12484

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AK/LSC/2017/0179**
Property	:	**54D Derby Road, Enfield, EN3 4AW**
Applicant	:	**Mrs Gabrielle Baldwin**
Representative	:	**Ms J Orlebard-Reid, of Walter Jennings and Sons, solicitors.**
Respondent	:	**Marketbell Limited**
Representative	:	**Mr R Timpson, Solicitors' Agent, for Chander Harris, Solicitors**
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 T Sennett MA FCIEH**
Date and venue of Hearing	:	**2 October 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 November 2017**

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 the service charge years from 30 June 2013 to 29 June 2016.

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

The property

3. The property is a one bedroom flat on the third floor of a converted house, which comprises four flats.

4. The applicant purchased the leasehold interest in the property in June 2013. The applicant lives abroad. The property was let on a short term tenancy.

The lease

5. The lease, which is for a term of 99 years from 1983, makes provision for the payment of a service charge (clause 1 and the fourth schedule).

6. The service charge is defined as a quarter (or another proportion based on user) of the "expenditure on services". The sixth schedule sets out the landlord's obligations which may be recovered in the service charge. They include "To repair the House (except such parts thereof as the Tenant covenants in this lease to repair)". The tenant's covenant is to repair the demised premises, which does not include the roof (clause 3(1), first schedule).

7. The service charge is payable by the tenant on receipt of "the service charge statement". That term is defined in the fourth schedule (paragraph 1(iv)) as follows:

> " 'Service charge statement' means an itemised statement of:-
> (a) the expenditure on services for a year ... ending on the 30th day of June
> (b) the amount of the service charge due in respect thereof
> ...
> (c) sums to be credited against that service charge being the interim service charge instalments paid by the tenant for that year or period and any service charge excess from the previous year or period
> accompanied by a certificate that in the opinion of the accountant preparing it the statement is a fair summary of the

> expenditure on services set out in a way which shows how it is or will be reflected in the service charge which is sufficiently supported by accounts receipts and other documents that have been produced to him."

8. The "interim service charge instalment" is defined as a quarter (or other proportion) "of the service charge shown on the service charge statement last served on the tenant".

9. The schedule also provides that the service charge obligation also covers a charge of ten percent for "the Landlord's expenses in the administration and management of the Landlord's obligations ..." (paragraph 1(i)).

10. By clause 2(7), the tenant covenants to pay all costs "of and incidental to the preparation and service of (i) a notice under section 146 of the Law of Property Act 1925 ...".

The hearing and the issues

Representation

11. The applicant was represented by Ms Orlebard-Reid of Walter Jennings and Sons. Mr Hickey, of WJ Meade, the applicant's managing agent, attended and gave evidence. The respondent was represented by Mr Timpson, for Chandler Harris.

The concessions

12. By a letter dated 3 July 2017 to the Tribunal office, the respondent's solicitors made the following concessions:

> "1. The applicant has no liability to pay any service charge that pre dates her purchase of 54D Derby road
> 2. That the service charges demanded for the years 2013-2014, 2014-2015, 2015-2016 and the estimated service charge for 2017 were incorrectly demanded.
> 3. That the respondent is not entitled to demand an advance service charge.
> 4. The service charges demanded as above, were not accompanied by the required documentation."

13. Mr Timpson explained that the respondent intended to validly re-demand the service charges after these proceedings.

14. Before us Mr Timpson further conceded that, in the service charges so demanded, the respondent would limit its management fee to 10% of the landlord's expenses, as required by the lease. This concession is

inevitable given the clear terms of paragraph 1(i) of the fourth schedule to the lease.

The remaining issues

15. In the light of the respondent's concessions, and with the assistance of the parties, the Tribunal determined at the start of the hearing that the remaining issues were:

(i) The nature of the invalidity of the service charge demands, and the effect thereof;

(ii) Whether we should allow the applicant's challenge to the validity of the consultation process conducted relating to the roof repairs pursuant to section 20 of the 1985 Act;

(iii) Whether the expenditure on the roof repairs was reasonable;

(iv) Whether we should make an order under section 20C of the 1985 Act.

The nature of the evidence

16. The directions given on 29 June 2017 include the normal provision that, if either side wished to rely on expert evidence, an application should be made to the Tribunal. Ms Orlebard-Reid told us that she had applied for permission to adduce expert evidence at the case management conference concerned with the directions, and the application had, at that time, been denied. A subsequent application was made on the papers in August and/or September. A letter from the Tribunal dated 11 September 2017 relayed the determination of a procedural judge that permission was not granted, but could be renewed at the hearing. At the hearing, the applicant did not make a further application.

17. Accordingly, we heard factual evidence in respect of the applicant's case, and no evidence from the respondent. We allowed Mr Timpson to rely on some factual assertions contained in the respondent's statement of case.

The nature of the invalidity of the service charge demands

18. The concessions recorded at paragraph [12] above do not expressly specify whether the admitted invalidity of the service charge demands was contractual or statutory.

19. In both her original application and in her statement of case, the applicant's case was that the demands were not compliant for two reasons. First, they were not complaint with section 21B of the 1985

Act, because they had not been accompanied by the requisite summary of rights and obligations. Secondly, the demand did not comply with the requirements of the lease.

20. Mr Timpson stated that the respondent's concession related to the statutory requirements, not the contractual ones. Some doubt may be cast on this assertion by the terms in which the concession is described in the respondent's case statement, which says that the demands "have not been correctly demanded in accordance with The Fourth Schedule". However, we proceeded on the basis that the concession extended only to the statutory requirements.

21. The distinction is of importance, because the application of section 20B of the 1985 Act varies depending on whether a demand is invalid by reason of statute or a contractual term in the lease.

22. Section 20B(1) provides that

> "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."

Mr Timpson did not submit that a notice under subsection (2) had been served.

23. Breach of a statutory requirement may be retrospectively corrected for the purposes of section 20B by a valid re-demand. Breach of a contractual requirement cannot be.

24. Section 21B requires a demand for payment of a service charge to be accompanied by a summary of rights and obligations in the form set out in regulations made thereunder. The respondent concedes that the summary did not accompany the demands in each of the years under consideration. The effect of this is that the "tenant may withhold payment of a service charge".

25. A similar information requirement is contained in section 47 of the Landlord and Tenant Act 1987, which requires information about the landlord's address to be provided with a service charge demand. If it is not, the service charge "shall be treated for all purposes as not being due from the tenant to the landlord at any time before the information is furnished...". In *Johnson v County Bideford* [2012] UKUT 457, [2013] L. & T.R. 18, the Upper Tribunal held that if a demand was validly made in accordance with section 47, a previous, invalid, demand would be retrospectively corrected, and thus, for the purposes of

section 20B, the 18 month limitation will run back from the original demand.

26. The same considerations apply to section 21B of the 1985 Act as apply to section 47 of the 1987 Act. Accordingly, the conceded failure to provide the summary of rights and obligations suspends the obligation to pay the service charge at the date at which it was originally served, but the obligation is revived on the service, at a later date, of a valid demand.

27. As to compliance with the lease, by paragraph 4 of the fourth schedule, the tenant's obligation to pay the service charge arises when the "service charge statement" is served on her. The definition of the service charge statement is set out at paragraph [7] above.

28. In each case, the document served as the service charge demand satisfied the requirements set out in the definition of the service charge statement, except that in paragraph 1(iv)(b), that is, it did not specify the amount of service charge due from the tenant. The figures were, rather, those for the house as a whole.

29. The applicant argued that this failure invalidated the demands.

30. The respondent argued that the failure was *de minimis*. It was clear from the lease that the contribution was 25% for each flat.

31. We agree with the applicant that the failure was not *de minimis*. Under the lease, the service charge statement amounts to the service charge demand. That a demand should state how much is demanded is, to the contrary, fundamentally important. The requirement is clear on the face of the lease, as one of the three numbered requirements of the service charge statement.

32. Accordingly, we find that the demands were not contractually valid.

33. That the effects of contractual and statutory invalidity are different is clear from the recent Court of Appeal case of *Skelton v DBS Homes (Kings Hill) Limited* [2017] EWCA Civ 1139 (copies of which were provided to the parties by the Tribunal). In that case, the invalidity relied on by the tenant was a contractual one, the failure to provide an estimate of expenditure with the demand. Lady Justice Arden considered *Johnson v County Bideford*, and continued, at paragraph [20]:

> "Ms Gourlay [counsel for the tenant] submits that *Johnson v County* is about statutory validity not contractual validity. I agree. We have not been shown any authority for the proposition that as a matter of contract law the delivery of the

estimate validated the demands in this case as of the date of the demand."

34. It follows that, as of the date of the hearing, there had been no valid service charge demands. Because the invalidity was contractual (as well as statutory), section 20B of the 1985 Act will bite from the date that the demands are validly reissued. This means that the respondent cannot recover any costs incurred earlier than 18 months before the date that the demands are validly re-issued. Costs are "incurred" for the purpose of section 20B on the presentation of an invoice or other demand for payment, or on payment (*OM Management Limited v Burr* 2013] EWCA Civ 479; [2013] WLR 3071).

35. *Decision*: The demands were both statutorily and contractually invalid. If the demands are re-issued in the correct form, the applicant will be liable to pay the service charge referable to expenditure by the respondent incurred not earlier than 18 months from the date of the correct demands.

The roof: the factual evidence

36. The applicant provided a witness statement and gave oral evidence before us, as did Mr Raymond Hickey, a property manager with her agents, WJ Meade, who has been responsible for the flat throughout.

37. The appellant's evidence was that she had bought the flat as an investment. The flat was let shortly after she purchased it in June 2013. She engaged WJ Meade as managing agents at that time.

38. In the winter of 2013, it became apparent there was a leak in the bathroom ceiling of the flat. The leak was reported to the respondent's managing agent, Robert Irving Burns ("RIB"). In March, the applicant was emailed by a Mr Zorpedes of RIB that he had obtained three estimates for a roof repair and was making various preparations related to undertaking a consultation process, as required by section 20 of the 1985 Act. Attached to the email was one quotation, from a company called Alois, for £4,108 + VAT. At this time she received, and passed on to RIB, complaints from her tenant that leaks were now apparent elsewhere in the flat.

39. In April 2014, she received a further email from Mr Zorpedes including a notice of intention to carry out works. However, nothing further was heard from RIB. The applicant's evidence was that she made efforts throughout the rest of 2014 to find out what RIB were doing in relation to the roof, but without success. At some point, Mr Zorpedes stopped working for RIB. The applicant's account suggests that throughout this period, relations between her and RIB were complicated by repeated requests from RIB for payment of what RIB considered to be arrears of service charge, which at least in part constituted arrears outstanding

from the time before she bought the leasehold interest (and which are now conceded not to be owed). The property continued to deteriorate during this period, and mould and mildew were becoming a problem.

40. In March 2015, management of the property of the property passed to Mr Scott at RIB, who told the applicant that he had no records relating to the property, or the section 20 notice. In April 2015, Mr Scott visited the property. According to the applicant's account, Mr Scott said that the mould/mildrew were, he thought, attributable to condensation, but that there had been a leak or leaks. Subsequently, in May, Mr Scott told the applicant that a further section 20 process would be initiated. Whether that process was properly conducted is an issue dealt with below. In her witness statement, the applicant refers to "a section 20" being sent out, which we assume means the notice of intention to carry out works, with a closing date for consultation of 12 June 2015.

41. Despite attempts to pursue the matter, the next communication from RIB was in September 2015, when she received a statement of estimates from Mr Scott. The lower of the two estimates included was £9,480, including VAT.

42. In December 2015, WJ Meade, her managing agents, told the applicant that scaffolding had been erected at the house. It was clear that work to the roof was undertaken at this time.

43. Mr Hickey's evidence was that after that work was undertaken, the leaks to the bathroom, hall and bathroom stopped, and the mould stopped appearing there. The applicant's tenant was abroad from January to July 2016. When he returned, he reported that water was, however, coming into the flat when it rained in the bedroom at the rear of the flat.

44. In August, Mr Scott of RIB visited the property with another roofing contractor, RDF. Mr Hickey attended the meeting. As a result of this meeting, it appears that RIB secured the washing down of the walls and ceilings to remove existing mould and mildew (an operation that the applicant had had performed on two previous occasions) and the decoration of the walls and ceilings in the bathroom and bedroom.

45. A quotation for further work by RDF, which had been disclosed as a result of these proceedings, was produced by the applicant, dated 12 August 2016. It referred to work on "the dormer roof". However, the evidence of Mr Hickey was that no further work was carried out on the roof.

46. Later in 2016, the applicant approached the contractor who undertook the work in December 2015, T Vine Conversions. In an email to her, annexed to her witness statement, an employee of the contractor

identified as "Tom" said "[w]e only renewed one section of the roof, and it was not the area where your leak is".

47. Appended to Mr Hickey's witness statement are:

(i) photographs taken in April 2015 which show mould and damage to ceilings in the flat; and

(ii) an inspection reported dated 21 July 2016 stating "Property is in an OK condition from tenants point of view, but as property is a loft flat there is cracks and water marks in both rooms, as shown in pictures. Leak is evident and there is mould in property which is effecting tenants health". Photographs taken at that inspection show mould affecting parts of the flat.

48. The flat, according to the applicant and Mr Hickey, became uninhabitable in January or February 2017, and the tenant moved out. In their oral evidence, both referred to a visit they had made to the flat shortly before the hearing. We agreed to hear this evidence orally, but declined to consider documentary evidence not provided in advance to the respondent. The evidence was to the effect that water ingress continued to be apparent.

49. On the basis of the material now available, Ms Orlebard-Reid advanced the theory that the original repairs had only been effected to the two pitches on the roof visible from street level, but not to a third pitch – the "dormer roof" – at the rear of the flat, only externally visible from the roof itself.

50. The respondent provided no evidence, either in the form of witness statements or oral evidence. The respondent's statement of case does not significantly contest the factual evidence produced by applicant.

51. The respondent's statement of case does quote an email from Mr Scott of RIB to the applicant following the meeting in September 2015. In that email, Mr Scott states that "the walls are covered in black mould caused by condensation, which in turn is caused by poor ventilation and the lifestyle of those living in the flat. It was clear however that there were some areas that were affected by a roof leak and I was uncertain as to whether or not this leak was ongoing." The statement concedes that Mr Scott is not an expert, and observes that the same is true of Mr Hickey.

The roof: the validity of the section 20 consultation

52. At the hearing, the applicant contested the validity of the section 20 consultation conducted in 2015 was properly conducted.

53. The basis for this was twofold. First, both the notice of intention to carry out works and the statements of estimates were sent to the postal address of the applicant's husband's parents. The applicant said in evidence that she and her husband used this as a postal address in the UK whilst living abroad, but that she had requested that all communications should be addressed to her by email. The result was that she had received neither in time. That the respondent was aware of the need to communicate by email was evidenced by an email of 20 August 2015, in which Mr Scott said, in relation to the section 20 notices, that "I have noted that they are to be emailed to you in future".

54. Secondly, the statement of estimates contained an error, in that the specified date for the completing of the consultation period was erroneous.

55. For the respondent, Mr Timpson argued that we should not consider this challenge to the section 20 procedure. It was not prefigured in the application, or any of the subsequent documents. He also contested the validity of the challenge on its merits, and, further, applied for dispensation under section 20ZA of the 1985 Act on the basis that the applicant could not demonstrate prejudice.

56. We accept Mr Timpson's primary submission. While it is true that both the application and the applicant's statement of legal submissions contain statements contesting the validity of the section 20 process, both do so on other grounds. The application claims the first notice does not include the requisite consultation period, and that no notice of intention to appoint a contractor was received. The statement of legal submissions, although not entirely clear, appears to be put on the basis that the notices did not include a full statement of the work undertaken. None of these challenges were made before us.

57. In the narrative in her witness statement, the applicant refers to the receipt of the notice of intention to carry out works, and the consultation period, without mentioning the notice point now relied on.

58. The applicant had every opportunity to argue in advance the points made before us, but did not do so. As a result, the respondent was not on notice to meet the point made by the applicant in relation to where notices should be sent, either by way of factual evidence as to the respondent's practice in relation to communication, or as to the law.

59. It may be that this objection does not apply with the same force to the misstatement of the consultation period in the statement of estimates. However, since the error was obvious (the date given was well before the date of the letter containing the notice), and was immediately preceded by the statement that observations must be received within 30 days of the date of the notice, no possible prejudice could be

demonstrated, and a retrospective dispensation under section 20ZA would be inevitable.

60. *Decision*: The applicant is not entitled to advance her challenge to the validity of the consultation process under section 20 of the 1985 Act conducted by the respondent in 2015.

The roof: reasonableness of expenditure

61. The applicant sought to challenge the reasonableness of the expenditure on the repair of the roof, having regard to the history outlined in paragraphs [36] to [51] above.

62. We have not been addressed as to the date on which the relevant expenditure was incurred for the purposes of section 20B, and of course we do not know when the respondent will re-demand the service charge. Accordingly, we do not know whether or not this expenditure, in its entirely, will now be recoverable as a result of our finding in paragraph [35].

63. In the application and in the applicant's written legal submissions, the applicant asked for a declaration that the respondent had breached its repairing obligations under the lease. At the beginning of the hearing, we made it clear that this Tribunal has no jurisdiction to make such declarations.

64. The way that Ms Orlebard-Reid put the case before us was that, had the landlord acted timeously, in 2014, then the repairs would have costs £4,930 instead of £9,480 (both including VAT) for the work undertaken in December 2015.

65. Mr Timpson's response to this was simply that there was a burden of proof on the applicant, and she could not discharge that burden without expert evidence.

66. We reject Mr Timpson's contention. Ms Orlebard-Reid's point is a limited one. In 2014, the respondent was ready to go ahead with a process the result of which would (in all probability) have been that the repair that was in fact effected in late 2015 would have been effected then. It is apparent on the evidence that we have that the reason that it did not go ahead in 2014 was that one employee of the respondent's managing agent left the company and the company lost all its relevant records.

67. On the face of the evidence, we conclude that it was not reasonable for the repair not to have been effected in 2014. Clearly the respondent accepted that its repairing obligation required the work to be undertaken. The only reason it was not undertaken was the default of

the respondent's managing agent in not continuing with the process initiated by Mr Zorpedes after his departure from the company.

68. This conclusion follows from a straightforward consideration of the history of the matter. It does not require expert evidence.

69. Mr Timpson did not argue that the fact that the conduct of the respondent was not reasonable does not necessarily mean that the expenditure itself was unreasonable. Had he done so, we would have rejected that argument. On the particular facts of this case, it is clear that the result of unreasonably dilatory conduct was higher expenditure than would have been incurred had the work been undertaken timeously. In such circumstances, the additional expense occasioned by the default of the agents cannot be regarded as reasonably incurred.

70. The description of the work in the two estimates is identical. The only difference is that the second estimate included an additional sum of £1,800 (including VAT) as a contingency sum. It appears that that sum was spent, as additional work was identified once the initial work was commenced. We must assume that the same would have been true had the work been undertaken in 2014. The difference between the two sums, if the contingency sum is added to the 2014 estimate, is £2,750.

71. Before departing from this issue, we observe that it is the applicant's case that the repair undertaken in 2015 was in any case inadequate. While alleviating the leaks in the front of the flat, it did not address those towards the rear, the effect of which was, over time, to render the flat uninhabitable. A proper repair, which is what, on the applicant's case, should have been undertaken, would have cost more, either at the same time as the initial work was undertaken, or, more plausibly, after it became apparent that the roof was still leaking, albeit in a different place.

72. The way that Ms Orlebard-Reid put the case before us in effect extracted one element of the broader case that could be packaged in terms of the reasonableness of expenditure under section 27A of the 1985 Act rather than directly relating to a breach of covenant by the respondent. It may be that what the applicant really wants in respect of the roof is for the landlord to discharge its repairing obligation properly, and perhaps to compensate her for loss consequent on its failure to do so. These issues are not within the jurisdiction of this Tribunal (and so, of course, we make no finding as to whether the repairing obligation has been breached as the applicant claims).

73. *Decision*: The expenditure on the repair on the roof was unreasonable to the extent that it exceeded the cost of the same work if undertaken in 2014. The excess amounts to £2,750 overall, of which the applicant's share is £687.50.

Application for an order under section 20C of the 1985 Act

74. The applicant sought an order under section 20C of the 1985 Act that the costs of these proceedings may not be recovered under the service charge.

75. At the beginning of the hearing, the applicant invited the Tribunal to make a declaration that the costs of legal proceedings were not in principle recoverable under the lease. The Tribunal declined to give such declaratory relief, as outside our jurisdiction. However, both parties agreed that we should consider whether legal costs are recoverable under the lease as a preliminary issue in relation to the applicant's application for an order under section 20C.

76. Mr Timpson indicated that the only clause relied upon to recover legal costs through the lease was clause 2(1)(7), the clause relating to the costs of a notice under Law of Property Act 1925, section 146.

77. In the light of that submission, the Tribunal considered that *Barrett v Robinson* [2014] UKUT 0322 (LC) may be relevant. In that case, the Upper Tribunal considered a similar, but more widely drawn clause, and concluded that the legal costs in that case were not recoverable because there was no evidence that forfeiture proceedings were in fact contemplated by the landlord (and, indeed, on the facts of that case, could not have been contemplated).

78. At the conclusion of the hearing, it became apparent that neither party was aware of *Barratt v Robinson*. We considered it appropriate to issue directions allowing the parties to make written submission within 14 days of the hearing.

79. In the event, only the respondent made a submissions.

80. It was entirely clear at the hearing, and from the terms of the direction inviting written submissions, that the issue to be addressed was the recoverability of legal costs via the service charge under the lease. However, the bulk of the respondent's written submission amounted to argument in favour of the Tribunal making a costs order under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

81. The respondent did not make an application under rule 13 at the hearing. It is open to the respondent to make such an application in proper form now, if it so wishes.

82. The position at the close of the hearing, therefore, was that we would decide following written submissions the question of whether the lease allowed recovery of legal costs under the section 146 clause, clause 2(7), in relation to the application for an order under section 20C.

83. On further consideration, it is clear that two refinements are necessary to this position. In the first place, the question of the application of clause 2(7) cannot be raised on an application for an order under section 20C of the 1985 Act. The reason for this is that section 20C only applies to the recovery of costs through the service charge, whereas a charge under clause 2(7) would be an administration charge, and therefore cannot be subject to an order under section 20C.

84. However, the second, and countervailing, consideration is that, since 6 April 2017, section 131 of the Housing and Planning Act 2016 has been in force. This section inserts into Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") a new paragraph 5A, which provides a power equivalent to section 20C in respect of administration charges.

85. Given the understanding of all concerned set out in paragraph 82 above, we consider that the appropriate course is to treat the applicant's application for an order under section 20C as including an application under the new paragraph 5A of schedule 11 to the 2002 Act. We deal with each application in turn.

86. *Barrett v Robinson* expressly dealt with the question: "In what circumstances does a covenant for the reimbursement of costs of proceedings under section 146 render a tenant liable for costs incurred by their landlord in tribunal proceedings to determine the amount of a service charge or administration charge?" (paragraph [38]). The Upper Tribunal referred to the fact that *Freeholders of 69 Marina, St Leonards on Sea v Oram* [2012] L&TR 4 had been considered authority for a broad proposition that such a clause could be used to justify recovery of service charge litigation before a Tribunal.

87. However, in *Barrett v Robinson* the Deputy President explained the significance of that case in these terms:

> "Clauses such as clause 4(14) [the section 146 clause] 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."

88. In that case, the clause provided for recovery of costs "in contemplation of" a section 146 notice, in addition to those incidental to it. It was thus significantly more widely drawn than that in the applicant's lease, and so particular attention was paid to the "contemplation" limb of the clause.

89. In this case, 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, and cannot possibly be characterised as "incidental" to the service of a notice.

90. In its written submissions, the respondent briefly mentions *Barrett v Robinson*, and in doing so appears to endorse this view. For the most part, *Barrett v Robinson* is concerned with the question we set out in paragraph [86] above, with the conclusion set out at paragraph [87]. However, the final paragraph also refers to an independent basis for deciding the appeal, that is, that the sum involved was too small for forfeiture (section 167(1) of the 2002 Act). The respondent erroneously asserts that the Deputy President had found that the costs would have been recoverable, but for that consideration. The submission then continues "This is an entirely different situation from the present matter. The landlord has not served a s. 146 notice. This was ostensibly a 27A application brought by the leaseholder."

91. Our conclusion, therefore, is that we will not grant an order under section 5A of schedule 11 to the 2002 Act, because the costs of these proceedings are not recoverable under the relevant term in the lease.

92. We turn now to the application under section 20C. As will be apparent, we have not been addressed separately and distinctly on the question of whether the costs of these proceedings are recoverable under the service charge, as opposed to as an administration charge under clause 2(7) of the lease. It is true that initially, albeit under the shared misunderstanding that clause 2(7) fell to be considered in the context of the section 20C application, Mr Timpson only sought to rely on that clause. However, it may be possible for the respondent to argue for recovery under another provision in the lease, and we do not think it

would be appropriate to shut such an argument out altogether in any future proceedings upon which a finding by us would be determinative.

93. Accordingly, we decline to make a determinate finding as to whether the costs of these proceedings could be recovered in the service charge under the lease.

94. We are therefore prepared to consider the question of an order under section 20C on its merits, on the usual assumption that this involves no finding as to whether the costs are, as a matter of law, recoverable under the lease.

95. The extent to which a party is successful before us is not determinative of whether we should make an order, but it is a significant factor. In this case, the Tribunal considered three main issues, and decided in favour of the applicant in relation to two of them.

96. In truth, the second issue should probably count as neutral in this context, in that it would not have affected the outcome either way in financial terms. Thus, success would probably not have availed the applicant in financial terms. Had we found that the section 20 consultation had been flawed, we would have considered the retrospective application to dispense with consultation under section 20ZA, upon which we heard submissions. To demonstrate prejudice, the applicant would have relied on her inability to seek to resurrect the 2014 estimate in the consultation, with the end result that we would have dispensed with consultation on a condition which mirrored the financial effect of the third issue, the repair of the roof.

97. While the respondent's written submissions were principally focused on an application for costs that has not been made, they are also relevant to this application (as is indicated by the last paragraph). We reject the submission that the hearing was unnecessary as the issues had been dealt with in the concessions already made by the respondents. As is evident, we dealt with three matters of substance, in a full day's hearing. If one of those issues – the first, relating to the nature of the invalidity of the demands – was a result of the indeterminacy of the expression of those concessions, that is hardly a factor for which the applicant can be held to blame.

98. Further, the written submissions assert erroneously that the case management conference came to substantive decisions on some issues; and that at the hearing before us, that we announced certain conclusions.

99. *Decisions*: In respect of the deemed application for an order under paragraph 5A of schedule 11 to the 2002 Act, we decline to make an

order on the express finding that the costs of these proceedings cannot be recovered under clause 2(7) of the lease.

In respect of the application for an order under section 20C of the 1985 Act, we order that the costs of these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of a service charge payable by the applicant. In doing so, we make no determination in respect of the payability of such costs under the lease.

Name: Tribunal Judge Richard Percival **Date:** 16 November 2017

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).