FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/33UG/LSC/2019/0022**
Property	**:**	**Flats 3, 5, 6, 8 and 10 Imperial House, Rose Lane, Norwich NR1 1BY**
Applicants	**:**	**Tracy Bullen, Clive Bullen and Keiron Bullen**
Respondent	**:**	**Norwich Elite Lettings Ltd**
Type of Application	**:**	**Application for the determination for the reasonableness and payability of service charges**
Tribunal Members	**:**	**Tribunal Judge S Evans** **Mr R Thomas MRICS**
Date and venue of Hearing	**:**	**Paper determination**
Date of Decision	**:**	**17 September 2019**

DECISION

DECISION

In summary, the Tribunal determines that:

(1) The service charge payable for 2016 and 2017 is nil.

(2) The Respondent shall reimburse the Applicants their fees of their applications dated 3 April 2019.

(3) Pursuant to s.20C of the Landlord and Tenant Act 1985 and Schedule 11 paragraph 5A of the Commonhold and Leasehold Reform Act 2002, the costs of these proceedings cannot be claimed from the Applicants.

(4) There shall be consequential directions concerning the Applicants' claim for costs pursuant to rule 13(1)(b) of the Tribunal Procedure (Fist-tier Tribunal) (Property Chamber) Rules 2013.

(5) No further orders should be made.

Introduction

1. The Tribunal is asked to determine the payability and reasonableness of service charges pursuant to applications made under s.27A of the Landlord and Tenant Act 1985.

2. References in this decision in square brackets are to pages in the bundle helpfully prepared by the Applicants' solicitors.

Parties

3. The First and Second Applicants are the husband and wife registered joint leasehold proprietors of Flats 5 and 6 on the ground floor of Imperial House, Rose Lane, Norwich NR1 1BY, under title numbers NK465872 and NK465873 respectively [512-520].

4. The Third Applicant is the son of the other Applicants, and is the registered leasehold proprietor of Flats 3, 8 and 10 on the ground floor of Imperial House, Rose Lane, Norwich NR1 1BY under title numbers NK461364, NK461365 and NK461366 respectively [522-535].

5. The Applicants purchased their various leasehold interests on or about 10th August 2016 from the freeholder Imperial House Developments Ltd.

6. The 1st and Second Applicants engaged Abbott Fox to manage their leasehold interests (Flats 5 and 6) from the commencement of their leases up to about 2019.

7. Imperial House is a block of 58 flats in the centre of Norwich. In 2015 permission was granted by Norwich City Council for a change in use from offices to residential use [385].

8. The Respondent company is the successor in title to Imperial House Developments Ltd. The Respondent's freehold title no. NK448898 was registered on 6th December 2016 [539]. The director of the Respondent is Elaine Hunter.

9. Although there is a party to the Applicants' leases dated 10th August 2016 named as the Management Company and called Imperial House Management (Norwich) Ltd (company registration number 10055341), at all material times (whether pursuant to clause 7.5 of the Leases or otherwise) the Respondent has stepped into the shoes of the Management Company as regards the Company's rights and obligations under the leases.

10. In any event, on 1st May 2018 Imperial House Management (Norwich) Ltd was dissolved, and a new but different legal entity called Imperial House Management (Norwich) Ltd (no.11417267) was incorporated. There is no evidence before the Tribunal that this later entity has been managing the building, however.

The Applications

11. By their applications filed on or about 3rd April 2019 the Applicants apply for a determination of liability to pay and reasonableness of service charges, pursuant to the Tribunal's jurisdiction under s.27A of the Landlord and Tenant Act 1985, in relation to the following periods:

    (1) 1st September 2016 to 31st December 2016;
    (2) 1st January 2017 to 31st December 2017;
    (3) 1st January 2018 to 31st December 2018.

12. In respect of period (1), the Applicants challenge the sum of £500 demanded and paid for each flat in which they have an interest. They say the sum should be reduced to nil.

13. They allege the relevant demand was made contractually pursuant to paragraph 1.3 of Part 2 of Schedule 1 to the Lease, as a contribution to

the Provisional Service Charge for the period from the date of the lease (10th August 2016) to the end of the current Financial Year (31st December 2016) [145].

14. It would appear that, owing to an administrative error, only £500 for each flat was paid, but no objection would appear to have been raised by the Respondent's predecessor in title, nor the Respondent.

15. In respect of period (2), the Applicants challenge the payment of £675 for each flat in which they have an interest. This sum was demanded by an invoice from the Respondent dated 3rd October 2017 [491/554]. They say the sum should be reduced to nil.

16. in respect of period (3), no demand has been made by the Respondent, as yet. The Applicants are asking the Tribunal to decide that prior to service charge demands being sent out that they include statements for financial years, signed by an accountant, plus 3 quotes for all items listed, with invoices. By their written case [102] they ask the Tribunal to declare that the sum should be nil.

17. The Applicants also seek an order pursuant to s.20C of the Landlord and Tenant Act 1985 and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that any costs incurred by the Respondent in these proceedings should not be collected through the service charges.

18. Further, by their written case [89-115] the Applicants also ask for an order requiring the Respondent to repay to the Applicants any amount the Tribunal finds is not payable, plus an order for the costs "occasioned by this application" [102].

19. Yet further within their case the Applicants seek a declaration that the Respondent has not complied with s.20B of the 1985 Act, such that any relevant costs over 18 months old are irrecoverable [105].

Procedural History

20. The Tribunal Judge gave directions on 29th April 2019. These gave the standard warning that if the Respondent failed to comply with the directions the Tribunal may debar it from taking any further part in all or part of the proceedings.

21. Regrettably, the Respondent has failed to comply with any directions, whether:

(1) For the sending of copies of service charge accounts and estimates for the Flats, together with all demands for payment and details of the payments made, and insurance schedules, by 24th May 2019 or at all;

(2) For the production of a completed column on the Applicants' Schedule [79-86], together with copies of relevant documents, and a statement setting out its legal case, plus witness statements, by 8th July 2019 or at all.

22. Given the default at (1) above, by letter dated 4th June 2019 the Applicants requested the Respondent be debarred from defending [381].

23. On 20th June 2019 the Tribunal Judge, by letter to the Respondent, barred the Respondent from taking any further part in these proceedings.

24. The papers were received by the Tribunal on or about 4th August 2019 for a determination on the papers without a hearing.

Relevant law

25. Sections 18, 19, 20B, 20C and 27A of the Landlord and Tenant Act 1985 are set out in Appendix 1. Of particular relevance in this case is section 27A(3) of the Act.

26. In *Willow Court Management Co. Ltd v Alexander* [2016] UKUT 0290 (LC), the Upper Tribunal considered the power under rule 13(1)(b) of the procedural rules 2013 to award costs on basis of unreasonable behaviour. Appendix 1 to this decision contains a summary of the Upper Tribunal's guidance.

Leases

27. The Applicants' Leases are in identical form, and for these purposes the Lease to Flat 3 will be used for illustration [116-154].

28. By clause 3.1 [126] of the Leases the Applicants covenant to pay the "Rents", which is defined by clause 1.28 as meaning the Rent, the Provisional Service Charge and the Service Charge [123].

29. Effectively, Rent is the ground rent (1.27), Service Charge is 1.724% of varying sums expended by the Management Company/Respondent

under the terms of the Lease, and the Provisional Service Charge is a sum on account thereof (1.26).

30. The service charge mechanism is to be found in Schedule 1 to the Lease [141-147]. Part 1 of Schedule 1 provides for the Services, and makes express provision that the Respondent can incur expenditure as long as it is reasonably incurred.

31. The most relevant of the included Services are set out in Appendix 2 to this decision.

32. By clause 1.6 "Common Parts" means the "Estate Areas" (for which see 1.9), "Building Areas" (see 1.4) and the Parking Area (see 1.18) [120-122].

33. Part 2 of Schedule 2 emphasises that the Management Company shall perform the Services, with minor exceptions (paragraph 1.1) [145].

34. It also provides (paragraph 1.2) that as soon as convenient after the end of each Financial Year (year ending on 31st December) accounts shall be prepared, which amongst other things shall contain a fair summary of the expenditure.

35. Further, paragraph 1.4 defines Provisional Service Charge as a provisional sum by way of service charge which can be calculated in 1 of 2 ways: either an increase of 10% on the actual service charge for the previous year, or (at the option of the Management Company) a sum calculated on a reasonable and proper estimate of what it the actual expenditure is likely to be [146].

36. Paragraph 1.5 provides for a balancing exercise [146], whereby any overpayment shall be credited to the Applicants against the Service Charge for the next Financial Year.

37. Paragraph 1.6 gives the Management Company an absolute discretion to alter the Services in the general interests of the Tenant and in order to ensure the proper and efficient management of the Building and the Common Parts [146].

The evidence

38. In the absence of any participation by the Respondent in these proceedings, the Tribunal takes into consideration only the Applicants' evidence, which is contained in:

(1) The witness statement of the First Applicant dated 27th June 2019 [495-509];
(2) The witness statement of David Musgrove of Abbott Fox dated 25th June 2019 [678-679];
(3) The exhibits to the statements.

39. In summary, the Applicants contend that the Respondent has failed to perform the Services adequately or at all since the commencement of their Leases in August 2016.

40. Unfortunately, the Applicants have not provided much documentary evidence of complaint to the Respondent before the year 2018, but this is understandable given that Abbott Fox have not been able to provide evidence of complaint, finding themselves in a conflict of interest, having been agents for the Respondent to some degree as well as the Applicants.

41. However, Mr Musgrove's statement evidences that between August 2016 and February 2018 (when he was employed by Abbott Fox) he made numerous complaints on behalf of the Applicants to the Respondent about: external areas not being maintained or cleaned, a leak in the ground floor corridor, the intercom not working properly, internal areas not being cleaned, a rat infestation, bins not being collected or cleaned, communal areas needing decorating, and a broken gate in the external area of the Building.

42. As in these proceedings, the Respondent was unresponsive to any complaint. By February 2018 none of the matters had been addressed, Mr Musgrove states.

43. The only document in the bundle which would appear to give an idea of the Respondent's position is a memo which was sent by it accompanying the 2017 demand [490]. This reveals that the Respondent admitted a vermin issue, but said it was caused by refuse left by tenants. It promised the tarmacking of the car park to address the vermin (the First Applicant states the tarmacking was done, but the issue remained). The Respondent also said that a structural surveyor had checked the rat holes in the vicinity of the front pillars and found no concerns, and that in the week after the tarmacking the drains would be jetted; that a brick wall had been repaired and re-wired; that "now" the Respondent had contracts set up for cleaning windows, and for the bins and for the upkeep to the front of the Building.

44. The service charge budget/estimate for 2017 [491/554] seeks to levy sums for:

(1) Building insurance;
(2) Cleaning contract;
(3) Gardening Grounds Maintenance;
(4) Planting to frontage;
(5) Security Contract;
(6) Monthly gas estimate;
(7) Monthly communal electricity;
(8) Accountancy fee;
(9) Bin cleaning;
(10) Façade cleaning reserve;
(11) Repairs reserve;
(12) Management Fee;
(13) Sinking Fund.

45. In February 2018, the First Applicant states, she asked Elaine Hunter at least twice for service charge accounts, without substantive response.

46. From April 2018 onwards she began to message Ms Hunter about the intercom, the leak in the ground floor corridor, and other matters.

47. On 6th June 2018 a photo of the leak was sent to the Respondent [356].

48. On 7th June 2018 Ms Hunter of the Respondent messaged back to state it would attempt to inspect a cavity in the region of the leak [374], but there is no evidence this was in fact done.

49. On 2nd November 2018 the Applicants sent photos of the leak, said to have been active since May 2018, of a heater hanging off the wall, of the intercom not working, that the cleaner needed an extension lead, and that windows needed cleaning [362-365].

50. On 3rd January 2019 the First Applicant messaged Ms Hunter a photo of a smashed door, and reminded her of the leak, which was then damaging the carpets [365-366].

51. On 27th January 2019 more photos were texted to the Respondent [565-569].

52. On 28th February 2019 the Applicants engaged reputable local solicitors to send a Pre-Action Protocol letter to the Respondent [375-379]. This alleged a breach of covenant, requested a written summary of costs,

and the relevant insurance policy documents. There was no response from the Respondent.

53. There are further photos of the state of parts of Imperial House taken on 4th April 2019 [570], 8th April 2019 [571-577] and 1st June 2019 [578-642].

Issues

54. The Tribunal considers the following to be the substantive issues for determination:

    (1) Whether we should make a summary determination under rule 9(8) of the Procedure Rules 2013;

    (2) Whether the sums claimed by the Respondent fall under the terms of the Leases;

    (3) Recoverability (reasonableness/standard) of relevant costs incurred for 2016;

    (4) Ditto, 2017;

    (5) Ditto, 2018;

    (6) Whether to make an order for repayment of sums paid by the Applicants;

    (7) Whether to make an order under S.20C of the 1985 Act/ para 5A of the 2002 Act, so as to impose a limitation on costs recovery through the service charges;

    (8) Whether to order Applicant's costs occasioned by this application on grounds of behaviour.

Whether the Tribunal should make a summary determination under rule 9(8) of the Procedure Rules 2013

55. This was an attractive submission. However, the Tribunal has a discretion ("may" summarily determine any or all issues against a respondent), which in this case we decline to exercise in favour of the Applicants. We consider it would be better to scrutinise the available evidence and make a decision on the merits.

Whether the sums claimed by the Respondent fall under the terms of the Leases

56. The Tribunal finds that the items detailed in paragraph 44 above would prima facie be recoverable (subject to being reasonably incurred) under the terms of the Lease at Schedule 1, Part 1 [141-142] as follows:

    (1) Building insurance – sub-paragraphs 1(a) and (l);
    (2) Cleaning contract – sub-paragraphs 1(f) and (p), and 2(d);
    (3) Gardening Grounds Maintenance – sub-paragraphs 1(d) and (i);
    (4) Planting to frontage -– sub-paragraphs 1(d) and (i);
    (5) Security Contract – sub-paragraph 1(i);
    (6) Monthly gas estimate – sub-paragraph 1(o);
    (7) Monthly communal electricity– sub-paragraph 1(o);
    (8) Accountancy fee– sub-paragraph 1(j);
    (9) Bin cleaning – sub-paragraphs 1(f) and 1(p);
    (10) Façade cleaning reserve – sub-paragraphs 1(k) and 2(b);
    (11) Repairs reserve – sub-paragraph 1(k);
    (12) Management Fee – sub-paragraph (h).

57. It is unclear what item (13) in paragraph 44 above ("Sinking Fund") relates to, and prima facie does not appear to come within Schedule 1. The Tribunal notes, however, that sub-paragraph 1(k) of Schedule 1 Part 1 is limited to the setting aside of such sums as may be reasonably required to meet future costs in replacing, maintaining and renewing items the Management Company has covenanted to replace, maintain or renew.

58. The Tribunal is prepared to adopt a generous interpretation of the catch-all provision (sub-paragraph 1(i) [142]) which would permit the recovery of item (5) above.

Service charges for 2016

59. It is important to emphasise that this year (as well as 2017) is a budgeted (estimated) amount for expenditure.

60. The Tribunal has enormous sympathy for the Applicants in the difficulty they have faced in asking for anything other than a nil determination. The Respondent has not provided any accounts, whether audited or certified, nor any insurance details, nor any summary of its service charge expenditure (if any), nor any receipts/invoices.

61. We do tend to agree that the Applicants cannot have a "proper understanding" of the matters which are set out in paragraph 13 of their Case [103].

62. The Tribunal accordingly decides that the estimated sum for this service charge year should be reduced to nil.

63. Given the above, it is unnecessary for us to decide whether any such costs would be time-barred under s.20B of the 1985 Act.

64. We note that there are 58 flats in the block, and that the Respondent appears to have been collecting sums in reserve. The Tribunal has some confidence that the Respondent, notwithstanding this decision, will be a position to undertake the Services going forward.

Service charges for 2017

65. This year is slightly different, in that the heads of budgeted (estimated) are set out in the invoice [491/554].

66. Therefore, it has been possible for the Tribunal, as set out above, to take at least a preliminary view as to whether such matters would fall within the terms of the Lease.

67. The only item which has caused the Tribunal any concern is whether the Applicants should pay an amount for gas and electricity, given that it does not appear to be disputed that such services were supplied. Our difficulty however lies in quantification, in the absence of any input from the Respondent. Absent any justification for the figure claimed, the Tribunal finds itself unable to apportion any sum for such services without being arbitrary.

68. Accordingly, for this reason and for reasoning identical to the year 2016, the Tribunal makes a nil determination for 2017.

69. Further, the Tribunal finds that Services were not undertaken to a reasonable standard, at least as regards cleaning, accountancy, management fees and gardening, and in this regard the Tribunal accepts without reservation the Applicants' evidence as summarised in paragraphs 39 to 43 above, which speaks for itself.

Service charges for 2018

70. No demand has been levied. It is unclear if any relevant costs have been incurred by the Respondent.

71. The Tribunal does not have the jurisdiction to make the determination sought in the applications [14]. The jurisdiction is limited to that under s.27A of the 1985 Act. We cannot decide that prior to any service charge demands being sent out for this year, they should include certain matters.

72. The Tribunal can indicate that it is deeply concerned about the Respondent's ostensible breach of paragraph 1.2 of Part 2 of Schedule 1 to the Lease [145], and expresses its expectation that the Respondent with comply with the Lease terms going forward in the light of this decision.

73. Given the above, it is not necessary for us to decide whether any such costs would be time-barred under s.20B of the 1985 Act.

Whether to make an order for repayment of monies paid

74. Whilst this request is understandable, the difficulty for the Applicants is that contractually any sums overpaid should be set off against the next financial year: see para. 1.5 of Part 2 of Schedule 1 to the Lease [146].

75. In any event, the Tribunal considers that is has no jurisdiction under s.27A of the 1985 Act to make such an order, nor is any other jurisdiction suggested.

S.20C of the 1985 Act/ para 5A of the 2002 Act

76. The Tribunal does not hesitate to make an order under these paragraphs, on the basis that, in our broad discretion, it is the just and equitable order, not least given the Respondent's attitude to the complaints, and to these proceedings.

77. Accordingly, should the Respondent have incurred any costs in relation to these proceedings, they shall not be recoverable as a service charge or administration charge against the Applicants.

Applicants' costs occasioned by this application

78. Similarly, the Tribunal does not hesitate is making an order for the application fees to be paid by Respondent to the Applicants.

79. However, the Tribunal is invited to go further. The Statement of Case seeks an "unreasonable behaviour" costs order: para. 21 [106].

80. In the *Willow Court* decision, the Upper Tribunal gave guidance at paragraph 43 on the correct procedure:

> "43. We conclude this section of our decision by emphasizing that such applications should not be regarded as routine, should not be abused to discourage access to the tribunal, and should not be allowed to become major disputes in their own right. They should be determined summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. We consider that submissions are likely to be better framed in the light of the tribunal's decision, rather than in anticipation of it, and applications made at interim stages or before the decision is available should not be encouraged. The applicant for an order should be required to identify clearly and specifically the conduct relied on as unreasonable, and if the tribunal considers that there is a case to answer (but not otherwise) the respondent should be given the opportunity to respond to the criticisms made and to offer any explanation or mitigation. A decision to dismiss such an application can be explained briefly. A decision to award costs need not be lengthy and the underlying dispute can be taken as read. The decision should identify the conduct which the tribunal has found to be unreasonable, list the factors which have been taken into account in deciding that it is appropriate to make an order, and record the factors taken into account in deciding the form of the order and the sum to be paid."

81. The Tribunal determines that paragraph 21 of the Applicants' case [106] sets out clearly enough the conduct relied on as unreasonable, and that there is a case to answer. Although the Respondent has been sent the Applicants' Case, (a) it has not been sent, as far as we can see, a schedule giving a breakdown of costs sought, nor (b) had the opportunity to respond to the criticisms made and to offer any explanation or mitigation, in the light of our overall decision.

82. We therefore direct:

(1) The Applicants to file at the Tribunal and serve on the Respondent a schedule of their reasonable costs within 14 days of receipt of this decision, together with any further submissions (limited to 1 page of A4 paper, line spacing 1.5, minimum 11 point font);

(2) The Respondent to file at the Tribunal and serve on the Applicants a response to the criticisms made and to offer any explanation or mitigation, in the light of this decision (limited to 2 pages of A4 paper, line spacing 1.5, minimum 11 point font) within 14 days of receipt of the documents directed in paragraph (1) above;

(3) The Tribunal to make a summary determination of the issue on the papers.

Judge: S J Evans

Date:
17/9/19

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 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 to 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.

Appendix 1

Landlord and Tenant Act 1985

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 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.

(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 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 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 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.

Schedule 11 para 5A of the Commonhold and Leasehold Reform Act 2002

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph-
  (a) "litigation costs" means costs incurred or to be incurred by the landlord in connection with proceedings of a kind mentioned in the table [First-tier Tribunal proceedings.

Willow Court Management Co. Ltd v Alexander [2016] UKUT 0290 (LC)

In *Willow Court Management Co. Ltd v Alexander [2016] UKUT 0290 (LC),* the Tribunal had used its power under rule 13(1)(b) of the procedural rules 2013 to award costs on basis of unreasonable behaviour. The costs awarded were greater than amount of service charge in issue. The Upper Tribunal on appeal held that whilst there is now a general discretion regarding costs under

s.29(1) of the Tribunals Court and Enforcement Act 2007, rule 13 of the procedural rules allows only where there is:

(a) Wasted costs under s.29(4) of the Act; and/or

(b) Costs against a person who has acted "unreasonably" in bringing, conducting or defending proceedings in an agricultural land and drainage case, or a residential property case, or a leasehold case, or

(c) A land registration case.

Guidance was given on (a) and (b) above by the Upper Tribunal. In relation to "unreasonable behaviour", this is to be found in paras 22-43 of the judgment, and may be summarised as follows:

(1) The Upper Tribunal emphasised the fact-sensitive nature of the inquiry in every case.

(2) "The standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level."

(3) The acid test is: "Is there a reasonable explanation for the conduct complained of?"

(4) "…for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable."

(5) A sequential approach was held to be necessary:

- Unreasonable conduct is a precondition of the power to award costs for unreasonable behaviour. This <u>first stage</u> is application of objective standard of conduct, not an exercise of discretion.
- This <u>second stage</u> is the question whether, in the light of the unreasonable conduct, the Tribunal ought to make an order for costs or not. This is a matter for the discretion of the Tribunal.
- The <u>third stage</u> is what the terms of the order should be.

Appendix 2: Services

Schedule 1, Part 1, para.1:

(a) The costs of and incidental to the performance of the covenants contained in clauses 5 [Insurance] and 7 of this Lease [Management Company/Respondent's covenant to perform the Services etc.];

(b) …

(c) All reasonable fees charges and expenses payable to…any…accountant…whom the Landlord or the Management Company may from time to time reasonably employ in connection with the management of the Development, the Building and the Common Parts including… the cost and preparation of the account of the Service Charge….and if any such work shall be undertaken by an employee of the Landlord or Management Company then a reasonable allowance for such work"

(d) To maintain and keep in good and substantial repair and condition and renew of replace when required the Common Parts the Parking Area and the Pipes used in common by the Tenant and other tenants and/or occupiers of any Dwelling on the Development and the boundary walls fences and any other parts of the Development

(e) …

(f) To keep the Estate Areas and the Parking Area clean and where appropriate lit

(g) …

(h) …

(i) To do or cause to be done all works installations acts matters and things as in the absolute or reasonable discretion of the Landlord and/or the Management Company may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development, the Building and/or the Common Parts and/or the Parking Area;

(j) To keep proper books of accounts of the sums received from the Tenant…in respect of the Annual Expenditure and of all costs,

charges and expenses incurred by the Management Company pursuant to its covenants in this Lease

(k) To set aside such sums as may reasonably be required to meet the future costs that the Management Company reasonably expects to incur in replacing maintaining and renewing those items that the Management Company has covenanted to replace maintain or renew

(l) To insure the Building in accordance with clause 5...

(m) ...

(n) ...

(o) To pay all charges for electricity and any other services supplied to the Development, the Building and the Common Parts as distinct from any charges made in respect of any Dwelling

(p) To employ such staff or contractors as may reasonably be required to carry out all the necessary works of maintenance cleaning and repairs and such other duties as are (in the opinion of the Management Company) necessary for the proper running and management of the Development, the Building and the Common Parts.

(q) To provide a continuous supply of hot water to the premises...

Schedule 1, Part 1, para.2:

In relation to the Building and Building Areas only:

(a) To maintain and keep in good and substantial repair and condition and renew or replace when required the Main Structure...

(b) ....

(c) The costs of decorating in a good and workmanlike manner the relevant internal parts of the Building Areas;

(d) To keep the Building Areas clean and where appropriate lit

(e) ...

(f) To pay all hire or other charges for and to service maintain repair and replace (or arrange for this to be done) any main door entry system….