FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UF/LSC/2020/0087
Property	**:**	14 Harlow Court, Wray Common Road, Reigate RH2 0RJ
Applicant	**:**	Jonathan and Maria Brett
Representative	**:**	-
Respondent	**:**	Harlow Court Limited
Representative	**:**	Ms Hannah Daly instructed by Browne Jacobson LLP
Type of Application	**:**	Determination of service charges: section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge E Morrison
Date and venue of hearing	**:**	25 May 2021 (by video)
Date of Decision	**:**	1 June 2021

FINAL DECISION

The applications

1. On 2 September 2020 Mr and Mrs Brett, the former lessees of the 14 Harlow Court (hereinafter referred to jointly as "the Applicant"), applied to the Tribunal for a determination of service charges demanded on account for years 2018/19, 2019/20 and 2020/21, pursuant to section 27A Landlord and Tenant Act 1985 ("the Act"). The Applicant also sought orders limiting recovery of the Respondent's costs in the proceedings under Section 20C of the Act and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

2. A preliminary hearing took place on 19 November 2020. The decision resulting from that hearing is attached as Annex 1.

3. Following further submissions, a case management decision and directions were issued on 13 January 2021, identifying the issues that the Tribunal would determine. This attached as Annex 2.

4. Both Annexes provide important background information which should be referred to and will not be repeated in detail in this decision.

5. In addition the Applicant has made a number of applications in the course of the proceedings for various orders and directions, all of which have already been determined.

6. The Respondent has made an application for costs under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. This is addressed at the end of this decision.

7. The Applicant has made two previous substantive applications to the Tribunal. These are detailed in Annex 1.

8. In its Directions of 13 January 2021 the Tribunal noted that the service charges were in modest amounts and that any dispute must be dealt with in a proportionate manner. The Tribunal considered that the application was suitable for determination on the papers. However, the Applicant requested an oral hearing.

9. The bundle prepared for the hearing runs to 421 pages and includes lengthy and detailed submissions from the Applicant, a detailed response from the respondent, and a further lengthy reply from the Applicant, along with supporting documentation.

10. At the hearing on 25 May 2021 Mr Brett presented the Applicant's case and Ms Daly of Counsel represented the Respondent. The Tribunal also heard brief evidence from Dr J Bedeman, a director of the Respondent, and from Claire Manton of PMMS Ltd, the managing agents.

The leases

11. The Property, being one of 18 flats at Harlow Court, was originally demised to the Applicant under a lease dated 18 January 2011 ("the lease"). Following statutory enfranchisement, the Respondent lessee-owned management company granted a new 999 year lease dated 17 March 2014 to the Applicant (the new lease"). Mr Brett was a director of the Respondent until he resigned on 13 August 2016. On 7 July 2020, the Applicant sold the flat. Mr and Mrs Brett now live abroad.

12. The lease requires the lessee to pay a service charge, described in the lease as the "Maintenance Charge", being 5.56% of the lessor's annual cost of carrying out its obligations. Twice yearly payments on account "the Interim Sum" can be required.

13. Under clause 3(2)(d):

> *If in any accounting period the Maintenance Charge exceeds the Interim Sum then the Tenant shall pay the difference to the Lessors within Twenty eight days of the service upon the Tenant of a Certificate of the external Auditors of the Lessors of the Annual Cost and the amount of such difference shall be recoverable from the Tenant in case of default as if the same were rent in arrear*

14. Under clause 3(2)(e):

> *If in any accounting period as aforesaid the Maintenance Charge is less than the Interim Sum the difference (being the unexpended surplus) shall be accumulated by the Lessors and shall be applied towards the Annual Cost in the next succeeding or future Accounting Period or period as aforesaid together with any interest carried thereon in the meantime*

15. The new lease incorporated these provisions and also, by clause 7.2.3, imposed a covenant on the lessee to pay "*a proportion of the administration and other costs (including professional fees) of Harlow Court Limited such proportion reflecting the tenant's shareholding in Harlow Court Limited* ".

The dispute

16. In the previous two applications to the Tribunal, the Applicant contended that they had been required to contribute towards costs that were not recoverable through the service charge.

17. In the first application to the Tribunal, made in 2018, the Tribunal construed the leases and decided that two categories of budgeted expenditure, namely management fees and legal fees, were not recoverable under either the lease or the new lease. Insofar as on account demands had been based on budgets which included sums for these categories of cost, those sums were disallowed. This decision, dated 7

August 2018, was unchanged by the decision in the second application to the Tribunal, made in 2019. As a consequence, since August 2018 the Respondent has issued two demands: one for service charges payable under the leases, and one for the costs not recoverable as a service charge but said to be payable as a shareholder.

18. The Applicant's primary contention in the present (third) application has been that, due to the non-recoverability of management and legal fees through the service charge, the on account demands made since August 2018 have been too high. The retrospective disallowance of these fees means that there are surpluses arising in previous service charge years, which in turn mean that later demands should have been for less, or for nothing at all.

19. The Tribunal refused the Applicant's request to expand the scope of the application to include a determination of service charges in years prior to 2017/18. See Annex 2.

20. The end of year service charge certificates for 2018/19 and 2019/20 do not include any of the expenditure categories that have been disallowed. There is no challenge to the reasonableness or payability of any of the actual expenditure in either year[1]. The Applicant nonetheless asked the Tribunal to determine whether the on account sums demanded in those years were reasonable and payable. The Tribunal declined to do so, on the ground this is a pointless exercise. Even if the sums demanded on account were too high, once the service charge certificate has been produced clause 3(2)(e) of the lease provides that surplus funds collected but unspent will be retained by the lessor and applied towards future costs. There is no provision for repayment to the lessee, and as the Applicant has disposed of their interest, the surplus will accrue for the benefit of the current lessee. See Annex 2.

21. Thus the only substantive issue remaining in dispute is the first on account demand made in service charge year 2020/21, which the Applicant paid prior to disposing of their interest by selling the flat.

2020/21

22. On 18 March 2020 an on account service charge demand was issued, said to be in respect of the period 1 April 2020 – 31 March 2021, in the sum of £1569.00. Subsequently it was realised that the demand should have referred only to the first six months of the year, and a revised demand was issued dated 23 March 2020 in the sum of £784.50.

23. Accompanying the demand was a budget for the year totalling £28,235.00, listing various anticipated heads of expenditure. The revised demand is for 5.56%, the Applicant's proportion, of one-half this annual total.

[1] This was conceded for 2018/19 at the hearing on 19 November 2020, and conceded for 2019/20 in the statement of case dated 9 February 2021.

24. The Applicant does not argue that any of the budgeted costs are invalid or for a greater sum than is reasonable.

25. The service charge certificate for 2020/21 has not yet been produced.

The submissions

26. The Applicant argues that the demand is invalid on four grounds.

(i) The amount of the service charge has not been estimated by a surveyor

27. Clause 3(2)(b) of the lease is a covenant by the tenant:

> *To pay to the Lessors … such yearly sum in advance and on account of the Maintenance Charge as the Lessors' Surveyor shall specify at his discretion to be a fair and reasonable interim payment …*

28. The Applicant says this imposes a condition precedent to payability, and that there is nothing in the papers supplied by the Respondent which indicates that the amount of the demand "was ever certified by a suitably qualified person". That the demand was initially sent out for the wrong amount, that it refers to a service charge year running from 1 April instead of 25 March as it should, and that it does not distinguish between service charges under the lease, and costs under clause 7.2.3 of the new lease, all indicate that the demand was not prepared by a qualified person.

29. The Respondent' submissions, which are verified by a statement of truth signed by Dr Jack Bedeman, a director of the Respondent, state that since the present managing agents took over management in October 2019, a surveyor, Derek Lee MRICS, has specified the sum of on account service charges and that he determined the sum demanded in March 2020 to be fair and reasonable. Claire Manton, an associate member of RICS, also checked the figures. At the hearing Ms Manton confirmed Mr Lee's involvement, both as a chartered surveyor and as the managing director of PMMS Ltd, the managing agents.

Tribunal determination

30. The lease requires only that a surveyor *specify* that the sum demanded is fair and reasonable. There is no requirement for *certification* as suggested by the Applicant, nor is there any requirement that documentary evidence of compliance must be provided to a lessee prior to payment. The lease does not require that the actual demand be prepared by a surveyor, so mistakes of a clerical nature made in the written demand itself do not imply that a surveyor did not specify the budget figure. The evidence of Mr Lee's involvement in March 2020 is not challenged, and the Tribunal finds that clause 3(2)(b) of the lease

was complied insofar as it required that the demand be in an amount specified by the lessor's surveyor.

(ii) The estimated amount is not "fair and reasonable" as stated in clause 3(2)(b) of the lease

(iii) The costs include those not reasonably incurred and the demand is in an amount greater than reasonable.

31. These two grounds of objection will be considered together.

32. The Applicant says that the sum demanded was not a "fair and reasonable estimate" as required by clause 3 (2) (b) of the lease. It is said that no reasonable person could possibly argue that the calculation was made in good faith.

33. This argument is based on a mis-reading of the lease. Clause 3(2)(b) does not require that the demand be in a sum that is fair and reasonable. It states only that it be in an amount that the Lessor's surveyor has specified is fair and reasonable. Thus objection (ii) falls away.

34. Notwithstanding this, the Applicant is protected from unreasonable demands by section 19 of the Act. The Applicant has cited both subsections of section 19, but as we are concerned with an on account demand, made before the costs had been incurred, only section 19(2) applies. This provides:

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

35. All the arguments the Applicant has put forward under ground (ii) above will therefore be considered as part of ground (iii).

36. The Applicant notes that the service charge certificate for 2018/19 declares service charge income of £20,400.00 against expenditure of £21,652.00. It is said that £20,400.00 is an incorrect figure because other evidence shows that a total of £24,600.00 was demanded in service charges during the year. The extra £4200.00 has been wrongly appropriated by the Respondent to cover its own costs which fall outside the service charge. If this had not been done there would have been a surplus for 2018/19 that should have been credited against future demands.

37. The Applicant also says that for every year from 2015/16 onwards there has in fact been a surplus on the service charge account. Later demands, including the 2020/21 demand failed to take any account of this.

38. It is also submitted that even if the Respondent, in March 2020, had considered only the most recent year for which accounts were then

available, namely 2017/18, it would have been clear that, as a result of the Tribunal's decision of August 2018, the sums of £4775.00 for management charges and £6,477.00 for legal fees, needed to be deducted from the service charge expenditure, producing a surplus that should have been credited against future demands.

39. Mr Brett has made his own detailed calculations based on what he considers are appropriate adjustments to the service charge accounts, and concludes that by the end of the 2017/18 service charge year, there was an accumulated surplus of £34,351.00[2]. At the hearing he suggested this figure should be even higher, because other errors in the accounts (unrelated to costs disallowed by the Tribunal in 2018) had not been corrected as promised.

40. It is therefore submitted that there should have been no on account demand at all in 2020/21, the surpluses available being more than enough to covered the anticipated budget of £28,235.00.

41. In reply, the Respondent acknowledges that in 2018/19 the true service charge income was £24,600.00, as asserted by the Applicant. It was during this year that the Tribunal made its first decision, that certain costs could not be recovered through the service charge. However the lessees had already, through the first on account demand in that year, made a contribution to the disallowed costs. It is accepted an error was made in "accounting as company costs £4200.00 which ought to have been accounted for as service charges. However, the Respondent decided against restating the 2018/19 accounts because the exercise would not have been proportionate or of any real benefit to the leaseholders/shareholders … because any adjustment would simply have moved funds from the company accounts to the service charge accounts, creating an equivalent loss in the former and surplus in the latter. All of the leaseholders (except for the Applicants) had agreed not to challenge the deemed refund of service charges – particularly since they would only have had to pay the same amount to the company account. Further still, the Respondent had gone though a lengthy and careful reconciliation exercise which had been carefully explained to the leaseholders/shareholders. A further adjustment would have added yet another layer of complication to a process which would need to have been explained to all of the leaseholders/shareholders".

42. With respect to other surpluses, it is said that following the first Tribunal decision, the Respondent commenced a lengthy and comprehensive reconciliation exercise to determine (i) the amount of any sums to be credited to leaseholder service charge accounts as a result of costs which could not be recovered under the leases and (ii) the amount of any deficit "following the Tribunal's decision that reserve funds should not have

[2] This figure includes the balance of a historic fund, which seems to be some sort of pre-enfranchisement surplus and is now referred to as the Residents Fund in the accounts.

been used to cover year-end deficits"[3]. The result of the reconciliation was a letter sent to each leaseholder dated 7 December 2020. The letter explained that to the extent there was a credit due to the leaseholder on their service charge account, it was being applied towards a deficit to the Respondent to cover company costs that could no longer be recovered through the service charge. It is further submitted that "it is generally accepted by the leaseholders/shareholders that this is an acceptable way to deal with the application of credits".

43. At the hearing Ms Manton accepted that it was not until after the Tribunal decision of 30 November 2020 was received that the reconciliation exercise was completed, and a new bank account opened so that service charge monies and company funds would be kept separate. Dr Bedeman, a director of Harlow Court, said the delay in completing the reconciliation was partly because there were ongoing proceedings and he did not want to do something, only for it to have to be undone or redone after another Tribunal decision.

44. The Respondent also submitted that it is not proportionate for the Tribunal to embark upon a review of the historic accounts and demands in order to determine whether a surplus had accumulated which stood to be credited to the March 2020 demand.

The Applicant's response

45. Mr Brett did not accept the accuracy of the figures referred to in the letter of 7 December 2020 sent to the leaseholders. He suggested that the reconciliation had only been done then because of the Tribunal's comments in the decision of 30 November 2020 (at paragraph 31 the Tribunal had pointed out that service charge funds should not be intermingled with other company funds). He also submitted that in March 2020 Mr Lee and the team at PMMS Ltd were aware that a reconciliation was needed, and that this would result in credits to the account. This should have been taken into consideration before issuing the on account demand.

Tribunal determination

46. It is important to bear in mind that the Applicant has not objected to any of the actual service charge expenditure in any year. The entirety of the Applicant's case is based on what is perceived as a failure by the Respondent to respond to the Tribunal's decision of 7 August 2018 by promptly making the necessary adjustments to previous years' accounts and crediting individual leaseholder's service charge accounts so they showed a surplus which should have led to reduced/nil demands until the surplus was used up.

[3] This Tribunal does not read the Decision of 7 August 2018 as formally deciding that use of the reserve/residents fund was wrong.

47. The reasonableness of an on account demand is based on facts known at the time it is made: *Knapper v Francis* [2017] UKUT 3 (LC). So the Tribunal must focus on what was known in March 2020.

48. The Respondent accepts that credits needed to be applied to the service charge accounts as a result of the first Tribunal decision. The Tribunal is not attempting a forensic calculation but it is clear that if one totals the disallowed legal and management fees just for the years 2015/16 – 2017/18 (years in which any annual deficit was met from the Residents or Reserve funds), the Applicant's 5.56% (1/18th) share of that total is more than the sum of £784.50 demanded on account in March 2020. This calculation could have been made by the Respondent in March 2020.

49. The service charge certificate for 2018/19 was not sent to the Applicant until June 2020 so it is less clear that the information in it would have been available to the Respondent in March 2020.

50. A spreadsheet attached to the March 2020 demand includes figures for 2019/20 income and expenditure. Although not a formal account, and the subsequently produced service charge certificate contains slightly different totals, it indicates that the Respondent believed there was a surplus of £2590.00 in that year. The spreadsheet suggested that surplus would be allocated to the Reserve. Subsequently, in a letter of 4 June 2020, the managing agents accepted this was incorrect, that the surplus should have been credited against the following year's budget, and said that any adjustment would be made in the 2021/22 budget.

51. It is therefore clear that at the time when the first on account demand for 2020/21 was made, the Respondent should have known that there were credits on the service charge account which exceeded the amount being demanded on account for 2020/21. It also believed there was a surplus of £2590.00 to carry forward from 2019/20. But does that mean that the amount demanded was in a greater amount than is reasonable?

52. The Respondent was faced with the situation where, as a result of the first application made to the Tribunal, the costs recovery regime it had operated since enfranchisement (initially sanctioned if not authorised by Mr Brett as a director) was found to be incorrect. Service charge funds had been used to pay costs incurred by the Respondent but not of a type recoverable through the service charge. However, the resulting credits due on the service charge account were not represented by actual funds, because the monies had already been spent. The Respondent still required ongoing service charge income to pay ongoing costs.

53. As the Respondent is lessee-owned, its only other source of funds is the leaseholders *quae* shareholders. The Respondent has had, retrospectively, to make adjustments so that the costs now disallowed as service charges are reallocated as company costs, paid by the shareholders.

54. Service charge funds are held in trust for the persons who are the contributing tenants for the time being: section 42(3) Landlord and Tenant Act 1987. Thus funds or credits can only be moved out of the service charge account to pay costs that are not service charges if the beneficiaries, i.e. the contributing tenants, agree. It appears that most if not all of the leaseholders, apart from the Applicant, have so agreed. This would seem an entirely pragmatic and sensible approach. There is little point in relieving lessees of their obligation to make regular modest payments towards ongoing service charges until their notional credits are used up, if at the same time those same people receive a company bill a for a very large sum which must be paid immediately. Moreover, the Respondent would need to reimburse the funds received from the shareholders back to the service charge account. The company cannot retain funding for company costs that have already been paid from service charge monies; the service charge account must be reimbursed. Viewed from this perspective, the Tribunal does not consider the demand made in March 2020 to be unreasonable.

55. The Applicant has not agreed to the Respondent's approach, but had sold the flat by the time the reconciliation was finalised in December 2020. Thus it is the new lessee of Flat 14 who has been affected by the notional debit to the service charges, not the Applicant[4].

56. Aside from the Applicant's argument about surpluses, perhaps more accurately characterised as credits, there is no challenge made to the 2020/21 demand for £784.50. The Respondent was simply asking the leaseholders to contribute their share of the budgeted expenditure for the year ahead.

57. The remaining question is whether the procedure adopted by the Respondent contravenes clause 3(2)(e) of the lease which provides that: *If in any accounting period as aforesaid the Maintenance Charge is less than the Interim Sum the difference (being the unexpended surplus) shall be accumulated by the Lessors and shall be applied towards the Annual Cost in the next succeeding or future Accounting Period or period as aforesaid together with any interest carried thereon in the meantime.*

58. This means that if lessees have paid more on account towards the service charge than is actually spent, the amount unexpended must be accumulated and applied towards future costs. It applies to monies demanded which have not been spent.

59. However, the situation here is that the monies paid on account prior to 2019/20 had all been expended, albeit not all on service charge expenditure. As of March 2020, the only actual sum of money reported to be unspent was £2590.00, namely the unexpended surplus from the 2019/20 year that had just ended. Applying clause 3(2)(e) of the lease,

[4] The Tribunal is not concerned with any arguments regarding use of trust monies in breach of section 42 Landlord and Tenant Act 1987.

this could have been applied towards the 2020/21 budget, in which case it would have reduced the demand sent to the Applicant by £71.95. The letter from the managing agents to the Applicant dated 4 June 2020 in effect accepts that this should have been done, and the Tribunal agrees. To that limited extent, the demand was for a higher amount than was reasonable.

(iv) The demand is invalid because it does not distinguish between the Maintenance Charge payable under the lease and additional costs payable under clause 7.2.3 of the new lease. Instead there has just been one demand for the "Annual Service Charge".

60. This can be dealt with summarily. There is no requirement that a demand must use the exact terminology found in the lease. It is only necessary that a reasonable recipient of the demand will understand what it is for. The Tribunal decision of August 2018 did not say there needed to be separate demands for costs under the lease and costs under the new lease; it simply pointed out that the collection machinery in clause 7.2.3 of the new lease differs from the machinery in the old lease. That does not mean there cannot be a combined demand. The budget accompanying the demand makes it clear what heads of expenditure are covered; nothing further is required.

Conclusion

61. The Tribunal finds that in all the circumstances that the first on account demand for 2020/21 was in a reasonable amount save to the extent set out in paragraph 59 above. **The Tribunal determines that the reasonable amount payable by the Applicant in respect of the March 2020 on account demand should have been £712.55 instead of £784.50.**

62. The Tribunal cannot and does not order repayment of the difference, namely £71.95, to the Applicant. The end of year accounts for 2020/21 will, determine whether clause 3(2)(d) or clause 3(2)(e) applies.

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

63. No section 20C order need be considered because the Tribunal, in its decision of 7 August 2018, has already determined that legal fees cannot be recovered through the service charge. Furthermore, as the Applicant is no longer a lessee, no costs can be recovered from the Applicant through the service charge.

64. In respect of paragraph 5A, again the Applicant, no longer being a lessee, cannot be called upon to pay costs pursuant to any clause in the lease. Thus no order is required.

Respondent's application for costs under Rule 13

65. In its statement of case dated 10 March 2021 the Respondent stated it would be seeking a costs order against the Applicant and this was followed by a formal application under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Rule 13(1)(b) states that the Tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings. This an exception to the general rule that costs orders are not made in Tribunal proceedings.

66. The Respondent asked the Tribunal to make a costs order in the sum of £17,677.20 on the grounds of the Respondent's unreasonable conduct.

67. The parties agreed that the Tribunal should be shown 'without prejudice' correspondence between 3 and 5 February 2021. The contents of this correspondence can be summarised as follows:

- On 3 February the Applicant offered to withdraw the application if the Respondent made no claim for costs;
- On 4 February the Respondent counter-offered to give up the claim for costs only if the Applicant agreed to give up any possible further claims arising from or connected to 14 Harlow Court;
- The Applicant replied saying that a full release of claims would require "some element of consideration";
- On 5 February the Respondent rejected that proposal.

68. The Respondent said the Applicant had acted unreasonably in the following ways:

- The entire substantive application was unreasonable because even if the Applicant had succeeded in establishing any service charge demands were unreasonable, the lease did not provide for repayment, and as the Applicant had sold the flat, there was no practical benefit to the Applicant in pursuing the case;
- The case involved a small amount of money but had been pursued despite knowing it would involve a disproportionate expenditure of time and effort by the parties and the Tribunal;
- The Applicant made several case management applications in the course of the proceedings which were an attempt to re-litigate issues already decided, or to broaden the scope of the main application beyond the limits set by the Tribunal;
- Even when the Tribunal disposed of these applications without requiring input from the Respondent, the Respondent's solicitors still had to consider them take instructions, report to client/insurers etc.;
- The application of 16 March 2021, seeking sanctions because the Respondent had served its statement of case 1 minute late, was almost vexatious;

- The Applicant should have accepted the Respondent's counter offer of 4 February 2021 to settle the case.

69. The Respondent submitted that in view of the above, and applying an objective test, the Applicant had conducted the proceedings unreasonably, and the Tribunal should exercise its discretion to make a costs order.

70. The Applicant denied they had acted unreasonably and said that it was the Respondent who had been unreasonable by (i) failing properly to implement the Tribunal's decision of August 2018 over a protracted period of time, (ii) not accepting the Applicant's settlement offer of 3 February 2021 (iii) running up unnecessary and huge costs.

71. In response to the Respondent's allegations of unreasonable conduct the Applicant said:

- If the Respondent had implemented the decision of August 2018 by restating all the service charge accounts and making appropriate credits, the application would not have been needed. The cost of putting matters right would have been tiny compared with the costs incurred by the Respondent in these proceedings. As it was, the Respondent had only sought to regularise matters in December 2020;
- The Applicant believed that all demands from August 2018 had been unreasonable, and despite having sold the flat, the Applicant hoped and expected a repayment as they had been overcharged;
- The application had been partly successful in that it had been determined that the March 2020 demand was too high;
- There is no minimum value for an application under section 27A of the Act;
- The Applicant had tried to conclude matters by making the offer of 3 February 2021 and the Respondent had unreasonably rejected this. It was not reasonable for the Respondent to require the Applicant to give up all other claims (at this point Mrs Brett told the Tribunal there "were other issues of a more personal nature" but did not give further details);
- They had complied with all case management decisions, and only made applications which they believed were rational i.e. permitted and supported by the procedure rules.

72. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 0290 (LC), the Upper Tribunal set out a three stage approach that should be followed when considering a Rule 13 costs application. The first stage is to decide whether a person has acted unreasonably, to be judged by an objective standard. If so, at the second stage the Tribunal will decide whether or not to make any order. If the answer is yes, then the third stage is to decide what the terms of that order should be.

73. The Upper Tribunal said that the guidance given in Ridehalgh v Horsefield [1994] Ch 205 as to the meaning of unreasonable conduct

should be followed, whilst bearing in mind that Ridehalgh was concerned with the conduct of professional lawyers:

"Unreasonable" … The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation…

74. At para. 25 the Upper Tribunal noted that for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponents' case, should not be treated as unreasonable. However (at para. 33) the absence of legal representation should not become an excuse for unreasonable conduct.

75. It was also emphasised that Rule 13 costs applications should not be allowed to become major disputes in their own right. They should be decided summarily. Applications made before the decision is available should not be encouraged. Decisions on Rule 13 applications need not be lengthy.

76. On the first stage question as to whether the Applicant has acted unreasonably the Tribunal finds as follows:

- The entire substantive application cannot be viewed as unreasonable. Although the issues were narrowed down by the Tribunal through case management decisions, there remained two issues which the Tribunal considered it was proper to permit the Applicant to pursue. The Applicant's statement of case of 9 February 2021 reduced this to one issue.
- Although the sum in dispute was very modest, the Applicant is correct that there is no minimum financial value for an application under section 27A; however, this is a factor that should have weighed heavily in the Respondent's mind when the Applicant, sensibly in the Tribunal's opinion, made an offer in early February 2021 to withdraw completely if the Respondent did not pursue costs.
- The Applicant has conducted the case with zeal, has obviously studied the procedure rules and some case-law, and has expended enormous effort in preparing lengthy and detailed submissions and making several subsidiary applications. Whilst some points taken were the result of a misunderstanding of the rules, and others have been summarily rejected by the Tribunal (mostly without requiring input from the Respondent), it would be unduly harsh, applying an objective standard applicable to a lay litigant, to characterise these as meeting the high bar of unreasonableness, except in one instance (see next bullet point). While

it is unfortunate that it has taken so much time to deal with these matters, that is a hazard of litigation.

- The application of 16 March 2021, seeking sanctions against the Respondent because its statement of case had been served one minute late, was without doubt unreasonable. It may have been provoked by concern or desperation brought about by the Rule 13 costs application referred to in the Respondent's statement of case (which was, in the Tribunal's view, made prematurely), but it had no merit whatsoever and cannot be regarded as reasonable from an objective standpoint.
- The Tribunal cannot find that the Applicant's rejection of the Respondent's settlement offer of 4 February 2021 was unreasonable because it does not know what other potential claims the Applicant was being asked to give up.

77. Having found that the application of 16 March 2021 was an instance of unreasonable conduct by the Applicant, the Tribunal must now consider whether to make a costs order. The Respondent will have incurred only modest costs in preparing brief written submissions in response to that application, but the Tribunal is not constrained by this by when considering what costs order to make. However, the Tribunal, after careful consideration, has decided not to exercise its discretion to make a costs order because:

- Looking at the case as a whole, the Applicant has not been entirely unsuccessful.
- The Applicant's case, put most simply, was that service charges had been demanded and used to pay costs that were not service charge costs, and that following the Tribunal decision of August 2018 which made this clear, the accounting records and financial practices of the Respondent had not been regularised to reflect this. This was correct. The Respondent did not separate out service charge and other company funds, or reconcile individual lessee accounts, until just after the Tribunal's preliminary decision of 30 November 2020, and has never (so far as the Tribunal is aware) retrospectively adjusted the actual service charge accounts.
- While the Tribunal is not fully convinced by the Applicant's submission that if the Respondent had dealt with matters more promptly, the application to the Tribunal would not have been made at all, there is little doubt this would have made an application less likely, or at least less complex.
- Finally, it would have been reasonable and highly cost-effective for the Respondent to have accepted the Applicant's settlement offer of 3 February 2021.

While only the last of these points has any time-causal relation to the application of 16 March 2021, the Tribunal has a wide discretion and considers that the Respondent is, to some extent, the author of its own misfortune. Therefore, **no costs order is made**.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX 1

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UF/LSC/2020/0087
Property	**:**	14 Harlow Court, Wray Common Road, Reigate RH2 0RJ
Applicants	**:**	Jonathan and Maria Brett
Representative	**:**	-
Respondent	**:**	Harlow Court Limited
Representative	**:**	Ms Seohyung Kim of Counsel, instructed by Browne Jacobson LLP:
Type of Application	**:**	Determination of service charges: section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge E Morrison
Date and venue of hearing	**:**	19 November 2020 (by video)
Date of Decision	**:**	25 November 2020

DECISION
following preliminary hearing

Background

1. On 2 September 2020 the Applicant lessees applied to the Tribunal for a determination of service charges for years 2018/19, 2019/20 and 2020/21, pursuant to section 27A Landlord and Tenant Act 1985 ("the Act"). The Applicant also sought orders limiting recovery of the Respondent's costs in the proceedings under Section 20C of the Act and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

2. The Applicants have twice previously applied to the Tribunal in respect of the same property, and on referring to the decisions in those applications, the Tribunal was concerned that the present application raised issues already dealt with. A preliminary hearing was directed to consider the point. The parties served written submissions in support their positions, the Applicants also providing a bundle of documentation.

3. The first application, Case No. CHI/43UF/LIS/2018/0006, culminated in a decision dated 7 August 2018. It considered service charges demanded "for the years ending 2016 to 2019", although this period might be more accurately described as service charge years 2015/16 – 2018/19, the year end being 31 March.

4. The decision explains that the only service charge demands issued by the Respondent in this period were on account demands, in the sum of £800.00 every six months. The parties accepted that the service charge machinery in the lease had not been complied with, and the Applicants confirmed they took no issue with this (Mr Brett had been a director of the Respondent, a lessee-owned company, during the earlier part of the period). The original lease dated 18 January 2010 provides for an end of year certificate of actual expenditure. If the actual costs are greater than the sums paid on account, the lessee must pay the difference; if the actual costs are less than the sums paid on account, the surplus paid should be applied towards future costs. During the period in question (and of course 2018/19 was not yet over) no end of year certificates had been prepared. The decision records that "Invariably insufficient funds were demanded through the on account demand to meet the annually recurring costs with the result that there was a deficit. However, rather than utilise the mechanism in the lease to recover the deficit from leaseholders, the Respondent dipped into a fund that was transferred to it when the freehold was purchased… Mr Brett stated that the intention had been to wind down this fund rather than charge the leaseholders additional service charges to make up any deficit".

5. Against this factual matrix the Tribunal decided that it could only consider the on account demands. The Applicants contended that four heads of expenditure in the budgets were not payable under the lease. The Tribunal decided that two of these, namely accountancy fees and directors and officers insurance, fell within clause 7.2.3 of the New

Lease dated 17 March 2014[1], and could be recovered from the lessees via the on account demands. The other two heads, namely management and legal fees, were not recoverable as service charges under any provision in either the original or new lease. The sums budgeted for management and legal fees in the service charge years 2015/16 – 2018/19 were therefore disallowed. This decision was not appealed.

6. In the second application, Case No. CHI/43UF/LSC/2019/0064, the Applicants applied for a determination of the service charges "for years 2014 – 2019". As there were still no end of year certificates for these years, the Tribunal noted it was again limited to considering on account demands, which issue had already been determined in the first set of proceedings for years 2016-2019, and therefore it could not be re-litigated. As regards pre- 2016 years, the Tribunal found the application to be an abuse because the issues either were dealt with in the first decision, or should have been raised in the earlier proceedings.

7. The Applicants also contended that since the decision of 7 August 2018 there had been further on account demands that still sought to recover costs for management and legal fees, which the Tribunal had decided were not recoverable. The Respondent countered that all later demands had been split into two, one for service charge expenditure, and one for company costs covering those heads of expenditure payable by the lessees in their capacities as shareholders pursuant to the company's Articles. The Tribunal said that if this was correct, there was no part of the service charge demand that was challenged, and accordingly the application was struck out. Again, this decision was not appealed.

8. The present (third) application seeks a determination in respect of the on account demands for years 2018/19 - 2020/21. On reading the application form it appeared to the Tribunal that the principal point being made was, once again, that the demands received following the Tribunal's decision dated 7 August 2018 were still seeking to recover monies towards costs found to be irrecoverable as service charges.

9. The preliminary hearing took place by way of video conference, Mr Brett speaking for himself and his wife, and Ms Kim acting for the Respondent.

The "company costs"

10. The following on account demands have been issued by the Respondent:

<u>Year 2018/19</u>

- 29 August 2018 - for half yearly service charge in the sum of £566.67
- 29 September 2018 - for "half yearly administration charge (Company costs)" in the sum of **£233.33**

[1] On enfranchisement a new lease was granted, and the lessees became shareholders in the freehold company

Year 2019/20

- 22 May 2019 - for half yearly service charge in the sum of £729.44
- 22 May 2019 - for "half yearly contribution towards company costs under companies Articles of Association" in the sum of **£244.45**
- 4 September 2019 - for half yearly service charge in the sum of £729.44
- 4 September 2019 - "half yearly contribution towards company costs under companies Articles of Association" in the sum **of £244.45**

Year 2020/21

- 18 March 2020 -for "annual service charge" in the sum of £1569.00, subsequently amended to £784.50 for the first half year
- 18 March 2020 - for "company costs" in the sum of **£323.00**

11. The Applicants' submission was that all the costs noted in bold above had in reality been demanded as service charges, which the Tribunal had jurisdiction to determine under sections 19 and 27A of the Act, and that the Respondent's submission in the second proceedings, namely that the costs had been demanded as company costs under the Articles, was incorrect.

12. In support of this submission Mr Brett relied on the following:

    (i) All the demands were accompanied by the Summary of Rights and Obligations which must be provided with service charge demands, pursuant to section 21B of the Act. It was said that this was an acknowledgement of the Tribunal's jurisdiction.
    (ii) The costs in issue had been included in statements sent to the Applicants setting out what they owed in service charges.
    (iii) A letter from the managing agents dated 10 September 2018 referred to the company expense being requested from "the leaseholders".
    (iv) These demands post-dated the first decision of 7 August 2018 and had not already been subject to a determination by the Tribunal because the second application was struck out on the basis (which the Applicants now disputed) that the costs had not been demanded as a service charge.
    (v) Until the Respondent's Articles were amended, they did not permit the costs in question to be recovered from shareholders, and even after amendment, Mr Brett submitted the alteration did not bind himself or his wife. Therefore, it was argued, the costs must have been demanded as service charges.

13. In response the Respondent's case was that all the demands in question were demands for company costs due from shareholders under the Articles. The Tribunal had, it was said, determined that accountancy fees[2], legal/professional costs and management fees were not

[2] The Respondent has misunderstood the decision of 7 August 2018 as regards accountancy fees. The Tribunal decided that these were not payable under the original lease, but, like the directors and officers

recoverable under the lease as service charges, and the Respondent had acted accordingly. None of the subsequent demands in respect of these costs were service charge demands. They were clearly labelled company costs and demanded separately from the service charges. The inclusion of the s 21B Summary and other administrative practices by the managing agents, whose systems were based on service charges, did not alter the nature of the demands.

14. It was further submitted that the Tribunal had no jurisdiction as the issue had already been decided, or should have been taken up by way of appeal against the previous decisions, and that accordingly the application should be struck out.

Determination in respect of the "company costs"

15. The Applicants' case has an inherent illogicality, because it does not assist them. Even if the Tribunal were to accept that the costs had been demanded as service charges not previously been determined, so there was jurisdiction under section 27A of the Act, the inevitable result would be that the Tribunal reached the same decision as it did on 7 August 2018, and the Respondent would be left to argue - as they do now - that the costs can be recovered from the lessees as shareholders, pursuant to the Articles. A Tribunal decision that a cost has been wrongly demanded as a service charge does not prevent a landlord company from seeking to recover the same cost by other means, just as a lessee may seek to exercise rights both as a lessee and as a shareholder. See *Morshead Mansions Ltd v Di Marco* [2008] EWCA Civ 137; *Houldsworth Village Management v Barton* [2020] EWCA Civ 980.

16. In any event the Tribunal has no doubt that the costs in issue were **not** demanded as service charges. After the first decision of 7 August 2018 the Respondent's managing agents wrote to the Applicants (and presumably to the other lessees) on 29 August 2018, explaining about changes to the service charges as a result of the decision. Apart from including accountancy fees within the irrecoverable service charges (see footnote 2), the explanation provided was correct, and the letter made it completely clear that costs found by the Tribunal to be irrecoverable as service charges would result in those costs being demanded as a "company cost" separately from the service charges. The accompanying budget also divided budgeted costs into either service charge or company costs.

17. All subsequent demands have followed this distinction. When new managing agents were appointed earlier in 2020, the format of the demands changed slightly, heading the company costs demand with "Freehold Company Funds – Application for Payment", which simply

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insurance, they *did* fall within clause 7.2.3 of the new lease. That is why there were no sums disallowed in respect of these costs. They can be demanded on account, and are payable within 14 days of demand (see paras. 32, 42-43, 46 of decision dated 7 August 2018).

reinforces the distinction between that demand and the accompanying "Service Charge Demand – Application for Payment". The fact that this demand was issued by the "Service Charge Department" of the managing agents does not alter the nature of the demand.

18. When Mr Brett queried the letter of 29 August 2018, the managing agents replied on 10 September 2018 explaining, again, that certain costs would now be "recovered as a company expense in accordance with the memorandum and articles of association … from the leaseholders". Mr Brett asks the Tribunal to conclude that because this letter refers to "the leaseholders" having to pay, rather than the shareholders, this demonstrates the demand is for service charges. This is semantics; the shareholders are the same people as the lessees. The Tribunal is in no doubt that any reasonable recipient of the managing agents' letters would have clearly understood that the company costs were no longer going to be demanded as service charges, and that this was as a direct result of the decision of 7 August 2018. The point applies with much greater force to a recipient like Mr Brett who had been party to the proceedings leading to that decision.

19. Nor does the Tribunal accept that sending out the company costs demands with a section 21B Summary printed on the reverse can alter the characterisation of the demand. The reality is that the Respondent required the managing agents to issue, on its behalf, not only the service charge demands but also the company costs demands. If the managing agents sent out the company costs demands with the Section 21B Summary on the reverse, that is an administrative error, but that is all it is.

20. Finally, Mr Brett relies on the fact that he has been sent statements of account from the managing agents, setting out sums said to be due, which include the company costs demands. However, these statements clearly distinguish between debits for service charges and debits for company costs. The Tribunal comments below (see paragraph 31 below) on how the two funds should be differentiated, but the inclusion of both types of cost in a single statement sent to a lessee cannot alter the fundamental nature of the demands.

21. Accordingly, the Tribunal decides that the company costs have not been demanded as service charges and the Tribunal has no jurisdiction to consider their payability or reasonableness.

Other issues

22. The Tribunal asked Mr Brett at the hearing whether there were any other issues he wished the Tribunal to consider as part of his application, so that matters can be finalised and further applications avoided. The end of year certificate of actual service charge costs in 2018/19 having been served in June 2020, he confirmed that he accepted all items of expenditure in that certificate. However, he contended that, having regard to a service charge credit of £1149.00

made as a result of the decision of 7 August 2018, the on account demands made in 2019-20, and perhaps also 2020-21, should have been for lesser amounts. He noted that the statement of account sent to him on 29 November 2018 showed a credit balance of £430.28.

23. The following comments are not part of the Tribunal's decision but are provided in the hope that they will clarify certain matters and assist in bringing matters to a conclusion.

24. The reasonableness of an on account demand is based on facts known at the time it is made: *Knapper v Francis* [2017] UKUT 3 (LC). At the time of issuing the first on account service charge demand for 2019/20 in March 2019 the managing agents should have been aware that there was a credit/surplus of £430.28 on the Applicants' account. Clause 3 (2) (e) of the original lease provides:

[*If] in any Accounting Period … the Maintenance Charge is less than the Interim Sum the difference (being the unexpended surplus) shall be accumulated by the Lessors and shall be applied towards the Annual Cost in the next succeeding or future Accounting Period or period as aforesaid together with any interest carried thereon in the meantime*

25. It is therefore arguable that the sum of £430.28 should have been credited against the first on account demand for 2019/20, reducing it by that amount.

26. It is unclear exactly when the end of year certificate for the 2018/19 expenditure was produced but a copy appears to have been first sent to the Applicants on 14 June 2020. The overall expenditure is £21,652.00, which is £1202.88 per flat. According to the certificate, the total expenditure for the year exceeded total income. However, the Applicants paid £1366.57 on account for that year, so it would seem that, for their flat at least, the service charge account should credit the surplus paid of £163.69.

27. The Tribunal was told that the end of year certificate for 2019/20 will be available by 17 December 2020. The Applicants will then be able to consider whether any of the actual expenditure in that year is disputed, and it will also be clear whether there is a surplus or deficit to be applied to the service charge account for the Applicant's flat.

28. However, it emerged at the hearing that the Applicants sold their flat in July 2020. Therefore, even if surpluses remain on their account and/or the Applicants were to be successful in challenging any of the actual expenditure for 2019/20, this Tribunal's view is that it would not be of any practical benefit to them. This is because service charge monies are held, under section 42 of the Landlord and Tenant Act 1987, "on trust for the persons who are the contributing tenants for the time being". The Applicants have never been able to require actual repayment to them of any surpluses – because the lease does not provide for that –

and therefore any surpluses simply result in credits to be set against future costs. Even if the Tribunal were to find that some of the most recent on account demands were unreasonably high because they did not take into account surpluses which were or should have been credited against the sums demanded, this would not result in the Tribunal ordering the repayment of any sums[3]. The credits would stand for the benefit of the current lessee.

29. In *Gateway Holdings v McKenzie* [2018] UKUT 371 (LC) the Upper Tribunal held that although a lessee could apply to the Tribunal in respect of service charge years before she acquired her interest, any reduction in the service charges for those years would be of no practical benefit to her because any repayment would be payable not to her, but to the previous lessee. However, in *Gateway* the lease simply provided that "the landlord shall give credit for [any] overpayment", which the Upper Tribunal interpreted as meaning that overpaid sums were repayable to the specific tenant who had made payment. This contrasts with the lease in this case, which specifically says that overpayments are to be credited against future costs.

30. Even if the Tribunal is wrong as to the effect of section 42, and any credits are due to the Applicants, repayment cannot be ordered by the Tribunal. The Applicants would need to take further action in the county court and might find they are then faced with an argument that payment to them would constitute a breach of trust under section 42. The sums involved are unlikely to justify lengthy litigation.

31. One further point should be made. Service charge funds must be held on trust in a designated account: section 43 Landlord and Tenant Act 1987. The funds collected for "company costs" should be held entirely separately, so they are not intermingled with trust funds. The statements issued by the managing agents should therefore also, in the same way as the demands, be separated, so there is one statement showing the relevant entries and balance for the service charges, and a second statement showing the same for the company costs.

32. The parties are invited to consider these comments. If the Applicants contend, after receiving the 2019/20 end of year certificate, that there are any further matters on which they request a determination from the Tribunal, they must write to the Tribunal and the Respondent by **8 January 2021** stating what matters they wish to pursue.

33. If there is nothing further of a substantive nature to determine, this leaves only the applications in respect of costs, and any necessary directions in this regard will be given after 8 January 2021.

34. The time- limit for appealing against this decision (see below) will not start to run until the application is finally disposed of.

[3] In any event the Tribunal has no power to order repayment of service charges

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX 2

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UF/LSC/2020/0087
Property	**:**	14 Harlow Court, Wray Common Road, Reigate RH2 0RJ
Applicant	**:**	Jonathan and Maria Brett (email:jb.harlowcourt@gmail.com)
Representative	**:**	-
Respondent	**:**	Harlow Court Limited
Representative	**:**	Brown Jacobson LLP
Type of Application	**:**	Determination of service charges: section 27A Landlord and Tenant Act 1985
Tribunal Member(s)	**:**	Judge E Morrison
Date	**:**	13 January 2021

CASE MANAGEMENT DECISION
and DIRECTIONS

This is a formal order of the Tribunal which must be complied with by the parties.

The Tribunal Judge directs that the parties must comply with the Statement on Tribunal Rules and Procedure issued August 2020 and the Guidance on PDF bundles dated August 2020, which are enclosed with these directions (if not already provided).

Due to the Covid 19 pandemic, communications to the Tribunal MUST be made by email to rpsouthern@justice.gov.uk. All communications must clearly state the Case Number and address of the premises.

1. On 25 November 2020 the Tribunal issued its decision following a preliminary hearing. At paragraph 32 of that decision the Applicants were directed to write to the Tribunal by 8 January 2021 stating whether "there are any further matters on which they request a determination from the Tribunal".

2. Subsequently the Tribunal issued a further case management decision dated 10 December 2020, dismissing an application by the Applicants for disclosure. In that decision the Tribunal warned the Applicants that making applications which seek to reopen issues either already decided or outside the Tribunal's jurisdiction may be regarded as unreasonable conduct, opening the door to an application for costs by the other party under Rule 13.

3. In purported compliance with paragraph 32 of the decision dated 25 November 2000, the Applicants have supplied a lengthy "Position Statement… not intended as a statement of case". So far as can be understood, it appears that the Applicants still wish to challenge the reasonableness of on account demands made in 2018/19 onwards. They consider that service charge expenditure in 2018/19 and 2019/20 was "actually covered by surplus contributions from previous years which remain unaccounted for", and so they should not have had to pay the later on account demands. This is the only cogent basis stated for challenging the demands.

4. In order to consider this, the Tribunal would need to determine the actual service charges in 2015/16 – 2017/18, to decide whether in fact those year(s) did result in a surplus. Yet the application in this case was limited to 2018/19 onwards. Thus, in effect, the Applicants are seeking to amend the scope of the application to include earlier years.

5. Previous decisions of the Tribunal in Case Nos. CHI/43UF/LIS/2018/0006 and CHI/43UF/LSC/2019/0064 determined the on account demands for the years 2015/16 through 2018/19. So far as the Tribunal is aware, there have been no service charge certificates or accounts prepared for the actual expenditure in the first two of those years. In 2017/18 the end of year certificate shows

a deficit of expenditure over income. The decision in Case No. CHI/43UF/LIS/2018/0006 records that Mr Brett himself told the Tribunal that "Invariably insufficient funds were demanded through the on account demand to meet the annually recurring costs with the result that there was a deficit. However, rather than utilise the mechanism in the lease to recover the deficit from leaseholders, the Respondent dipped into a fund that was transferred to it when the freehold was purchased… Mr Brett stated that the intention had been to wind down this fund rather than charge the leaseholders additional service charges to make up any deficit". The deficit position in some of these years is confirmed by the notes to the service charge certificates for 2017/18, 2018/19 and 2019/20 prepared by the Respondent's accountants.

6. It is therefore very difficult to accept the Applicants' new contention (and so far as the Tribunal can ascertain it has never been made previously), that in fact the service charge income exceeded costs in 2015/16 through 2017/18, thus producing a surplus which should have been carried forward and offset against future on account demands.

7. Should it now be open to the Applicants to require a determination of actual service charges for the three years prior to 2018/19, in order to argue that the sums demanded in the later years were too high?

8. A stated above, there have already been two previous applications made to the Tribunal in respect of the earlier years. The first was made in 2018. The Applicants could have required a determination of actual expenditure for 2015/16 and 2017/18 (those years having ended), but it is clear from reading the decision of 7 August 2018 that the Applicants did not take issue with the lack of service charge accounts for those years. Mr Brett (who was a director of the Respondent for some of the relevant period) told the Tribunal that the excess of expenditure over service charge income in those years had been met by having recourse to other monies held by the Respondent. The thrust of that case concerned whether charges for accountancy fees, directors and officers insurance, and management/legal fees were recoverable under the lease. The Tribunal held that management/legal fees were not so recoverable.

9. The second application commenced in the following year, was struck out, because it related to the same years as the first case and there were still no end of year certificates or accounts of actual expenditure. The Applicants' focus remained firmly on the on account demands and the heads of expenditure already dealt with by the Tribunal in the first case.

10. It was, however, open to the Applicants in those earlier proceedings to seek a determination of actual expenditure, notwithstanding the lack of an end of year certificate or accounts: *Warrior Quay v Joachim* (Unreported Jan 11,208; LRX/42/2006) at paragraphs 24-25). They did not do so.

11. If the Applicants had remained the lessees of the flat up to the present time, the Tribunal might have considered allowing an amendment to the application to cover the earlier years, because it is theoretically possible that, as a result of the decision in Case No. CHI/43UF/LIS/2018/0006, the lack of recoverability of management/legal fees converted a deficit on the service charge income/expenditure account to a surplus. There would, however, be a counter argument: that such an amendment should not be allowed, because the Applicants had their opportunity to pursue the issue in the earlier proceedings. But, this point aside, the Applicants parted with their interest in the flat in July 2020, and that has practical consequences. Any surplus from those years can no longer benefit them because it will simply be retained by the Respondent and applied towards the current lessee's future liability (see clause 3 (2)(e) of the lease). The Applicants cannot demand a refund. There is therefore no practical benefit to them in obtaining a determination for those years, and in such circumstances it is not in furtherance of the overriding objective of dealing with cases justly to allow such an amendment, greatly expanding the scope of the application, and requested only after the Applicants have assigned the lease[1].

12. The Tribunal is supported in this decision by *Gateway Holdings (NWB) Ltd v McKenzie* [2018] UKUT 371 (LC). In that case the Upper Tribunal considered whether an assignee could apply for a determination of service charges in respect of years before she acquired her lease, and as regards which she had no entitlement to recover any sums overpaid. In that case the Upper Tribunal interpreted the lease as meaning that any refund due would be payable only to the previous lessee. *Gateway* decided that any "tenant" could apply under section 27A of the Landlord and Tenant Act 1985, and this right was not restricted to those entitled to receive or obliged to pay the service charge in question. However, as the determination could be of no practical benefit to the assignee, she could not require the Tribunal to investigate years prior to those in which she was the lessee.

13. In the instant case, the converse situation arises, where an assignor of a lease (the Bretts) seeks a determination of service charges, as regards which the benefit of any refund or further liability to pay will accrue, under the terms of the lease, not to them but to the assignee. However, the reasoning in *Gateway* is of equal application. The Tribunal is entitled to limit its determinations to matters which have a practical effect on the applicants.

14. The application therefore remains confined to the years covered by the original application.

[1] On assigning the lease, it would have been open to the Applicants to seek an agreement from the assignee that the amount of any surpluses from previous years credited to the assignee's service charge account should be reimbursed by the assignee to the Applicants. There is no evidence of such an agreement in this case.

15. There are now end of year certificates available for 2018/19 and 2019/20.

16. At the preliminary hearing, Mr Brett clearly confirmed that he accepted the 2018/19 expenditure. A Tribunal has no jurisdiction to determine expenditure which is agreed or admitted (section 27A(4)(a) Landlord and Tenant Act 1985). There is no practical purpose to have the on account demands for this year determined anyway as a separate issue, as the Applicants request. It is clear what has been demanded and the end of year certificate shows what has been spent. Any balance will be dealt with in accordance with clause 3(2)(d) or clause 3(2)(e) of the lease. If there is a deficit to be recovered, it will be the new lessee, not the Applicants, who is liable to pay it. If there is a surplus, it will be credited to the account of the new lessee, not repaid to the Applicants.

17. In respect of 2019/20, the purpose of paragraph 32 of the decision following the preliminary hearing was to give the Respondents the opportunity to challenge any of the actual expenditure once they received the end of year certificate in December 2020. In respect of this the Applicants say only that they reserve their position, which is hardly helpful. Instead, they focus on other accounting aspects of the certificate, which are not the concern of the Tribunal. The certificate shows a surplus of income over expenditure for the year; but again any surplus does not warrant a separate determination of the on account demands, and this surplus will accrue to the benefit of the assignee, not the Applicants. Nowithstanding this, because the Applicants were the lessees when they made the application, and therefore had a valid interest in the matter at that time, the Tribunal is prepared to determine the actual service charges for 2019/20, if indeed there is a challenge to any of the expenditure.

18. With regard to 2020/21, an on account demand was made in March 2020, prior to the assignment, so the Applicants can pursue a challenge to this demand under section 19(2) of the Act, and, as the year is not yet over, any overpayment could be repayable to them.

19. **The Tribunal therefore concludes that the only issues which remain open for determination are:**

(i) A challenge to actual service charge expenditure in 2019/20
(ii) A challenge to the first on account demand for £784.50 in 2020/21, but only if the Applicants have paid this
(iii) The applications in relation to costs.

No other matters will be considered by the Tribunal. The service charges are in modest amounts and any dispute must be dealt with in a proportionate manner. The Applicants cannot attempt to use this

application to pursue more general and wider grievances against the Respondent.

DIRECTIONS

20. The Tribunal considers that this application is likely to be suitable for determination on the papers alone without an oral hearing and will be so determined in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objects in writing to the Tribunal within 28 days of the date of receipt of the directions.

21. If a party objects to a paper determination, the Tribunal may then decide whether to proceed under the Pilot Practice Direction, which gives the Tribunal the power to make provisional decisions on the papers during the Covid emergency, or to offer a hearing by telephone or video conferencing.

22. If there is no objection, suitability for a paper determination will be reviewed upon receipt of the bundle, and a hearing may be ordered requiring a payment of fee.

The Applicants' case

23. By **3 February 2020** the Applicants shall send to the Respondent:

- A signed and dated statement with a statement of truth (i.e. "I believe that the facts stated in this witness statement are true") which sets out each aspect of their case, limited to the issues listed at paragraph 14 above. In respect of each head of expenditure which is challenged, the statement must set out the reason why, and the amount that the Applicants say should be payable
- Copies of all relevant documents relied upon
- Any witness statements (see below).

The Respondent's case

24. By **24 February 2021** the Respondent shall send to the Applicants:

- A signed and dated statement with a statement of truth (i.e. "I believe that the facts stated in this witness statement are true") which sets out each aspect of its case including a response to the points made by the Applicant
- Copies of any other relevant documents relied upon
- Any witness statements (see below).

The Applicants' reply

25. By **3 March 2021** the Applicants may send a concise reply to the Respondent's case.

Witness statements

26. If either party intends to rely on the evidence of any person (other than a person who has signed the statements of case referred to above), a witness statement setting out what that person says must be prepared. Witness statements should identify the name and reference number of the case, have numbered paragraphs, end with a statement of truth and be signed and dated. If there is an oral hearing witnesses are expected to attend the hearing to be cross-examined as to their evidence, unless their statement has been agreed by the other party.

Experts

27. The Tribunal does not consider there is a need for expert evidence, but if any party disagrees with this assessment, they must apply to the Tribunal for permission by 1 February 2021.

Documents for the determination

28. The **Applicants** shall be responsible for preparing the bundle of relevant documents, the contents of which should be agreed by the parties, and shall by **10 March 2021** send one copy to the other party and send one copy to the Tribunal.

29. **THE BUNDLE MUST BE IN PDF AND MUST COMPLY WITH THE GUIDANCE ON PDF BUNDLES DATED AUGUST 2020.**

30. The Tribunal will only consider the documents in the bundle. Parties should not send documents piecemeal to the case officer.

31. The bundle shall contain copies of:

- The application with accompanying documents
- All Directions and decisions of the Tribunal in this application
- All statements of case served pursuant to paragraphs 18-20 above
- All witness statements
- All relevant documents relied upon by either party

Do not include any documents not strictly relevant to the issues that the Tribunal has agreed to consider.

32. The time- limit for appealing against this decision (see below) will not start to run until the application is finally disposed of.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.