12614

FIRST TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**: CAM/00KF/LSC/2017/0082**
Property	**: 50B Inverness Avenue, Westcliff-on-Sea, SS0 9DY**
Applicant	**: Trevor Oakley**
Respondent	**: Regisport Limited now changed to Long Term reversions (Harrogate) Limited**
Represented by	**: Ms Jennifer Lee of Counsel**
Type of Application	**: For determination of payability of service charges and administration charges – s.27A of the Landlord and Tenant Act 1985 ("the Act") and for a costs order under Rule 13.**
Tribunal	**: David S Brown FRICS (Chair) Graham Wilson (Judge) Loraine Hart (Lay Member)**
Date of Decision	**: 12th February 2018**

DECISION

The service charges for recovery of insurance premiums are payable in full.
The insurance administration charges are not payable.
The service charges for the soil pipe repairs £142.50 in 2013 and gutter clearance £40 in 2015 are payable in full.

The Respondent has accepted that the other administration charges are not payable and has withdrawn them.

The Respondent has accepted that the lease does not permit recovery of the costs of these proceedings via the service charge and so an order under section 20C is not necessary.

The Tribunal Orders Regisport to pay to Mr Oakley costs of £400 under Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

STATEMENT OF REASONS

Application

1. For simplicity, we will refer to the Respondent as Regisport, for whom David Bland has submitted a statement and attended the hearing.

2. Mr Oakley is the leaseholder of the Property under a lease dated 5th November 1980. Service charges demanded under the lease have been in dispute for some years and Mr Oakley has applied for determination under section 27A for the years 2008 to 2017 inclusive.

3. The application includes claims for reimbursement of overpayments and interest thereon but we explained to Mr Oakley at the hearing that our jurisdiction is limited to that set out in section 27A, which provides –

S27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

.....

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

4. Section 19 of the Act provides -

19 Limitation of service charges: reasonableness.

(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.

5. The background to this case is set out in detail in the papers and we do not need to set it out again here. Briefly, in 2016, Regisport took forfeiture proceedings in the county court and the lease was deemed forfeit but the mortgage lender, Mortgages 1 Limited, paid the amounts claimed in the court which brought the forfeiture proceedings to an end. Those amounts included the service charges up to the year 2017. Mr Oakley did not authorise or agree with that payment and, indeed, referred the matter to the Financial Ombudsman.

6. During the case management process Regisport asked that the application by Mr Oakley be limited to 2016 as the previous years had been paid by his mortgagee. The Tribunal Chair refused this request, pointing out that payment of service charges by a mortgagee without the consent of the lessee does not in itself constitute agreement to or admission of those charges by the lessee.

The Lease

7. The service charge provision is at the end of clause 1 of the lease and states –
"...and paying by way of additional rent a yearly sum equal to a fair proportion expended by the Landlord in insuring the Demised Premises in accordance with clause 4(2) hereof such sum to be paid immediately upon demand thereof."

8. Clause 4(2) provides-
"To insure and keep insured the Building during the term hereby granted for the insured risks and to make all payments necessary for the above purposes within seven days after the same shall respectively become payable and to produce to the Tenant upon demand the Policy or Policies of such insurance and the receipt for every such payment."

Charges in Dispute

9. The service charges and administration charges in dispute are:-
- for each of the years in question, the insurance charge and the insurance administration charge, plus
- 2010, bank postage fee, Notice of Intention fee, NIRA fee, interest.
- 2012, arrears fee x 2, administration fee,
- 2013, arrears charge x 3, soil pipe repairs,
- 2014, court fee x 2, legal fees x 2
- 2015, gutter clearance, admin fee for gutter clearance,
- 2016, visitation fee, disbursement fee, refer to solicitor,
- 2017, reminder charge, H&S survey.

Applicant's Case

10. Mr Oakley did not set out the hearing bundle in the manner directed. He has provided copious amounts of evidence and documentation, some of which is irrelevant, some of which is duplicated and most of which is piecemeal and difficult to follow. We have read all of his submissions and have taken all of the relevant items into account; we do not propose to set them all out in detail here but will refer to the principle matters on which the parties have relied.

11. There is much argument about the previous court proceedings and, in particular, whether or not a section 146 notice was served on Mr Oakley by Regisport, this being the evidence of Mr Bland. This turned out to be irrelevant and not necessary through no fault of Mr Oakley.

12. The case management directions required Mr Oakley to produce like-for-like insurance quotations. He did produce quotations, on the basis of which he asserted that the insurance premiums in each year were excessive. These were obtained in November 2017 and the premiums quoted were –

Lansdown Insurance Brokers	£698.18 (£250 excess)
	£659.94 (£500 excess)
Angel Terrorism Insurance	£120.16 plus
Discount Insurance	£671.01 (£1000 excess)
Bluefin	£638.70

He compared these with the AXA insurance effected by Regisport for the period 1/7/17 to 30/6/18 of £1,735.66 (£1,000 excess).

13. The proportion of premium charged to Mr Oakley and his suggested reasonable charge are-

- 2008	Charged £345.79	Suggested	£188.21
- 2009	£343.93		£187.20
- 2010	£361.12		£196.56
- 2011	£382.47		£208.18
- 2012	£401.24		£218.39
- 2012	£401.24		£401.24
- 2013	£420.94		£229.12
- 2014	£512.28		£278.83
- 2015	£660.79		£359.67
- 2016	£609.73		£331.88
- 2017	£433.89		£236.17

14. A letter from the Competitions and Markets Authority to Sir David Amiss MP, dated 5th October 2016 stated that certain lines of insurance (including residential property owners) consistently attract very high rates of commission, generally over 35% and sometimes over 50%. Mr Oakley asserted that any commission paid by the insurers to Regisport should be deducted from the premium before it is posted to the service charge account. No such deduction has been made and Regisport have not informed him how much commission they receive.

15. Mr Oakley stated that he had served a section 30A notice on Regisport to provide insurance details to him and they had refused to comply.

16. We do not need to deal with the evidence on the administration charges, save that Mr Oakley disputed them all.

Respondent's Case

17. David Bland, Legal Executive Lawyer at Regisport, provided a statement in reply to the application.

18. He asserted that the Tribunal Chair was in error in saying that the payment by the mortgagee did not constitute agreement or admission by Mr Oakley. He cited *Bhimji v Salih* which, he said, found that a section 146 notice constitutes an offer, that offer was accepted by Mr Oakley's mortgagee resulting in a contract entered into on behalf of Mr Oakley by his mortgagee in their capacity as a charge holder and in accordance with standard terms and conditions for mortgages wherein a secured lender may exercise powers of attorney on behalf of their borrower to protect their security and protect legal title.

19. He went on, "The same applies here, the Respondent having served notice pursuant to section 146, this was an offer to the tenant (who was represented by the mortgagee) not to forfeit and take possession of the premises on the basis the arrears as specified in the notice were paid to remedy the Applicant's breach of covenant" and "It cannot therefore be correct that the Applicant can revisit sums due under the notice/offer in these proceedings, the contract now being final by way of offer and acceptance."

20. Mr Bland stated that insurance is placed by the freeholder on a portfolio basis and Regisport relies on its broker who is FCA regulated to arrange insurance and negotiate terms. The broker undertakes market testing and he can recall insurance being placed with Allianz, Brit, QBE, Covea and AXA in recent years. Brokers used have included Oxygen, The Insurance Partnership, Jeff Insurance and Lockton. The insurance is index linked. The block policies issued on such a large corporate scale allow the landlord to obtain favourable terms and benefits included in the policy which would not be available to a private individual and which, in most cases, will be more advantageous to a leaseholder in the event of a claim.

21. He confirmed that the Landlord does not derive commission in isolation but the Regis Group (of which the landlord forms part) does, and Pier Management Limited does not. In return for commission Regis Group undertakes work to ease the administrative burden on the broker and insurer, including instructing agents and external surveyors to arrange reinstatement valuations, supplying details of such valuations for renewals, arranging health and safety surveys and also advising insurers of any h&s risks, alterations and breaches of covenant that may impact on the risk accepted by the insurer, issuing demands to tenants, copying and providing information to tenants, lenders and asset managers and administrators dealing with tenants' assets including certificates and policy wording, keeping accurate claims records.

22. He accepts that the insurance may not be the cheapest available but it is not commercially viable, nor reasonable, to expect a commercial landlord to insure each development separately with different insurers.

23. We do not need to relate his submissions on the administration charges, save that he simply quoted the definition from Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and asserted that the landlord is entitled to the charges.

THE HEARING

24. At the hearing, Mr Oakley represented himself and Ms Lee appeared for Regisport and Mr Bland attended to give evidence..

Limitation

25. Ms Lee pointed out that Mr Oakley's 'Overview' only gave details of years 2010-2017 and asserted that the application should therefore be limited to those years. We rejected that assertion. The application form clearly refers to 2008-2017 and in paragraph 29 of the Overview Mr Oakley referred to his claim 'back to 2008'. The overview document is a summary of Mr Oakley's case and the omission of details of the earlier years does not constitute a withdrawal of those years from the application.

26. Ms Lee pointed out that Mr Oakley had paid the insurance charges from 2008 to 2010 without any objection, as shown on the schedule of payments on page 580 of the bundle. This constituted a series of payments over time which, coupled with the delay in raising this challenge to those charges, should be taken as constituting agreement to those charges.

27. Mr Oakley denied that this was the case, saying that he had disputed the insurance charges since 2002 when he moved in. He said he did not previously want to withhold payment for fear of forfeiture proceedings and he did not know then the procedure for applying to the Tribunal and thought it was costly.

28. We asked Ms Lee about the reference by Mr Bland to the *Bhimji* case as she had not referred to it in her skeleton argument. She replied that the objection to inclusion of the earlier years is solely based on the payment history and relied on *Cain* for that, although the landlord in *Bhimji* had relied on the payment made.

Discussion

29. We do not consider that *Bhimji* is relevant. It is readily distinguishable from this case as the decision was dependant on the particular circumstances, which were very different.

30. In *Cain v LB of Islington* [2015] UKUT 542 (LC) His Honour Nigel Gerald determined that where there have been payments over a period of time of sums demanded there may come a time when an implication or inference of agreement to the charges is irresistible. What is required is some conduct which gives rise to the clear implication or inference that that which is

demanded is agreed or admitted by the tenant. The relevant question, therefore, is: are there any facts or circumstances from which it can properly be inferred or implied that the tenant has agreed or admitted the amount of service charge which is now claimed against him?

31. He went on to explain that the Limitation Act does not apply to applications under section 27A.

32. We are not satisfied that there is sufficient evidence of other facts or circumstances, other than the payment of amounts demanded, from which it can properly be implied that Mr Oakley agreed to the charges demanded for 2008 to 2010. We accept his evidence that he had questioned the charges previously. It is true that there has been a delay in bringing these proceedings but it is conceivable that this was partly due to ignorance of the correct process and fear of costs and we note that in the 2014 proceedings Mr Oakley was already challenging the amount of charges, although he did not then specify the years. We therefore accept inclusion of the years 2008-2010 in these proceedings.

33. We would just add that it is settled law that payment of service charges by a mortgagee under threat of forfeiture does not of itself constitute agreement of those charges by the lessee. In addition, in this case the payment was accompanied by a statement that the debt was not admitted.

Insurance

34. At the hearing, Mr Oakley again questioned the amount of insurance commission being paid to Regisport. He pointed out that the evidence from Lockton was that 15% commission as paid to Regis Group (Holdings) Limited, with no mention of what is paid to Regisport Limited. He referred to deductions made by other first-tier tribunals in other cases.

35. Mr Oakley stressed the point that he had served a notice on Regisport under section 30A of the Act requiring them to provide certain details of the insurance and they had refused to comply. He said that the quotes he had obtained were on a like-for-like basis.

36. Ms Lee asked us to note that Lockton had clearly stated that the insurance commission was 15% and that the premium is made in accordance with their standard terms of business. Mr Bland has said in his statement that the landlord does not derive commission in isolation, The Regis Group owns a large portfolio and bulk buys insurance. The Landlord is part of the Regis Group.

37. Mr Bland has produced copies of letters dated 01 and 06 September 2016 sending to Mr Oakley the information that he requested in his section 30A notice. Mr Oakley pointed out that his notice was in 2017, to which Ms Lee replied that, following that notice, the information had been provided in compliance with the Tribunal's directions.

38. Ms Lee pointed to differences between the insurance policies and the quotes obtained by Mr Oakley showing that they were not like-for like. The insurance is on a company block policy not for an individual. Mr Oakley had not

disclosed the claims history, there had been two claims in the last 3 years. There were numerous other differences in details of the cover. She said the landlord relies on *Berrycroft* and *Forcelux*. Mr Oakley has produced nothing to show that the premiums are not reasonable.

39. With regard to the insurance commission, Ms Lee referred to Mr Bland's evidence about the work undertaken by Regis Group to ease the administrative burden on the broker and insurer. She stated that the insurance company had changed over the years and suggested that in the absence of like-for-like quotations or other evidence of unreasonable premiums, it is not open to the Tribunal to rely on Mr Oakley's figures or select other figures.

40. Mr Oakley responded that he had sought like-for like quotes; he was unable to provide the claims history because he did not get that information in time and it would have made little difference to the quotes anyway. With regard to the work done by Regis Group to earn the commission, Regisport charges lessees for giving permission for alterations and registration of lettings.

Discussion

41. The question to be decided is whether or not the insurance premiums were 'reasonably incurred'. The parties have cited and are familiar with the *Berrycroft* and *Forcelux* cases and so we do not intend to refer to them in detail.

42. *Berrycroft* was determined by the Court of Appeal, which considered the question of the effect on the rights and liabilities of landlord and tenant of the provisions of the 1985 Act. The Court held that the judge in the court below, having thoroughly reviewed the evidence, had determined that the quotations for insurance obtained were competitive, being neither unreasonable nor excessive, and negotiated in the ordinary course of business. Furthermore, the judge had concluded that the active and responsible management of the agency nominated by the landlord was, taken overall, beneficial to the tenants. That being the case, the Court of Appeal, dismissing the appeal, upheld the decision at first instance that the costs of the insurance were not unreasonably incurred

43. In *Forcelux*, the Tribunal held, on the facts, that the costs of the premiums were reasonably incurred, and that there was no evidence upon which it could be concluded that the costs were excessive. The Tribunal was satisfied, from the landlord's evidence, that the block policy was competitively obtained in accordance with the market rates, and that there was an upwards effect on premium rates in view of the limited pool of insurers who were prepared to underwrite commercial cover for commercial landlords.

44. The Court of Appeal had also considered insurance premiums in *Havenridge Ltd v Boston Dyers Ltd* [1994] 49EG 111 (CA) and determined that the fact that a landlord might have obtained a lower premium elsewhere does not prevent him from recovering the premium he has paid. If a rate was negotiated at arms' length between a broker and an underwriter and there were no special factors involved then that rate itself is evidence of the market rate and cannot be said to be something different from it. If the rate is

representative of the market or was negotiated at arms' length in the market place and it was a genuine contract, the landlord has acted properly and the sum was properly paid.

45. *Williams V Southward Borough Council* [2001] 33 HLR 224 Chancery Division dealt with the question of insurance commission. The Court decided that of 25% commission paid to the landlord, 5% should be attributed to a loyalty bonus and 20% as consideration for handling and administration carried out by the landlord. The council conceded that the 5% should be handed back to the lessees. The Court held that the 20% was not in law or in fact a rebate or deduction from the premium, it was a payment for services and the council was under no obligation to pay it back to the lessees.

46. In the more recent case of *Cos Services Ltd v Nicholson and Willans* [2017] UKUT 0382 LC, the Upper Tribunal (Lands Chamber) determined that the burden is on the landlord to satisfy the relevant tribunal on the balance of probabilities that the costs in question have been reasonably incurred. The Tribunal must consider whether the sum being charged is, in all the circumstances, a reasonable charge. It will not be necessary for the landlord to show that the insurance premium sought to be recovered from the tenant is the lowest that can be obtained in the market. However, the Tribunal must be satisfied that the charge in question was reasonably incurred. In doing so, it must consider the terms of the lease and the potential liabilities that are to be insured against. It will require the landlord to explain the process by which the particular policy and premium have been selected, with reference to the steps taken to assess the current market. Tenants may, as happened in this case, place before the Tribunal such quotations as they have been able to obtain, but in doing so they must ensure that the policies are genuinely comparable (that they "compare like with like"), in the sense that the risks being covered properly reflect the risks being undertaken pursuant to the covenants contained in the lease.

47. Due to a change in the case management directions, Mr Oakley was not able to inform the companies from whom he sought quotes of the claims history because that information was not to hand. We agree with him that that information would make little difference to the quotes. He was able to provide other details of the insurance cover. The other differences in cover would have made some difference but we have no evidence of the extent.

48. The main problem for Mr Oakley, and for other lessees in similar circumstances, is the difficulty – or even impossibility - in obtaining like-for-like quotations. Irrespective of minor differences in policy and/or cover details, a quotation provided for an individual on one building cannot be comparable to a premium paid by a commercial landlord on a large block policy. The Tribunal must therefore have confirmation that the premiums have been reasonably incurred at arms' length in the open market. Mr Bland's evidence and that of Lockton demonstrate that this is so and there is no evidence from Mr Oakley to the contrary. It was open to him to produce evidence by way of a witness statement by a broker as to the usual level of insurance for policies of this type and size; he referred in passing to a comment by a broker that the premium was high but that is not evidence.

49. With regard to the commission, we are surprised that it is as little as 15% but we have been provided with evidence of that rate and have no reason to disbelieve it. We are satisfied that it is payment to Regisport's parent company for services provided to the insurer and broker and that no commission is paid direct to the landlord, (although if it was not remuneration for services we would expect it to be passed proportionately to the subsidiary companies). We find that 15% is a reasonable amount for such remuneration.

50. We therefore conclude that the insurance premium in each of the years in question was reasonably incurred and is payable in full.

51. We now turn to the insurance administration charge. Ms Lee's case is that this is a charge by the managing agent permitted by the words 'a fair proportion expended by the Landlord in insuring the Demised Premises in accordance with clause 4(2)' in clause 1 of the lease, coupled with the wording in clause 4(2). It is, she suggested, part and parcel of the landlord obtaining insurance. Section 4(2) refers to supplying the policy and receipt. It is a cost incurred.

52. We do not accept that proposition. We find that it stretches the meaning of those words in clause 1 too far. The clause allows recovery of monies expended (ie paid out) by the landlord in effecting the insurance. It does not cover supplying copy policies and receipts to lessees. Even if it did cover those tasks, the landlord's entitlement would be to recover the cost expended not to demand an arbitrary sum by way of an administration charge.

53. We find that the insurance administration charges are not payable.

Other Charges

54. When we asked Ms Lee, at the hearing, to point us to the provisions in the lease which permit the landlord to demand the other administration charges, she informed us that Regisport accept that there is no such provision and the charges are withdrawn.

55. Mr Oakley's other challenge is to the charges for the soil pipe repairs £142.50 in 2013 and gutter clearance £40 in 2015. His only basis for challenging these charges is his contention that Regisport regularly overcharges for repairs; he did not dispute that the works were carried out or claim that they were unnecessary. That basis of challenge is untenable. There is no evidence that those charges were unreasonably incurred and they are payable.

Section 20C

56. Ms Lee informed us that Regisport accepts that the lease does not permit the landlord to recover the cost of these proceedings through the service charge and will not seek to do so. Mr Oakley was content with this undertaking.

Rule 13 Costs

57. Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides that –

(1) The Tribunal may make an order in respect of costs only –

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings.

58. Mr Oakley has applied for a 'wasted costs' order but then referred to Rule 13(1) and we have taken his application to be under that Rule. His main complaint is that Mr Bland acted unreasonably in referring to the *Bhimji* case and linking it to this case by virtue of a section 146 notice having been served on Mr Oakley when he knew that no section 146 notice had been served. Mr Bland had written a letter to him on 18th August 2016 in which stated that the notice which was pinned to Mr Oakley's door "was not a Notice under section 146 of the Law of Property Act 1925". Mr Oakley said that he had had to spend a lot of time on dealing with that issue in these proceedings, as well as dealing with the administration charges which had now been withdrawn.

59. Mr Oakley also claims that Mr Bland was unreasonable in questioning the Tribunal's jurisdiction on the early years by totally baseless arguments. The *Bhimji* case has no relevance at all.

60. Mr Oakley alleges that Mr Bland's predecessor and Pier Management have been dishonest and that Mr Bland has been obstructive and this has caused him a lot of extra work. He is a legal executive and should know better.

61. The costs claimed are £1,200, being two-thirds of a total of £1,800 assessed as 100 hours at £18 per hour.

62. On the section 146 notice point, Ms Lee was instructed at the hearing that Mr Bland's reference to section 146 was an error and it should have been section 166.

63. Ms Lee said that the size of the bundle was due to Mr Oakley including lots of documents which are irrelevant and raising arguments which are unjustified, such as the challenges to the soil pipe and gutter works costs without any credible evidence. Mr Oakley has made allegations of fraud without any evidence. She said that Rule 13 presents a high hurdle and the test has not been met; the Tribunal should take into account Mr Oakley's conduct to achieve a balance.

Discussion

64. Guidance on Rule 13 costs has been provided buy the Upper Tribunal in the Willow Court case [2016] UKUT 290 (LC). The Upper Tribunal said that the language and approach of rule 13(1)(b) are clear and sufficiently illuminated by the decision in *Ridehalgh* and added "*The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?*"

65. The definition of 'unreasonable' in Ridehalgh v Horsefield [1994] Ch 205 is –
"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes

conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

66. The Upper Tribunal set out a three stage approach to be adopted to applications under Rule 13 –

At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

67. If an order is to be made, the Tribunal must have regard to the over-riding objective and decide what amount is reasonable. An order for the whole of a party's costs will not be appropriate in every case. There does not have to be a causal link between the Tribunal's order and the costs arising from the conduct to be sanctioned. The Upper Tribunal considered it appropriate to adopt the observations of Mummery LJ in *McPherson* that "*It is not punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct.*"

68. We find that the conduct of Mr Bland has been unreasonable for the following reasons:-

69. Our principle concern is with Mr Bland's conduct in relation to the alleged service of a section 146 notice on Mr Oakley. No such notice was served and Mr Bland knew that because he told Mr Oakley so in his letter of 18th August 2016. It is difficult to believe that he had forgotten this by 30th November 2017 but if he had, any reasonable person being faced with Mr Oakley's strong denial that such a notice had been served would have checked his facts.

70. Mr Bland's argument for barring Mr Oakley from challenging the earlier years was predicated on the application of the principles in the *Bhimji* judgement. In his statement, having set out details of the *Bhimji* case and quoted what Eveleigh LJ had said about the section 146 notice in that case, he stated at paragraph 14, "*The same applies here, the Respondent having served notice pursuant to section 146, this was an offer to the tenant...not to forfeit....*".

71. We accept that this incorrect reference to section 146 caused Mr Oakley considerable extra work in reading judgements and framing arguments in response.

72. At the hearing, Ms Lee advanced the explanation that the reference to section 146 was an error and it should have been to section 166. We are assuming that she put this excuse forward on instructions given to her by Mr Bland at that point without an opportunity to check the assertion because it is entirely without credibility. Section 166 of the Law of Property Act 1925 was repealed by the Perpetuities and Accumulations Act 2009 and, in any event, concerned restriction on accumulation for the purchase of land and was totally irrelevant to the case against Mr Oakley. There is no way that Mr Bland could have intended to refer to section 166.

73. I any event, from the way in which that part of Mr Bland's statement is set out, it is abundantly clear that he had section 146 in mind. To suggest otherwise is nonsensical. Posing that excuse was, in our opinion, a deliberate and reprehensible attempt to mislead this Tribunal.

74. We find that Mr Bland's conduct in continuing to rely on service of a section 146 notice until the last minute and then proffering that explanation was vexatious and designed to harass Mr Oakley. There is no reasonable explanation for that conduct.

75. We also find that Mr Bland's insistence on defending the administration charges (other than the insurance administration charges) right up until the hearing was unreasonable. It was patently obvious to us on reading the lease that there was no provision for such charges. They were withdrawn as soon as we referred to them at the hearing. Mr Bland is a Legal Executive Lawyer, it would have been equally obvious to him if he had checked the lease provisions, as he should have done, when those charges were challenged and the charges should have been withdrawn before he wrote his statement, allowing Mr Oakley not to have to include material relating to them in the bundle. It seems to us that this insistence was designed to harass Mr Oakley and, whilst much less serious that the section 146 conduct, was nevertheless unreasonable.

76. The unreasonable conduct has clearly caused Mr Oakley extra time and effort and we consider that an order under section 146 is appropriate. In considering the amount of the order, we note that Mr Oakley has effectively asked for payment in respect of over 66 hours of work. He has not provided any breakdown of the relevant time spent.

77. Ms Lee suggested that we should take into account the conduct of Mr Oakley in making serious unsupported allegations and including much irrelevant material in the bundle. It seems to us that it would be proper for us to take into account any conduct of Mr Oakley that we assess to be unreasonable within the ambit of Rule 13 but we have received no representations from either side on that subject and it would not be right for us to make such an assessment.

78. As previously mentioned, we are not restricted to linking the order to the costs incurred. In any event, 66 hours appears to us to be more than can reasonably

be attributable to the unreasonable conduct. We consider that a costs order in the sum of £400 is appropriate in this case.

D S Brown FRICS (Chair)

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.