



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

**Case reference** : **LON/00BK/LSC/2019/0378**

**Property** : **Flat 10, 54/55 Kensington Gardens Square, London W2 4BH**

**Applicant** : **Kensquare Limited**

**Representative** : **Mr David Peachey (counsel);  
Dale & Dale Solicitors Limited**

**Respondent** : **Ms Mary Adwoa Akyaa Boakye**

**Representative** : **Mr Edward Blakeney (counsel);  
Radcliffes Le Brasseur (solicitors)**

**Type of application** : **For the determination of the  
reasonableness of and the liability to  
pay service charges and administration  
charges**

**Tribunal members** : **Judge Nicola Rushton QC;  
Mr Duncan Jagger MRICS**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **7 February 2020**

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**DECISION**

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## **Decisions of the tribunal**

- (1) The tribunal determines that the sum of £360 is payable by the Respondent to the Applicant in respect of the interim service charge for 2018-2019 and £180 for 2019-2020.
- (2) The tribunal determines that the Respondent is liable to pay the sum of £192.50 to the Applicant as an administration charge in relation to the costs of preparing and serving a s.146 Notice in 2017. This is subject to the service by the Applicant of a compliant demand.
- (3) The tribunal declines to make an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing the Respondent's liability to pay the said administration charge of £192.50.
- (4) The tribunal determines that the Applicant's legal costs of this application and of the application to the tribunal made in 2017 are not recoverable from the Respondent as service charges by the terms of the lease. It therefore makes no order on the Respondent's application under section 20C of the Landlord and Tenant Act 1985.
- (5) The tribunal stays any enforcement of paragraphs (1) and (2) above, pending the conclusion of the Respondent's claim in the County Court at Central London in Claim Number D67YM410. Permission is given to either party to apply to the tribunal, on notice to the other, to lift the stay.
- (6) The tribunal's determinations are subject to any equitable set-off which the Respondent may establish in those county court proceedings.
- (7) The tribunal makes further determinations as set out under the various headings in this Decision.

## **The applications**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of interim service charges payable by the Respondent in respect of the service charge years 2018-2019 and 2019-2020.
2. The Applicant also seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to whether certain legal costs incurred by the Applicant in previous s.27A proceedings against the Respondent are payable by the Respondent as an administration charge.
3. Insofar as any of the Applicant's legal costs in connection with these or previous proceedings before the tribunal would otherwise be payable by the Respondent

under the terms of the lease, as administration charges or service charges, the Respondent seeks an order under paragraph 5A of Schedule 11 to the 2002 Act and/or section 20C of the 1985 Act (as appropriate) reducing or extinguishing her liability to pay any such charges.

4. The Applicant confirmed at the hearing that no application was made for any determination that any interest was payable on any outstanding sum, whether as a service charge or an administration charge.
5. The relevant legal provisions are set out in the Appendix to this decision.

### **The hearing**

6. The Applicant was represented at the hearing by Mr David Peachey of counsel and the Respondent was represented by Mr Edward Blakeney of counsel. The Respondent did not herself attend the hearing.
7. Shortly before the start, each parties' counsel handed in a skeleton argument with accompanying authorities. The tribunal considered both skeletons before the hearing commenced, which was at 10.20 am.
8. Directions in standard form were issued by Valuer Chair Mr Ian Holdsworth FRICS MCI Arb on 9 October 2019. Any specific directions will be referred to below as relevant. The Respondent's Statement of Case was filed on 20 November 2019 and the Applicant's Statement of Case in response was filed on about 10 December 2019.
9. No statements of fact were filed by or on behalf of the Respondent.
10. The Applicant filed statements of fact from one of the directors of the Applicant, Mr Bryn Robertson, and from the Applicant's solicitor, Mr Martin Comport, both dated 10 December 2019.
11. At the start of the hearing Mr Peachey told the tribunal that Mr Robertson was unable to attend as he was abroad on business. He said that the other director of the Applicant with knowledge of the case was also abroad and unable to attend. He asked that Mr Robertson's statement nevertheless be accepted by the tribunal in evidence. Mr Blakeney indicated that Mr Robertson's evidence was not agreed and that he would have had questions for him if he had attended.
12. Both counsel agreed that the hearing should proceed on all issues. Mr Blakeney submitted that Mr Robertson's evidence should be given less weight than it would otherwise have, since he was not available for cross examination.
13. The tribunal has accepted the signed statement of Mr Robertson (which included a statement of truth) into evidence. However, given that his evidence was not agreed and he was not available to answer questions, this has limited

the weight that the tribunal has been able to give his evidence on certain matters in issue, as detailed below.

14. Mr Comport gave oral evidence and was cross-examined by Mr Blakeney and also answered questions from the tribunal.

### **The background**

15. The property which is the subject of this application is Flat 10, 54/55 Kensington Gardens Square, London W2 4BH (“the Flat”). It is one of 18 flats across two buildings of which the Applicant owns the freehold.
16. The Respondent holds a 125-year lease of the Flat, commencing 15 October 1982. The lease requires the Applicant landlord to provide services and the Respondent tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.
17. The Applicant is understood to be a tenant management company incorporated in 1982, of which the Respondent is a shareholder. Office copy entries for the Flat in the bundle record that the Respondent was registered as proprietor on 17 February 1998.
18. Neither party requested an inspection and the tribunal did not consider one was necessary given the nature of the dispute.
19. The Applicant has previously made an application to this tribunal (LON/00BK/LSC/2017/0118) for determination of the reasonableness and liability for service charges payable by the Respondent for the years 2011-2017. It is understood that those were also interim service charges. A hearing took place of that application on 10 July 2017. In a short judgment of the same date the tribunal (Judge Hargreaves and Peter Roberts DipArch RIBA) concluded:
  - “4. *The Respondent has no case to make or defend on this point. Her representative made that clear at the hearing. The real thrust of her position is that she wishes to make a counterclaim for damages/a set-off which has yet to be made in the county court. In the circumstances the order [for determination of the amount of service charges which are reasonable and payable] is entirely appropriate. It is regrettable that her position was not clarified until the hearing.*
  5. *The Applicant made no application for costs.*”
20. Prior to this, on 21 June 2017, the tribunal had offered the Respondent the option of having her counterclaim for damages for disrepair determined by the tribunal, together with the s.27A application, under the Deployment of Judges Pilot. By a letter of 29 June 2017 the Respondent’s solicitors declined that offer

because the damages claimed were said to exceed the claim for service charges and because under the pilot, the matter would be allocated to the small claims track.

21. On 29 June 2017 the tribunal replied that a procedural judge had decided that the tribunal would not deal with the disrepair counterclaim but would limit itself to the issue of reasonableness and payability unfettered by any issue of set-off. It said the tribunal would be able to make a determination “...*that, subject to determination by the court of any set-off and/or counterclaim for damages for disrepair, the service charges claimed [were] reasonable and payable by the lessee.*” [emphasis in original].
22. On about 10 August 2017 the Applicant served a s.146 notice on the Respondent at the address of the Flat. The notice was not copied to the Respondent’s solicitors. They say it did not come to the attention of them or their client until 3 October 2017, by which point the Applicant was threatening to commence proceedings to forfeit the lease. The s.146 Notice was also served on the Respondent’s mortgagee. There is no dispute that the mortgagee then paid the full amount of the service charges then claimed.
23. The Respondent has not herself therefore paid any service charges since before 2011.
24. On 17 October 2017 the Respondent issued a claim against the Applicant in the county court for damages for breach of covenant to repair, limited to £70,000. This tribunal has had sight of the parties’ statements of case in that claim, which is due to be heard at a 3 day trial commencing 6 April 2020 in the County Court at Central London.
25. This tribunal has therefore proceeded on the basis that it is not seised of any issue as to whether any service or administration charges otherwise payable fall to be extinguished or reduced by reason of the set-off of any claim for damages for disrepair, this being a matter for the county court. Any determination which this tribunal makes is subject to the determination by the county court of any such set-off and/or counterclaim.
26. On 15 August 2019 the Applicant sent the Respondent, at the Flat address, a demand for a “*Half yearly estimated service charge due in advance*” of £1,623.52 and a “*Half yearly contribution to reserve fund*” of £480, in each case for three periods: 01/04/2018 – 30/09/2018; 01/10/2018 – 31/03/2019 and 01/04/2019 – 30/09/2019. Also included was a demand for legal costs of the Applicant’s solicitors totalling £8,213.70. The demand attached the statutory summary of tenants’ rights and obligations in relation to service charges but not (it is conceded) any summary of rights in relation to administration charges.
27. The Applicant also asked (in the witness statement of Mr Robertson and at the hearing) for a determination of the reasonability and payability of service

charges in the same amounts for the period 01/10/2019 – 31/03/2020, subject to service of a demand. It is common ground that no demand has yet been served for this period.

### **The issues**

28. The issues which arise for determination by the tribunal are:
- (i) Whether on a proper interpretation of the lease, the interim service charges which could be demanded of the Respondent for 2018-19 and 2019-20 were limited to £360 per annum, including whether any necessary notices had been served.
  - (ii) Whether any issue estoppel on the interpretation of the interim service charge provisions in the lease arises from the decision of 10 July 2017.
  - (iii) Subject to any set-off, what interim service charges are therefore payable by the Respondent.
  - (iv) Whether the Applicant's legal costs relating to the 2011-2017 service charges can be charged to the Respondent under the lease as an administration charge. If so, subject to service of a compliant demand, what administration charge is reasonable and payable?
  - (v) Whether the Respondent can now raise an issue as to waiver of any such administration charge.
  - (vi) Whether the tribunal has the power to order a stay of enforcement of any of its determinations and if so, whether it should do so.
  - (vii) Whether the tribunal should make any order in favour of the Respondent under either s.20C of the 1985 Act or s.5A of Schedule 11 to the 2002 Act.
29. As to the application under s.27A, this is a demand for interim service charges only. If an issue of reasonableness arises, it will be under s.19(2) of the 1985 Act.
30. Having heard evidence and submissions from the parties and considered all of the documents provided, including the skeleton arguments of both counsel, the tribunal has made determinations on the issues, as follows.

### **What amount could be demanded as interim service charges**

31. Clause 4 of the lease provides (so far as material):

“4. The Lessee HEREBY COVENANTS with the Lessor and with and for the benefit of the owners and lessees from time to time during the said term of the other flats comprised in the Building that the Lessee will at all times hereafter during the said term:-

...

(2) (i) Pay to the Lessor the Agreed Percentage... of the expenditure incurred by the Lessor on the matters specified in the Seventh Schedule hereto and in carrying out its obligations under Clause 5 hereof in respect of the Building (such proportion being hereinafter referred to as “the maintenance charge”)

(ii) Pay the Maintenance Contribution specified in Paragraph 9 of the Particulars or such revised sum as shall be calculated in accordance with the provisions of paragraph (x) of this subclause as a contribution towards the maintenance charge such sum to be paid to the Lessor by equal half yearly payments in advance on the 1<sup>st</sup> day of April and the 1<sup>st</sup> day of October in each year...

(iii) As soon as practical after the end of each financial year... of the Lessor the Lessor shall furnish to the Lessee an account of the maintenance charge payable by the Lessee for that year due credit being given for the advance contribution relevant to that year and amounts carried forward from previous financial years (if any) and upon the furnishing of such account there shall be paid by the Lessee to the Lessor within twenty eight days any balance or difference found to be payable or there shall be carried forward by the Lessor to the next financial year any amount which may have been overpaid by the Lessee as the case may require.

...

(v) the amount of the maintenance charge shall be ascertained and certified annually by a certificate of annual expenditure (hereinafter called “the Certificate”) signed by the Lessor or the Managing Agents as soon after the end of the financial year of the Lessor as may be practicable and shall relate to such years in manner hereinafter mentioned.

...

(x) It is further specifically provided that the Lessor may if it thinks fit revise and adjust the Maintenance Contribution for any of the Lessor’s financial years to such amount as it shall deem necessary in the light of expenditure reasonably anticipated for that year notice of such revision and adjustment to be served on the Lessee not less than one month prior to the commencement of that financial year and the

*Maintenance Contribution so revised and adjusted shall be payable by the Lessee in accordance with paragraph (ii) hereof...*

32. Clause 1(a) of the lease states: “...(v) ‘*The Maintenance Contribution*’ means the yearly sum specified in Paragraph 9 of the Particulars or such revised sum as shall be calculated in accordance with the provisions of Clause 4 (2) (x) hereof.”
33. Paragraph 9 of the Particulars of the lease states that the “*Current Maintenance Contribution*” is £360 p.a..
34. At paragraph 10 of his witness statement, Mr Robertson stated that the estimated service charges were based on the budgets for the two financial years ending 31 March 2019 and 31 March 2020. Copies of those budgets were attached to his statement and, as he said, the total budget was the same for both financial years (£52,588).
35. At paragraphs 11 to 13 he explained that the four directors of the Applicant liaise with the managing agent to decide the budget for the coming financial year, in line with estimated actual expenditure for the previous financial year (the accounts not having been prepared by then) and expected future expenditure. He said they also consider what major works need to be undertaken and so how to build up the reserve fund. The current reserve is £115,000. The amount of the reserve is based on the proposed major works and the interim service charges include a proportion for the reserve fund.
36. Mr Blakeney’s submission was that the terms of the lease only require the Respondent to pay an interim service charge of £360 p.a. unless the Applicant has given notice in accordance with clause 4(2)(x), at least one month before the start of any financial year, of a revision and adjustment of the interim service charge, in the light of expenditure reasonably anticipated for that financial year. He also submitted that this had to be done separately for each financial year where the Applicant sought an interim service charge greater than £360.
37. He further submitted that there was no evidence that any such notice had been served for the two financial years in question and, since Mr Robertson was not in attendance to answer any questions about this, the tribunal should conclude that no such notice had been served. He submitted that the Applicant had been put to proof that the service charges were payable and, given the disclosure which the Applicant had been required to make by the Directions, if any such notice had been served, it would have been disclosed.
38. Mr Peachey submitted that there was an issue estoppel on this point, since the previous tribunal must necessarily have found that the provisions of clause 4(2)(x) had been complied with. This is considered below. He also objected that if the Respondent had wished to raise this issue, she should have done so in her Statement of Case, which she had not (the point being raised for the first time in Mr Blakeney’s skeleton argument). He submitted it was not sufficient for the



Respondent simply to put the Applicant to proof on everything, especially where she herself served no evidence.

39. The tribunal's view is that the Applicant had a reasonable opportunity to deal with this issue. While Mr Robertson had not attended, the Applicant knew that his evidence was not agreed, so it had accepted the risk that questions might arise at the hearing where the tribunal would not have the benefit of his answers.
40. On the interpretation point, the tribunal accepts the submissions of Mr Blakeney. The terms of clause 4(2)(ii) and (x) taken together clearly provide that the amount of any interim service charge payable by the Respondent is limited to £360 p.a. unless a notice of revision and adjustment has been served on the Respondent in accordance with subclause (x).
41. Further, the tribunal accepts Mr Blakeney's submission that a new notice must be served for each financial year. Although subclause (x) refers to adjusting the Maintenance Contribution for "*any of the Lessor's financial years*" it is clear that this must be read as meaning "*any [one] of the Lessor's financial years*" given the references to "*that year*" and "*that financial year*" in the same clause. "Years" is plural simply because the phrase would otherwise be ungrammatical, not because the adjustment can be applied to more than one year.
42. On the factual question of whether such a notice was served for either financial year, the tribunal finds on the evidence that, most probably, no such notice was served. Mr Robertson gives a lot of detail of the process undertaken by himself and the other directors in determining the interim service charges, but nowhere does he mention serving such a notice. The Directions (which were in standard form) provided that the Applicant should serve on the Respondent copies of (a) the estimated service charge costs and service charge accounts for each of the disputed years; (b) the demands for the disputed service charges; and (c) an account showing all service charges demanded by the tenant. No copies of any adjustment notices were disclosed. While the Directions do not refer expressly to disclosure of notices, it seems inherently unlikely that copies would not have been disclosed along with the other documents if they had indeed been prepared and served.
43. In addition, the tribunal was not taken to any document or case statement from the Applicant which referred to the service of any such notice as occurring or being needed. The strong impression created was that the Applicant has overlooked this notice requirement for many years, and possibly has just been serving interim service charge demands, based on its budgets.
44. Mr Comport confirmed in his evidence that he was unable to comment on whether any such notices had been served.

45. Subject to the question of issue estoppel (and set-off), the tribunal therefore concludes that the interim service charge payable by the Respondent is limited to £360 p.a. for each of the two years in question.
46. Since this is a fixed interim service charge, the tribunal does not have jurisdiction to determine whether the amount is reasonable.

### **Issue estoppel**

47. Mr Peachey's submission was that an issue estoppel arose as a result of the previous decision on 10 July 2017. He submitted that the provisions of subclauses 4(2)(ii) and (x) must necessarily have been found to have been complied with, since interim service charges were held to be payable in sums greater than £360 p.a..
48. Mr Blakeney submitted that it was clear that the tribunal on the previous occasion did not consider the point at all, and so it was open to this tribunal to consider the matter. He emphasised that we were now concerned with subsequent years, so the Applicant's submission essentially amounted to saying that by virtue of the 2017 decision, it was no longer possible for the Respondent to rely upon the service charge provisions within the lease, which could not be correct.
49. The application of the doctrine of issue estoppel in a case such as the present was considered by the Upper Tribunal in *Hemmise v. London Borough of Tower Hamlets* [2016] UKUT 109 (LC). In that case HHJ Behrens reviewed and applied authority on the issue from the highest courts, especially in *Arnold v. National Westminster Bank plc* [1991] AC 93 and *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2013] UKSC 46. *Arnold* in particular concerned issue estoppel in the context of interpretation of provisions in a long lease.
50. *Hemmise* raised the question of whether the tribunal was obliged by issue estoppel to interpret service charge provisions in a long lease in the same way as a previous LVT, even though the tribunal considered that previous interpretation was wrong. In the earlier decision, the point of interpretation had been taken by the LVT itself, so the landlord had not prepared to argue it.
51. On issue estoppel, at [33] HHJ Behrens quoted *Virgin Airways* at [22] citing *Arnold* as authority for the proposition that: "*Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.*"
52. HHJ Behrens concluded that the interpretation point was a necessary ingredient of the earlier tribunal's decision. Accordingly, he held that unless there were special circumstances, the doctrine of issue estoppel applied to

prevent the landlord from challenging the interpretation in subsequent proceedings.

53. He then went on to consider the meaning and requirements of “special circumstances”. At [41] he quoted Mann LJ in the Court of Appeal in *Arnold* as saying: “*It therefore follows that nowadays ‘special circumstances’ can defeat an issue estoppel of whatever species*”. At [42] HHJ Behrens quoted Lord Keith in the House of Lords in *Arnold* as saying (in concluding that special circumstances applied):

*“There is much force also in the view that the landlord, if the issue cannot be reopened, would most unfairly be receiving a very much higher rent than he would be entitled to on a proper construction of the lease. The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondents permission to reopen the disputed issue.”*

54. In the case before him HHJ Behrens concluded at [43] that special circumstances also applied, because: (1) the decision of the first LVT was plainly wrong; (2) there was a continuing relationship of landlord and tenant, and the lease was for 100 years. Any estoppel would also bind their successors; (3) the point was taken by the LVT itself and the landlord did not have a proper opportunity to deal with it; (4) the focus of the hearing had been reasonableness; (5) the landlord was seeking to re-argue the point for later charges, not re-open the original decision.
55. So far as the present application is concerned, it is agreed, and it is quite plain, that the point as to the proper interpretation of subclauses 4(2)(ii) and (x) of the lease was not raised or argued or considered by the tribunal on 10 July 2017. No issues as to the reasonability or payability of the service charges, or the proper interpretation of the lease, were raised at all by the Respondent’s representative. This is clear from the decision, even though it did not strictly speaking proceed by consent.
56. Since no consideration was given to the point, it is somewhat artificial to try to determine whether the tribunal in 2017 necessarily applied a different interpretation of clause 4(2) or whether it proceeded on a factual assumption that any necessary notice had been served. It might be said that a different interpretation was not a necessary ingredient of that decision.
57. It must be said though that the issue as to the correct interpretation of clause 4(2) was one which could with reasonable diligence have been raised at the 2017 hearing and (if no notices of adjustment had been served) probably should have been raised.

58. Accordingly, the tribunal considers that this is a case where issue estoppel does *prima facie* arise, subject to the question of whether special circumstances apply.
59. However, this tribunal is also of the view that special circumstances do apply and the Respondent should be permitted to re-open the question of the proper interpretation of the interim service charge provisions of the lease. This is for the following reasons, which are similar to those given by HHJ Behrens in the *Hemmise* case:
- (i) It considers that an interpretation of subclauses 4(2)(ii) and (x) which differed from that above would clearly be wrong.
  - (ii) This is a long lease, with about 87 years left to run, under which the parties and their successors will continue to have the relationship of landlord and tenant. It is unsatisfactory and unattractive that they should be prevented from applying the actual provisions in the lease as to interim service charges for the remaining term.
  - (iii) Since the previous tribunal was not asked to consider the terms of the lease, it is not clear what interpretation of subclauses 4(2)(ii) and (x) it should be taken as having applied;
  - (iv) Both parties anyway have the right under s.27A to ask for a determination as to the payability and reasonableness of the interim service charges every year into the future if they wish to do so. As in *Arnold* and *Hemmise*, the public interest in seeing an end to litigation carries little weight where there is such a right;
  - (v) The point was not previously argued or determined (even though it should have been), the focus on the previous occasion being on the effect of any counterclaim rather than the payability and reasonableness of the service charges themselves.
60. Accordingly, the tribunal concludes that insofar as it can be said that a different interpretation of subclauses 4(2)(ii) and (x) was a necessary ingredient of the 2017 decision, there are special circumstances which mean that issue estoppel should not and does not prevent the Respondent from raising the point now.

### **What interim service charges are accordingly payable**

61. The tribunal concludes for these reasons that the interim service charges which have been demanded and are payable by the Respondent (subject to any issue of set-off) are £360 for 2018-2019 and £180 for 2019-2020.
62. £180 will also be payable for the second half of the 2019-2020 year, subject to service of an appropriate demand which complies with all statutory

requirements. It is agreed that a demand has not yet been served for that period, so the second part of the interim service charge for 2019-2020 is not yet payable.

63. None of this affects the amount of any final service charges which may be payable by the Respondent for these two years, as to which there are separate provisions in the lease. Nothing in this decision affects the ability of either party to apply to the tribunal to determine the reasonableness and payability of those final service charges for the years in question, under s.27A.
64. Similarly the tribunal makes no determination as to whether any or all of the individual items which are included in the service charges budgets for 2018-2019 and 2019-2020 properly fall within the Seventh Schedule to the lease. That schedule sets out the costs and expenses to which the Respondent is to contribute by way of service charge.
65. Some submissions were made by both counsel as to whether certain items in the budgets fell within the Seventh Schedule. Mr Peachey also objected to such points being taken given that (a) the Respondent had indicated in her statement of case that she did not dispute the reasonableness of the service charges, subject to certain caveats and (b) these points were raised for the first time in Mr Blakeney's skeleton or submissions. Given its findings that the interim service charges payable are for a fixed sum, it is not necessary for the tribunal to make any determinations on these questions and it does not do so.

#### **Claim for legal costs from 2011-2017 as an administration charge**

66. The Applicant also seeks a determination under Schedule 11 to the 2002 Act as to whether the Respondent is liable to pay the Applicant's legal costs of the claim for service charges for 2011-2017, as an administration charge, and the reasonableness of the same.
67. As a preliminary, Mr Peachey accepted on behalf of the Applicant that the demand of 15 August 2019 which included the legal costs did not include the necessary statement of tenant's rights in relation to administration charges, but only as to service charges. Any determination of the tribunal as to payability will therefore be subject to service of a demand with the necessary notice.
68. By clause 3 of the lease the lessee covenants to observe and perform the obligations in the Fourth Schedule. Both counsel agreed that the relevant clause of the Fourth Schedule for the purpose of any administration charge is paragraph (5), which obliges the lessee:

*“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 preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court...”*

69. The tribunal heard live evidence from the Applicant's solicitor Mr Comport, who has been a solicitor for 33 years and a landlord and tenant specialist since 1989. He stated that in his view all of the costs were recoverable under this clause, even though they were incurred over a period going back to 2014. He accepted that only one of those bills (relating to the period 10.08.17 to 14.02.18) included any express reference to matters concerning a Section 146 Notice. A handwritten note on this invoice has separated out the amount relating to the Section 146 Notice as being £192.50. In his statement Mr Comport said in general terms that "*the applicant is entitled to seek to recover all the costs it has incurred as a result of the Respondent's breaches of covenant resulting in a Section 146 Notice under the terms of the Lease.*"
70. Mr Comport also explained why no application for costs under Regulation 13 of the First Tier Tribunal Rules had been made at the hearing on 10 July 2017, even though he said in his statement that the tribunal had indicated he would be "pushing at an open door". He said such an order would only have covered the costs of the application before the tribunal, whereas the Applicant also wanted to recover the costs incurred before that and subsequently.
71. As to why the s.146 Notice had only been served on the Flat, he said he had never been given an alternative service address for the Respondent since previous litigation in 2005. Although he knew the Flat was sub-let, the Notice had to be served on the lessee (and not her solicitors). He knew it would be good service and expected she would get it, if it was served at the Flat. He accepted that he had not also served the Notice on her solicitors. He said he simply omitted to do so – there was no other reason and he was not cynically trying to take advantage of her. No forfeiture proceedings were issued because the mortgagee discharged all the outstanding interim service charges then claimed, about 7 weeks after the service of the Notice.
72. It was accepted by Mr Blakeney that the £192.50 falls within paragraph 5 of the Fourth Schedule. The dispute between the parties is as to whether the remaining legal costs do so. Those legal costs relate to the demands for service charges and the previous application to the tribunal.
73. Mr Peachey submitted that all of these costs were "*for the purpose of or incidental to*" the service of a s.146 Notice because a determination of the service charges was a necessary precondition to serving the Notice.
74. Both counsel made reference to previous authorities which considered the scope of clauses which imposed a liability to pay legal costs in the context of Section 146 Notices, in particular *Willens v. Influential Consultants* [2015] UKUT 262 (LC) and *Barrett v. Robinson* [2014] UKUT 322 (LC). Mr Peachey submitted that the clause in the present case was comparable to those cases; Mr Blakeney submitted the clause here was materially narrower.
75. Mr Blakeney submitted that the clause in *Barrett* was wider because it extended to costs "*...in or in contemplation of any proceedings or the preparation of any notice under section 146...*". The clause in *Willens* extended to costs "*...incurred*

*in or in contemplation of proceedings under section 146...*". He further submitted that in *Contractreal Ltd v. Davies* [2001] EWCA Civ 928 Arden LJ had held that "incidental" denoted a lesser or subordinate sum, and that in previous authorities the word had been held to have a limited meaning.

76. The tribunal's conclusion is that the only element of the Applicant's legal costs which falls within the terms of paragraph 5 of the Fourth Schedule is the £192.50 which relates to the preparation and service of the Section 146 Notice. This clause is significantly narrower than those considered in *Willens and Barrett*. The only costs covered are those which are "*for the purpose of or incidental to the preparation and service of a Notice...*", which it considers is narrower than "*in contemplation of...*" While a s.146 Notice could not be served unless there had previously been a determination by the tribunal of a breach of covenant by the Respondent, it is stretching language too far to say that the FTT proceedings were therefore for the purpose of the preparation of that notice.
77. As to "*incidental to*", the tribunal has had regard to the *Contractreal* decision especially at [36-37], and at [41] where Arden LJ said: "*So those authorities show that the expression 'of and incidental to' is a time-hallowed phrase in the context of costs and that it has received a limited meaning, and in particular that the words 'incidental to' have been treated as denoting some subordinate costs to the costs of the action. If [the Appellant] was right in this action it would mean that the costs of some very substantial proceedings would be treated as costs of and incidental to other proceedings.*" The same analysis applies here: the costs of the application before the FTT cannot be said to have been subordinate to the costs of serving a s.146 Notice, and they certainly greatly exceeded the latter.
78. Mr Blakeney also submitted that it was wrong for the Applicant to serve any s.146 Notice when it knew that the Respondent was asserting a set-off of a claim for damages for disrepair. However, no such claim had been issued by the Respondent as at the date of the hearing on 10 July 2017 or when the Notice was served on 10 August 2017. On those dates there was no extant claim for damages to which the determination of interim service charges was subject. The tribunal does not consider therefore that the Applicant could not properly serve a s.146 Notice at that time, so that it should not be entitled to its costs of doing so.
79. Accordingly (and subject to the next point), the tribunal determines that the administration charge payable by the Respondent in this regard is £192.50, an amount which it considers reasonable.

### **Waiver**

80. In his skeleton argument at paragraph 30.3 Mr Blakeney faintly raised the possibility that the Applicant had waived any right it had to forfeit the lease for failure to pay the interim service charges, and so to serve a s.146 Notice. He sought to develop this point in submissions, arguing that the service of service

charge demands amounted to a waiver of any right to forfeit, even if the service charges related to an earlier period.

81. Mr Peachey objected that it was far too late to raise such a substantial point, with no opportunity to obtain relevant authorities.
82. It was clear to the tribunal that there was a substantial dispute between the parties, of both fact and law, as to what acts had taken place and whether they might constitute a waiver. The tribunal agrees with the Applicant's counsel that it would not be appropriate to try to determine such an issue, essentially raised for the first time in final submissions and so without the factual matrix having been explored or the relevant authorities obtained. Given the recoverable administration charge is limited to £192.50, it would also not be proportionate in terms of costs.

### **Stay**

83. The Respondent has in any event sought a stay of enforcement of any determinations as to either interim service charges or administration charges payable, pending the trial of her claim for damages for disrepair.
84. Mr Peachey submitted that the tribunal has no such power to stay enforcement of its determinations. He submitted that there was no specific or general power to do so within rule 6 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").
85. Mr Blakeney submitted that such a power is envisaged by rule 6 of the 2013 Rules and that in its letter of 29 June 2017 the tribunal considered that it had such a power.
86. The tribunal has concluded that it does have such a power to order a stay of enforcement of its determinations, under rule 6 of the 2013 Rules.
87. Rule 6(1) provides in general terms that, subject to the Tribunals Courts and Enforcement Act 2007, it may regulate its own procedure. Rule 6(2) provides that it may give a direction in relation to the conduct or disposal of proceedings at any time. Rule 6(3) provides that, without restricting its general powers under 6(1) and 6(2), it may among other things: "*(m) stay proceedings*" and "*(o) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision.*"
88. Given the preamble to rule 6(3), the tribunal does not accept Mr Peachey's specific submission that the limited power to suspend the effect of a decision in sub-rule (o) means there cannot be a wider power to suspend. The tribunal's conclusion is that by analogy with sub-rules (m) and (o), it can also suspend the effect of its determinations pending the outcome of a claim in the county court.



89. As already stated, there is an issue between the parties as to whether any service charges or administration charges can be set off against any claim for damages for disrepair which the Respondent may have. That is an issue of which the tribunal is not seised and which is to be determined by the county court, together with the Respondent's disrepair claim.
90. In those circumstances the tribunal considers it obviously appropriate that the effect of its determinations be stayed pending the determination of that claim by the county court. The stay is ordered with permission to either party to apply to the tribunal to lift it if appropriate, on notice to the other. It therefore makes such an order.

### **Applications under para. 5A or s.20C**

91. In his skeleton argument, Mr Blakeney invited the tribunal to make an order under paragraph 5A of Schedule 11 to the 2002 Act extinguishing the Respondent's liability to pay the remaining £192.50 legal costs relating to the s.146 Notice.
92. In addition, both in her statement of case and in Mr Blakeney's skeleton argument, the Respondent has invited the Applicant to clarify whether it contends that its legal costs (of this application and the 2017 one) are recoverable from the lessees under the Seventh Schedule to the lease, as service charges. If the Applicant does not concede that the costs are not so recoverable, then the Respondent has asked the tribunal to make an order under s.20C of the 1985 Act that the Applicant may not pass on any of the costs of either application through the service charge.
93. Mr Peachey submitted that if the Applicant has a contractual right to its legal costs, it should not be prevented from recovering them by an order under either jurisdiction. He said that the Applicant's solicitors had engaged with the Respondent's solicitors at length, including sending them a copy of the s.146 Notice, and had not acted unreasonably.
94. So far as the application for an order under paragraph 5A in relation to the administration charge is concerned, the tribunal is concerned only with the reasonableness of the Applicant's conduct in relation to the s.146 Notice. The tribunal has already noted that at the time it was served, no proceedings for disrepair had been issued by the Respondent. It was also reasonable of the Applicant to serve the Notice on the Flat, even though it would have been good practice also to send a copy to the Respondent's solicitors.
95. In those circumstances the tribunal does not consider that the Applicant acted unreasonably in incurring the costs of the s.146 Notice and it declines to make any order under paragraph 5A.
96. As to the application under s.20C, Mr Peachey made it clear at the hearing that he was not conceding that the Applicant's legal costs (of either application) were

not recoverable as a service charge. The application for an order under s.20C was therefore pursued by Mr Blakeney.

97. This requires the tribunal to determine whether or not the Applicant's legal costs are recoverable contractually under the terms of the Seventh Schedule to the lease. Mr Peachey's position was that legal costs were recoverable as costs of professional advisers.
98. The paragraphs of the Seventh Schedule which are potentially relevant are those relating to:

“5. *The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the Building*” and

“9. *Cost of employing such staff to perform such services as the Lessor shall think necessary in or about the Building.*”
99. There is significant authority on the question of whether a landlord can recover legal costs by way of service charges where there is no express provision in the lease for the recovery of legal or litigation costs, but only a clause in more general terms. “*Clear and unambiguous lease terms are required*” (*St Mary's Mansions Ltd v. Limegate Investments Co Ltd* [2002] EWCA Civ 1491). However this does not mean that general language cannot be sufficiently clear to demonstrate an intention to include legal costs (*Assethold Ltd v. Watts* [2014] UKUT 537 (LC)).
100. In *Sella House Ltd v. Mears* (1989) 21 HLR 147, the Court of Appeal held that legal costs of recovering unpaid rent and service charges from defaulting tenants were not recoverable under service charge provisions which extended to “*expenses payable to... such other person who may be managing the Building including the cost of computing and collecting the rents and service charges..*” or costs of “*...other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.*”
101. While such questions of construction are very fact sensitive, the tribunal considers that both the clauses and the factual matrix in the present case are materially similar to *Sella House*. The tribunal does not consider that the language used in paragraphs 5 and 9 can be said to show a clear or unambiguous intention to extend to legal costs incurred in obtaining a determination of service charges. On the contrary, on a natural reading neither clause appears to be intended to extend to legal costs.
102. Since the tribunal's conclusion is that the legal costs of the applications do not fall within the service charge provisions in the lease, no question arises of making an order under section 20C.

103. If it had reached a different conclusion on the point of interpretation, the tribunal would have concluded, taking into account its determinations and the submissions made by the parties, that (a) it was not just and equitable to make an order under section 20C of the 1985 Act in relation to the costs of the 2017 proceedings; but (b) it was just and equitable to make such an order in relation to the costs of the present proceedings.
104. The consequence is that the tribunal's view is the Applicant's legal costs are not recoverable either as an administration charge (save as to the s.146 Notice costs) nor as a service charge. The tribunal notes that the fact the Applicant is a tenant management company with no income other than through its members or from service or administration charges is considered to be of no "*practical significance to the interpretation of the lease*" – *Fairbairn v. Etal Court Maintenance Ltd* [2015] UKUT 639 (LC). The tribunal notes that the Respondent may nevertheless be obliged to contribute to these legal costs in her capacity as a member of the Applicant company, but that is not a matter for the tribunal.

**Name:** Judge N Rushton QC      **Date:** 7 February 2020

### **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), 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).

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **Section 18**

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
  - (a) "costs" includes overheads, and
  - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

#### **Section 19**

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  - (a) only to the extent that they are reasonably incurred, and
  - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

#### **Section 27A**

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.

- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  - (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

## **Section 20**

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  - (a) complied with in relation to the works or agreement, or
  - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  - (a) an amount prescribed by, or determined in accordance with, the regulations, and
  - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

### **Section 20B**

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

### **Section 20C**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
  - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
  - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

## **Commonhold and Leasehold Reform Act 2002**

### **Schedule 11, paragraph 1**

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
  - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

### **Schedule 11, paragraph 2**

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

**Schedule 11, paragraph 5**

- (1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  - (a) the person by whom it is payable,
  - (b) the person to whom it is payable,
  - (c) the amount which is payable,
  - (d) the date at or by which it is payable, and
  - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  - (a) in a particular manner, or
  - (b) on particular evidence,of any question which may be the subject matter of an application under sub-paragraph (1).

**Schedule 11, paragraph 5A**

- (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
- (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.
- (3) In this paragraph—



(a) “litigation costs” means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) “the relevant court or tribunal” means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	“The relevant court or tribunal”
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.