



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

**Case Reference** : **LON/00BK/LSC/2022/0154**

**Property** : **2 Falmouth House, London W2 2NT**

**Applicant** : **FALMOUTH HOUSE LTD**

**Representative** : **Michael Buckpitt**

**Respondent** : **MR AND MRS DAO**

**Representative** : **Piers Harrison**

**Type of Application** : **Determination as to the reasonableness and  
payability of service charges.**

**Tribunal Members :** **Judge Shepherd**  
**Stephen Mason FRICS**

**Date and venue of :** **10<sup>th</sup>-11<sup>th</sup> October 2022 at 10 Alfred Place**

## Hearing

**Date of Decision** : **28<sup>th</sup> November 2022**

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## DECISION

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1. In this case the Applicant, Falmouth House Limited (“The Applicant”) is seeking a determination as to the payability and reasonableness of service charges owed by the Respondents Alicia Dao and David Anis Dao (“The Respondents”) who are the leaseholders of Flat 2 Falmouth House, Hyde Park Place London W2 2NT (“The premises”). The service charges in issue relate to the period from 2017 to date. In the application form the Applicant said that the total value of the dispute was £104,071.54. As will be seen this sum was adjusted and clarified during the hearing. The original claim included a claim for costs and interest. At the start of the hearing the Applicant sought through their counsel Mr Buckpitt to withdraw the claim for costs and interest. The assessment of these sums was not within the jurisdiction of section 27A Landlord and Tenant Act 1985. Mr Harrison the Respondents’ counsel asked the tribunal to dismiss the claim for costs and interest. On balance the Tribunal considered that it would accept the withdrawal of the claim for costs and interest.
2. The matter was heard over two days on the 10th and 11th of October 2022

## Background

3. The freehold to Falmouth House is registered to the applicant under title reference end GL835515. The leasehold is held in the joint names of the Respondents registered under title number NGL851639.
4. By a lease dated the 7th of June 2005 made between the Applicant and the Respondents the premises were demised to the Respondents for the term of years expiring on the 25th of March 3003.

### **Lease terms**

5. The relevant terms of the lease are the following:

1.1: - (34-35)

*“Annual Maintenance Provision” means the annual amount calculated in accordance with the Fourth Schedule”.*

*“Building” means the block of flats known as Falmouth House . . .*

*“Interest Rate” means five per cent over the base rate from time to time of HSBC Bank plc, . . .*

*- “Maintenance Contribution” means a sum equal to the percentage proportion appropriate to the Flat (as specified in Part I of the Fourth Schedule subject to the provisions of Part II of that Schedule) of the aggregate annual maintenance provision for the whole of the Building for each Maintenance Year (as computed in accordance with the provisions of Part III of the same Schedule).*

*- “The Maintenance Year” means every twelve month period ending on the Twenty fourth day of March . . .*

*- “Surveyor” means the person or firm employed pursuant to paragraph 1 of the Fifth Schedule*

*- 2. In consideration of the covenants herein contained the Landlord HEREBY DEMISES to the Tenant the Flat . . . TO HOLD the same unto the Tenant . . . YIELDING AND PAYING therefore to the Landlord FIRSTLY the yearly rent of one peppercorn AND SECONDLY the Maintenance Contribution (being a further rent and recoverable as such) calculated pursuant to Part III of the Fourth Schedule without any deduction or set-off by equal quarterly (unless otherwise required by the Landlord) payments in advance on the usual quarter days . . . AND THIRDLY any interest due under this Lease (36)*

*- 3. The Tenant HEREBY COVENANTS with the Landlord that it shall during the Term observe and perform the covenants set out in the Second Schedule and the Regulations set out in the Third Schedule (36)*

*- 5.2 In the event of the Flat or any part thereof being destroyed or damaged during the Term by any of the Insured Risks so as to be unfit for occupation or use . . . the Maintenance*

Contribution hereby reserved or a fair proportion thereof . . shall forthwith be suspended and cease to be payable until the Flat shall again be rendered fit for occupation and use or for a period of two years . . (whichever is the shorter) (37) -

5.4 Any notice to be served upon the Landlord under this Lease shall be properly served if sent by Registered or Recorded Delivery Post to the Landlord at its last known address or to the Landlord's Managing Agents for the time being (if any) and any notice to be served upon the Tenant shall be properly served if sent by such post as aforesaid to the Tenant at the Flat (37)

- 5.6 . . if any dispute shall arise . . . as to the construction or effect of the remainder of this Lease or otherwise in connection with the Flat the same shall be referred to arbitration . . .(37)

- **Second Schedule** (the Tenant's Covenants") 1. During the Term to pay the Maintenance Contribution and any VAT on it and any other sums due under this Lease at the times and in the manner at and in which the same are hereinbefore reserved and made payable without any deduction or set-off. (45)

- 17. to pay the Landlord on demand and indemnify the Landlord against all costs fees damages . . . (45)

- **Fourth Schedule:**

- **Part I** Percentage of Annual Maintenance Provision payable in respect of each flat as Maintenance Contribution Flat 2 1.93 (48)

- **Part II** If in the opinion of the Surveyor it should at any time become necessary or equitable to do so by reason of any of the flats in the Building ceasing to exist or to be habitable or being compulsorily acquired or requisitioned or for any other reason the Surveyor shall recalculate the percentage proportions appropriate on an equitable basis to the flats in the Building and notify the tenants accordingly and . . the new percentage . . shall be substituted for that set out in Part I of this Schedule . . (49)

- **Part 111 Computation of the Annual Maintenance Charge:**

- 1.1 Save in the first year the Annual Maintenance Provision in respect of each Maintenance Year shall be computed not later than four weeks prior to the commencement of the Maintenance Year

- 1.2 The Annual Maintenance Provision in respect each Maintenance Year shall be computed in accordance with paragraph 2 hereof

- 2. The Annual Maintenance Provision shall consist of a sum comprising:

2.1 the expenditure estimated as likely to be incurred in the Maintenance Year by the Landlord for the purposes mentioned in the Fifth Schedule together with

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*2.2 an appropriate amount as a reserve for or towards those of the matters mentioned in the Fifth Schedule as are likely to give rise to expenditure after such Maintenance Year being matters which are likely to arise at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the painting of the common parts and the exterior of the Building the repair and renewal of the Conduits in the Building the repair of the structure thereof the repair of drains and the overhaul renewal and modernisation of any plant or machinery (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Annual Maintenance Provision shall not unduly fluctuate from year to year) together with*

*2.3 a sum equal to any maintenance contribution (or part thereof payable in respect of any flat in the Building) in respect of any preceding Maintenance Year which shall not have been paid at the date on which the computation is made Provided Always that no such sum shall be included unless the Surveyor is satisfied that the Landlord has taken reasonable steps to recover such sum from the person liable to pay the same*

*REDUCED BY:*

*2.4 any unexpended reserve already made pursuant to paragraph 2.2 hereof in respect of any such expenditure as is mentioned in paragraph 2.1 hereof and further*

*2.5 any sum by way of maintenance contribution which was included in the computation for any previous Maintenance Year pursuant to paragraph 2.3 hereof and has since been recovered by the Landlord from the person liable to pay the same*

*- 3.1 After the end of each Maintenance Year the Surveyor shall determine the Maintenance Adjustment calculated as set out in the next following paragraph*

*- 3.2 The Maintenance Adjustment shall be the amount (if any) by which the estimate under paragraph 2.1 above shall have exceeded or fallen short of the actual expenditure in the Maintenance Year*

*- 3.3 The Tenant shall be allowed or shall on demand pay as the case may be against or with the next instalment of maintenance contribution falling due after the date of such determination the percentage proportion appropriate to the Flat of the Maintenance Adjustment*

*- 4. A certificate signed by the Surveyor and purporting to show the amount of the Annual Maintenance Provision or the amount of any Maintenance Adjustment for any Maintenance Year shall be conclusive of such amount and in giving such certificate the Surveyor shall be deemed to be acting as an expert and not as an arbitrator*

*- 5. The Landlord shall procure that there shall be open to inspection by the Tenant during ordinary business hours at the office of the Surveyor during the Term audited accounts of the Maintenance Fund for the preceding Maintenance year (provided that the Tenant shall*

*give to the Surveyor reasonable notice in writing of his desire to see such copies) and the Landlord shall further supply to the Tenant a summary of such accounts*

### **Allegations of breach**

6. The Applicant says that the Respondents have breached their lease because they failed to make payment due to the applicants in respect of the maintenance contribution, and the reserve fund.
  
7. Prior to the instruction of Mr Harrison the Respondents submitted a statement of defence and particulars in response to the Applicant's statement of claim. They raised a number of defences most of which were not pursued by Mr Harrison. Amongst other things the defence raised the fact that the premises had been damaged by rainwater and were not properly habitable (there are ongoing arbitration proceedings which are referred to further below); an alleged breach of the lease deed by the Applicant for failing to serve notices by registered post; an allegation that the apportionment was wrongly varied; an allegation that the calculations carried out by the Applicant did not comply with the requirements of clause 2 of part 3 of the fourth schedule of the lease. In this regard the Respondents relied on a decision of the tribunal : Falmouth House Limited v Treetop Investments LLC and others LON/00BK/LSC/2019/0021 ("the Treetop Decision"). This case is referred to in more detail below. This is a broad summary of late defences raised by the Respondents. In addition the Respondents claimed a number of demands made by the Applicants were outside the limitation period – this was tacitly conceded by the Mr Buckpitt on behalf of the Applicant. The Respondent's defence came in a different form when Mr Harrison became involved and this is dealt with further below.
  
8. The Applicant in a reply to the Defence argued that the Treetop decision was wrongly decided and in any event was not binding. They also stated that the Respondents were estopped from contending that invoices were not demanded in accordance with the lease on the basis that they were both previously involved with the Landlord and would or should have known how the lease was being operated. The First Respondent Mrs Dao and Mr Dao acted, according to the Applicant, as a shadow director. They relied on a witness statement of Scott Thrower which included an exhibit showing that in 2005 and 2009 Mr Dao's name and flat number were noted as the landlords address for service of statements and the person to whom enquiries should be addressed when a former managing agent Rendall Ritner was replying to the purchaser's enquiries.

9. In his statement to the Tribunal Scott Thrower a Senior Property Manager employed by JMW Barnard Management Limited who are the managing agents for Falmouth House states that the Applicant invoiced quarterly in advance for the estimated service charges and following year end reconciliation had sent a demand for the balancing charge which in the terms of the leases at Falmouth House was known as the maintenance adjustment. In addition, each quarter the Applicant invoiced for the annual reserve contribution payable by each flat. He stated that JMW took over management in August 2017 and therefore his knowledge was limited to the period since then. He attached a statement from Dr Parry Mohana a director of the Applicant making reference to historical matters. In relation to the service charge accounts he stated that the end of year accounts in a budget were prepared for each year that JMW we're managing. The draft budget would be given to the company secretary who was James Collins he would then liaise with the board and come back to him with proposed alterations before the budget was finalised and then implemented into quarterly service charge demands to each of the lessees. He attached the budgets for the years 2018 to 2023 inclusive.
  
10. Mr Thrower made reference to the Treetop decision which was dealing with a different flat - flat 17. That decision found that the demands had not been raised correctly because historic arrears had not been included with the budget. He says that he was asked to include arrears figures into the service charge and these arrears figures are shown for years ending 2021, 2022 and 2023
  
11. Mr Thrower says that he was informed by James Collins that the service charge was prepared and invoiced in the same manner for many years. He understood that Mrs Dao was previously a director of the Applicant company and although Mr Dao was not formally a director he was very active in the management of the company. He said that involvement was reflected in the witness statement of Dr Mohana which he attached to his statement. He referred to the copy of an old service charge demand dated the 27th of April 2006 and replies to pre contract enquiries dated the 8th of May 2009 from a previous managing agent Rendall and Ritner both of which clearly referred to Mr Dao and his address of as a point of contact for service of landlord notices and the provision of information. The Applicant contends therefore that it's not open for Mr Dao to complain about the method of charging as it follows the method adopted during his period of management and when Mrs Dao was a director.
  
12. The witness statement of Dr Mohana was not made pursuant to current proceedings and contains a considerable history much of which is irrelevant to

the present case and therefore it is not intended to summarise any part of that statement here.

13. Mr Dao submitted a witness statement on behalf of the Respondents. He referred to an annual general meeting on the 15th of May 2022 when there was a change of management of the premises. He had discussions about settling the outstanding service charge matter and it was agreed that he would pay 50% of the outstanding service charges. He said he thought that the matter was settled and took no further steps for several months but on the 16th of September 2022 he was informed that the claim was restored and the matter would be placed with the board of directors on the settlement proposal. He said *in panic I sent a brief statement of defence to the tribunal relying on an established and known recent and a related case president precedent because I did not know any other way and what else to do*. In fact the Board of Directors had rejected the settlement proposal. In any event Mr Dao was represented at the hearing by Mr Harrison who robustly defended his case.
  
14. In a further statement made by Mr Dao he repeated the argument that the demands raised by the Applicant were not in accordance with the lease. He then made reference to disrepair in the premises which the Tribunal understands is being dealt with by means of arbitration. In his statement there followed a number of unfathomable arguments relating to trust duties. The Respondents' case was never really clarified until Mr Harrison became involved and submitted his skeleton argument and submissions at the hearing. Mr Buckpitt dealt with this "ambush" in a sensible and professional manner and all of the issues were properly argued by both parties.

### **The hearing**

15. In cross examination Mr Thrower admitted that he had no knowledge of the scheme before April 2019 because he joined in February 2019. He said he didn't personally send out demands they were sent out by the accounts team. They were sent out by e-mail as a lot of leaseholders were abroad but they were posted as well. It was put to Mr Thrower that Mr Dao had not received the demands or the statement of rights and obligations ( this allegation was later withdrawn) . Mr Thrower said that prior to 2021 there had been a failure to comply strictly with the lease terms and arrears had not been included. He said that James Collins had decided about the election of the arrears and he was not a surveyor but his firm had surveyors.
  
16. Mr Dao gave evidence. He was cross examined about letters in which he was referred to as being a point of reference for the landlord. He claimed he had



not seen the letters before. He said he was appointed as the authorised representative of 27 participants in their enfranchisement. He said that he hadn't paid his service charges due to the water ingress at the premises. He denied he had any involvement in the running of the building. It was put to him that he was the point of contact for the purposes of section 47 and 48 of the Landlord and Tenant Act 1987 – he denied this. It was also put to him that the service charges had been run in the same way during the time when he was involved – his response to this was unclear. He sought to distance himself from the landlord. He said his wife had been a non - executive director. He said she was a mere secretary. He said the witness statement of Dr Mohana contained lies. He was not the authorised representative of the landlord but was merely the authorised representative of participations in the enfranchisement. It was again put to him that he was the main point of contact in service charge demands sent. He said he had no idea his name had been put forward. It was put to him that he was happy with the auditing during his period of involvement. He conceded that he was aware that the service charge apportionment had been adjusted when the caretaker's flat was sold. He admitted that he received demands by e-mail and letter but claimed that the rights and obligations were not included although he had received them in September 2022. He gave details about the disrepair in his property.

### **The party's submissions**

17. In his skeleton argument Mr Harrison stated that because there was an express exception to the condition that service charges were payable without deduction or set off where the flat was damaged by any of the insured risks so as to be unfit for occupational use. In that case the maintenance contribution was suspended in part or in toto. Since the arbitrator was deciding liability for disrepair and it's likely to turn on whether the flat was uninhabitable it was suggested that the Tribunal treat the other issues raised as preliminary issues and leave open the final determination of the service charge liability pending the decision of the arbitrator. Mr Harrison did not really push this argument at the hearing. In any event it is the Tribunal's view that the existence of parallel arbitration proceedings do not preclude us making a determination as to the payability and reasonableness of service charges. It may be that following the arbitration some amounts need to be deducted from the service charges due. However, as it stands the Respondents have substantial service charge arrears because they have not paid for a considerable period of time. It may be that the premises are in poor condition and the tribunal notes the photographs provided in the bundle but there is no legal right to withhold payment of service charges.
18. As outlined by Mr Harrison in his opening statement the sums in dispute in this case are substantial these are:

- a) £43,770.47 by way of interim service charges alleged to have fallen due between the 24th of March 2017 and the 25th of March 2022.
  - b) £3072.22 by way of balancing charges alleged to have fallen due between the 24th of March 2017 and the 24th of March 2020.
  - c) £9025 identified as reserve fund charges and said to have fallen due between the 24th of March 2017 and the 25th of March 2022.
19. Mr Harrison said the lease terms were in mandatory form in terms of what the landlord was expected to do. The lease was unusual because the advance service charge includes three things which are not usually included-
- i. by para 2.3 it must make provision for service charges not paid by any lessees in the building;
  - ii. by paragraph 2.4 it must give credit for any unexpected reserve; and
  - iii. by paragraph 2.5 it must also give credit for any service charge arrears recovered from tenants in the block.
20. Mr Harrison stated that the unusual provisions were there to deal with funding problems where leaseholders in a block do not pay their service charges. absent an express provision in the lease to the flat landlords cannot generally fund such deficits by increasing the service charges for the lessees who do actually pay.
21. Mr Harrison said that the FTT heard evidence on the service charge administration in the block during the period 2012 to 2016 in the Treetops case. It concluded at paragraphs 37 to 38 that paragraphs 2.3 -2.5 of the fourth schedule were ignored during the period. The FTT also concluded that during the period there was no maintenance adjustment under para 3 of schedule 4 Part 3.
22. Mr Harrison said that the accounting during the period had not been carried out in accordance with the lease in several ways. There had been a failure to comply with paragraphs 2.1 - 2.5 because the annual maintenance provision was not computed in accordance with those paragraphs. It completely failed to include the debits and credits. Further time was of the essence in relation to

the computation of the charges. The starting point was that the tenant covenanted to pay the maintenance contribution calculated pursuant to part 3 of the 4th schedule in equal payments on the usual quarter days and the AMP had to be computed not later than four weeks prior to the commencement of the maintenance year. He relied on the case of *Kensquare v Boakye* [2022] HLR 26 which found that the usual presumption against time not being of the essence was displaced by a clause permitting a notice adjusting the on account main maintenance contribution to be served not less than one month prior to the commencement of the financial year.

23. Mr Harrison said that the failure to implement paragraphs 2.1- 2.5 and paragraph 3 meant that the Landlord was not entitled to payment of the demands. He relied on the case of *Southwark LBC v Woelke* [2013] UKUT 349 (LC). The acid test is whether leaseholders can “work out for themselves whether a sum is due to be paid by reading the lease and comparing the process it described with the information provided in support of the demand by the landlord”. But as the FTT in the 2020 Decision found in para 52, the “the leaseholder is not given a figure to pay that reflects the Maintenance Contribution as defined by the lease”.

24. In relation to the time is of the essence argument he said that all the demands were of no effect as the computation had to be made four weeks prior to the 25th of March in each year and this had not been done therefore nothing was due by way of advanced service charges for any of the relevant years.

25. He said that although the landlord had purported to comply with the strict lease terms following the Treetops decision the person who decided if the arrears were to be added was Mr Collins who was not a surveyor and the criteria used in making the decision whether to add the arrears was not objective.

26. Mr Buckpitt reminded the Tribunal of the guidance on interpretation of the Court of Appeal in *Universities Superannuation Scheme v Marks & Spencer* 1999 L & TR 237 (noted by the UT in *Southwark v Woelke* 2013 UKUT 349 (LC) at paragraphs 31 and 35):

*“The purpose of the service charge provisions is relevant to their meaning and effect. So far as the scheme, context and language of those provisions allow, the service charge provisions should be given an effect which fulfils rather than defeats their evident purpose. The service charge provisions have a clear purpose: the landlord who reasonably incurs liability for expenditure in maintaining the Telford Shopping Centre for the benefit of all its tenants there should be entitled to recover the full cost of doing so from those tenants and each tenant should reimburse the landlord a proper proportion of those service charges”*

27. In *Woelke* the UT stated (at paragraph 40):

*Where a contract lays down a process giving one party the right to trigger a liability of the other party, such as the payment of a sum of money in response to a demand, it is a question of construction of the contract whether the steps in the process are essential to the creation of the liability, or whether the process may unilaterally be varied or departed from without invalidating the demand. Where issues such as those in this appeal arise, it is necessary to identify the minimum requirements laid down by the lease before the obligation to pay the service charge will be created, and then to consider whether the circumstances of the case satisfy those minimum requirements. In considering each of those matters, it is not appropriate to adopt a technical or legalistic approach. The service charge provisions of leases are practical arrangements which should be interpreted and applied in a business like way.*

28. In other words any departure from what is required has to be material for the Respondents to be able to say that the contractual obligation has not been performed. In this case the machinery used allowing for the adding of irrecoverable arrears in the calculation is according to Mr Buckpitt entirely for the benefit of the landlord and the landlord can waive this part of the calculation. There is no advantage to the lessees in having to pay through the service charge the arrears of others.

29. He said that the use of the word “shall” in the lease term was not conclusive. The formula in the lease was intended to be the formula used but it did not mean that the parties intended time to be of the essence in relation to that formula. The *Kensquare* decision did not bind the tribunal because it concerned a different lease. Further the present case had a formula for calculation of the AMP which did not include notification unlike in *Kensquare* therefore it was not possible to say that time was of the essence. Mr Harrison’s argument that there was an implied requirement of notice within the 28 day period was not sustainable because there had to be a clear term for time to be of the essence.

30. Mr Buckpitt said that in the context of a resident owned company the parties would not have intended time to be of the essence. In addition, the recovery of arrears in the mechanism was entirely for the landlord’s benefit and the landlord can waive the requirement to include this. The failure to apply that part of the mechanism cannot mean that nothing is due. That could not be what the parties intended. As a matter of construction did the landlord intend that if he chose not to foist on paying lessees the arrears of non - paying lessees then the landlord gets nothing? Of course not said Mr Buckpitt. The landlord has the right to waive a part of the mechanism that is solely for his benefit. In any event the effect of the failure to include the arrears was minimal.

31. As a secondary argument Mr Buckpitt said that Mr Dao and his wife had been closely involved with the landlord previously and had never taken issue with the mechanics of the service charge calculation. He said Mr Dao had not been completely frank in his evidence. He knew how the service charge was administered. The Treetops decision gave him the opportunity to argue that the sums were not due.
32. In response Mr Harrison said that the provisions were mutually beneficial because everyone wants the landlord to be funded.

### **Determination**

33. This was a well argued and apparently complex case but the Tribunal is clear in its decision that the sums claimed by the landlord subject to deductions for the limitation period are due and owing. The intention is to deal with the evidence first and then address the interpretation of the lease.

### **Evidence**

34. Mr Thrower was a credible witness. His evidence was reliable and honest without any element of self serving. He accepted that the service charge mechanism had not been applied word for word in accordance with the lease.
35. In contrast Mr Dao was considered to be an unreliable witness. His evidence changed in order to meet the questions being asked. Originally, he had argued that he had not received appropriate service charge demands, this was retracted. He sought to explain away his connection with the landlord which was clearly evidenced by documents in the bundle. His explanation was at times bizarre and unbelievable. He argued that he had no knowledge of letters being sent out with him as the point of contact. He sought to belittle any involvement of his wife or him with the landlord notwithstanding the fact that his wife had been a Director and he had clearly played an active role not just in the enfranchisement claim but in other aspects of the running of the business by the landlord. He was plainly aggrieved about his disrepair claim and adopted an entrenched view of the landlord's conduct notwithstanding the fact that he had substantial arrears. He had no problem in hijacking the benefit of the previous tribunal decision despite the irony that it presented in his case. He had substantial arrears. The fact that his arrears along with others had not been included in the calculations meant that he didn't have to pay anything according to him. He had clearly not made any contingency plans if this argument failed. There was no offer of payment despite earlier negotiations in which he had offered to pay at least something.
36. The tribunal reminds itself that it must look at the lease provisions objectively notwithstanding its interpretation of the credibility of Mr Dao.

### **The lease interpretation**

37. The tribunal has no hesitation in deciding that the interpretation of the lease put forward by Mr Buckpitt is the correct one. The crucial basis for this finding is his argument that the arrears provision is entirely for the benefit of the landlord. It made financial sense to allow the landlord to include arrears in the calculations. It is not however right to say that it was mandatory for the landlord to include the arrears. The landlord can waive the right to obtain a benefit. Neither can it be said that the provision in question made time of the essence. As Mr Buckpitt pointed out there was no requirement of notification and the clause was not clear enough to make time of the essence. In recent years the landlord has sought to include the arrears but according to the Respondents this does not meet the requirements of the lease because a surveyor was not involved in the decision on the arrears. In fact Mr Thower's organisation includes surveyors and they liaised with the landlord. In any event the fact that the Tribunal have found that the mechanism is not mandatory and can be waived by the landlord as the beneficiary of that mechanism means that arguments of strict compliance fall away. To this extent the previous Tribunal decision which does not bind us was with respect is wrongly decided. We suspect that we had more time to properly consider the matter. We also had the benefit of pragmatic arguments by Mr Buckpitt.
38. Even if the tribunal is not right about its interpretation of the lease it does find that the Respondents are estopped from denying that payment is due based on a failure to apply the strict lease provisions because they were integrally involved with the landlord previously. Mrs Dao was a director and Mr Dao the appointed point of contact. They would or should have known that the landlord was applying the lease in a particular way. It's not open for them to now turn around and demand perfection in an opportunistic attempt to rely on the previous Tribunal decision.
39. The Tribunal rejects Mr Harrison's application for a stay pending the outcome of the arbitration. The arbitration does not preclude a determination by the Tribunal as to what is payable. The Tribunal accepts that the arrears claimed by the Applicant are payable but this sum should be adjusted to take into account the limitation period (as the service charge was reserved as rent) and the Respondent's payments. If the parties cannot agree the sum due they should make a joint written submission within 14 days outlining any remaining issues pertaining solely to the arrears amount owing.

Judge Shepherd

28 November 2022

#### ANNEX - RIGHTS OF APPEAL Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. 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.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.