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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LSC/2016/0043**
Property	:	**5a Burnbury Road, London SW12 0EH**
Applicant	:	**Mr Henry Willink and Ms Aisha Jung**
Representative	:	**In Person**
Respondent	:	**Mr Nicholas Samuel**
Representative	:	**Mr Andrew Wilson 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** **Mr P S Roberts DipArch RIBA**
Date and venue of Hearing	:	**9 June 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11 July 2016**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of proposed major works in 2016. The service charge demand in issue is for the replacement of the roof, and was made in advance of any costs being incurred.

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

Background

3. The building is of late Victorian brick construction under a slate roof, comprising two purpose built maisonettes accessed by self-contained entrances. Number 5 Burnbury Road is on the ground floor, and is occupied by the Respondent. The Applicants are the leaseholders of Number 5a, on the first floor. It is in a conservation area.

4. The Respondent acquired the freehold in 2008. He has been the lessee of number 5 (that is, the ground floor maisonette) since 1997.

5. The Applicant's acquired the leasehold interest in number 5a in 2013. The lease was originally granted in 1996.

The hearing and the issues

Preliminary

6. The Applicants appeared in person. The Respondent was represented by Mr Andrew Wilson of counsel. During the course of the hearing, both of the Applicants gave evidence, as did the Respondent and Mr D Kelly MRICS, his surveyor.

7. The directions given on 1 March 2016 identified the following issues for the hearing:

   (i) Whether the landlord is entitled to conclude that the roof should be replaced;

   (ii) Whether the landlord has complied with the consultation requirement under section 20 of the 1985 Act;

   (iii) Whether the works are within the landlord's obligations under the lease;

(iv) Whether the costs of the work are reasonable;

(v) Whether an order under section 20C of the 1985 Act should be made; and

(vi) Whether an order for reimbursement of Tribunal fees should be made.

8. As a result of discussion with the parties at the start of the hearing, it became clear that (iii) and (iv) were not in issue. The Tribunal did consider (ii) as a matter of substance, but as a result it became clear that the Applicants did not contend that the consultation process was flawed, and we say no more about it.

9. The Tribunal canvassed a further point, to wit whether the lease made any provision for liability for service charge to be payable on account, in advance of the freeholder incurring the relevant costs.

10. This was clearly a novel point not foreshadowed in the directions of the 1 March 2016 nor in the application or the Applicants' case statement. The law in relation to the taking of such points by the Tribunal is helpfully brought together and set out in *Jastrzembski v Westminster City Council* [2013] UKUT 0284 (LC) at [13] to [20]. At [17], Her Honour Judge Walden-Smith quotes *Regent Management Ltd v Jones* [2010] UKUT 369 (LC), at [29]:

> "The LVT is perfectly entitled ... to raise matters of its own volition. Indeed it is an honourable part of its function ... But it must do so fairly, so that if it is a new point which the Tribunal raises, which the respondent has not mentioned, the applicant must have a fair opportunity to deal with it"

11. Mr Wilson, aware of course of the legal context, did not argue that we should not consider the issue. We concluded that we should do so.

12. First, the point is a fundamental one. The service charge demand in issue was a demand on account in advance of any expenditure by the freeholder. It is evidently fundamental whether the lease makes provision for such a demand. It is therefore far from the "purely technical point" deprecated in *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC), [13]. We add that it is a question evident on any reading of the lease, but one that would not necessarily be evident to litigants in person, such as the Applicants.

13. Secondly, it was a point dependent entirely on the construction of the lease. There was no need for evidence on either side.

14. Thirdly, Mr Wilson told us that he was capable of dealing with the question on the day of the hearing, subject to a short adjournment. We accordingly adjourned for about 25 minutes at 11.30, a time, by chance, which was also convenient for the Applicants. In the event, we did not consider the issue until after the lunch adjournment.

15. However, Mr Wilson, at the close of his substantive argument as to the construction of the lease, submitted that, should we be against him on the principal point, we should nonetheless come to a decision under section 27A(3) of the 1985 Act as to the reasonableness of the expenditure to be incurred on the replacement of the roof. At the hearing, we heard the argument on the roof before considering the on-account point. That we rehearse our conclusions fully in this decision in respect of the roof is the result of our acceptance of Mr Wilson's submission as to section 27A(3).

16. The result, therefore, was that the parties agreed that the following issues arose:

(i) Whether the Respondent was entitled to conclude that the roof should be replaced, rather than repaired;

(ii) Whether the lease provided for service charge demands on account;

(iii) Whether we should make an order under section 20C of the 1985 Act; and

(iv) Whether we should make an order for reimbursement of Tribunal fees.

Issue (i): The roof

17. The service charge demand in issue relates solely to the Respondent's decision to replace the main roof of the building. The Respondent's case was that he had been increasingly aware that the state of the roof was deteriorating. His case was that he had suffered water ingress into his flat, and that a number of slates had fallen from the roof or become displaced on it.

18. The Respondent accordingly commissioned TCL Chartered Surveyors to prepare a report and preventative maintenance schedule. The report, dated 30 July 2015, was written by Mr D Kelly MRICS. Mr Kelly gave evidence, adopting the report as his evidence in chief.

19. The report stated Mr Kelly's opinion that the roof was in excess of 60 years old. He referred to slipped and displaced slates, and some previous patch repairs of the roof. The roof was reaching the end of its

useful life. While Mr Kelly concluded that it was possible to "overhaul" the roof, it would not be cost effective to do so and replacement with new natural slates and leadwork was advisable. He also recommended the replacement of metal flashings adjacent to the party wall with number 3, and the abutment to the rear addition to the Respondent's property.

20. Mr Kelly was cross-examined by the Applicants. It is convenient to set out here the matters upon which the Applicants rely. While these were were brought out in cross-examination, they were also largely apparent from Mr Kelly's report.

21. Mr Kelly only had limited access to the roof. Externally, he could view some parts only with binoculars and others not at all. Internally, he could not view the main roof space.

22. The report was not a building survey, but rather a maintenance schedule (or at least, the Tribunal observes, a narrative supporting such a schedule).

23. The Applicants sought to rely on Mr Kelly's characterisation in the schedule of the roof as being in a "fair/poor" state, where "fair" was defined as "subject to several years' wear but serviceable" and "poor" as "subject to hard or long wear, repair or renovation generally necessary". Further, replacement was "recommended", not "essential". Mr Kelly said that these characterisations were consistent with his view that repair rather than replacement of the roof was possible, but not cost effective.

24. The Appellants also questioned the costings in the maintenance schedule. The total cost of the roof works, they said, came to £44,931 including VAT, a sum very far from the cost of £18,792 upon which the service charge demand was based. They further drew attention to the total costs of all the works in the schedule, which amounted, on their calculation, to £73,747. Mr Kelly's response was that the figures he provided were purely for budget purposes, and were not an estimate. They were arrived at by applying relevant Building Cost Indices to site measurements and also stand alone costs. In Mr Kelly's experience, such budget figures were always substantially higher than the eventual costs of works following a tender process (although he was not involved in the tender process in this case). He described budget figures as a "worst case scenario".

25. Mr Samuel, the Respondent, also gave evidence. He adopted his witness statement as his evidence in chief. The Applicant's cross-examination focussed on the relationship between the Respondent and the Applicants. One feature of that was that it was put to the Respondent that they had not been aware that the figures in Mr Kelly's report were an unrealistic worst case scenario.

26. The Appellants adopted their witness statement. Four contractors contacted by them had said that repair of the roof was possible and cost effective. They relied on quotations for £1,880 (Barras Roofing) and £1,524 (S Evans Roofing) for such repairs.

27. They also commissioned a report by Hallas and Co, a firm of chartered surveyors. The report concluded that the roof appeared to be the original one installed when the house was built. The life expectancy of the roof could be extended by ten years with repairs and maintenance, including patch repairs to areas where damage to slates was evident.

28. A feature of the Applicant's case was that they had been assured on buying the property that no major works were expected within 24 months, but it was agreed that Mr Kelly's report had been commissioned after the expiry of that period, albeit very shortly thereafter.

29. In general, much of the evidence related to the relationship between the parties, which had deteriorated over time. The Tribunal found this evidence of no assistance in determining the reasonableness of the proposed expenditure.

30. The report by Mr Kelly is key to the Respondent's submission that replacement of the roof, rather than repair, is the right way to proceed. Some of the criticisms made by the Applicants of the use of Mr Kelly's report are reasonable. It would have been better had the Respondent secured a full building survey. However, we also note that the Applicants' surveyors only considered that an extension of the life of what it accepted was a very old roof of ten years would be possible with patch repairs.

31. The question for the Tribunal is not whether replacement of the roof, as opposed to repair, is the only reasonable option, nor even if it is the best among a range of reasonable options. Rather, we must determine whether replacement would be an expense "reasonably incurred" under the lease. It need only be within the range of reasonable responses to the condition of the roof.

32. *Decision*: Taking into account all of the evidence, the Tribunal concludes that replacement of the main roof rather than repair would be an expense reasonably incurred by the Respondent under the lease.

33. It is important that the parties understand both the substance of this finding and its limitations. At the level of the Tribunal, it constitutes a finding binding on the parties that the decision to replace the roof is such that expenditure incurred on such works would be in principle reasonably incurred. It is thus not open to the Applicants to re-open the question of replacement as against repair in the future.

34. However, this finding does not mean that all costs that will actually be incurred by the Respondent in replacing the roof are immune from challenge in the future. Thus, while replacement per se cannot be challenged, it is open to the Applicants to challenge the actual costs of replacement incurred if it is their view that those costs are unreasonably incurred.

35. In short, the Respondent may replace the roof rather than repair it. But in replacing the roof, the costs he incurs must be reasonable. If the Applicants think they are unreasonable, they may challenge them.

Issue (ii): On account service charge demand

36. We have explained at paragraphs [9] to [14] our decision to consider the question of whether the lease makes provision for the charging of an on account service charge, in advance of actual expenditure.

37. Clause 3(iv) of the lease contains the lessor's covenant to "repair maintain support rebuild and cleanse: (a) all ... roofs and foundations party structures fences appurtenances belonging to or used or capable of being used by the Lessee in common with the Lessor or the tenants or occupiers of the Lower Maisonette subject to the contribution by the lessee in accordance with clause 2(9) hereof". By clause 2(9), the lessee covenants "to pay and contribute half of the expenses of making repairing maintaining supporting rebuilding and cleansing all ..." parts of the building in similar terms to the Lessor's covenants.

38. The lease otherwise contains no express provision for a service charge, nor any procedure for demand and payment of the contributions required, whether on account or otherwise.

39. The Applicants did not make legal submissions on the question, as is understandable from litigants in person.

40. Mr Wilson submitted, first, that while there was no express provision for an on account service charge, the words "subject to the contribution by the lessee in accordance with clause 2(9)" which qualified the lessor's obligation to undertake repairs was effective to impose an obligation to pay a service charge on account.

41. In support of this contention, he cited *Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289, [2004] L. & T.R. 23. In that case, the nature and effect of a similar formula in a lease, by which the performance of the lessor's covenants were stated to be "subject to the lessee paying the maintenance contribution pursuant to the obligations under [the relevant lessee's covenant]", were considered *obiter*. In particular, the question was considered in relation to the earlier case of *Yorkbrook Investments v Batten* [1985] 2 E.G.L.R. 100.

42. However, the question in both *Bluestorm* and *Yorkbrook* was not whether the leases provided for the payment of a service charge on account, but the quite separate question of whether the performance of the lessee's covenant to pay a service charge was a condition precedent to the performance of the lessor of its covenants. *Yorkbrook* is authority for the proposition that the two are (at least ordinarily –see Woodfall, Landlord and Tenant, paragraph 11-317) independent of each other. In *Bluestorm*, two members of the Court of Appeal (Buxton LJ and Sir Martin Nourse) would – had a decision on the question been required, which it was not – have distinguished *Yorkbrook*.

43. It is clear as a matter of logic that cases relating to whether a lessee's obligation is a condition precedent to a lessor's obligation cannot throw any light on the *content* of the lessee's obligation – in this case, whether there was an obligation to pay a service charge on account. We therefore conclude that *Bluestorm* does not have the effect claimed for it by Mr Wilson. In any event, as we have stated, this aspect of that case was decided *obiter*, and we are bound by *Yorkbrook*. If, therefore, the argument were to be that there is an analogue to be drawn between the argument for a condition precedent and the argument for an on account service charge obligation, the result would be that we must hold that there is no such obligation (we note that Mr Wilson did not seek to put the argument on this basis).

44. We observe that formulae of this sort are ubiquitous in leases. It would be surprising if, every time such a formula appeared, it was on its own effective to impose an obligation to pay a service charge on account.

45. Mr Wilson's second submission was that we should imply a term requiring on account payment of a service charge into the lease. Business efficacy required such an implication. Mr Wilson said that the absence of an on account provision would present difficulties in the circumstances in which the Respondent found himself, a resident freeholder. The absence of an on account payment by the other leaseholder would mean that the resident freeholder would have to provide both halves of any expenditure in advance. When we asked Mr Wilson what arrangements for the payment of an on-account service charge we should imply, including what provisions as to dealing with a surplus, or a deficit, after actual expenditure was accounted for, he said that any reasonable mechanism would be acceptable.

46. We reject this submission. Taken as a whole, it is apparent that the lease (which is not an old one) is structured to make minimal provision for a service charge. The provision for contribution to the performance of the repairing covenant is a minimal statement, with no detailed provision for demand and payment of the service charge, accounts and so on. Even such normal obligations as a lessor's covenant to insure is absent. The parties must be taken to have deliberately chosen this course, part of which was to abjure provision for the payment of a

service charge on account. There is simply nothing to suggest that the parties intended to make provision for an on account service charge, and the lease, taken as a whole, speaks of the contrary intention.

47. In such circumstances, we cannot conclude that such a provision "would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean" (*Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988, [21]). This conclusion is strengthened by the procedural indeterminacy implied by Mr Wilson's response to our question about the mechanism for on-account service charges.

48. Further, we reject Mr Wilson's argument that business efficacy demands the implication of such a provision. There is nothing in particular about this lease that would suggest that an on account service charge obligation was *necessary* to give it efficacy. Many long residential leases make provision for on account service charges, and many function perfectly well without. Insofar as Mr Wilson relies on the particular difficulties of a resident lessor, we reject this as an argument for implication. The is no reason to believe that the original parties to the lease had any particular expectation as to whether the freehold would be held by a resident leaseholder or not; and there is nothing in the lease that requires or indicates such an arrangement.

49. *Decision*: There is no provision for the lessor to require the payment of service charge on-account. Accordingly, the service charge demand on 17 December 2015 is not payable.

The section 20C application

50. The Applicants applied under section 20C of the 1985 Act for an order that the costs of these proceedings should not be relevant costs for the purposes of a service charge demand.

51. As a preliminary issue, we asked to be addressed on whether the lease makes provision for the recovery of legal costs. If it does not, then the application under section 20C falls for that reason. On the application of Mr Wilson, however, we agreed to allow the parties three weeks to present us with written submissions on the question.

52. In their submission, the Applicants argue in short form that there is no express or implicit right to legal costs under the lease. In particular, they say that the clause relating to the costs of serving a notice under Law of Property Act 1925, section 146 notice does not cover these costs.

53. Otherwise, the Applicants' submission consisted of material clearly irrelevant to the question, including what would appear to be references to "without prejudice" negotiations. The Tribunal has ignored this material, and deprecates its submission.

54. In his detailed and well-argued submission, Mr Wilson makes four points, which we consider in turn.

55. First, he argues in what he describes as his primary submission that the Tribunal need not determine the question. The Applicants did not raise it and it was not raised by Judge Latham when he made directions at the Case Management Conference. It is up to the Applicants to put all the issues before the Tribunal, and if they fail to do so, they cannot rely on a new issue.

56. We reject this submission. First, we consider that, on an application for a section 20C order, the question of whether the lease provides for legal costs to be recovered will always *potentially* arise as a preliminary issue. As a matter of law and logic, an order under section 20C will only have any effect if the lease does allow for these costs to be recovered. It will, of course, very frequently be the case that it is appropriate and proportionate for the Tribunal to make a section 20C order without deciding whether the lease provides for recovery or not. In other cases, of which this is one, it is proportionate and efficient for the Tribunal to come to a determinate decision on whether the lease allows for the recovery of legal costs as a preliminary matter to the determination of the section 20C application. In respect of proportionality, we note that one factor is that it is inevitable that a dispute on the issue would arise once a service charge demand were issued for recovery of legal costs.

57. Indeed, in some cases – as here – it is *only* on a section 20C application that the question arises. The service charge demand in issue in these proceedings does not relate to legal costs. In such a case, a party can only raise the issue in the way that we consider it is potentially always raised anyway, that is as a preliminary question to the exercise of the jurisdiction to make an order under section 20C. It follows that we consider Mr Wilson's suggestion that merely making a section 20C application itself amounts to the acceptance on the part of the tenant that the lease *does* provide for recovery of legal fees to be misconceived (and, we note, incompatible with the practice of the Tribunal when it declines to make a finding on recovery under the lease when determining a section 20C order).

58. If, however, we are wrong in our interpretation above, then the issue would be a novel point raised by the Tribunal. We have set out at paragraph [10] above the position of the Tribunal in relation to novel points. The position on reception of the question of the recovery of costs as a novel point parallels that in relation to the question of on-account service charge demands under the lease. In particular:

    (i) in relation to the application under consideration – that we make an order under section 20C – the question is a fundamental, not a merely technical one;

(ii) it is a point on the construction of the lease, not involving evidence; and

(iii) the parties have been given a fair opportunity to deal with the point, given the Tribunal's accession to Mr Wilson's application for time for written submissions.

59. Mr Wilson's second submission was that the lease provided for the recovery of legal costs in clause 2(3), under which the lessee covenants:

> "To pay and discharge all rates taxes duties assessments charges and outgoings whatsoever whether parliamentary parochial or of any other description which now are or during the term hereby granted shall be imposed or charged on the demised premises or the lessor or the lessee or occupier in respect thereof PROVIDED ALWAYS that where any such outgoings are charged upon the demised premises and the Upper Maisonette without apportionment the lessee shall be liable to pay one half only of such outgoings and the lessor shall keep the lessee indemnified against the payments of the remaining half."

60. Mr Wilson submits that legal costs are a "charge" or "outgoing" which are "charged" on the Respondent, and are thus covered by a clause which he renders, with the assistance of ellipsis, as a covenant "To pay and discharge all ... charges and outgoings whatsoever ... or of any other descripton ...". This, he submits, plainly encompasses the Respondent's legal costs of dealing with the application.

61. We reject this submission. It seeks to attach to what is a more or less orthodox Parliamentary and parochial taxes clause the most general possible sweeper clause, covering an apparently limitless range of expenditures by the lessor.

62. On the contrary, we consider that the specific words at the start of the clause – "rates taxes duties assessments" – clearly indicates the genus that is the subject matter of the clause, that is, imposts by the state. The following general words can only sensibly be interpreted *ejusdem generis*.

63. That this is correct is reinforced by the words used to indicate how the relevant costs arise –they are "imposed or charged on" the premises, the lessor or the lessee. "Imposed" is a word only apt to describe an external imposition, as by the state (or conceivably some other authority) rather than an expense incurred voluntarily under a contract.

64. "Charge" is a more neutral term, and is used elsewhere in the lease. However, in each case it is made abundantly clear that it relates to expenditure incurred by the lessor in connection with contractual obligations. Thus in clause 2(4), the lessee must "pay all costs charges and expenses incurred by the lessor in abating a nuisance ...", and in clause 2(23), the obligation is "to pay all costs charges and expenses including solicitors costs and surveyor's fees incurred by the lessor ...".

65. Thus throughout the lease, where the intention is that the lessee should reimburse the lessor for his expenditure, the lease makes that clear by referring expressly to the charges (etc) as being those incurred by the lessor. The service charge obligation uses slightly different terminology, referring to "the expenses" of repair etc, but that is clearly dependent on the obligation in clause 3(iv) to undertake such work.

66. If the lease had intended the general words relied on by Mr Wilson to apply to costs voluntarily incurred by the lessor, rather than those imposed by a public authority, it would have said so by reference to the incurring of those costs by the lessor.

67. The clause is, accordingly, very different from that relied on by Mr Wilson in *Reston Ltd v Hudson* [1990] 2 E.G.L.R. 51, which expressly referred to "all outgoings, costs and expenses whatsoever, which the lessor may reasonably incur in the discharge of its obligations".

68. Further, if the interpretation contended for by Mr Wilson were right, it is difficult to see what limits could be placed on the ability of the lessor to pass on expenses he had incurred, whether related to the property or not (see, for a parallel, the rejection of a significantly less broad reading of general words appended to a section 146 notice clause in *Barrett v Robinson* [2014] UKUT 0322 (LC), [2015] L. & T. R. 1 [47]).

69. In support of his interpretation, Mr Wilson argued that, in order for the lease to function at all, it was *necessary* that the lessor's legal costs were recoverable. Were it otherwise, any demand for a service charge could be frustrated by the taking of unmeritorious proceedings in this Tribunal. Mr Wilson repeats this argument in his third submission, that we should imply a term allowing recovery of legal costs, and what follows applies equally to that submission.

70. In the first instance, this approach asks us to depart from the construction of the words of the lease in a way that is not warranted on the approach to contractual interpretation set out in *Arnold v Britton and Others* [2015] UKSC 36; [2015] A.C. 1619 at [14] to [23], and in particular the limits on the use of commercial common sense at [20].

71. Secondly, although Mr Wilson refers to the particular factual matrix of this case, it is difficult to see why, if he were right, the same

considerations would not apply to every lease which places obligations on a lessor and a corresponding obligation on a lessee to pay a service charge, and that cannot be right. For a recent example of a finding that a lease does not allow for the recovery of legal costs upheld on appeal, see *Geyfords v O'Sullivan and Others* [2015] UKUT 683.

72. Although not determinative, we should add that we regard as exaggerated Mr Wilson's account of the difficulties of enforcing service charge obligations in the absence of a provision allowing the recovery of legal costs.

73. As we have noted, Mr Wilson sought to rely on the same considerations in support of his submission that we should imply a term into the lease allowing for the recovery of legal costs. Our rejection of this argument in relation to the interpretation of clause 2(3) applies equally to the application to imply a term as submitted.

74. If, adopting the words of Woodfall, Landlord and Tenant, paragraph 11.079, "the implication of a term is not an addition to the instrument. It only spells out what the instrument means" (or, similarly, see the reference to *Attorney-General of Belize v Belize Telecom* at paragraph [47] above), we do not consider that we can imply the covenant contended for into this lease. The lease is workable without it.

75. Finally, Mr Wilson seeks to rely on clause 2(23), by which the Lessee covenants

> to pay all costs charges and expenses including Solicitors costs and Surveyor's fees incurred by the Lessor for the purpose of or incidental to the preparation and service of Notice under Section 146 of the Law of Property Act 1925 requiring the Lessee to remedy the breach of any of the covenants herein contained notwithstanding forfeiture for any breach may be avoided otherwise by relief granted by the Court".

76. Mr Wilson's submission relied on *Freeholders of 69 Marina, St Leonard's On Sea v Oram* [2011] EWCA Civ 1258, [2012] L. & T.R. 4. That case is authority for the proposition that, even where a service charge is expressed as being reserved as rent, a determination by the Tribunal of breach of covenant is required before a notice under section 146 may be served. It had previously been thought that that was not the case. The issue arose in connection with a clause relating to the recovery of costs associated with a notice under section 146 of the Law of Property Act 1925. Such clauses are common in residential leases, although (as will appear) their wording varies.

77. In *Barrett v Robinson*, the Deputy President explained the significance of *69 Marina* in respect of recovery of legal costs through a section 146 clause as follows, at paragraph [57] (clause 4(14) in the lease in that case being the section 146 notice clause):

> "Clauses such as clause 4(14) are regularly resorted to for the recovery of costs incurred in proceedings before the First-tier Tribunal where that tribunal has made no order of its own for the payment of such costs. ... Where a First-tier Tribunal has to determine whether such costs are recoverable as an administration charge it is important that it consider carefully whether the costs come within the language of the particular clause. If a service charge or administration charge is reserved as rent the decision of the Court of Appeal in *69 Marina* is binding authority that a determination by the First-tier Tribunal is nonetheless a pre-condition to the service of a notice under section 146. But the decision does not require that whenever a lease includes such a clause the landlord will necessarily be entitled to recover its costs of any proceedings before the First-tier Tribunal to establish the amount of a service charge or administration charge. It is always necessary to consider the terms of the particular indemnity covenant and whether any relevant contemplation or anticipation existed in fact in the circumstances of an individual case. In this case it did not, so clause 4(14) provided no route to recovery by the respondent."

78. Mr Wilson invites us to conclude, first, that the wording of the section 146 clause in the lease before us is materially different from that in *Barrett v Robinson*, and in a way that means we should come to a different conclusion to the Deputy President in that case. Secondly, he invites us to conclude that there is a conflict between *69 Marina* and *Barrett v Robinson*, and therefore we should follow the former as of higher authority than the latter.

79. Mr Wilson's first submission relies on the fact that the clause in *Barrett v Robinson* includes recovery where a notice under section 146 is contemplated, whereas that in this case does not. Therefore, he argues, the wording of the *Barrett v Robinson* clause "required contemplation of proceedings on the part of the landlord".

80. The *Barrett v Robinson* clause required payment by the lessee of costs "...incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 ...". In that clause, therefore, recovery was possible in two circumstances. One is that the costs were incurred in the preparation of a notice, or proceedings thereon; the second alternative was that service/proceedings were

contemplated. The lessor in that case relied on contemplation, which the Deputy President found required evidence.

81. The clause in the Applicants' lease is limited to costs for the purpose of service and proceedings; or costs that are incidental to service and proceedings.

82. The addition of "contemplation" in the *Barrett v Robinson* clause as an alternative basis for recovery substantially *widens* the clause. The clause in the Applicants' lease is much closer to the narrower element in the *Barrett v Robinson* lease – costs incurred "in ... proceedings or the preparation of any notice". Both allow recovery for the costs of preparation of a notice and proceedings in relation to the notice. The Applicants' clause goes somewhat wider, however, in including expenditure *incidental* to preparation of the notice/proceedings (although not nearly so far as the "contemplation" limb of the *Barrett v Robinson* clause).

83. It follows that Mr Wilson's contention that the element in the *Barrett v Robinson* clause relating to contemplation narrows the ambit of costs recoverable is misconceived.

84. The only possible basis for recovery on the basis of this clause, therefore, would be if these proceedings could be regarded as "incidental to" a section 146 notice or proceedings. A charge or expense is "incidental" to a purpose if it is connected with, but ancillary to, the primary purpose. Defending an application by a tenant under section 27A of the 1985 Act is a long way away from the service of a section 146 notice by a landlord. We doubt that the substantive proceedings necessary as a pre-condition to the service of a section 146 notice (that is, under either section 81 of the Housing Act 1996 or section 168 of the Commonhold and Leasehold Reform Act 2002) could be described as "incidental" to service. Proceeding before even that stage is reached cannot, we consider, possibly be characterised as "incidental" to the service of the notice.

85. We decline Mr Wilson's invitation to disregard *Barrett v Robinson* as incompatible with *69 Marina*. On the contrary, we consider the two to be compatible, for the reasons explained by the Deputy President. While it is true, as Mr Wilson points out, that there was another reason for allowing the appeal in *Barrett v Robinson*, it is evident that in the passages upon which we rely, the Deputy President was laying down general guidance for this Tribunal.

86. *Decision*: The legal costs of these proceedings incurred by the Respondent cannot be recovered under the lease from the Applicants by way of service or administration charge. Accordingly, and on that basis, we make no order under section 20C of the 1985 Act.

Re-imbursement of Tribunal fees

87. The Applicants applied to be reimbursed by the Respondent for the fees they have paid to the Tribunal. The Tribunal may make such an order under the Tribunal Procedure (First-Tier Tribunal)(Property Chamber) Rules 2013, rule 13(2).

88. Both parties asked us to take into account in determining this application the submissions they made in respect of the substantive application for an order under section 20C above.

89. Those submissions largely consisted of charge and counter-charge in relation to the conduct of the parties of the relationship between them. In the light of our conclusion that legal fees are not recoverable under the lease, we did not rehearse these submissions in connection with the section 20C application. We do not propose to rehearse them here, nor to adjudicate on the respective faults of each party.

90. The Tribunal's discretion under rule 13(2) is a wide one. In exercising it, we take into account that both parties have enjoyed a significant measure of success before us. The Applicants acted reasonably in making the application; and equally the Respondent acted reasonably in defending it.

91. We conclude that the reasonable and equitable course for us is not to disturb the incidence of the fees, which rests with the Applicants.

92. *Decision*: The Tribunal makes no order that Tribunal fees paid by the Applicants be reimbursed by the Respondent.

Name: Tribunal Judge Richard Percival **Date:** 11 July 2016

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).