



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

Case Reference : **CHI29UG/LAC/2019/0009**

Property : **Flats A,C,D,E,G & H, 5 & 7 Lansdowne Square, Northfleet, Gravesend, DA11 9LX**

Applicant : **Steven Newman**

Representative : **D & S Property Management**

Respondents : **Mr D Noyes & Mr D Carpenter
c/o Sovereign Services**

Represented by : **Judge & Priestley LLP
Solicitors**

Type of Application : **Administration Charge: Paragraph 5
of Schedule 11 to the Commonhold
and Leasehold Reform Act 2002.**

Tribunal Member : **Judge M Davey**

Date of Decision : **18 November 2019**

Decisions

1. **No administration charge is payable by the Respondents.**
2. **The Tribunal orders, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, that the Respondents' liability to pay an administration charge in respect of the litigation costs in connection with these proceedings is extinguished.**

The Application

1. By an application ("the Application") to the First-tier Tribunal (Property Chamber) ("the Tribunal") Mr Steven Newman ("the Applicant"), being the freeholder landlord of the building containing Flats A, C, D, E, G & H 5-7 Lansdowne Square, Northfleet, Gravesend, Kent DA1 9LX ("the Flats") seeks a determination from the Tribunal as to the payability and reasonableness of administration charges levied by him on the Respondent leaseholders of the Flats on or around 25 February 2019 and requiring payment of the sums demanded, by 25 March 2019. The Application, which is dated 26 March 2019 and was received on 8 April 2019, is made under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

Directions

2. The Application included a Statement of Case of the same date. On 3 June 2019, Judge Tildesley OBE issued Directions to the parties. Paragraph 3 of those Directions required the Applicant to provide further and better information. Paragraph 4 provided that the Application would be determined on the papers without a hearing, in accordance with Rule 31 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013, unless either or both parties objected in writing to the Tribunal within 28 days of the Directions. Paragraph 6 provided that the application, statement of case, further particulars and reply shall stand as the Applicant's case. Paragraph 7 provided that the Respondent's statement of case should be served by 15 July 2019 and that any Applicant's reply shall be served by 29 July 2019.
3. In response to paragraph 3 of the Directions, the Applicant provided a Supplemental Statement of Case dated 10 June 2019. The Respondents then produced their Statement of Case, dated 15 July 2019 and signed by their solicitor, Mr Mark David Oakley of Judge & Priestley, Solicitors. Paragraphs 17 to 24 of that Statement deal with the administration charges claimed. (The earlier paragraphs dealt with the now withdrawn contemporaneous application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), as to which see paragraph 42 below). The Respondents' Statement of Case was accompanied by an Application of the same date for an order under paragraph 5A of Schedule 11 to the 2002 Act.

4. The Applicant responded to the Respondents' Statement of Case with a Reply, together with accompanying witness statements, dated 26 July 2019, of which paragraphs 25 to 38 deal with the disputed administration charges.
5. Judge D. Whitney issued further Directions on 16 August 2019, permitting the Respondents to submit a Supplemental Statement of Case and the Applicant a Statement in Reply. The Respondents' Supplemental Statement of Case is dated 5 August 2019 and the Applicant's Statement in Reply, with further witness statements, is dated 5 September 2019.
6. No objection having been received the Tribunal has accordingly considered the Applications on the basis of the written submissions of the parties.

Background

7. 5-7 Lansdowne Square, Northfleet, Gravesend, Kent DA1 9LX ("the Building") is a purpose built 4 storey block of 8 self-contained flats with internal and external common parts. Flat A is on the ground floor, Flats C & D are on the first floor, Flat E is on the second floor and Flats G & H are on the third floor. Flats B (lower ground floor) and F (first floor) are held by other leaseholders and are not part of this Application.
8. The leases of the Flats ("the Lease") are all in the same form and were granted to the Respondents in 2008 by Riverview Square Limited for a term of 99 years. Mr David Noyes is the leaseholder of Flats A, C, E & G and Mr Dean Carpenter is the leaseholder of Flats D & H. Although the Respondents are the original lessees of the Flats the freehold reversion has changed hands several times along with the managing agents. The Applicant landlord acquired the freehold reversion by purchase on 19 October 2018 and was registered as proprietor on 5 December 2018. Following the Applicant's acquisition of the freehold he appointed D&S Property Management ("D&S") as his managing agents.
9. In the meantime there has been a series of disputes between the Respondents and the landlords and their agents for the time being with regard to the payability and reasonableness of service charges levied on the Respondents. These have led to several court and tribunal cases, which are more particularly described in paragraph 37 and subsequent paragraphs below.

The Applicant's case

10. The Applicant says that on or about 26 March 2018, a previous tribunal determined that, with regard to Flats D & H as at 16 September 2015 and with regard to Flats A, C, E & G as at 5 October 2015, there were arrears of Interim Charge and Service Charge. (CHI/29UG/LIS/2016/0020; CHI/29UG/LIS/2016/0022; CHI/29UG/LIS/2016/0023; CHI/29UG/LIS/2016/0034; CHI/29UG/LIS/2016/0030; CHI/29UG/LIS/2016/0035). All six cases were referrals from the county court in respect of the sums claimed for each Flat.

11. On or about 25 February 2019, D & S issued each of the Respondents with a request for payment by 25 March 2019 of the costs stated to have been incurred by the landlord for the time in connection with the enforcement of payment of those arrears by the court and Tribunal proceedings of 2016 to 2018.
12. The Applicant says that the sums demanded are contractually payable by the Respondents by virtue of paragraph 8 of the Fourth Schedule of the Lease which contains a covenant by the Tenant

“To pay all proper and reasonable costs charges and expenses (including solicitors costs and architects and surveyors’ fees incurred by the Landlord for the purposes of or incidental to the preparation service or enforcement (whether by proceedings or otherwise) of.....”

8.3 The payment of any arrears of the Rent Interim Charge or Service Charge....”

13. The Applicant says that the sums demanded by D&S on 25 February 2019 have not been paid and the Applicant accordingly seeks a determination from the Tribunal as to whether an administration charge is payable and if so the amount payable. The sums demanded of Mr Noyes amount to £11,385.28 and the sums demanded of Mr Carpenter amount to £5,783.14. The details are set out below:

Flat	Lessee	Sum demanded
A	Mr D Noyes	£2,368.57
C	Mr D Noyes	£3,005.57
D	Mr D Carpenter	£2,681.57
E	Mr D Noyes	£3,005.57
G	Mr D Noyes	£3,005.57
H	Mr D Carpenter	£3,101.57

14. The Applicant says that all the costs claimed were invoiced to and paid by the landlord for the time being, BM Samuels Finance plc (“BMS”) and demanded at the time from the Respondents. However, he says that in any event the costs were incurred when the person raising the invoice requested payment from BMS and therefore whether or not BMS had paid the sums in question they had been incurred. He relies on the decision of the Upper Tribunal in *OM Property Management Ltd v Burr* [2012] UKUT 2 (LC) as authority for the proposition that a cost is incurred by a landlord when he is invoiced or when the invoice is paid.
15. The sums demanded by the Applicant are made up of the following invoices. The dates are when the person providing the service issued the invoices.

Flat A	Date	Charges	Amount
	11/05/2015	London Debt Collectors Invoice	£120.00
	11/11/2015	London Debt Collectors Invoice	£60.00
	11/12/2015	London Debt Collectors Invoice	£665.00
	10/03/2016	London Debt Collectors Invoice	£264.00
	12/05/2016	HSC Invoice	£38.00
	23/06/2016	HSC Invoice	£198.00
	09/09/2016	TPP – Tribunal costs – 1/6 share	£283.87
	08/02/2017	TPP – Tribunal costs – 1/6 share	£425.00
	19/12/2017	TPP – Tribunal costs – 1/6 share – (Disbursements)	£575.00
	5/01/2017	TPP – Tribunal costs – 1/6 share (Disbursements)	£7.28
	19/03/2018	TPP – Tribunal costs – 1/6 share (Disbursements)	£2.42
			£2,638.57

Flat C	Date	Charges	Amount
	11/05/2015	London Debt Collectors Invoice	£120.00
	16/09/2015	London Debt Collectors Invoice	£120.00
	11/11/2015	London Debt Collectors Invoice	£60.00
	11/12/2015	London Debt Collectors Invoice	£950.00
	10/03/2016	London Debt Collectors Invoice	£264.00
	23/06/2016	HSC Invoice	£198.00
	09/09/2016	TPP – Tribunal costs – 1/6 share	£283.87
	08/02/2017	TPP – Tribunal costs – 1/6 share	£425.00
	19/12/2017	TPP – Tribunal costs – 1/6 share – (Disbursements)	£575.00
	05/01/2017	TPP – Tribunal costs – 1/6 share (Disbursements)	£7.28
	19/03/2018	TPP – Tribunal costs – 1/6 share (Disbursements)	£2.42
			£3,005.57

Flat D	Date	Charges	Amount
	11/05/2015	London Debt Collectors Invoice	£120.00

16/09/2015	London Debt Collectors Invoice	£120.00
16/10/2015	London Debt Collectors Invoice	£60.00
09/11/2015	London Debt Collectors Invoice	£890.00
23/06/2016	HSC Invoice	£198.00
09/09/2016	TPP – Tribunal costs – 1/6 share	£283.87
08/02/2017	TPP – Tribunal costs – 1/6 share	£425.00
19/12/2017	TPP – Tribunal costs – 1/6 share – (Disbursements)	£575.00
05/01/2017	TPP – Tribunal costs – 1/6 share (Disbursements)	£7.28
19/03/2018	TPP – Tribunal costs – 1/6 share (Disbursements)	£2.42
		£2,681.57

Flats E & G	Charges	Amount (including VAT)
11/05/2015	London Debt Collectors Invoice	£120.00
16/09/2015	London Debt Collectors Invoice	£120.00
11/11/2015	London Debt Collectors Invoice	£60.00
11/12/2015	London Debt Collectors Invoice	£950.00
10/03/2016	London Debt Collectors Invoice	£264.00
23/06/2016	HSC Invoice	£198.00
09/09/2016	TPP – Tribunal costs – 1/6 share	£283.87
08/02/2017	TPP – Tribunal costs – 1/6 share	£425.00
19/12/2017	TPP – Tribunal costs – 1/6 share – (Disbursements)	£575.00
05/01/2017	TPP – Tribunal costs – 1/6 share (Disbursements)	£7.28
19/03/2018	TPP – Tribunal costs – 1/6 share (Disbursements)	£2.42
		£3,005.57

Flat H	Charges	Amount
11/05/2015	London Debt Collectors Invoice	£120.00

16/09/2015	London Debt Collectors Invoice	£120.00
16/10/2015	London Debt Collectors Invoice	£60.00
16/10/2015	London Debt Collectors Invoice	£890.00
10/03/2016	London Debt Collectors Invoice	£420.00
23/06/2016	HSC Invoice	£198.00
09/09/2016	TPP – Tribunal costs – 1/6 share	£283.87
08/02/2017	TPP – Tribunal costs – 1/6 share	£425.00
19/12/2017	TPP – Tribunal costs – 1/6 share – (Disbursements)	£575.00
05/01/2017	TPP – Tribunal costs – 1/6 share (Disbursements)	£7.28
19/03/2018	TPP – Tribunal costs – 1/6 share (Disbursements)	£2.42
		£3,101.57

16. The Applicant supplied copies of the relevant invoices as evidence of the costs claimed. The costs all relate to the period leading up to the Tribunal determination of 26 March 2018. The Building was managed by Hurford Salvi Carr Property Management Limited (“HSC”) as managing agents from 1 January 2009 to 31 May 2016, At all material times thereafter it was managed by Trent Park Properties LLP (“TPP”). Costs in connection with the Tribunal proceedings, following the court transfer, were incurred by TPP and invoiced to BMS.
17. In her witness statement, of 25 July 2019, Ms Julie Howard, who is, and at all material times was, employed by HSC, stated that during HSC’s period of management there were continual problems in securing payment of monies requested from the Respondents under the terms of the Lease, despite two Tribunal determinations on 6 June 2013 and 20 May 2014.
18. Ms Howard says that in May 2015 HSC decided to take action to recover outstanding arrears by engaging London Debt Collectors Limited (“LDC”). That firm charged £120 per flat (£100 plus VAT) in respect of the preliminary costs of the referral of the arrears. The actions involved were stated to be HM Land Registry searches of the leasehold titles, liaising with HSC and writing to the lessees. Ms Howards says that these invoices were recharged to the Respondents.
19. LDC also charged £120.00 (all Flats save Flats A and C) for “ additional costs writing to and liaising with lessee and mortgagee as necessary in order to secure payment of the debt.” Ms Howard states that these invoices were also paid by HSC and re invoiced to the Respondent leaseholders. When payment of the arrears was not received, solicitors (Breeze & Wyles Limited) were instructed by HSC to commence proceedings in the county court, which the Applicant submits was a reasonable course of action.

20. Breeze & Wyles' charges in respect of the court proceedings are set out below.

Flat	Fees	Court fee	VAT	Total
A	£670.00	£185.00	£134.00	£989.00
C	£720.00	£410.00	£144.00	£1274.00
D	£450.00	£410.00	£90.00	£950.00
E	£720.00	£410.00	£144.00	£1274.00
G	£720.00	£410.00	£144.00	£1274.00
H	£800.00	£410.00	£160.00	£1370.00
Total	£4,080.00	£2235.00	£816	£7,131.00

21. The invoice of 12 May 2016 is from HSC to Mr Noyes with regard to Flat A and states that it is "To cover the cost of the attached LDC Invoice no 4600." (This invoice from LDC was not included in the bundle).
22. In her witness statement of 25 July 2019 Ms Howard states "I can confirm that Administration Charge Invoices for HSC's period of management were discharged from the monies held on-account from the then Freeholder."
23. The invoice of 23 June 2016 for £198.00 was raised by HSC's in respect of "Costs incurred by the Landlord under clause 8 of the fourth schedule for the purpose or incidental to the preparation service or enforcement of arrears of service charge 1st January to 31st May 2016." The invoice is addressed to "H277- 5-7 Lansdowne Square" and requests payment to HSC.
24. The invoices issued by TPP were in respect of fees for dealing with the First Tier Tribunal proceedings on a time charge basis at an hourly rate of £125 per hour (plus VAT) plus disbursements. The invoices were made up as follows:

Date	Time (hours)	Fee/charge	VAT	Postage costs	Total
09/09/16	11	£1,375.00	£275.00	£53.20	£1,703.20
08/02/17	17	£2,125.00	£425.00		£2,550.00
19/12/17	23	£2,875.00	£575.00		£3,450.00
05/01/17		£7.28			£7.28
19/03/18		£2.42			£2.42
					£7,712.90

25. As part of his case the Applicant supplied time sheets (from TPP) in respect of all the above charges along with a witness statement dated 19 July 2019 from Mr Elliot Esterson, the senior partner of TPP who managed the Building at the time. Mr Esterson says that the time spent on the Tribunal proceedings was charged to the freeholder at £125.00 per hour in accordance with the terms of TPP's management contract of 17 May 2016 with the Landlord. He says that it was based on his previous experience of being involved with the F-tT in service charge applications and being appointed as a manager by the Tribunal under the Landlord and Tenant Act 1987.
26. In his Supplemental Witness Statement of 5 September 2019, Mr Esterson explained that TPP was a small company with two full time property managers and one member of administrative staff. He said that he was the only individual with experience of handling tribunal proceedings and was of the opinion that tasks should not be delegated. Mr Esterson acknowledged that the 2016-18 tribunal proceedings had include matters outside the county court referral but stated that he had considered it prudent to deal with all matters raised by the Respondents given that his instructions were to recover all outstanding arrears.
27. In his first witness statement Mr Esterson produced bank statements, which he says showed payment of the sums claimed in respect of the proceedings and says that this evidenced "that not only did the previous freeholder incur the costs but they were paid." In a Supplemental Witness Statement of 4 September 2019, Mr Esterson states, "Under the agreement between TPP and BM Samuels it was understood, and stated, that TP would "manage a float of your [BM Samuels] funds. As confirmed in my First Witness Statement that (sic) the Administration charges were paid from the funds held on account."
28. In a witness statement dated 5 September 2019, Mr Andrew Samuels, a Director of BMS, says that all the costs incurred by HSC and TPP were incurred on his instructions and were therefore incurred by BMS. He says that "4. For the avoidance of all doubt the incurred expenses which form part of the remaining application have been paid from monies held on account, and if and when sufficient monies were not held on account money is provided by BM Samuels." And "6. For the avoidance of all doubt TPP's invoices have been paid in full."

The Respondents' Case

29. The Respondents submit that it has not been proved that the landlord at the time (i.e. BMS) or the Applicant had incurred the costs now claimed.
30. Without prejudice to that primary submission, the Respondents argue that the charges are not reasonable. They say that the sums claimed relate

to a former freeholder's claim for outstanding service charges which had led to the issue of six County Court claims and thereafter their transfer to the Tribunal. The Respondents submit that the amounts claimed by the then freeholder were in dispute and it was not reasonable, in the light of that dispute, to instruct solicitors to issue six independent debt recovery claims, incurring the costs of such claims and in circumstances where all six claims were transferred to a single Tribunal application. The Respondents contend that the freeholder should have made one single application to the First-tier Tribunal to determine the disputed service charges.

31. The Respondents also make reference to the Tribunal determination of 26 March 2018, where it was stated in the reasons for decision that the case before the Tribunal included years outside the terms of the County Court reference to the Tribunal and that the Tribunal had already made determinations in respect of some of the years in question. The Respondents therefore contend, that in relation to the fees from TPP, some of those costs were unnecessarily expanded.
32. The Respondents further submit that the sums claimed in respect of the initial LDC invoice are unreasonable because a fee of £100 plus £20 VAT to instruct a debt-collecting agent to send a template letter is not a reasonable sum. Finally, the Respondents submit that an hourly rate of £125 was not a reasonable rate to be charged by TPP as managing agent to deal with the Tribunal proceedings. Furthermore, they disputed a number of individual items on the TPP time sheets as having been unreasonably incurred or unreasonable in amount. In his second witness statement of 4 September 2019, Mr Esterson sought to rebut each of these detailed objections.

Discussion

33. The Building known as 5-7 Lansdowne Square, Northfleet, Kent, DA11 9LX, its owners and the Respondent lessees of six of the eight Flats in the Building, do not have a happy history.
34. It would appear that service charges became payable from the beginning of the service charge year 2009. An earlier Tribunal noted that at an early stage after the leases were granted the freehold of the Building came into the possession of BM Samuels Finance Group plc ("BMS") as mortgagee in possession. BMS appointed HSC to manage the property as from 1 January 2009.
35. From the outset the Respondents disputed sums claimed by way of service charges and refused to make payment in whole or in part. This dispute continued and has only recently been settled after a series of court and tribunal hearings. The first of these, with regard to the subject Flats, was in 2013 when the Respondents applied to the (then) Leasehold Valuation Tribunal under section 27A of the 1985 Act for a determination as to the payability of the entirety of the service charges for the years ending 2009 to 2013. (CHI/29UG/LSC/2012/0079).

36. That Tribunal made its determination in two stages. The first was on 6 June 2013, when the Tribunal made determinations on some of the issues raised with a view to the parties seeking to resolve their differences as to the remainder by agreement. That did not happen and the Tribunal (now the First-tier Tribunal) supplemented its earlier decision with a second decision (the two to be read together) of 20 May 2014, when the Tribunal determined the sums payable by way of Service Charge for the years ending 2009 to 2012. On each occasion the landlord, BMS, was represented by HSC. Despite the determinations of the Tribunal, that was not the end of the matter. BMS made further demands in respect of outstanding arrears and when these were not settled in full the stage was set for the next step.
37. That step was the six county court money claims brought by BMS in 2015 and referred by the court to the Tribunal in 2016. By the time of the Tribunal proceedings HSC's contract to manage the Building had been terminated and TPP had been appointed to manage the Building from on or about 24 May 2016. TPP represented BMS in those proceedings, which culminated in the Tribunal's decision of 26 March 2018. That Tribunal made a determination as to the actual service charge costs payable by the Respondents for the years 2009 to 2014 inclusive and a determination as to the budgeted charges for 2015 (noting that the budgeted costs for that year were outside the court's referral in respect of Flats D & H). The Tribunal also noted that the earlier tribunal had already made determinations for the years 2009 to 2012 (save the insurance costs in 2012) and therefore it would only make determinations in respect of the insurance costs for 2012 and service charge years 2013 (excluding the reserve fund which had been dealt with by the 2014 decision) to 2015. The net result was that the Tribunal reduced the sums payable by the Respondents.
38. On 19 October 2018, Mr Steven Newman, who is a solicitor, acquired the freehold interest in the Building and was duly registered at HM Land Registry as freehold proprietor of the Building on 5 December 2018. Mr Newman appointed D & S Property Management ("D&S") as his managing agents. On 7 December 2018, D&S issued Interim Charge notices to the Respondents, which they disputed. That led to further litigation by way of a defended Application to the Tribunal by Mr Newman, on 21 January 2019, in which he sought a determination from the Tribunal as to the payability of the Interim Charges for 2019 (CHI/29UG/LIS/2019/0013).
39. By a decision made on 24 May 2019 and amended on 12 June 2019, under Rule 50 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber Rules 2013, the Tribunal determined that the quarterly sums payable by the Respondents by way of Interim (Service) Charges on 25 December 2018 were those demanded in the Interim Charge demands of 7 December 2018. The Tribunal also determined the same sums to be payable by the Respondents by way of Interim Charges on each of the March, June and September quarter days in 2019. In the same decision the Tribunal

rejected an application by the Respondents for an order under paragraph 5A of Schedule 11 to the 2002 Act.

40. In the meantime Mr Newman had applied to the Tribunal on 26 March 2019 for a determination under section 27A of the 1985 Act as to the payability of service charges for the years 2015 to 2018 inclusive (CHI/29UG/LIS/2019/0036). The Tribunal listed this Application for determination, but on 6 September 2019 the Tribunal consented to the withdrawal of the Application, the parties having reached an agreement with regard to service charges due as at 31 December 2018. The parties agreed that their agreement and the withdrawal did not affect the Applicant's right to seek to recover the costs of the Section 27A Application under the terms of the Lease.
41. Together with the section 27A Application of 26 March 2019, the Applicant made the present application, under paragraph 5 of Schedule 11 to the 2002 Act. The Respondents resist the Application and, by an Application dated 19 July 2019, seek an order under paragraph 5A of Schedule 11 to the 2002 Act. The Applicant resists the Respondents' paragraph 5A Application.
42. Finally, Mr Newman subsequently made an application to the Tribunal on 4 July 2019, under paragraph 5 of Schedule 11 to the 2002 Act, for a determination that costs demanded by the Applicant under paragraph 8 of the Fourth Schedule to the Lease were payable by the Respondents by way of an administration charge. Those costs were costs that he had allegedly incurred in connection with his section 27A Application of 21 January 2019. The Tribunal's determination in respect of that Application is issued along with the Tribunal's decision in the case of the present Application.
43. Paragraph 1 of Schedule 11 to the 2002 Act provides (so far as relevant) that

“(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 –
.....

(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.”
44. Paragraph 1(3) provides that “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.”

45. Paragraph 2 of Schedule 11 to the 2002 Act provides that “a variable administration charge is payable only to the extent that the amount of the charge is reasonable.”
46. Paragraph 5 (1) of Schedule 11 to the 2002 Act provides that an application may be made to the 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 (d) the manner in which it is payable.”
47. Paragraph 8 of the Fourth Schedule of the Lease contains a covenant by the tenant

 “To pay all proper and reasonable costs charges and expenses (including solicitors costs and architects and surveyors’ fees incurred by the Landlord for the purposes of or incidental to the preparation service or enforcement (whether by proceedings or otherwise) of.....

 8.3 The payment of any arrears of the Rent Interim Charge or Service Charge....”
48. Section 23 of the Landlord and Tenant Covenants Act 1995 provides that “(1) where as a result of an assignment a person becomes by virtue of this Act, bound by or entitled to the benefit of a covenant he shall not by virtue of this Act have any liability or rights under the covenant in relation to any time before the assignment. (2) sub-section (1) does not preclude any such rights being expressly assigned to the person in question.”
49. The first issue therefore is whether “the Landlord” incurred the charges claimed for the purposes of paragraph 8 of the Fourth Schedule of the Lease. The Applicant certainly did not incur the charges because he only became the registered proprietor, and therefore the Landlord on 5 December 2018.
50. The Applicant acknowledges this because, in his demands of 25 February 2019, he says that the costs claimed were incurred by “the Landlord of the time being.” Furthermore, in his Reply of 26 July 2019 to the Respondents’ Statement of Case, the Applicant states “...it is confirmed that the monies requested under the requests for payment dated 25th February 2019 were incurred by the previous freeholder, with the right to recover the same having been assigned to the Applicant.”
51. When asked by the Tribunal for evidence of the assignment, the Applicant produced a copy of an assignment of service charge and administration charge arrears by Crossway Enterprises Limited (described as the Former Landlord) to Mr Newman (described as the Current Landlord). The terms of the assignment, which is dated 22 February 2019, were that Mr Newman would pursue the arrears from the Respondents, if necessary by applications to the Tribunal, and pay all recovered charges to Crossway

Enterprises Limited less any monies which should have been held on reserve as at 31 December 2018 with regard to Flats B & F.

52. A certified Land Registry Office copy, produced by the Applicant at the request of the Tribunal, showed that the freehold was vested in Crossways Enterprises Limited on 21 November 2016. The only administration charges that were made after that date were those raised by TPP on 5 January 2017, 19 December 2017, and 19 March 2018. It follows that the Applicant's claim that administration charges are payable to him is dependent on BMS having assigned to Crossways Enterprises Limited the benefit of the covenant in paragraph 8 of the Fourth Schedule of the Lease in respect of the charges which BMS allegedly incurred.
53. The Tribunal has not seen a copy of such an assignment, but even if one were to be produced, the issue of who is able to enforce payment of an administration charge remains secondary to the primary issue of whether an administration charge is "payable" at all. A charge is only payable if it has arisen under the terms of the Lease. Paragraph 8 of the Fourth Schedule of the Lease contains a covenant by the tenant to pay charges that satisfy the requirements of that paragraph, which have been "incurred by the Landlord" for the purposes set out therein.
54. Thus we return to the issue of whether the Landlord (at the time) "incurred" the disputed costs. The Applicant submits that BMS settled the costs in question. The Respondents submit that there is no evidence of HSC having invoiced BMS or that BMS had paid any such invoices. In response the Applicant stated, in his Reply to the Applicant's Supplemental Statement of Case, that in accordance with the terms of the management agreement between the Landlord and HSC, the Landlord instructed HSC to take the necessary enforcement action. He also submitted that the costs associated with that action were taken from an expenses fund provided by the Landlord to the agent and supplemented from time to time as necessary to pay the costs. This was supported by Mr Andrew Samuels' witness statement.
55. Furthermore, with regard to costs that arose during HSC's period of management, Ms Howard states, in her witness statement of 25 July 2019, "I can confirm that Administration Charge Invoices for HSC's period of management were discharged from the monies held on-account from the then Freeholder." In other words she says that the persons who raised the invoices were paid by HSC from monies provided by BMS and held on account for them by the agents.
56. HSC was engaged by the Landlord to manage the Building (and the other buildings on the site of the development) from 1 January 2009 to around 23 May 2016. The basic fee under the management contract (supplied by the Applicant) covered the obligations on the part of HSC set out in clause 1.2 of the agreement. Clause 1.2.19 – headed "- Legal proceedings-" provided "where legal action is required to enforce or comply with any rights or obligations owed to the Client, to notify the Client as soon as practical and on receiving the Client's instructions to do so to instruct the

Clients solicitors (or if none have been notified to the Agent other solicitors believed by the Agent to have the appropriate expertise to act as they may advise.” Attending at courts or tribunals was not covered and would require an additional fee (clause 2.1.3).

57. Clause 4.2 of the agreement headed – “Float for expenditure - ” contained an obligation on the part of the Client “To pay the Agent the amount of the Float within seven days of this agreement and to pay any further sums requested by the Agent as necessary to maintain the amount of the Float held by the Agent.” The Float is stated to be £1,000.
58. It seems clear therefore that the Float was meant to be a sum not exceeding £1,000 and this would very likely cover relatively small day to day expenses. The Tribunal is not satisfied that the evidence provided by the Applicant is sufficient to demonstrate that the Landlord at the time incurred the costs charged to HSC by LDC. There are no invoices from HLC to the Landlord as opposed to invoices from HLC to the Respondents. The Applicant says that the costs were settled by HSC from funds provided by the Landlord but no documentary evidence of such funds or payments, save for the expenses Float, has been provided.
59. This brings us to the charges raised by TPP in respect of the 2016-2018 Tribunal proceedings. The Landlord signed a management agreement with TPP on 22 May 2016. The services to be provided including “Managing a float of your funds/or your bank account for payment of day to day expenditure, within our agreed expenditure authority limit.” The agreement provided “ If we are involved in any LVT or First Tier Tribunal action we will need to charge for our time spent dealing with this at an hourly rate of £125 per hour (plus VAT).”
60. It is clear that TPP invoiced BMS in respect of these fees, although as noted above, the Landlord from 21 November 2016 appears to have been Crossways Enterprises Limited. The invoices have been supplied. They are also marked as “paid by transfer”. Thus it seems clear that TPP has been paid. However, it is not clearly established that the Landlord settled the payments. The bank details provided by the Applicant, although headed Lansdowne Square 5 to 7, appear to relate to a service charge account with Barclays that covers other buildings within the development (e.g. 6-8 Lansdowne Square). Furthermore, as submitted by the Respondents, the transfers in respect of the TPP invoices appear to have come from this fund. This does not evidence payment to TPP by “the Landlord.” If this is a service charge fund it is a trust fund. There is no evidence of the Landlord having reimbursed this account. The Applicant says that the management contract with TPP provided for a Float to be provided by the Landlord but this relates to day to day expenses. Furthermore, there is no documentary evidence relating to payments to and from the same.
61. At a late stage in the submissions the Applicant submitted that it did not matter whether the Landlord had paid the costs in question because it was sufficient that it had incurred a liability to pay them. The Applicant relies on the decision of the Upper Tribunal in *OM Property Management Ltd*

v Burr [2012] UKUT 2 (LC) (accepted as correct by the Court of Appeal at [2013] EWCA Civ. 479) as authority for the proposition that a cost is incurred by a landlord when he is invoiced or when the invoice is paid. The Tribunal does not accept that the decision is applicable to the circumstances of the present case.

62. The *Burr* case was about the interpretation of the word “incurred” for the purposes of Section 20B of the 1985 Act which prevents a landlord from recovering service charges where the demand was made more than 18 months after the relevant costs were incurred. The case was about whether time began to run when the services were supplied or when the landlord was invoiced or paid. The Upper Tribunal decided that “incurred” meant either when the invoice was issued or paid. It did not matter which in that case because the invoice was both issued and paid within the 18 month period.
63. In the present case we are concerned with the meaning of the word “incurred: for the purposes of paragraph 8 of the Fourth Schedule of the Lease. This creates a liability on the part of the tenant to pay costs incurred by the landlord for the purposes set out in paragraph 8. A charge arising under that provision is an administration charge. The Tribunal considers that the proper meaning of the word incurred in this context is that the Landlord had paid the costs. The charge could then be levied on the Tenant. If the Applicant’s interpretation were correct it would mean that the clause would permit the Landlord to recover charges from a Tenant to reimburse him for costs that he had never paid. This cannot be right. The Tribunal therefore determines that for the purposes of clause 8 the tenant’s liability would only arise when a demand was made in respect of costs actually paid, that is to say were incurred, by the landlord.
64. That is sufficient to dispose of this Application. However, even had the charges been incurred the Tribunal would have decided that the sums claimed were not reasonable. Whilst it may have been appropriate for the Landlord via its agents to engage debt collectors and solicitors in order to recover outstanding service charges, the six flats were held by two tenants, one having four flats and the other the remaining two flats. The leases are identical and it is a straightforward matter to issue a money claim for sums demanded as notified by the agents to the debt collectors and solicitors. There are only two lessees involved and they have been the tenants throughout since the leases were granted. Two claims would have sufficed.
65. The Tribunal therefore considers that the sums charged by LDC for their services and by Breeze & Wyles Solicitors were unreasonable and excessive. Furthermore, the claims before the 2016-18 tribunal covered years already determined by the Tribunal of 2013-14, creating an unnecessary duplication of time and cost. With regard to the Tribunal proceedings, the sum charged by TPP was accordingly excessive and unreasonable. The Tribunal agrees that some of the costs incurred were of a routine or administrative nature or were not properly chargeable having been caused by lack of co-operation from the former agents.

66. The charges by LDC for writing standard letters to the Respondents and their mortgagees on two occasions amount to £1,100 plus VAT. This sum is unreasonable. The letters are, as the Respondents submit, template letters and the necessary information will have been provided by HSC as managing agents. The Tribunal considers that a total charge of £250 plus VAT (£300) was reasonable, being apportioned £180 to Mr Noyes and £120 to Mr Carpenter on a three fifths/two fifth basis to reflect what the Tribunal considers to be an equitable apportionment.
67. With regard to the legal charges of £4,080.00 plus VAT (£4,896.00) raised by Breeze & Wyles, the Tribunal has no details of time spent but having regard to the tasks undertaken and doing the best it can with the information available the Tribunal considers that had the claims been consolidated into two claims the sums reasonably payable would have been half of the fees claimed, being £2,040.00 plus VAT (£2,448 say £2450) being apportioned on the same basis as to £1500 to Mr Noyes and £950 to Mr Carpenter and the appropriate court issue fees for two such claims.
68. The invoice for £38.00 of 12 May 2016 (Flat A) refers to an attached LDC invoice but the invoice referred to is missing and accordingly the Tribunal would not have allowed this sum as reasonable.
69. The invoice of 23 June 2016 for £198.00 (issued in respect of each Flat – total £1,188.00) was issued in respect of “Costs incurred by the Landlord under clause 8 of the fourth schedule for the purpose or incidental to the preparation service or enforcement of arrears of service charge 1st January to 31st May 2016.” It is raised by HSC and was for 3 hours work at £55 per hour (which was the Property Manager’s charge rate under HSC’s management contract). It is not clear why 18 hours work was required by HSC in this matter and the Tribunal would have needed more evidence as to what was involved in order to have considered the charge to be reasonable.
70. The sums calculated as due by the Tribunal in its March 2018 determination came to £20,282.44. This is no small sum. However, it included court costs, ground rent, interest and administration charges none of which was part of the court referral. To spend £7,7703 with TPP to represent the landlord at the Tribunal proceedings, having regard to the costs already spent on the court proceedings, was not proportionate especially when one has regard to the fact that representations were made by TPP on matters that were not part of the court transfer and on matters which had already been determined by the 2014 Tribunal. The Tribunal would therefore have considered a reasonable fee to have been in the region of £4,000 plus VAT attributable to Mr Noyes as to £2,400 and to Mr Carpenter as to £1,600 (in proportion to their Flat ownerships).

The paragraph 5A Application

71. Because the Respondents have succeeded in the present case the Tribunal makes an order in favour of the Respondents under paragraph 5A of the

2002 Act extinguishing any liability that might arise under the Lease in respect of litigation costs incurred in connection with these proceedings with regard to the administration charges claimed.

RIGHT OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Martin Davey
Chairman