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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

IN THE COUNTY COURT at Clerkenwell and Shoreditch, sitting at 10 Alfred Place, London, WC1 7LR

Case reference	:	**LON/00AW/LSC/2018/0113**
Property	:	**Flat 8, 73 Ladbroke Grove, London, W11 2PD**
Applicant	:	**73 Ladbroke Grove Residents Management Limited**
Representative	:	**Mr Andrew Skelly (Counsel) instructed by Comptons**
Respondent	:	**Ms Fatima Seteman Saiadi**
Representative	:	**Mr Richard Devereux-Cooke (Counsel) instructed by De Cruz Solicitors**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Robert Latham** **Mr Kevin Ridgway MRICS** **Mrs Jayam Dalal**
In the County Court		**Judge Robert Latham**
Venue and Date of Hearing	:	**10 Alfred Place, London WC1E 7LR** **On 4 and 5 September 2018**
Date of decision	:	**10 October 2018**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the sum of £6,640.48 is payable by the Respondent in respect of the service charges payable as at 30 January 2017. The Tribunal has made a reduction of £51.20 in the sum demanded (see [33] of our decision).

(2) The Tribunal determines that the sum of £2,521.22 which was demanded as interest on the arrears of service charges is payable. However, this sum was paid by the Trustee in Bankruptcy on 13 January 2017 (see [29] of our decision).

(3) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(4) The Tribunal determines that the Respondent shall pay the Applicant £200 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

(5) Judge Latham, sitting as a Judge of the County Court, determines that interest of £944.00 is payable as at the date of this determination and will thereafter accrue at £1.46 per day (see [56] of the decision).

(6) The parties are agreed that this matter should now be referred back to the Clerkenwell and Shoreditch County Court to determine the issue of costs.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Respondent.

2. The Applicant is both the lessor and management company of 73 Ladbroke Grove, London, W11 2DP ("the Building"). The Building is managed by Quadrant Property Management Ltd ("Quadrant"). The Respondent is the lessee of Flat 8 (the Flat). The Building is an early Victorian property constructed on six floors. There were eight flats, but the three flats on the ground and lower ground floors have now been combined into one flat (Flat 3). Flat 4 is on the first floor; Flat 5 on the second; Flat 6 on the third; and Flats 7 and 8 on the fifth floor. Flats 7 and 8 both have one bedroom. Flat 7 is at the front; Flat 8 at the rear.

3. On 5 July 2017, the Applicant issued proceedings in the in the Northampton CCMCC. The Applicant claims the following sums:

(i) Rent and administration charges in the sum of £9,212.90. This claim is set out in a letter dated 9 March 2017. It includes two elements: (a) Balance carried forward on 30 January 2017: £6,691.68 and (b) Service charges demanded on 30 January 2017: £2,521.22.

(ii) Interest on "outstanding ground rent" in the sum of £272.60. The Applicant clarified that the service charges are reserved as rent in the lease. This is therefore a claim for interest on the arrears of service charges. The Applicant claims interest pursuant to section 69 of the County Courts Act 1984 at 8% from the date of the issue of the claim.

(iii) Legal Costs of £3,383.40. These were the legal costs incurred by the Applicant at the date of the issue of proceedings. At the end of the first day of the hearing, the Applicant produced a Schedule of Costs totalling £36,305.30. This had not been served in accordance with the Directions given by the Tribunal. The Respondent was not in a position to deal with this. Judge Latham indicated that this was not a matter which he could deal with as a summary assessment. The parties therefore agreed that this aspect should be referred back to the County Court.

(iv) Administration charges of £84. The Applicant did not proceed with this.

4. On 29 September 2017, the Respondent filed a Defence and Counterclaim. In her Defence, the Respondent specified six grounds for disputing the claim. In her Counterclaim, she avers that the landlord has wrongly demanded contributions towards a reserve or sinking fund. Secondly, she avers that the landlord has wrongly charged her the total cost of the repairs to the roof above her Flat, whereas this should be a communal expense shared by all lessees. Thirdly, she avers that an agreement was reached "in or about 1989" whereby she was entitled to an annual deduction of £50.71 in her service charge. She seeks a declaration with regard to her contractual liability in respect of the roof above her Flat.

5. On 31 January 2018, the claim was transferred to the Clerkenwell and Shoreditch County Court. On 20 February, an order was made providing that "the matter be sent to the First-tier Tribunal (Property Chamber)"("FTT") .

6. On 24 April, Judge Dutton gave Directions. He noted that the County Court had transferred all matters to the Tribunal pursuant to the Deployment of Judges' Pilot Scheme. Following amendments to the County Courts Act 1984, made by Schedule 9 of the Crime and Courts Act 2013, all FTT Judges are now judges of the County Court. Accordingly, where FTT judges sit in the capacity as judges of the County Court, they now have jurisdiction to determine issues relating to ground rent, interest and costs. In considering its jurisdiction under this Scheme, the Tribunal has heeded the guidance provided by the Upper Tribunal ("UT") in *Avon Ground Rents limited v Sarah Louise Child* [2018] UKUT 204 (LC). The Tribunal can only determine matters within its traditional jurisdiction; whilst Judge Latham can determine any further issues sitting in his capacity as a judge of the County Court. The parties have agreed that the

issue of costs should be referred back to the County Court. Judge Latham, sitting as a judge of the County Court, has determined the two issues: (i) the Applicant's claim for interest pursuant to section 69 of the County Court Act 1984 (see [56] below); and (ii) the Respondent's Counterclaim for a declaration (see [51] below). These procedural matters were discussed with the parties.

7. The Directions made provision for the following:

(i) Disclosure of relevant documents by the Respondent.

(ii) The Respondent to file a Statement expanding on, as necessary, the matter pleaded in the Counterclaim. On 29 May, the Respondent filed a Statement of Case (at p.26-31 of the Core Bundle);

(iii) The Applicant to file full particulars of any costs being sought. On 19 June, the Respondent filed a Statement in Reply (at p.32-42). This did not address the costs which were being claimed.

(iv) The Applicant has filed witness statements from Ms Jill Coupe (at p.85-94). The Respondent has also filed a witness statement (at p.95-160).

(v) The Applicant has filed a Bundle of Documents extending to 509 pages. The Respondent has filed her Bundle extending to an additional 294 pages. References to the Respondent's Bundle are pre-fixed by the letter "R".

(vi) On 22 June, there was a mediation hearing. However, this failed to resolve the issues in dispute.

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

The Hearing

9. The Applicant was represented by Mr Andrew Skelly (Counsel) who was instructed by Comptons Solicitors. He adduced evidence from Ms Jill Coupe who is the tenant of Flat 3. She is also a director of the Applicant Company.

10. The Respondent was represented by Mr Richard Devereux-Cooke (Counsel) instructed by De Cruz Solicitors. He adduced evidence from Ms Saiadi, the Respondent, who is a nurse.

11. Both Counsel provided Skeleton Arguments. They also provided copies of a number of legal texts and authorities. We are grateful to the assistance provided by both counsel who ensured that we were able to complete the hearing within the two days which had been allocated.

12. Counsel agreed the issues which we are required to determine. Some involve small sums of money. There have been three previous sets of proceedings

involving the parties. An important issue (Issue 4) is whether it is open to the tenant to reopen an issue relating to the construction of her lease which was determined by Recorder Winstanley on 20 January 1995. We decided that this should not be determined as a preliminary issue, but that we should rather hear full argument on all issues.

The Lease

13. The Respondent occupies Flat 8 pursuant to a lease dated 7 July 1982 (at p.64-82). This is a tripartite lease between the Lessor (then Syed Ghasen Shobeiry), the Management Company (the Applicant) and the Lessee (the Respondent). On 1 August 1990, the Applicant acquired the freehold interest and also became Lessor. On 5 June 1992, the Respondent was registered at the Land Registry as the freehold owner (see p.83). All the lessees of the Building are also shareholders in the Applicant Company.

14. Paragraph 2 of the Preamble to the Respondent's lease recites that the Lessor has either granted or intends to grant leases of other flats in the Building which shall contain the restrictions set out in the Seventh Schedule and the lessee's covenants in the Eighth Schedule. In the event, the leases have not been granted in identical terms and this has caused practical problems in respect of the repair of roof.

15. Clause 2 demises Flat 8 to the Lessee. The definition of "the Flat" includes "the floor and ceiling of the Flat and the structure supporting the floor", "the internal and external walls of the Flat" and "the roof and roof structure of the Building so far as the same constitute the roof and the roof structure of the Flat".

16. The term is 99 years from 1 January 1982. The Lessee covenants to pay a rent of £75 for the first 33 years increasing to £150 and then to £300 for the subsequent periods of 33 years.

17. By Clause 4, the Lessee's covenants are set out in the Eighth Schedule. These include the following:

> (i) Paragraph (iv): to pay "all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the proportion (sic) and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than relief granted by the Court".
>
> (ii) Paragraph (viii): to keep "the Flat" in "good and tenantable repair and condition".
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> (iii) Paragraph (x): "to make good all defects and wants of repair of which written notice shall have been given to the Lessee by the Lessor for which the Lessee is liable hereunder within two months of service of such notice".

(iv) Paragraph (xi): to indemnify the Landlord and the Management Company against "all costs incurred in abating a nuisance or for remedying anything else in respect of the Flat".

18. By clause 5, the Lessee covenants to contribute the proportionate part of the service charges which are specified in the Ninth Schedule. The Lessee's contribution to the service charge is reserved as rent and her proportion is specified at 8%. The service charge year is 1 January to 31 December. An interim service charge is payable on 1 January and 1 June. The service charge extends to (emphasis added):

(i) "1. the expense of maintaining and keeping in repair and renewing the roofs main structure walls footings foundations entryphone installation hallways stairways the central heating and hot water installation lifts and the common parts of the Building and of the Estate except insofar as they are comprised in a lease of a Flat in the Building...."; and

(ii) "5. All other proper expenses incurred by the Management Company in respect of managing the Building, the Flats therein and the Estate".

19. By Clause 7(a), the Management Company covenants (emphasis added):

"to maintain and keep in repair and renew (i) the roofs main structure walls foundations footings and floors thereon .... in under or upon the Estate including the Building enjoyed or used by the Lessee in common with the owners or lessees of the other flats not otherwise demised ...".

20. The Respondent also referred the Tribunal to the lease for Flat 7 (at R238-18. This is dated 7 July 1982. The demise of the Flat in Clause 2 does not include the words: "the roof and roof structure of the Building so far as the same constitute the roof and the roof structure of the Flat".

The Background

21. On 16 August 1988, the Respondent Tenant issued Case No. B8834722 against the current Applicant in the Central London County Court. On 20 January 1995, Recorder Winstanley gave judgment (at p.290-346). The Tenant complained of disrepair to the roof and the Management Company counterclaimed for arrears of service charges. A nine-day trial occurred more than six years after the proceedings had commenced. Both parties were represented by Counsel. The Recorder noted that they were "very ably represented". The central issue involved in the dispute was the true construction of the lease, namely who was responsible for the repairs of the roof, exterior walls and windows. For almost six years, the case had proceeded on the basis that this was the responsibility of the Management Company. It was only on 13 June 1994, that the Management Company took the point that it was the responsibility of the tenant.

22. The Recorder had regard to Clause 2 of the lease and concluded that the Tenant's demise included that part of the roof and roof structure which is above her flat. This excluded from the demise the rear parapet wall and the party parapet walls from the ceiling of the tenant's flat upwards. The Recorder accepted that the lease for Flat 8 was inconsistent with that for Flat 7, but was satisfied that the Tenant's lease, read by itself, was perfectly comprehensible. The Recorder accepted that the sub-division of the repair of the roof was impractical, in that the Tenant was liable for the front section whereas the rear section was the responsibility of the Management Company. However, the system set up by the lease was not "impossible to operate".

23. The significance of the fact that part of the roof was demised to the Tenant is that the responsibility to repair falls on the Tenant, rather than the Management Company. The Recorder had regard to the covenants on the Management Company which are to be found at Clause 7(a)(i) of the lease. The Recorder ruled that the words "not otherwise demised" relate to all that goes before it; it was not possible to divide the clause up as contended for by Counsel for the Tenant. Neither did the Recorder accept that the wording of paragraph 1 of the Ninth Schedule assisted the tenant. Again, he was satisfied that the words "except insofar as they are comprised in a lease of the Building" applied to all the words that went before it.

24. Having regard to the manner in which the Management Company had operated the lease between 26 February 1982 and 13 June 1994, the Recorder found that an estoppel by convention had been established. During this period, the Management Company had carried out repairs to all sections of the roof and passed on the cost of these works through the service charge to all tenants. The Recorder was satisfied that it would be inequitable for the Management Company to be allowed to re-open 12 years of service charge demands.

25. The Recorder awarded damages of £2,000 to the Tenant in respect of the disrepair. The Management Company counterclaimed for arrears of service charges in the sum of £3,300.62. The Recorder disallowed items amounting to £1,249.28, awarding a reduced sum of £2,051.34. The outcome was a judgment for the Management Company for the net sum of £51.34,

26. On 3 January 2013 a Tribunal determined Application LON/00AW/LSC/2012/0515 (at p.380-396). This matter had been transferred from the Central London County Court. The Applicant Management Company claimed £2,170.64 for the service charge year 2011. The Tribunal found that the sums demanded were payable and reasonable. The Respondent raised an issue in respect of a Sinking/Reserve Fund. The Tribunal found that no contribution had been demanded from the Tenant, albeit that other tenants seemed to be contributing to such a fund. On 8 February, the Tribunal refused the Respondent permission to appeal (p.397).

27. On 18 February 2013, a Tribunal determined Application LON/00AW/LSC/2012/0589 (at p.425-443). This Application was brought by the Tenant and related to the service charge years 2009 and 2010. The Tribunal

found that most of the sums demanded were payable and reasonable, but made two small deductions. The Tribunal refused the Tenant's application for the appointment of a manager. On 18 February, the Tribunal refused the Applicant permission to appeal (p.442). On 17 April, the UT also refused permission to appeal (p.444).

28. On 14 October 2014, a bankruptcy order was made against the Tenant. On 3 January 2017, the order was annulled. During this period, the lease vested in the Trustee in Bankruptcy. The Applicant consulted the tenants on a programme of external decorations and repairs. On 2 March 2015, the Applicant served a Notice of intention (at p.205) and on 27 October 2015, the Notice of Estimates (p.208).

29. On 13 January 2017 (at p.454), the Trustee in Bankruptcy sent the Applicant a cheque of £16,687.58, namely (i) £14,166.36 in respect of outstanding debts owed by the Tenant; and (ii) statutory interest of £2,521.22 for the period 14 October 2014 to 3 January 2017 at the rate of 8%.

30. On 9 March 2017 (at p.6) the Applicant demanded a total of £9,820.23. This Tribunal is primarily concerned with two items:

(i) Balance carried forward on the service charge account as at 30 January 2017: £6,691.68. There is a service charge account at p.9. The items which are challenged are apparent from this statement.

(ii) Service Charges of £2,521.22 which were demanded on 30 January 2017. This is the interest which was paid over by the Trustee in Bankruptcy on 13 January 2017.

31. There is a more up to date service charge account, dated 29 June 2018, at p.167. This shows that the arrears at that date were £12,158.57.

Issue 1: Company Charge Advances

32. The Applicant claims three sums for "Company Charge Advances" of £58, £29, and £29, a total of £116 due for 2016. Paragraph 6 (i) of the Defence wrongly refers to a figure of £125. The sum of £116 is one six monthly payment of £58 and two quarterly payments of £29. It is claimed pursuant to Schedule 9, paragraph 5 (see [18(ii)] above). The Applicant Company is controlled by the lessees and must comply with the requirements of the Companies Act for the filing of accounts and the statutory returns.

33. The budget is at p.283. The Respondent agreed that the sum of £810 is payable and reasonable. However, the sum has been divided by seven, namely the number of shareholders. It is agreed that the Tenant's contribution to the service charge is 8%. Her contribution should therefore have been £64.80, and she is entitled to a reduction of £51.20.

Issue 2: Double Recovery

34. The Respondent contends that there was double recovery in 2016 of £337 for "Service Charge Advance" and £206.50 for "Insurance Advance". The Budget is at p.283. The Respondent's 8% share of the general expenses (£16,860) was £1,348 and insurance (£10,330) was £826. This should have been demanded as two six monthly payments of £674 and £413. It was rather collected as one six monthly payment (£674 and £413) and two quarterly payments (£337 and £206.50). This was rather an error in the manner in which the sums were demanded. The Respondent accepted this and it is no longer a live issue.

Issue 3: "Spanners and Manners"

35. On 13 March 2015, the Applicant charged the Respondent £90 in respect of an Emergency Callout on 24 December 2014 in respect of a leak from the trap beneath the bath in Flat 8. It is claimed pursuant to Schedule 8, paragraph xi (see [17(iv)] above).

36. The Respondent's case is that she should not be liable for this. She avers that the source of the leak was rather the pipework in Flat 6 where extensive building works were being executed rather than a leak from her bath. If it is a service charge item, she should only be liable for 8%.

37. The Tribunal has been provided with a number of e-mails passing between tenants, residents, Quadrant and the contractor on 24 December (at p.234-265). It is apparent that works were going on in Flat 6. However, on a balance of probabilities, the Tribunal is satisfied that the cause of the problem was a leak from the trap beneath the bath in Flat 8 for which the Respondent is liable. We have regard to the following:

(i) At 10.08, Mirco Keilflug who was staying in Flat 6 refers to water pouring through the ceiling when the lady in the flat above took a bath/shower (p.235). He later refers to two photos of the leaking pipes from the top flat (at p.236).

(ii) At 13.49, Jeremy Neville, Quadrant, instructed Spanners and Manners to attend and identify the cause of the leak (p.328). He suggests that the water is coming from Flat 8.

(iii) At 15.15, Jeremy Neville notifies a number of tenants of the report from the plumber (at p.244). He states that the cause of the water leak was found to be a defective seal on the bath waste serving Flat 8. The leak had run into Flat 5 as the ceilings in Flat 6 had been removed as part of the works in hand. The plumber advised that from the level of calcium, it was apparent that it had been leaking for some time.

(iv) On 5 January 2015, Spanners and Masters invoiced Quadrant for £90 "to arrange access, attend property. Investigate leak from Flat 8 into flat below" (p.266).

Issue 4: "Just Does It"

38. On 4 October 2016, Just Does It, a firm of builders, invoiced Quadrant £2,430 in respect of works to the roof (see p.217). The Tribunal is asked to determine whether these works to the roof above the Respondent's flat are her liability under her lease or are rather that of the Management Company. Mr Devereux-Cooke confirmed that this is the sole matter which we are asked to determine. It is a matter of construction of the lease, albeit one that has already been determined by Recorder Winstanley. We are not asked to consider any factual issues as to the circumstances in which the Applicant executed works which they now contend were rather the responsibility of the Respondent.

39. Mr Devereux-Cooke asks Judge Latham, in his capacity as a County Court Judge, to make a declaration in these terms:

> "Upon consideration of (a) the lease executed on 26 February 1982 between (i) the Lessor (Mr Sayed Ghasan Shoberry); (ii) the Management Company (the Applicant) and (iii) the Lessee (the Respondent) and (b) the written judgement of Mr Recorder Winstanley delivered on 20 January 1995 in a case between the present Respondent and the present Applicant; and (c) the circumstances on which the lease was entered into; and (d) the evidence of the representation made by the solicitor for the Lessor as the then Vendor to the solicitor for the present Respondent as intending lessee;
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> It is declared that:
>
> 1. This Tribunal is entitled to reconsider the true effect of the lease dated 26 February 1982; and
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> 2. This Tribunal is entitled to, and does, declare that the Respondent as lessee has not been and is not responsible for the cost of repairs and maintenance to the roof above her demised flat."

40. The parties were in general agreement as to what Recorder Winstanley had decided. This is summarised at [21] to [25] above. The issue is rather whether this Tribunal is bound by his decision.

41. The Respondent asks the Tribunal to have regard to two letters which form part of the correspondence between the parties' solicitors prior to the execution of the lease on 27 February 1982:

(i) On 30 December 1981 (at p.148), Olden Bishop and Gale, the Respondent's Solicitor, writes in these terms:

"The inclusion of the main structure of the roof on our client's demise is at odds with the management company covenant to repair same. Please confirm that the said roof will not be so included".

(ii) On 4 January 1982 (at p.149), Richard G Morgan, the Solicitor for Mr Shobeiry, the Lessor, responds:

"We thank you for your letters on which we are taking instructions, although we are taking instructions, although we are disposed to agree your amendments.

.....

The provision for the maintenance of the roof is subject to Clause 7. If the Management Company fulfils its obligations, no burden will fall on the lessee."

42. Mr Devereux-Cooke argued that the judgment of Recorder Winstanley was not binding on this Tribunal. He suggested that no bar of res judicata or issue estoppel therefore arose. It is therefore open to this Tribunal to reconsider the issue, especially as there is new evidence which was not before the Recorder. If the lease is read as a whole, it is apparent that the parties intended that the Management Company should be liable to repair and maintain the roof and pass on the cost of any works to all the lessees through the service charge.

43. Mr Devereux-Cooke referred us to the following:

(i) *Arnold v National Westminster Bank PLC* [1991] 2 AC 93 at 94 B-C; and the speech of Lord Keith of Kinkel at 105D and 109 A-B. The issue in this case was how a rent review clause was to be construed. The lease demised the premises for a term of just under 32 years with rent reviews at five yearly periods. On the first review, Walton J had held, on appeal from an arbitrator, that the reference to a hypothetical lease was not to be construed as containing rent review provisions. No appeal was possible against this decision. Subsequent judicial decisions, including two in the Court of Appeal, indicated that Walton J had been wrong on the construction point. On the second rent review, the tenants brought further proceedings to determine the basis on which rent reviews under the lease were to be conducted. The House of Lords held that although issue estoppel constituted a complete bar to relitigation between the same parties of a decided point, its operation could be prevented in special circumstances. Where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings, it gave rise to an exception to issue estoppel, whether or not that point had been specifically raised and decided. Such further material was not confined to matters of fact but that where a judge made a mistake and a higher court overruled him in a subsequent case, justice required that the party who suffered from the mistake should not be prevented from reopening that issue when it

arose in later proceedings. Accordingly, the tenant ought to be permitted to reopen the question of construction decided against them by Walton J.

(ii) *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160 at [17] to [27] where Lord Sumption JSC explained the principles of the modern law of res judicata. The Supreme Court held that the purpose of the principle of res judicata was to support the good administration of justice in the interests of the public and the parties by preventing abusive and duplicative litigation. The principle operated, in the form of cause of action estoppel, to prevent a cause of action being raised in subsequent proceedings which was identical to that raised in earlier proceedings between the same parties so that points which could, with reasonable diligence, have been taken in earlier proceedings but had not been could not be raised subsequently. Cause of action estoppel is absolute only in relation to points actually decided on the earlier occasion and is sufficiently flexible not to preclude the raising of essential points which had not been decided in the earlier proceedings.

(iii) Chitty on Contracts (32nd Ed) at 13-116 and 113-122; and *Brikon Investments v Carr* [1979] 1 QB 467 per Roskill LJ at 489 B-D. Mr Devereux-Cooke did not seek to go so far as to invoke promissory estoppel. However, he argued that the evidence of the two letters was admissible to prove the true nature of the agreement. A warranty point could have been put to Recorder Winstanley.

(iv) The Interpretation of Contracts (6th Ed), Sir Kim Lewison at 3.15 which considers where a representation in the course of negotiations may become a term of the contract.

44. Mr Skelly submits that it is not open to this Tribunal to revisit Recorder Winstanley's decision as to how the lease is construed. The doctrine of res judicata debars the Tribunal from so doing, whether this be cause of action estoppel or issue estoppel. He referred the Tribunal to various passages Volume 12A of Halsbury's Laws of England. The basic doctrine of res judicata is that where a decision is pronounced by a judicial or other tribunal, the same matter cannot be reopened by the parties bound by the decision save on appeal. However, the doctrine also embraces:

(i) "cause of action estoppel" which is absolute only in relation to points actually decided on the earlier occasion.

(ii) "issue estoppel" to which an exception arises in special circumstances where there has become available to a party further material relevant to the correct determination of the point raised in the earlier proceedings being material which could not by reasonable diligence have been adduced in those proceedings.

45. Mr Skelly highlighted the difference in approach between Chitty (at 13.122) and Lewison (at 3.15) as to the extent to which it is permissible to look at what the

parties said or did in the course of negotiations for the purposes of drawing inferences about what a contract should mean.

46. Mr Skelly reminded the Tribunal the circumstances in which this issue has arisen:

(i) In her Counterclaim (10 November 2017) (at p.13), the Respondent avers that these works are a service charge expense for which all lessees are liable under the Ninth Schedule of the lease. She makes no reference to the judgment of Recorder Winstanley.

(ii) In her Statement of Case (29 May 2018) (at p.28), she first addresses this judgment. She avers that this judgment is not binding on this Tribunal. She avers that the judgement was plainly wrong. She concedes that she did not appeal the judgment. She seeks to rely on two letters exchanged between the parties at the time the lease was executed. She suggests that had they been disclosed, they could have made a material difference to the trial. She does not explain why it was not possible to adduce them at the trial.

47. Mr Skelly makes the following observations on these two letters:

(i) We have only been shown two letters which cannot be read in isolation. We were given not explanation as to why we were not provided with a full set of the correspondence. This has not been seen by the Applicant.

(ii) The Tribunal was not offered any sufficient explanation as to why this correspondence could not have been adduced before Recorder Winstanley. Even if not in the physical possession of the Respondent, they were in the possession of her former Solicitor. The Respondent stated that she was not aware of the correspondence at the time of the County Court action and only later went back to her former Solicitor. She had been under a duty to make full disclosure of all relevant documents in the County Court proceedings.

(iii) The Respondent has not pleaded any case of collateral contract or warranty.

(iv) These letters would not have had any material effect on the decision of Recorder Winstanley, even had they been shown to him.

48. The Tribunal provided the parties with a copy of the recent decision of His Honour Judge Behrens in the Upper Tribunal ("UT") in *Hemmise v Tower Hamlets LBC* [2016] UKUT 109 (LC). In granting permission to appeal Martin Rodger QC, the Deputy President observed that it was arguable that a FTT is bound to follow the decision of a previous tribunal which had not been the subject of an appeal and which included a determination on the meaning and effect of the same lease in proceedings between the same parties. The issue was whether the definition of "Common Parts" in the lease was wide enough to include "Estate" items. An earlier Tribunal determined that it was not; two later Tribunals determined that it was. HHJ Behrens considered both *Arnold v*

National Westminster Bank and *Virgin Atlantic Airways v Zodiac Seats UK Ltd.* HHJ Behrens was satisfied that issue estoppel would prevent the landlord from challenging the finding in the earlier proceedings unless there were special circumstances. He concluded that there were special circumstances which permitted him to do so. He found the following factors to be relevant (at [43]):

(i) The Judge was satisfied that the decision of the earlier Tribunal was plainly wrong. It was clear from the definition of "Common Parts" in clause 1(10) of the lease that "the Estate" is included within the definition of the Common Parts;

(ii) There is a continuing relationship between the Landlord and the Tenant. The lease was for a period of 100 years. Were the tenants sell the lease, any estoppel would endure for the benefit of their successors in title. Thus, if there is an estoppel, it would mean that the tenant and its successors in title would be underpaying the service charge for a very considerable period of time.

(iii) The point had not been taken by the parties themselves in the earlier proceedings. The point was rather taken by the Tribunal without the landlord being given a proper opportunity to deal with it.

(iv) The pleaded issue before the Tribunal related to the reasonableness of the charges. No doubt the lawyer employed by the Landlord was prepared to deal with that point. Whilst this did not mean that the Tribunal were not entitled to decide the point, it did mean that that it was a point that it was reasonable for the Landlord not to deal with.

(v) The landlord accepted that it could (and probably should) have appealed the decision. On the other hand, the landlord was not seeking to overturn the Tribunal's actual decision in relation to the service charges found to be payable.

49. The Tribunal determines that the works to the roof above the Respondent's flat are her liability under her lease, rather that of the Management Company. The Respondent is therefore liable for the full cost of £2,430. We reach this decision for the following reasons:

(i) We are satisfied that we are bound by the judgement of Recorder Winstanley in which he construed the lease and determined that the works to the roof above the Respondent's flat are her liability under the lease. He concluded that by Clause 2 of the Lease, the demise of "the Flat" includes "the roof and roof structure of the Building so far as the same constitute the roof and the roof structure of the Flat". By Clause 4, the Lessee's covenants are set out in the Ninth Schedule. By paragraph (viii) of this Schedule, the Lessee covenants to keep "the Flat" in "good and tenantable repair and condition".

(ii) We would only be entitled to depart from this decision if satisfied that there are "special circumstances". We are satisfied that there are no such special circumstances.

(iii) We consider that the relevant limb of res judicata is "issue estoppel" rather that "cause of action estoppel". The current application does not involve the same cause of action, but rather similar issues relating to the construction of the lease. This was the approach adopted by the House of Lords in *Arnold v National Westminster Bank PLC* and the UT in *Hemmise v Tower Hamlets LBC.*

50. In concluding that there are no special circumstances for departing from the construction of the lease determined by Recorder Winstanley, we have regard to the following factors:

(i) The Recorder made his determination after a trial conducted over eight days. Both parties were represented ably by Counsel who argued the point fully.

(ii) The Respondent did not appeal this decision. There was some suggestion that the Respondent lodged an appeal, but later decided not to proceed with it.

(iii) We are not satisfied that the Recorder was plainly wrong. He gave a detailed judgement and construed the lease with care. Whilst he recognised that the operation of the lease was unsatisfactory, he concluded that there was no ambiguity. Whilst Mr Devereux-Cooke sought to argue that the Recorder had erred in law in construing the lease, he did no more than repeat arguments which had been raised and rejected by the Recorder. Had this Tribunal been required to construe the lease, we would have reached the same conclusion as the Recorder.

(iv) We are not persuaded that the two letters adduced by the Applicant would have led the Recorder to have reached a different decision. The two letters which we have been shown cannot be read in isolation. We have been given no sufficient explanation as to why we have only been provided with these two letters or why the relevant correspondence could not have been put before Recorder Winstanley. We agree with the submissions made by Mr Skelly. The Respondent has not pleaded any case of collateral contract or warranty. The Respondent's Solicitor sought confirmation that the roof would not be included within the Lessee's demise. The Lessor provided no such confirmation. The Respondent's Solicitor allowed their client to sign a lease in which the roof and roof structure above the flat clearly form part of the Lessee's demise. The relevance of this fact was known to the Solicitor. It is for a Solicitor to advise their client on the terms and effect of any lease. This is particularly important when a client is signing a lease for a term of 99 years, which will bind not only their client but any successor in title. If there is any ambiguity, it is to be resolved through the drafting process, rather than by reference to any extraneous material.

Issue 5: Counterclaim for a Declaration

51. The Respondent seeks a declaration in the terms set out in [39] above. Judge Latham, sitting as a Judge of the County Court, is not minded to make a

declaration. The Tribunal has decided that it is not open to it to revisit the issues determined by Recorder Winstanley. It would not be appropriate for Judge Latham to make a declaration seeking to record what Recorder Winstanley decided. The substance of his determination is apparent from his judgment. This has been summarised in this decision.

Issue 6: Interest paid by Trustee in Bankruptcy

52. The Service charge is reserved as rent. On 13 January 2017 (at p.454), the Trustee in Bankruptcy paid the Applicant £14,166.36 in respect of arrears of service charges owed by the Respondent together with interest of £2,521.22. On 30 January, the Applicant levied a service charge in this sum, reflecting the interest which it was entitled to demand on arrears. This sum appears in the pre-action letter dated 9 March 2017. The Respondent agreed that the interest paid by the trustee in Bankruptcy should be retained by the Applicant and should not be returned to her. This issue is no longer in dispute.

Issue 7: Counterclaim in respect of Sinking or Reserve Fund

53. The Respondent complains that demands have been made and payments have been received towards a sinking or reserve fund. It is common ground that the lease makes no provision for such a fund. Some tenants have contributed towards a reserve fund. However, this has been voluntary. There is no evidence that the Respondent has made any contribution. The Applicant agrees that the Respondent is not obliged to do so.

Issue 8: Counterclaim for Refund of £50.71 per annum

54. The Respondent suggests that an agreement was reached in about 1989 that she should be entitled to a reduction in her service charge annually of £50.71. We were referred to the minutes of an EGM which was held on 4 January 1989 (at p.121). It seems that when the Management Company which is owned by the tenants, acquired the freehold interest, it was agreed that no ground rent would be collected. There is no claim for ground rents. The minutes seem to refer to a one-off payment. There is no evidence of an agreement for an annual reduction. The Respondent did not pursue this aspect of her claim.

Issue 9: Statutory Interest

55. The Applicant claims interest on outstanding ground rent at 8% per annum from the dates due to 5 July 2017. A sum of £272.60 is claimed. Mr Skelly confirmed that there is no claim for ground rent or interest thereon. Rather, the service charges are reserved as rent under the lease. The claim is therefore for statutory interest at 8% pursuant to Section 69 of the County Court Acts.

56. This is an issue in respect of which Judge Latham now has jurisdiction as a County Court Judge. He awards the interest sought of £272.60 as at 5 July 2017. The outstanding service charges are £6,640.48. The additional interest payable

at the date of this determination is £671.40, namely 1 years and 96 days at 8%. The total interest, to date, is £944.00. Thereafter, interest accrues at £1.46 per day.

Application under s.20C and Refund of Fees

57. At the hearing, the Applicant made an application for a refund of the fees of £200 that is has paid in respect of the hearing pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the fees paid by the Applicant within 28 days of the date of this decision.

58. At the hearing, the Respondent applied for an order under section 20Cof the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not consider it to be just and equitable in the circumstances for such an order to be made.

The Next Steps

59. This matter should now be returned to the County Court. The parties agreed that the issue of costs should be determined by the County Court. The Court will need to consider whether any order should be made pursuant to Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2012.

60. This Tribunal agrees with Recorder Winstanley that the sub-division of repairs in respect of the roof is impractical in that the Tenant is responsible for the front section, whereas the rear section is the responsibility of the Management Company. The system set up by the lease is not impossible to operate. However, in practice, practical difficulties are likely to arise when repairs are required. We were not asked to consider the circumstances in which the Applicant had executed works to the front roof, and subsequently decided to charge the same to the Respondent.

61. The Applicant, which is controlled by the tenants, now holds the freehold interest. This provides an opportunity for the parties to agree to grant new modern leases which reflect a more practical division of responsibilities. It is also an opportunity to grant extended leases at peppercorn rents. Ms Coupe indicated that the directors are willing to consider this. The relationship between Ms Saiadi and her fellow tenants has not been good. We would urge all parties to look to the future. The Tribunal offers a mediation service which would enable the parties to

explore a more constructive approach for the future.

Judge Robert Latham
10 October 2018

Rights of Appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) or to a Circuit Judge at the County Court, as appropriate, then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber), or to the County Court, as appropriate.

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 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.