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

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| **Case Reference** | : | **LON/00BD/LSC/2014/0605** |
| **Property** | : | **Flats 2, 6 and and 10, Metropolitan Court, Clarence Street, Richmond, Surrey TW9 2SA** |
| **Applicant** | : | **(1) Mr Patrick Barsby (Flat 2)**<br>**(2) Mr Shehab Shoukry (Flat 6)**<br>**(3) Mr Andrew Ferguson (Flat 10)** |
| **Representative** | : | **Mr Georgakis and Ms Prelz-Oltramenti, BPP Pro Bono Centre** |
| **Respondent** | : | **Gamma Investments Limited** |
| **Representative** | : | **Ms Helmore of counsel** |
| **Type of Application** | : | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal Members** | : | **Tribunal Judge Richard Percival**<br>**Lady Davies FRICS**<br>**Mr O Miller BSc** |
| **Date and venue of Hearing** | : | **27 March 2015**<br>**10 Alfred Place, London WC1E 7LR** |
| **Date of Decision** | : | **22 May 2015** |

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**DECISION**

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## The application

1. The Applicants seek determinations pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable in respect of each of the service charge years from that ending in March 2010 to that ending March 2014 in respect of Mr Shoukry and Mr Ferguson, and the years from that ending March 2012 to that ending March 2014 in respect of Mr Barsby. Determinations are likewise sought pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount payable as administration charges as set out in paragraph 54 below.

2. A directions hearing was held on 16 December 2014 before Tribunal Judge Amran Vance. At the hearing, it was agreed that Mr Barsby's application, which had originally been of the same extent as that of Mr Shoukry and Mr Ferguson, should be limited to the three years indicated above. The service charges payable in the previous two years had been adjudicated by the Leasehold Valuation Tribunal in a decision dated 4 October 2012, following a hearing on 20 September 2012 (LON/00BD/LSC/2012/0345). The terms of the decision in that case, however, to a degree qualified the extent to which the relevant issues had, in fact, been adjudicated (see paragraph 19 below).

3. At the directions hearing, Judge Vance noted that the applications on behalf of Mr Shoukry and Mr Ferguson had not been signed. The Tribunal had received signed applications and statements of truth from both by the time of the hearing.

4. Directions were given as to disclosure and the compilation of a bundle for the hearing. In the event, the parties were unable to agree a bundle, and each presented their own at the hearing.

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

## The hearing

6. The Applicants were represented by Mr Georgakis and Ms Prelz-Oltramenti, members of the BPP Law School Pro Bono Centre, appearing pro bono. Mr Barsby attended the hearing and gave evidence. Mr Shoukry and Mr Ferguson did not attend.

7. The Respondent was represented by Ms Helmore of counsel. Mr Donaldson and Mrs La Valle Caruso, of Marquis and Co, the managing agents, attended and gave evidence.

## The background

8. The Applicants' flats are located in a purpose built block of five flats. There was no need for an inspection.

9. The Applicants hold long leases of the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

10. We were provided with a copy of the lease for flat number 2. It was agreed that the other leases were in the same form. The lease makes provision in clause 2 for a service charge (the "service rent") at a set percentage of the "service expenses", which the tenants covenant to pay (clause 4.1(a)). Clause 2 provides for payment on account in advance on the basis of estimates from the managing agent, with a balancing procedure after the end of the service charge year. Clause 6 imposes on the Landlord requirements to repair and maintain the building and services, and to insure against various risks. The Fourth Schedule defines the service expenses in more detail.

## The issues

11. At the start of the hearing, the Tribunal sought to establish with the parties the relevant issues for determination. Initially, the parties agreed that the issues were (largely) as set out in the directions hearing, as follows:

    (i) Whether the service charges/administration charges demanded were payable by the Applicants as a consequence of section 20B of the 1985 Act, where they been served without compliance with section 47 of the Landlord and Tenant Act 1987.

    (ii) Whether certain administration charges were payable;

    (iii) Whether the Tribunal should make an order under section 20C of the 1985 Act that the costs of these proceedings should not be recovered under the service/administration charge; and

    (iv) Costs under the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Procedure Rules").

12. At the directions hearing, and initially before us, a further dispute was identified as to whether the Respondent had misused the reserve fund to meet ongoing expenditure, and whether it was held in an improper way. However, during the course of hearing, the Applicants conceded that the point was no longer an issue.

13. Our initial understanding, and that of the Respondent, was that the issue identified in (i) above was a matter of law. The Respondent accepted that from April 2009 to August 2014, at least some of the service charge demands did not comply with section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act"), in that they did not include the Respondent's name and address. The relevant demands were re-issued on 5 August 2014 in compliance with the section. The question for the Tribunal was as to the legal effect of the re-issued demands.

14. However, after the start of the hearing, it became apparent that there was also a factual dispute between the parties as to whether any service charge demands had been made at all during the relevant period.

15. The exact extent of the dispute proved to a degree elusive, despite the Tribunal adjourning twice in an attempt to allow the parties time to agree the exact ambit. In the event, we were satisfied after hearing evidence that we were able to rule on the dispute.

16. In this decision, we record our conclusions under each heading of dispute.

17. At this point, it may be helpful if we point out to the parties that in this decision we only record the evidence – whether oral or contained in the bundles – that we found relevant to the issues that we have to decide. There was a considerable amount of evidence that did not fall into that category.

## Whether demands were made as a matter of fact between 2009 and 3 April 2012

18. Although in the hearing we heard legal argument first, it is convenient to deal with the factual dispute first in this decision.

19. We should explain first that the question of whether the service demands before the re-issue on 5 August 2014 were complaint with section 47 of the 1987 Act was first raised by the LVT at the hearing on 20 September 2012. At that hearing, Mr Donaldson for the Respondent assured the LVT that the demands, as served, had complied with the section. In the result, where the LVT found that sums were payable by Mr Barsby, and were reasonable, they qualified their finding with the caveat "if properly demanded". It is now accepted that the demands (or some of them) did not comply with section 47.

20. Mr Barsby was examined briefly in chief by Mr Georgakis. His evidence was simply that he had not received service charge demands from 2009 until 2012. He said that it had subsequently transpired that copies of the demands had been sent to his building society (and those of the other Applicants), and those copies were subsequently provided by the

building societies (as a result of an otherwise irrelevant complaint made by Mr Barsby to an ombudsman).

21. Ms Helmore cross examined Mr Barsby. At one point, it appeared to Ms Helmore – and indeed, to the Tribunal – that Mr Barsby was accusing the Respondent's agents of fraudulently falsifying documents. However, in answer to a direct question from the Tribunal, he said he was not saying that there had been dishonesty, but that he had not been informed, as he should have been, of what was happening.

22. Mr Barsby said that he did not know whether or not the other two flats (numbers 4 and 8) had paid their service charge during the period. He adverted to an email exchange with the leaseholders of flat 8, a Mr and Mrs Glover, in the Applicants bundle (at tab 2, page 4). In answer to a query from Mr Barsby (in May 2011) as to whether or not they had had a service charge demand, one of them said that they had "just received a wad having chased them for some weeks." He suggested that the "wad" must have been service charge invoices.

23. Pressed by Ms Helmore, he said that he was contending for a finding that flat numbers 4 and 8 might have received bills when the Applicants had not, because there were discussions going on between the leaseholders of those three flats and the managing agents about the level of service, and the discontinuation of a discount agreed by the managing agent in respect of historic poor service. This, he suggested, might have led the managing agent to have sent service charge demands to the two flats not involved in the discussions but not those that were involved in the discussions.

24. He also suggested that a succession of staff changes at the managing agent might have been responsible. He could not identify a reason why such staff changes would have resulted in only the two flats receiving service charge demands.

25. He denied that he had discussed service charge demands at a meeting he and Mr Ferguson attended with the managing agent in May 2012. Mr Barsby said that he had a note of that meeting in his bundle, and took the tribunal to it. It is an email from Mr Barsby to the Glovers on the 31 May 2012, referring to a meeting on the same day. The email refers to a number of matters discussed, but includes the statement that the agents "are going to revise their accounts and demands following their discussions with [the Landlord's London surveyors]", apparently as a result of matters put to them by Mr Barsby in the meeting.

26. Mr Barsby, in his evidence to us, produced what he said was the first invoice he had received after "the gap", the period when, he said, no demands had been issued. That demand was at tab 4, page 6 of his bundle. It is a demand dated 3 April 2012 for £1746.34, of which

£441.23 related to the period from 25 March to 29 September 2012, and the remainder was described as "arrears as at 03/04/2012".

27. Mr Barsby then sought to clarify the timetable relating to the submission of demands to the building societies. These demands (at is bundle, tab 3, pages 7 to 9) related to 29 September 2009 to 24 March 2010; 25 March to 29 September 2010; and 29 September 2010 to 24 March 2011. All three were dated 6 May 2011. He said he received these for the first time, via the ombudsman, on 18 October 2013. Mr Barsby said that the mortgagee in respect of flat 10 had asked for proof (presumably, of forfeiture proceedings) and as a result nothing further was done.

28. Mr Barsby then said that he had received a telephone call from his mortgagee, and had told them "don't pay, the demands aren't compliant". He said that he was aware they were not complaint, because he had become aware of *Beitov Properties Limited v Martin* [2012] UKUT 133 (LC), [2012] 35 EG 70 at, or shortly before, the LVT hearing in September 2012.

29. Ms Helmore put it to Mr Barsby that the service charge demands for the years ending March 2010 and March 2011 were available at the LVT hearing (see [4], where it is said that they were handed to the LVT during the hearing). Mr Barsby responded that there was one demand. He said that Mr Donaldson had handed this one demand to the LVT. He was not shown the demand.

30. For the Respondent, Mrs La Valle Caruso gave evidence on the basis that her evidence could assist in respect of the process of dispatching service and administration charge demands. A witness statement had not been served, but the Applicants took no point in respect of that.

31. Mrs La Valle Caruso explained that she was the managing agent's client account manager, in which capacity she prepared the service charge and administrative charge demands. She had been employed since 30 January 2012.

32. She said she prepared the demands on a PC, printed them out, made a copy, attached the summary of rights and obligations, and sent them out by post. They used a franking machine. She was not aware of any demands being returned by the Post Office.

33. Mr Georgakis cross examined Mrs La Valle Caruso. She said outbound post was recorded in a book in summary (as in "6 lessees Metropolitan Court"). This practice had started at about the same time as she had started working at the agents. The book was not available at the hearing. She agreed that on one occasion, she had dealt with an issue

raised by Mr Barsby, and found him open to resolving the matter. The demands were sent by first class post, not registered post.

34. In response to questions from the Tribunal, Mrs La Valle Caruso said that it was not conceivable that demands could be sent to some flats but not others. They were all sent together.

35. In re-examination, Mrs La Valle Caruso said that the Glovers in flat 8 had paid for all of 2010/2011 on 14 November 2011. It would not have been sensible to have dealt with different flats differently. The only reason to do so would be if there was a change of lessee. The fact that two of the flats (flats 4 and 6) were tenanted would not make a difference to the process of sending out demands.

36. Mr Donaldson gave evidence. He was a director and the major shareholder in Marquis and Co. His role was a background one.

37. Mr Donaldson could not recall which service charge demands had been handed to the LVT in 2012.

38. The system for dispatching service and administration charge demands before Mrs La Valle Caruso started in 2012 was similar, although they used stamps not a franking machine. The demands in respect of each block were sent out at the same time. This was done because it was administratively sensible. It would have been pointless and chaotic to have done otherwise.

39. In his witness statement, Mr Donaldson explained that no demands were issued between September 2009 and March 2011 because of a problem with a staff member, who left at the latter date. This was, he said, rectified when the error was uncovered, which was why a lot of demands were dated around May 2011.

40. At the LVT in 2012, he had only had the file copies of the service charge demands with him and genuinely believed that the demands would have been complaint with section 47 of the 1987 Act. It was not until legal advice was sought some time later that the error became apparent, which is why the demands were properly re-issued in August 2014.

41. It was unclear to the Tribunal whether the mortgagees of flats 2 and 6 had paid the service charge demands presented to them or not, or if they did pay, whether the payment was reimbursed to the mortgagors. However, neither party sought to make the payment of these demands an issue. They featured, rather, in the context of whether the demands were made or not.

42. We accept that, at least, the Glovers paid their service charge demand in November 2011, a time consistent with a demand in or about May

2011, and not consistent with an earliest post "gap" demand in April 2012, as contended for by Mr Barsby. As explained by both Mrs La Valle Caruso and Mr Donaldson, it is inherently unlikely that flats 2, 6 and 10 would accidentally have been treated differently from flats 4 and 8. Mr Barsby's suggestion that they were deliberately treated differently, because of discussions, is not credible. In the first place, it flatly contradicts the evidence of Mrs La Valle Caruso, who we concluded was a straightforward and honest witness. Secondly, there is no rational reason why the agent would have treated the discussant leaseholders differently from those not involved.

43. Finally, we find it incredible that the LVT in September 2012 did not show Mr Barsby the demands (or even demand in the singular, as he insisted) upon which it relied. It is, of course, the unvarying practice of this Tribunal and the LVT before it to ensure that when a party produces a previously undisclosed document, the other party is given the opportunity to see and consider it. His insistence that this did not happen undermines his credibility.

44. *Decision:* We find as a fact that the service charge demands in relation to the years ending in March 2010 and March 2011 were sent by the managing agents in May 2011 as contended for by the Respondent.

45. We consider the consequences of this finding below.

**Were the service charges payable by virtue of section 20B of the 1985 Act?**

46. The issue for the Tribunal is the relationship between section 20B of the Landlord and Tenant Act 1985 section 47 of the Landlord and Tenant Act 1987. It is not disputed that at least some of the service charge demands before August 2014 were not compliant with section 47.

47. Section 20B of the 1985 Act is headed "Limitation of service charges: time limit on making demands". Subsection (1) reads:

> (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

48. Section 47(1) and (2) of the 1987 Act is as follows:

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where —

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge or an administration charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

49. The Respondent argued the effect of section 47 is not to act as an absolute bar to the validity of the demands, if the requisite information is not included in them. Rather, as subsection (2) makes clear, it is suspensory. The charge is not due only for such time as the information is not furnished.

50. Ms Helmore referred us to *Johnson and Others v County Bideford Ltd* [2012] UKUT 457 (LC), [2013] L&TR 19 at [9] and [10]:

"9. Mr Knapper relied on the decision of Morgan J in *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC 1663 (Ch) for his submission that a demand for the purposes of section 20B(1) must be a valid demand, so that the original demands, being invalid by reason of their failure to meet the requirements of section 47(1), could not constitute demands for this purpose. The invalidity with which *Shulem B* was concerned, however, was a contractual invalidity. At paragraph 53 Morgan J said this:

'The reference to a demand in section 20B(1) presupposes that there had been a valid demand for payment of the service charge under the relevant contractual provisions. In this case, I have held that the letter of 23 February 2006 was not a valid demand for service charge under clause 2(6) of the leases. It follows that it was not "a demand for payment of the service charge" within section 20B(1).'

> 10. The invalidity with which Morgan J was concerned was thus not one that was capable of retrospective correction. An invalidity that arises by virtue of a failure to comply with the requirements of section 47(1) is by contrast one that can be corrected and can be corrected with retrospective effect. That is what subsection (2) provides. In my judgment, therefore, the lessees' contentions based on section 20B necessarily fail. The service of the demands in June 2011 had the effect of validating the earlier demands, and the amounts payable, therefore, are those set out in the schedule to the LVT's decision of 2 June 2011."

51. The Applicants submitted, without developing the argument, that *Beitov Properties Limited v Martin* [2012] UKUT 133 (LC), [2012] 35 EG 70 contradicted *County Bideford*. It was further argued that the demands, not being within 18 months of the compliant re-issue of the demands, were not payable as a result of section 20B.

52. *County Bideford* is exactly on point and is binding on us. *Beitov* is not concerned with the relationship between a failure to comply with section 47 and section 20B. Rather, it establishes the conditions under which the provision of an address is complaint with section 47.

53. *Decision*: The admitted failure to comply with section 47 of the 1987 Act suspended the operation of the relevant demands, but that suspension was lifted by the issuing of a valid demand in August 2014. The effect is to retrospectively confer validity on the earlier demands.

## Payability of administration charges

54. The application under Commonhold and Leasehold Reform Act 2002, schedule 11 related to a small number of administration charges demanded from the Applicants. The demands were against Mr Barsby for £969.80 for "arrears recovery" on 3 October 2010; against Mr Ferguson for £299.60 for "legal costs" on 22 April 2010 and for £93 for "arrears recovery" on 29 January 2014; and against Mr Shoukry for £135 for "arrears recovery" on 29 January 2014 and £567 for "late payment fee" on 4 November 2013. All of these administration charges related to the Respondent's efforts to secure payment of service charges demanded.

55. The payability of the administration charges were argued before us on the basis of the whether the charges were payable when the wrong summary of rights and liabilities was attached thereto.

56. The Administration Charges (Summary of Rights and Obligations)(England) Regulations 2007 ("the Administration Charge Regulations") were made under the power conferred in the 2002 Act,

schedule 11, paragraph 4(2) and apply, obviously, to administration charges as defined in the 2002 Act. The Service Charges (Summary of Rights and Obligations, and Transitional Provision)(England) Regulations 2007 ("the Service Charge Regulations") were made under the 1985 Act, section 21B.

57. It is again agreed by the Respondent that certain administration charge demands were accompanied by the summary of rights and obligations prescribed for service charge demands rather than that for administration charge demands.

58. In her evidence, during cross-examination, Mrs La Valle Caruso said that attaching the wrong summary of rights and obligations was a result of human error in the office.

59. Neither party had engaged in a detailed analysis of the differences between the summaries required by the two Regulations (although the issue had been prefigured at the directions hearing). In her submission to us, Ms Helmore accepted that the wrong summary had been attached and was content for the Tribunal to conduct the comparison exercise. Implicit in this submission was the understanding that, the greater the difference, the more likely the failure to attach the correct summary would vitiate the demand. The Applicants submitted that there were differences throughout the summaries, not just in the heading (but again, without a detailed analysis).

60. The Tribunal accordingly compared the summaries required by the two regulations. Paragraph 2 (and 3 in the Administration Charge Regulations) differ in substance, containing as they do a summary of the definition of service charge and administration charge in each case. Paragraph 3 (Service Charge Regulations) and 4 (Administration Charge Regulations) are somewhat different, in that the former specifies the matters that can be included in the service charge, whereas the latter merely uses the phrase "administration charge". Equivalents to paragraphs 7 to 11 of the Service Charge Regulations do not appear in the Administration Charge Regulations, as they relate to various rights relevant only to service charges, such as the consultation requirements contained in section 20 of the1985 Act and the right to inspect accounts and so forth.

61. The terms of schedule 11, paragraph 4 to the 2002 Act are mandatory. The demand "must" be accompanied by a summary, and the terms of the summary are as set out in the Administration Charge Regulations. Regulation 2 of those Regulations similarly specifies that the summary "must contain" the words set out therein.

62. Were it the case that the differences between the two were small or insignificant, we would have to decide whether such differences were sufficient to affect the validity of demands to which the wrong summary

was attached. However, as we have demonstrated above, there are substantial differences between the texts of the two summaries. We therefore are not required, and do not, decide whether minor changes would affect validity, as a matter of law. The differences are, in fact, substantial and so must negate the validity of the demands.

63. However, there is a more fundamental problem for the Respondent. It is not contested that, at the time the costs reflected in the administration charges were incurred, the Applicants liability to pay the service charge was suspended as a result of the failure of the Respondent to comply with section 47 of the 1987 Act.

64. The effect of a failure to provide the information required by section 47 is that "any part of the amount demanded which consists of a service charge or an administration charge ... shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished...". It follows that, at the time that the administration charges were incurred, the service charges demanded were not, in fact, due. As a result, administration charges incurred in attempting to secure payment cannot have been properly incurred.

65. It was not contested that the administration charges were recoverable under the lease.

66. *Decision:* The administration charges the payability of which the Applicants contest are not payable.

**Application under section 20C of the 1985 Act**

67. The Applicants applied for an order under section 20C that the costs of these proceedings should not be recoverable in the service charge. Section 20C is reproduced in the appendix.

68. The Respondent submitted before us that, first, it was not contested that legal costs were in principle recoverable under the lease. Secondly, that, while it was not the case that the making or otherwise of a section 20C order was dependent on success or failure before the Tribunal, it would rarely be right to make an order against a successful landlord. Finally, in any event, it was necessary to look at the behaviour of the parties as well as the result.

69. The Applicants responded that the proceedings had resulted from errors in the conduct of the managing agents (section 47, the summary of rights and obligations), not on behalf of the Applicants. Further, Mr Barsby, acting largely on his own, had made genuine efforts to get to the bottom of the issues.

70. Our discretion to make an order on section 20C is to be exercised on the basis of what is just and reasonable in all the circumstances. That includes the circumstances and conduct of all parties, and the outcome of the application. There is no necessary expectation of an order, even if a landlord is unsuccessful; and it requires some unusual circumstance to justify an order (*Tenants of Langford Court v Doren Limited* (LRX/37/2000); *Schilling v Canary Riverside Development Limited* (LRX/26/2005).

71. While both parties have enjoyed some success before us, the preponderance has clearly been with the Respondent. On the other hand, the origins of the dispute, as the Applicants argue, lie in failures of the Respondent to serve demands correctly. It could not, of course, be said, however, that the Respondent is in any way at fault in defending these proceedings.

72. We conclude that it would not be just and reasonable in all the circumstances to shut the Respondent out from recovering its costs of these proceedings by making an order under section 20C.

73. We make it clear that it was not contested before us that the lease allowed for the recovery of legal costs. We have not, therefore, ruled on that question. Should the payability and reasonableness of service charges or administration charges recovering the costs of these proceeds come before a Tribunal, the question of recoverability under the lease remains open.

74. *Decision*: The Tribunal refuses the Applicants' application for an order under section 20C of the 1985 Act.

## Costs

75. Both the Applicants and the Respondents made an application for their costs under rule 13 of the Procedure Rules. Rule 13 gives the Tribunal a discretion to award costs *only* if "a person has acted unreasonably in the bringing, defending or conduction of proceedings in ... a leasehold case". A leasehold case includes any relating to a jurisdiction under the 1985 and 2002 Acts (rule 1(3), 2002 Act, section 176A(2)(c)).

76. The Applicants produced a schedule of costs. At the start of his submission, Mr Georgakis said that the Applicants no longer sought £23, 912.50 in what were described as the "out of pocket expenses" of Mr Barsby. He did still seek legal costs and Mr Barsby's costs of producing his bundle of, together, £14,274.96.

77. Mr Georgakis submitted that the Respondents had behaved unreasonably in not resolving issues earlier, and not conducting their

business properly. The Respondent had also "walked out" of attempts to mediate the disputes.

78. The Respondent argued that no unreasonable behaviour had been identified in the "bringing, defending or conduct" of the proceedings. The attempt at mediation had broken down because the Applicants were claiming costs of about £40,000.

79. The Applicants application for costs is clearly hopeless and we reject it.

80. The Respondent submitted a statement of costs amounting to £12,739.10. Ms Helmore submitted, in making the application for the Respondent's costs, that the Applicants had behaved unreasonably both in the bringing and in the conduct of the proceedings. The Applicants had alleged a host of issues, including serious allegations, in Mr Barsby's witness statement, which were subsequently disregarded or dropped at the hearing. She referred to the fact that time had been spent on the day of the hearing attempting to clarify the Applicants' case.

81. The Applicants had been represented in the hearing by Mr Georgakis and Ms Prelz-Oltramenti, acting pro bono. In the past, at some point, Mr Barsby had had legal representation, and so should not be regarded as a litigant in person, and thus held to a lower standard than would be appropriate for a represented person.

82. In response, Mr Georgakis argued that Mr Barsby had not acted unreasonably. The application had not been unfair or unreasonable. That Mr Barsby had agreed to drop issues once they were clarified – he instanced the point about the reserve fund and his claim for "out of pocket" expenses – was an indication of reasonable, rather than, as Ms Helmore contended, unreasonable conduct.

83. In respect of the legal assistance, Mr Georgakis seemed to suggest that it was directed at resisting forfeiture, rather than pursuing these proceedings (although the Tribunal notes that that is somewhat at odds with the attempt to recover those sums as costs in these proceedings). He said that the assistance ceased before Christmas and that the application in this case had been made by Mr Barsby acting on his own rather than with legal assistance.

84. A person acts "unreasonably" in this context not merely if their conduct is inefficient or thoughtless, but, in the words of Sir Thomas Bingham MR, as he then was, in *Ridehalgh v Horsfield* [1994] 3 All ER 848, if it is "conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case." Similarly, in *Halliard Property Company Ltd v Belmonth Hall and Elm Court RTM Company Ltd*, the Lands Tribunal considered the 2002 Act, schedule

12, paragraph 10, where a similar costs jurisdiction is conditional on a party having "acted frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably". The Tribunal found that the first five adverbs describe modes of being "unreasonable"; and "otherwise unreasonably" was to be construed as describing conduct of the same kind.

85. For behaviour to be "unreasonable" in the relevant sense, therefore, it must be both out of the ordinary, and ill-motivated; motivated, that is, by something other than the proper initiation or conduct of proceedings. So understood, the question must be "was it reasonable *for this party* to behave as he or she did in the bringing, defending or conduction proceedings?" not "was the behaviour objectively reasonable?"

86. It is clear to the Tribunal that the Applicants' case throughout has been driven by Mr Barsby. The other two leaseholders are very largely absent from the narrative of events. Mr Barsby is clearly a driven man with a strong sense of wrongs done to him. Ms Helmore is right to observe that his witness statement and the materials in his bundle (including various captions added by him to material emanating from the Respondent) is wide ranging, and at times even wild in its expression.

87. In assessing the correct standard to apply to the Applicants, then, it is important to establish whether Mr Barsby can properly be said to be acting as a litigant in person, as opposed to a legal represented party. It is true that he was the recipient of, apparently, reasonably substantial legal assistance. However, the very features that Ms Helmore points to to establish unreasonableness are those that are entirely characteristic of a litigant in person, and particularly a litigant in person of Mr Barsby's character and cast of mind.

88. We are, in the event, driven to the conclusion that Mr Barsby – and thereby the Applicants together – have not acted unreasonably in the sense outlined above. For all that Mr Barsby may well be a difficult man to deal with, we cannot conclude that he is ill-motivated in the requisite sense. In assessing Mr Barsby's conduct in respect of the current proceedings, it must also be born in mind that the origin of these proceedings lies in substantial errors in compliance with the law (and indeed good management practice) by the Respondents.

89. *Decision*: The Tribunal refuses both parties' applications for costs under rule 13 of the Procedure Rules.

**Name:** Tribunal Judge Richard Percival **Date:** 22 May 2015

## Appendix of relevant legislation

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

### Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

### Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

### Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

**Section 20**

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

**Section 20B**

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

**Section 20C**

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

**Commonhold and Leasehold Reform Act 2002**

**Schedule 11, paragraph 1**

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

**Schedule 11, paragraph 2**

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

**Schedule 11, paragraph 5**

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).