12 of CLARA 2002

- 17 Mr Fain dealt with the issue concerning paragraph 10(4) of schedule 12. He stated that this paragraph did not limit the landlord's right to recover the costs that it has incurred in connection with the LVT proceedings where a tenant has covenanted to pay such costs under a lease as a variable administration charge. The Tribunal were referred to the case of Staghold Limited and Takeda. At paragraph 25 a previous LVT Decision (Ionic Properties and Lessees of Melcombe Regis Court) is quoted at sub paragraph 54 -: *"At first glance the wording of para 10 (4) does appear to have the result argued for on behalf of the lessees. However, it must be read in the context of the whole of para 10 which is concerned with the powers of the Tribunal. The word "required" in para 10(4) means "required by the leasehold valuation tribunal." Costs paid as permitted under a clause in a lease are not required by the Tribunal but by the lessor using their power under the lease. Therefore, para 10(4) has no effect on the costs payable in this way."*
- 18 In his submission the Leasehold Valuation were not requiring the cost to be paid and were merely determining the reasonableness of costs that are payable under the lease, as variable administration charges.
- 19 Mr Fain stated that it followed that the purpose of section 20C was to deprive the landlord of costs in circumstances where cost could normally be recoverable. Paragraph 4 (e) of the skeleton argument on authorities stated -: *"i. The reason why s20c was amended was to extend to the LVT the power previously only belonging to the courts to make an order depriving the landlord of his costs incurred in connection with LVT proceedings by way of a service charge where an appropriately worded lease allowed the landlord to recover those costs"* (Para

27 of *Canary Riverside PTE Limited and others and Dr & Mrs Schilling and Others LRX/65/2005*)

- 20 . Counsel also placed reliance upon paragraph 39 of *Canary Riverside PTE Limited and others and Dr & Mrs Schilling and Others LRX/65/2005* to support his contention Where his Honour Michael Rich QC stated -: *"I have therefore come to the conclusion that the application of sub paragraph 10 (4) is to be limited by its context and the title of the Schedule to the Procedure of the Leasehold Valuation Tribunals and the enforcement of their determinations, and that properly construed, it does not prevent the recovery of costs incurred before leasehold valuation tribunals which are otherwise recoverable by way of service charges."*
- 21 Mr Fain stated that para10(4) of schedule 12 of CLARA did not restrict the Landlord in recovering legal costs as variable administration charges where a tenant has covenanted to pay such costs. There is no reason to distinguish legal costs payable as service charges and those payable as variable administration charges.
- 22 In reply Mr Letman stated that Para 10(4) prohibited the recovery of LVT costs except where they were recoverable as part of the service charge and no section 20 C order is made.

Whether the cost were recoverable under the terms of the lease

- 23 Mr Letman submitted that LVT costs were not recoverable costs under clause 3.22 of the lease as claimed by the Applicant as the Respondents were not in breach of the terms of the lease. He stated that *"The costs before the LVT are not recoverable costs...because they do not arise directly or indirectly out of any breach of non-observance by the Respondents of their leases"*. Additionally Mr Letman stated that the Applicant could not place reliance upon clause 3.21 of the lease as the costs were not incurred in relation to or in contemplation of or incidental to the preparation and service of a section 146 notice.
- 24 Both parties in the course of their submissions referred the Tribunal to the wording of clause of 3.21 and 3.22 of the lease which were the terms considered to be relevant as dealing with the landlord's entitlement to claim the legal cost as a variable Administration Charge.
- 25 Clause 3.21 states -: *to pay the Landlord all costs fees charges disbursements and expenses (including without prejudice to the generality of the above those payable to counsel solicitors and surveyors) properly and reasonably incurred by the Landlord in relation to or contemplation of or incidental to:*

3.21.1 every application made by the Tenant for a consent or licence required by the provisions of this Lease whether such consent or licence is granted or refused or proffered subject to any qualification or condition or whether the application is withdrawn and

3.21.2 the preparation and service of a notice under the Law of Property Act 1925 Section 146 or the taking of proceedings under the Law of Property Act 1925 Section 146 or 147 notwithstanding that forfeiture is avoided otherwise than by relief granted by the court.

Clause 3.22 states -: to be responsible for and to keep the Landlord fully indemnified against all damage damages losses costs expenses actions demands proceedings claims and liabilities made against or suffered or incurred by the Landlord arising directly or indirectly out of :-

3.22.1 any act omission or negligence of the Tenant or any persons at the Premises expressly or impliedly with the Tenant's authority or

3.22.2 any breach or non-observance by the Tenant of the covenants conditions or other provisions of this Lease or any of the matters to which this demise is subject"

26 Mr Letman, on the Respondent's behalf, put forward the argument (in his statement of case), that the leaseholders were not in breach of the terms of the lease. In particular in paragraph 12 of the Respondents' Statement of Case, Mr Letman stated "... in any event ... the costs claimed by the Applicant do not come within the scope of clause 3.22 of the leases. The costs are incurred pursuant to the statutory jurisdiction of the LVT to determine whether a service charge is payable and its reasonableness, whether or not any payment has been made (section 27A of the 1985 Act refers)"^t Mr Letman, in his submissions made the submission that the costs do not arise from any breach and are thus, independent from any such breach. The costs would have arisen not from any breach but from the application to the LVT.

27 This proposition was not accepted by Mr Fain, who submitted that the true analysis of the relevant clauses are that the Respondents failed to pay their service charges for 2006 and 2007, as a result the Applicant had sought a determination and had subsequently enforced the LVT determination as a money judgement, two years after the determination. In paragraph 11 of the Skeleton Argument counsel stated that -: "*The failure to pay the service charges gave A little option but to apply to the LVT so as to enforce its rights to payment pursuant to the leases. This application was a direct or indirect consequence of Rs' failure to pay their service charges and thus it is clear that these costs fall within clause 3.22.*"

In support of his contention that clause 3.21 was applicable he relied upon *the case of Freeholders of 69 Marina St Leonards-on Sea-v- Oram & Ghoorun [2011] EWCA Civ 1258.*

28 This case was considered in detail by both parties, and a brief summary of the facts is set out below.

29 This case concerned an appeal from a decision of the Hasting County Court on the question of the cost arising as a result of a hearing in the Leasehold

Valuation Tribunal for a determination of the liability to pay service charges under section 27 A, and for a Dispensation Order under section 20ZA (of the consultation requirements) in relation to major works. At the hearing before District Judge Nightingale on 20.5.10 to enforce payment of the outstanding charges, permission was granted to amend the application to include further sums by way of service charges that related to the costs of the Tribunal proceedings and interest.

30 In her decisions DJ Nightingale found that the lease, imparted an obligation upon the leaseholder to "pay all that they have specifically cost the lessors in terms of dealing with these proceedings, both before the LVT and before this court, in relation to solicitors costs". The Respondents appealed first to the Circuit Judge and subsequently permission was granted to appeal to the Court of Appeal (Civil Division).

31 The Chancellor Lord Justice Hooper in considering the legislation made specific reference to section 146 of the Law of Property Act 1925, Section 18 of the Landlord and Tenant Act 1985 and section 81(1) of the Housing Act 1996.

32 Counsel for the lessees in this case contended that -: (i) the service charge was recoverable as rent so that section 146 was not in point (as there was no need to serve a section 146 notice) (ii) The Freeholders costs incurred in the Tribunal were not incidental either to (a) expenses including solicitors costs and surveyors' fees incurred by the landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925, or the preparation and service of a s146 notice or (b) to the service of notices and schedules relating to wants of repair. And that no claim to that effect was pleaded.

33 Counsel for the Landlord relied upon the fact that originally the Lessees refused to pay anything in respect of the repairs, and as a consequence of that refusal it was necessary to prepare notices and schedules of repairs both before and after the application to the LVT in order to be in a position to serve a 146 notice.

34 In summary in paragraph 18 of the decision, Lord Justice Hooper states that he prefers the submissions of counsel for the Freeholders. "... *In short the enforcement of the liability of the tenants under clause 1(b) required first the determination of the Tribunal and, second, an s146 Notice...*" He continues at paragraph 20 - "... *Given that the determination of the Tribunal and a section 146 notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the freeholders' costs before the Tribunal fall within the terms of clause 3(12). If and insofar as any of them may not have been strictly costs of the proceedings they appear to have been incidental to the preparation of the requisite notices and schedules.*"

35 Mr Fain in his Skeleton argument states -: "... *As per Freeholders of 69 Marina, the application before the LVT was a prerequisite to the service of a section 146*

notice and thus was in relation to or in contemplation of or incidental to it and thus the costs incurred fall within clause 3.21.2."

- 36 In reply Mr Letman's position for the Respondent in respect of the above case was that the decision in *Freeholders of 69 Marina* was per incuriam and "ignored relevant authority and law and, with great respect, [was] wrong". Mr Letman stated that this decision was not predominantly about the question of cost, and there were points to be taken about the issue of cost which were not fully argued. In paragraph 14 of his Statement of Case he noted that the decision in *69 Marina* made "no specific reference is made to the terms of section 146(11) of the Law of Property Act 1925 nor to the cases that decide that service charge recoverable as rent in arrears is rent for the purposes of that provision so as no section 146 notice is required. The Respondents will accordingly invite the tribunal not to follow this mistaken decision."
- 37 Mr Letman cited the legal position concerning the right to re-entry or forfeiture in the event of non payment of rent. He also referred the Tribunal to *Escalus Properties Ltd-v- Robinson 1996 QB 231* in which it was held that rent referred to a periodical sum paid in return for the occupation of land, issuing out of the land and for non-payment of which a distress was leviable; and that a lease, by providing that the service charge should be deemed to be sums due by way of additional rent, invested the charge with the character of rent and, notwithstanding an omission to reserve it as rent, it was for the purposes of claiming the relief to be treated as such.
- 38 Counsel for the Respondent helpfully provided the Tribunal with copies of extracts from Woodfall. Of particular assistance was paragraph 7.175.1 which commented upon the decision in *Escalus Properties Ltd-v- Robinson*. It was noted in the relevant extract that -: It would appear to follow that such a service charge would count as rent for the purpose of section 146 of the Law of Property Act 1925, so that no section 146 notice would be necessary before forfeiting for non payment. However unless the lease on its proper construction provides for the service charge to be treated as rent it is not rent within the meaning of the lease or for the purpose of the law relating to relief from forfeiture for non-payment of rent."
- 39 For the purpose of this hearing, neither counsel invited the Tribunal to consider the construction of the lease, and make a finding, as to whether on a true construction of the lease, the service charges, had been reserved as rent. Both agreed that this was the position, and given this, the Tribunal have accepted this as being the case, and the Tribunal's reading of the lease supports this proposition.
- 40 Mr. Letman also asserted firstly that the service of a 146 notice would not lawfully have been contemplated because it was unnecessary and secondly that the Respondents had bona fide concerns about the Applicant's entitlement to the service charges demanded, and had also asked for information pursuant to section 21 A of the Landlord and Tenant Act 1985 which had not been provided by the Applicant until after the application had been issued.

- 41 Accordingly, he submitted that the Respondents were not in breach of the lease, he sought to rely upon the wording of section 21A as perhaps providing an entitlement to withhold the charges.
This was not accepted by Mr Fain, who stated that this was not argued before the Tribunal (who dealt with the section 27A Application), and importantly there were no regulations, pursuant to section 152 of CLARA 2002, to give effect to this section
- 42 Mr. Letman stated that the procedure under section 27A permitted the tenant to refer a matter to the Tribunal regardless of whether or not the service charges had been paid, given this, the cost incurred by the landlord was incurred as a result of dealing with the application, and as such would still have been incurred had the Respondents initiated the application. Given this, "...the costs cannot be said to arise out of any breach or non-observance of covenant..."
- 43 In reply Mr Fain noted that the Respondents could have challenged the service charges, as it was open to them to make an application notwithstanding the fact that payment had been made, and that this would have been a legitimate course of action, which would have had the result that the Respondents would not have been in breach of the lease and would still have enjoyed the protection of Section 27A of the LTA 1985.
- 44 In respect of Mr. Letman's submissions concerning 69 Marina, Mr Fain submitted that it was not open to this Tribunal to consider the decision of a superior court to be *per incuriam*, and as such the Tribunal made directions that this matter would be considered further, after the Tribunal had received additional submissions on this point. Directions were given that -: "*The Applicant provides any additional submission within 7 days. The Respondent had a further 7 days in which to provide a response.*"
- 45 The Respondent also asked the Tribunal to consider the reasonableness of the Administration Charges. The Tribunal were referred to the sums recovered in respect of Flat 3 £2867.43 (excluding court fee and solicitors costs) in respect of flat 10 £1536.93, and £1536.93. The costs liability for flat 3 and flat 10 was in total the sum of £6944.37.
- 46 Counsel for the Respondent's stated that the cost were not reasonable on two grounds (1) the individual proportion of cost was insufficiently particularised in respect of each of the Respondents. In paragraph 18 of his statement of case, he stated that -: "*...The Applicant is put to strict proof of the exact costs, if any, referable to each Respondent for the purpose of clause 3.21; it is not sufficient to log all costs as the Applicant has done and divide the same up as if this were a claim for service charge.*"
- 47 Mr. Letman also argued that the cost were disproportionate, in that they were considerably higher than the outstanding service charges. Mr. Letman also stated that the costs or at least a substantial part of them may have been

avoided if the Applicant had provided the Respondents with the information requested pursuant to section 21A of the Landlord and Tenant Act 1985.

48 Mr Fain did not accept either of these propositions, in respect of the breakdown of the bill of costs; he referred to the detailed 12 page schedule appended to the Landlord's statement of case. This set out the work which had been undertaken by the solicitors. In paragraph 15 of the statement of case, he stated that the total costs were £28,476 net, with only £10,500 having been billed to the applicant (to date)

49 Counsel for the Applicant stated that in respect of the division of cost, all of the Respondents were represented by Christo & Co, YVA Solicitors and Mr Hawkins of Counsel. " ...*They all joined in issue with the same arguments concerning service charges and thus equally caused A to incur the costs...it is submitted that it is reasonable to divide the costs by three rather than seeking the full amount against all three tenants and then seeking a credit. This is the proportionate and fair way to separate the costs.*" (Para. 20 of the Skeleton Argument).

50 Mr Fain submitted that the Respondents had persisted with their defence of the application even after they had received the information requested, and "*save for a marginal reduction in the level of management fees, still pursued unmeritorious arguments, before the LVT.*" Mr Fain submitted that save for minor reductions, the Respondents lost the application to the LVT and "*thus the application was properly brought and the costs were reasonably incurred.*"

51 In respect of the Additional Closing Submissions received from Counsel for both the Applicant and the Respondent, these are considered in the Tribunal's decision below.

The Tribunal's decision

52 Subsequent to the hearing the Tribunal were assisted by additional submissions from Counsel for the Applicant and Counsel for the Respondent in relation to the *Freeholders of 69 Marina Court* of Appeal decision. Mr Fain submitted that "the Lands Chamber of the Upper Tribunal ("UT") is a superior court of record pursuant to s 3(5) of the Tribunals, Courts and Enforcement Act 2007 and thus bound by decisions of the Court of Appeal." And the tribunal was "a quasi-judicial body and must follow the law"; a failure to do so would result in a successful appeal.

53 Mr Letman in his submissions in reply dated 26 January 2012, accepted that the LVT was a quasi-judicial body, however, he stated that the doctrine of judicial precedent (state decisis) does not formally apply to the LVT. Mr Letman relied upon the fact that the LVT as a tribunal was "*merely constituted in accordance*

with section 173 of CLARA 2002 Further, it has not yet been brought within the new Courts and Tribunals service constituted under The Tribunals Courts and Enforcement Act 2007”.

- 54 For the purpose of this decision the arguments will not be rehearsed in detail. The Tribunal accept, that notwithstanding Mr Letman’s detailed response (at the hearing and his subsequent submissions), and submissions that the case of *Freeholders of 69 Marina* was per incuriam, The Tribunal consider that Mr Fain’s additional submissions are in this instance correct. There was considerable persuasive authority concerning the relation between inferior courts and the decisions of superior courts. Although the Tribunal have not considered it necessary to determine the exact status of the Tribunal, for the purpose of this decision, the Tribunal consider that it would be artificial to claim that the Tribunal is not an “inferior court”.
- 55 The Tribunal accept that it is not for a first instance judge or inferior court or a tribunal to find that a decision of the Court of Appeal is per incuriam.
- 56 The Tribunal however, have not applied the case of *Freeholders of 69 Marina* for reasons which are set out below.
- 57 The Tribunal considered that in reaching its decision the Tribunal needed to consider the answers to the following questions:-
- (1) whether the non-payment of the service charges on a construction of the lease amounted to a breach of covenant or condition of the lease.
 - (2) whether clause 3.22 amounts to a variable administration charge within the meaning of Schedule 11 Paragraph 1
 - (3) did the non-payment of service charges in *these* circumstances amount to a breach of the terms of the lease.
Furthermore if the Tribunal determines that clause 3.22 amounts to a variable service charge;
 - (4) did the conduct of the Applicant in *these* circumstances amount to contemplation of section 146 proceedings within the meaning of clause 3.21 of the lease.
- 58 In reaching a decision on the first question the Tribunal relies upon the exact wording of the lease. The Tribunal noted that neither counsel considered the wording of clause 3.1 in any detail; however the Tribunal consider that it is relevant to the matter before it.
Under Definitions and interpretation paragraph 1.13 states:-“*the Rents*” means the ground rent the Insurance Contribution and the Service Charge. The Tenant’s Covenant at 3.1 states:- “to pay the Rents on the days and in the manner set out in this Lease and **not to exercise or seek to exercise any right or claim to withhold the Rent.**”
- 59 Clause 3.27 states– *if any sum under this Lease is unpaid fourteen days from the date whether formally demanded or not to pay the Landlord on demand interest on such sums from the date on which payment was due to the date of*

payment both before and after any judgment at the Interest Rate PROVIDED that nothing in this clause shall entitle the Tenant to withhold or delay any payment of any sums due under this Lease after the date upon which it falls due or in any way prejudice affect or derogate from the rights of the Landlord in relation to such non-payment including (but without prejudice to the generality of the above) its rights under the proviso for re-entry contained in this lease.

60 Given the clear and unambiguous wording of the lease, the Tribunal find, (in relation to the issues that we consider relevant to the decision) that the Tenant's failure to pay the service charges, amounted to a breach of the lease. This is the clear and inescapable meaning of the terms of the lease.

61 The Tribunal accept that insofar as the Respondents were concerned, there was a genuine dispute concerning the Applicant's entitlement to the charges, and there was a real issue concerning the services rendered by Mr West. The Respondents concerns are clearly set out in the letters sent by their solicitors.

62 Although ultimately the Respondents were not successful in challenging the fees/charges that were attributable to Mr West's employment, this does not detract from the fact that there was a genuine issue to be determined concerning the issues that they raised. There was also no suggestion that they had been frivolous or vexatious in their defence of the claim. This was not suggested by the Applicant, and accordingly there was no application for costs under schedule 12 paragraph 10 of CLARA 2002.

63 However, the wording of the lease in particularly paragraph 3.1 "*... not to exercise or seek to exercise any right or claim to withhold the Rent.*" is clear and unequivocal. The Tribunal may have reached a different decision if such clear language had not been used.

64 The Tribunal find that the Respondents were in breach of a term of the lease.

65 In relation to whether clause 3.22 amounts to a variable administration charge clause, Schedule 11 Para. 1(1) provides -: "*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 —

(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."*

66 The Tribunal considers that the wording in clause 3.22 of the lease amounts to such a charge; "*to be responsible for and to keep the Landlord fully indemnified against all damage damages losses costs expenses actions demands proceedings claims and liabilities made against or suffered or incurred by the*

Landlord arising directly or indirectly out of :-

... 3.22.2 any breach or non-observance by the Tenant of the covenants conditions or other provisions of this Lease or any of the matters to which this demise is subject”

67 The Tribunal find that this is a variable administration charge clause and accordingly within the ambit of schedule 11 paragraph 1(1) and 1(3) Of CLARA 2002.

68 In respect of the third issue identified by the Tribunal as relevant to our decision, the short answer is that the non payment of the service charges did, in these circumstances amount to a breach of the lease. This is not because of the wording of section 27 (A) 5, which would have enabled the service charges to have been paid, without the leaseholders losing their right to challenge the charges. It is as a result of the clear wording of the lease, which leads the Tribunal to conclude that the clear and un escapable intention of the landlord is that in the circumstances of non-payment of “rents” the tenant would be in breach of covenant.

69 The Tribunal finds that the non-payment of the service charges, in these circumstances given the clear and ambiguous wording of the lease, amounted to a breach of the lease.

70 Given the findings of the Tribunal, the last question is somewhat academic; however, the Tribunal have considered the issue of whether the conduct of the Applicant in *these* circumstances amounted to contemplation of section 146 proceedings within the meaning of clause 3.21 of the lease.

71 The Applicant has simply stated that the section 27A determination is a necessary step, before section 146 proceedings can be contemplated. Mr Letman rejected this argument as he relied upon the fact that where the service charges were reserved as rent, then forfeiture could be obtained without the service of a section 146 notice, and accordingly the Landlord could not be considered to be contemplating something which was unnecessary.

72 The Tribunal have not relied upon this, we have considered the conduct of the Applicant; what happened prior to the Application and also subsequently.

73 The Applicant was aware that there was a genuine dispute between the parties. This can be seen from the correspondence between the parties, we refer to the letter dated 23.01.06 in particular points 2) and 3) in which further details are requested to support the service charges demanded. Following this there is additional correspondence, from which it can be seen that there is a dispute between the parties concerning reasonableness and payability. At the point at which the application under section 27A is issued there is no suggestion in the correspondence that the service of a Section 146 notice is contemplated.

74 The Tribunal also noted that upon receipt of a favourable determination, which supported the payability of the service charges, the Applicant chose to enforce payment, through the County Court. The Tribunal consider that this suggests that practically speaking the Applicant wanted to enforce payment rather than take action for forfeiture for breach of the lease. The Tribunal issued its decision on 9 February 2009, and it was not until 7 December 2010, that an order to enforce payment by way of a money judgement was made in the County Court. Given this the Tribunal does not accept that the cost incurred, were incurred in contemplation of forfeiture. Nevertheless the cost is caught by clause 3.22 of the lease.

75 That is the tenant will :

*"... be responsible for and to keep the Landlord fully indemnified against all damage damages **losses costs expenses** actions demands proceedings claims and liabilities made against or suffered or incurred by the Landlord arising directly or indirectly out of :-*

*... 3.22.2 **any breach or non-observance** by the Tenant of the covenants conditions or other provisions of this Lease or any of the matters to which this demise is subject"*

76 The cost of the hearing resulted from the non-payment of the service charges which was in breach of clause 3.1 of the lease.

77 The final issue which the Tribunal needs to consider is the reasonableness of the Administration Charges. The Tribunal carefully examined the schedules provided, and noted that the issue was wholly about the practice adopted by the Applicant in taking a global figure which was then apportioned on an equal basis. There was no attack on the time taken, the range of tasks and the hourly rates applied. The Tribunal accordingly have accepted that the challenge from the Respondents is on a limited basis. Having considered that limited challenge we accept the reasoning of Mr Fain, that -: *"They all joined in issue with the same arguments concerning service charges and thus equally caused A to incur the costs...it is submitted that it is reasonable to divide the costs by three rather than seeking the full amount against all three tenants and then seeking a credit. This is the proportionate and fair way to separate the costs."*

78 The Tribunal noted that the correspondence from the Respondent's solicitor dealt with the challenge jointly on behalf of all three leaseholders, and as such the issues were jointly addressed. We may have taken a different approach had the parties been separately represented or raised diverse issues, as is sometimes the case where a leaseholder has a more extensive challenge, for example, where more years are challenged by one leaseholder than another. This was not the case here and for this reason the Tribunal are comfortable with the fact that this is a fair and proportionate approach to the issue of costs.

79 The Tribunal also consider that if the Applicant had recorded the cost in the way suggested by the Respondents, then this would have been at a further cost to the Respondents that they would then have been entitled to recoup.

80 The Tribunal are satisfied that the Administration costs were reasonable in amount.

The Tribunal's decision

81 The Tribunal determines that the amounts payable in respect of the Administration Charges in the sum of £6944.37 are payable by the first Respondent, and Administration Charges in the sum of £6944.37 are payable by the joint second Respondents.

Application under s.20C and refund of fees

82 No additional applications were made by the parties in respect of the cost of this hearing, and accordingly no findings were made by the Tribunal in respect of any entitlement in respect of the cost of this hearing or in respect of a refund of fees. The Tribunal accordingly made no finding in respect of these issues.

Chairman: Ms M W Daley LLB
(hons)
[name]

Date: 19/03/2012

84 Appendix of relevant legislation

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 leasehold valuation 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 a leasehold valuation tribunal;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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 a leasehold valuation 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 a leasehold valuation 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).

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
- (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
- (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.