UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – ***jurisdiction of FTT to consider payability of sums drawn from reserve account – whether justiciable only in court proceedings because involving an allegation of breach of trust – recoverability of costs incurred in proceedings over control of corporate landlord and in disputes between landlord and individual leaseholders – payability of corporate accountancy fees – whether fees of managing agent unreasonable – sections 19 and 27A, Landlord and Tenant Act 1985 – appeal allowed in part***

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MRS MAHBOBEH ESHRAGHI (1)
MR SERGE TOUATI (2)
MR JOHN FREEDMAN (3)

Appellants

and

7/9 AVENUE ROAD (LONDON HOUSE) LTD **Respondent**

Re: 19 London House,
7/9 Avenue Road,
London NW8

Martin Rodger QC, Deputy Chamber President

17 March 2020

Royal Courts of Justice

Mr Soroush Eshraghi for the appellants
Mr Jonathan Upton, instructed by Bolt Burdon, Solicitors, for the respondents

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36; [2015] A.C. 1619

Assethold Limited v Watts [2014] UKUT 537 (LC)

Bretby Hall Management Company Limited v Pratt [2017] UKUT 70 (LC)

Chiswick Village Residents Limited v Southey [2019] UKUT 148 (LC)

Fairbairn v Etal Court Maintenance Limited [2015] UKUT 639 (LC)

Iperion Investment Corporation v Broadwalk House Residents Ltd [1995] 2 EGLR 47

Solar Beta Management Co Ltd v Akindele [2014] UKUT 416 (LC)

Solitaire Property Management Company Limited v Holden & Others [2012] UKUT 86 (LC)

Union Pension Trustees v Slavin [2015] UKUT 103 (LC)

Introduction

1. This appeal is against a decision of the First-tier Tribunal (Property Chamber) ("the FTT") made on 16 May 2018. The FTT determined a number of questions arising out of an application under section 27A, Landlord and Tenant Act 1985 made by the appellants, who are the current or former leaseholders of three flats in a purpose-built block of flats in St John's Wood. The respondent to the application, and to this appeal, is the landlord of the building, 7/9 Avenue Road (London House) Ltd ("the Company"), a company owned by the leaseholders of all of the flats in the building except the first appellant, Mrs Eshraghi.

2. The leaseholders' application concerned service charges payable in 2016 and 2017 and focussed on three main areas of concern: the costs of litigation between the Company and individual leaseholders, which had been met from money already collected by the Company and held in a service charge reserve account; the costs of professional services provided to the Company by accountants and managing agents; and consultation in respect of proposed work to the common parts and lift. The leaseholders also sought the protection of section 20C, 1985 Act in relation to the Company's costs of responding to their application.

3. This appeal is concerned only with the first and second of those matters, and with the appellants' application under section 20C.

4. Permission to appeal was granted by the Tribunal, having been refused by the FTT. Because of the absence of almost any relevant findings of fact in the FTT's decision the Tribunal directed that the appeal would be conducted as a rehearing of the original application so far as it related to the issues for which permission had been granted. Almost all of the relevant evidence was in documentary form, but it was supplemented by two witness statements by Mrs Eshraghi (the first of which had been adduced before the FTT) and a witness statement and some brief oral evidence by the Company's managing agent, Mr Jon Cann of Faraday Property Management Ltd ("Faraday").

5. At the hearing of the appeal all three appellants were represented by Mr Soroush Eshraghi, the husband of the first appellant. The Company was represented by Mr Jonathan Upton. I am grateful to them both for their assistance.

The background facts

6. 7/9 Avenue Road comprises 54 flats. The appellants each own, or owned, the lease of one of the flats. Mrs Eshraghi holds the lease of Flat 19, Mr Touati (together with Ms Monica Sakhai, who is not a party to the proceedings) is the former leaseholder of Flat 15, and Mr Freedman is the former leaseholder of Flat 50.

7. The lease of Flat 19 is the earliest of the three to have been granted and was the only one not to have been granted by the Company itself. The Company is wholly owned by leaseholders of flats in the block, and their leases include a provision requiring any assignee to take a transfer of a share in the Company. I was told by Mr Upton that all

leaseholders with the exception of Mrs Eshraghi are members of the Company, and her lease of Flat 19 omits the share transfer requirement.

The leases

8. Each of the appellants' leases was granted in substantially the same form in the early 1970s, and each is for a term of 99 years. By clause 2(1) the lessee covenanted to pay a fixed proportion of the expenses incurred by the lessor in the repair maintenance renewal and insurance of the building and the provision of services and other heads of expenditure in the Second Schedule.

9. The heads of expenditure listed in the Second Schedule include the following, at paragraph 5:

> "The total direct and indirect cost of employing such contractors agents or servants as the Lessor shall think necessary in and about the performance of the Lessor's obligations hereunder or in carrying out any improvement to the building or in providing any service for the benefit of the tenants or occupiers thereof not otherwise covenanted or provided for hereunder but so that in the employment of any agent to manage the building on its behalf the Lessor shall employ only a Chartered Practitioner."

10. Paragraph 6 includes the fees of any managing agent employed for the collection of rents and general management of the building, while paragraph 7 refers to fees incurred in respect of accounts and audits for the purpose of the service charge. Staff wages are covered by paragraph 8. Paragraph 11, which the FTT found to be the critical provision, allows the following expenditure to be recouped through the service charge:

> "The cost of providing or maintaining any other service matter or thing which the Lessor may in its absolute discretion decide shall be proper and reasonable to be provided done or carried out for the benefit of the building or the occupiers thereof as a whole and/or in the interests of good estate management."

11. The lease includes two covenants by the leaseholder which Mr Eshraghi relied on in argument. By clause 2(9)(a) the lessee covenanted to pay all costs charges and expenses (including legal costs and surveyors fees) incurred by the lessor incidental to the preparation and service of a notice, or in contemplation of proceedings, under section 146, Law of Property Act 1925, notwithstanding that forfeiture may be avoided otherwise than by relief granted by the Court, and by clause 2(9)(b) the lessee agreed to pay all expenses (including legal costs and surveyors fees) of and incidental to the service of any notice relating to disrepair of the demised premises.

The High Court litigation

12. The background to the service charge dispute is a quite separate dispute over the appointment of directors to the board of the Company which resulted in High Court litigation. At the Company's AGM in September 2016 Mrs Eshraghi and four other leaseholders offered themselves for election as directors. By the end of the meeting many of those present thought that a new board of directors had been elected, including Mrs Eshraghi and the new directors. Thereafter they acted on that understanding by trying to take management decisions relating to works of refurbishment and repair to the common parts and lifts at the block, by giving instructions to employees, and by countermanding instructions given by Faraday, the Company's managing agents.

13. Shortly after the AGM the original board of directors challenged the validity of the election and, within a month, had obtained an injunction to restrain the new directors from acting in that capacity pending the hearing of a claim that the procedure leading to their appointment had been defective. At a trial in the High Court in October 2017 the original board succeeded in their claim and a declaration was granted that Mrs Eshraghi was not a director of the Company and ordering her not to hold herself out as such (the other new directors had conceded that relief before the trial). Mrs Eshraghi and her husband were ordered to pay the Company's costs of the proceedings. The Court of Appeal subsequently refused permission to appeal.

14. The application under section 27A, 1985 Act which is the subject of this appeal was issued on 28 September 2017, a few weeks before the trial in the High Court and before the end of the Company's 2017 accounting period. It is clear from its terms that one purpose of the application was to prevent the Company from funding the High Court proceedings from service charge contributions. The appellants sought a determination that use of the service charge reserve fund to meet the Company's costs of the litigation was "unauthorised".

The Flat 48 litigation

15. The Company also incurred costs in a separate dispute with Mrs Hoffman, the leaseholder of a penthouse flat, Flat 48, concerned the repair of a balustrade surrounding the balcony terrace demised to her. The Company was responsible for keeping the balustrade in repair. According to the pleadings in subsequent litigation, by February 2013 at the latest the Company was on notice that remedial work was required. In October 2014 a structural engineer appointed by the then managing agents produced a report advising that the balustrade was a serious safety risk and that access to the balcony ought to be restricted. In December 2014 the Company decided to carry out the necessary work of repair and this was communicated to Mrs Hoffman. A specification was prepared in January 2015.

16. On 22 January 2015 Mr Cann's firm, Faradays, was appointed as new managing agent. Mr Cann obtained the advice of a second engineer, Olivers, who took a different view and concluded that the balustrade complied with current building regulation requirements and that no remedial structural work was required. Mrs Hoffmann responded to this change of tack by commencing proceedings in the County Court for specific performance of the Company's repairing obligations and damages.

17. In its Defence and Counterclaim the Company denied that the balustrade was in disrepair and counterclaimed for service charge arrears. The proceedings were settled by way of a Tomlin Order on 15 November 2017 which provided for the appointment of a single joint expert to inspect the balustrade and to consider whether it was in the condition required by the Company's repairing covenant. If it was not, the expert was to advise on remedial work which the Company would then carry out. The parties agreed to share the cost of the expert's report in equal amounts. Irrespective of the outcome of the inspection or the need for remedial work Mrs Hoffmann's claim for damages was to be dismissed but the Company was to pay £20,000 towards her costs. Mrs Hoffman agreed to pay the service charges which she had been withholding, amounting to £13,475.

18. The jointly instructed expert duly inspected the balustrade and found it to be in a state of disrepair. On 16 February 2018 Mr Cann informed Mr Eshraghi that the Company now accepted that repairs were required to strengthen the balustrade and the necessary remedial works were subsequently carried out.

The Flat 50 litigation

19. A third set of legal costs were incurred in proceedings between the Company and the third appellant, Mr Freedman, to recover service charge arrears.

20. In April 2015 the Company issued proceedings in the County Court against Mr Freedman claiming arrears of service charges and ground rent in the sum of £29,337 (plus interest). In his Defence Mr Freedman alleged that the Company was not entitled to recover a contribution towards a reserve fund. Mr Freedman had previously argued the same point in an earlier dispute about service charges which had been determined by a leasehold valuation tribunal in 2012. The LVT concluded that Mr Freedman was liable under the terms of his lease to pay a contribution to a reserve fund.

21. The Company applied successfully to strike out those parts of Mr Freedman's defence which repeated the case he had run unsuccessfully before the LVT in 2012 and an order to that effect was made on 27 October 2015. The remaining issues in the case were transferred to the FTT.

22. In March 2016 the parties attended a mediation and reached agreement. Mr Freedman admitted that he owed £26,000.00 in service charges and administration charges and the Company agreed to waive its entitlement to interest on the arrears. The matter returned to the Court where, on 14 December 2016, judgment was entered in the Company's favour for the agreed sum and Mr Freedman was ordered to pay its costs on the indemnity basis. These were quantified on 31 March 2017 in the sum of £16,244.

The treatment of the Company's expenditure on litigation and professional fees

23. The annual service charge accounts prepared on behalf of the company record service charge income and expenditure for the year and, separately, an account headed "reserve fund for future maintenance and renewal".

24. In the 2016 service charge year £78,247.00 was defrayed from the service charge reserve fund on legal fees incurred in the High Court proceedings against Mrs Eshraghi and others. All of the money held in the reserve account had been demanded and collected as service charges. The legal fees in the High Court litigation were not included in the estimated expenditure and they do not appear as an item of expenditure in the service charge accounts for 2016 or 2017.

25. In the 2016 service charge year legal fees of £6,085 were included in the service charge accounts. This amount included £3,848.84 in relation to the dispute over Flat 48 and a further £2,236.80 in relation to the dispute over Flat 50.

26. The service charge account for 2017 included legal and professional fees of only £396.00 which I was told did not relate to the dispute over Flats 48 or 50. Instead, £33,304 was drawn from the service charge reserve fund to meet the legal fees incurred in that year in the dispute with Mrs Hoffman over the balcony of Flat 48.

27. The further sum of £24,957 was taken from the reserve account to cover expenditure recorded as "FTT dispute – flats 19 & 50". The costs of the proceedings concerning Flat 50 payable by Mr Freedman were assessed at £16,244 and in his skeleton argument Mr Upton informed me that those costs had largely been recovered from Mr Freedman's mortgagee (which eventually took possession of the flat). Despite that statement, which I do not doubt, no credit appears in the 2017 accounts which were prepared on 6 June 2018. A credit does appear in respect of the sum of £116,900 recovered from Mr and Mrs Eshraghi in respect of the costs of the High Court proceedings after the end of the service charge year.

28. The appellants challenge an item included in the service charge accounts described as "audit fee & trust tax fee" which totalled £12,430.00 in 2016 and £2,208 in 2017. They suggested that, at least for 2016, this was a combined fee for preparing the Company's "corporate account" as well as the service charge account.

29. The Company accepted that the audit fees in 2016 or 2017 include an element of work for auditing the company's accounts (as opposed to the service charge accounts). Before the FTT the Company conceded that £193 of the 2016 fee was irrecoverable as it was in respect of the Company's secretarial costs. In its statement of case for the appeal it admitted that a further £5,042 of the costs charged to the service charge in 2016 and 2017 related to company matters which were not recoverable as a service charge. This sum was said to be an aggregation of the cost of preparing annual returns, statutory accounts, other company secretarial matters and costs of an investigation into the misallocation of one share. In his skeleton argument for the appeal Mr Upton sought to withdraw this concession.

The FTT's decision

30. The FTT recorded at paragraph [8] that the appellant's case concerning the costs of the High Court litigation was that during 2016 the respondent had not been entitled to charge £82,561.79 to the service charge account in respect of costs of what the FTT called "a

dispute within the board of directors". The FTT did not make any findings of fact about the subject matter of the dispute, but it directed itself that it was bound by *Solitaire Property Management Co Ltd v Holden* [2012] UKUT 86 (LC), in which this Tribunal held that the FTT has no jurisdiction to consider an allegation of breach of trust. At paragraphs [45]-[46] the FTT decided that the issue raised by the appellant was not within its jurisdiction because it involved "a breach of trust enquiry, not an enquiry as to the payability of a service charge". It explained:

> "The challenge to the use of the reserve fund is not a challenge as to the payability of any particular service charge item or items in any one or more years. Instead, the challenge is whether the use to which reserve fund monies have been put is an appropriate use of those monies."

31. The FTT made no findings of fact about the subject matter of the disputes between the respondent and Mrs Hoffman and Mr Freedman (nor could it have done, since no evidence was provided by the Company explaining the disputes). It accepted Mr Cann's evidence that the costs of £4,365.72 and £3,683.34 which were in issue related "to a claim against the leaseholder of Flat 48 in relation to a balustrade" and to "a claim against the leaseholder of Flat 50 to recover a service charge arrears". The respondent's case was that the costs were recoverable pursuant to paragraphs 5 and 11 of the Second Schedule to the lease. After reviewing a number of authorities, the FTT concluded at paragraph [58] that "the recovery of these legal fees would in our view fall within what a reasonable person would have understood the parties to mean when employing the words used in paragraph 11".

32. As for costs relating to the running of the respondent company, the FTT noted that the respondent conceded that £193 was not recoverable through the service charge in respect of company secretarial costs, but found that there was no evidence that any other item included in the service charge accounts related to the running of the company.

33. The final item of relevance to the issues in this appeal concerned the appellants' challenges to the charges of Faraday, the new managing agents. The FTT rejected a complaint of mismanagement at paragraph [69]. It dealt with the appellants' complaint that the agents' fee included a charge relating to managing the affairs of the company at paragraph [70], describing the issue as "whether the management fee itself has been reasonable". It concluded that the appellants had produced no evidence that the fee was unreasonably high or that the standard of management was poor and therefore the challenge failed.

34. As the appellants had been unsuccessful on all issues, except in relation to the sum of £193 conceded by the respondent, the FTT decided that it was not appropriate to make an order under section 20C which would have relieved the appellants from any responsibility to contribute to the costs of the proceedings through the service charge.

The issues in the appeal

35. The Tribunal gave permission to appeal on four issues:

(1) Whether the appellants' challenge to the use of £82,561.79 from the service charge reserve fund to meet the costs of the High Court litigation raised any question within the scope of the FTT's jurisdiction under section 27A, 1985 Act.

(2) Whether the legal costs incurred in the disputes with the leaseholders of Flat 48 and Flat 50 were recoverable through the service charge.

(3) Whether the FTT had dealt adequately with the appellants' case that the respondent used the service charge account to meet corporate accountancy costs, which it had dismissed due to lack of evidence. In particular, whether the inclusion in the accounts of a single item for accountancy fees described as "audit fee and trust tax fee" and covering both service charge matters and corporate accounting matters called for an explanation from the respondent, rather than evidence from the appellants.

(4) Whether the FTT dealt adequately with the appellants' case concerning the managing agents' fees, which was based on a comparison between the charges by Faraday and those of the previous managing agent which the FTT did not address, relying instead on the absence of evidence that the charges were unreasonably high. It is arguable that the FTT overlooked the evidence or omitted to give sufficient reasons for its conclusion.

Issue 1: Did the FTT have jurisdiction to consider whether the costs of the High Court proceedings were payable out of the service charge reserve fund?

36. For the purpose of the 1985 Act, section 18(1) defines "service charge" as "an amount payable by a tenant … which is payable, directly or indirectly, for services … and … the whole or part of which varies or may vary according to the relevant costs". Section 18(2) defines "relevant costs" as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord … in connection with the matters for which the service charge is payable."

37. Under section 27A(1), 1985 Act an application may be made to the FTT "for a determination whether a service charge is payable" and, if it is, as to the person by whom it is payable, the amount which is payable, the date at which it is payable and other such details. Although the language of section 27A(1), and in particular the question "whether a service charge is payable" might suggest that it is concerned only with sums which have not yet been paid, it is clear from section 27A(2) and (5) that it applies also to payments which have already been made.

38. Section 27A(3), 1985 Act permits an application to be made to the FTT for a determination whether, if costs were incurred, a service charge would be payable.

39. It is also relevant to refer to section 42, Landlord and Tenant Act 1987, which provides for service charge contributions to be held on trust by the landlord or other person to whom they are payable to defray costs incurred in connection with the matters for which the relevant service charges were payable and, subject to that, on trust for the persons who are the contributing tenants for the time being.

40. The appellants' application to the FTT alleged that the respondent had been charging its legal costs in relation to the High Court proceedings to the service charge account, and that in 2016 the sum charged for that purpose had been £82,561. The appellants said that there was special need for urgency in determining their application because further substantial sums were about to be diverted from the reserve account to prepare for the forthcoming trial. They asserted that "the Lease does not permit such costs to be recovered from the lessees as service charges" and asked for a determination that the respondent's litigation costs "are not recoverable from the applicant and the lessees as service charges under the lease."

41. The basis of the FTT's conclusion that it had no jurisdiction to consider this aspect of the application was the decision of the Tribunal in *Solitaire*. In that case the terms of the leases of flats in a block entitled the landlord to collect contributions towards a reserve fund to meet the cost of major repairs. The reserve was to be held on trust and funds withdrawn from it to meet the expenses referred to in the charging provision or to meet any "temporary deficiency" in the money available to fund current expenditure. At a time when the management company responsible for providing services was in dispute with leaseholders, the landlord drew funds from the reserve to meet the running costs of the building. The dispute led eventually to the appointment of a new manager by the LVT and an application under section 27A, 1985 Act for a determination of sums payable by the leaseholders in respect of the period before his appointment.

42. The LVT was satisfied that the sums collected for the reserve fund had been reasonable, but held that money taken from the reserve ought not to have been used to meet current running costs. It appreciated that it had no power to order reimbursement, but considered that it had jurisdiction under section 27A to determine that the sums which had been in the reserve fund should be treated as a service charge which the landlord was now liable to pay to the tribunal appointed manager.

43. The LVT's decision was reversed on appeal by this Tribunal (HHJ Huskinson). The LVT had not considered the reserve funds position for the purpose of deciding a question arising under Section 27A as to how much was payable as a service charge in any given year. The LVT had been concerned instead with an entirely separate consideration as to whether the funds held in trust by the appellants had been wrongly depleted by them and whether they should in consequence make good to the new manager any monies wrongly used from the reserve funds. That question, the Tribunal found, "was separate from and did not involve consideration of any question arising under Section 27A as to how much was payable by any tenant by way of service charges in any particular service charge year."

44. Mr Upton submitted that in this case the FTT had been correct to conclude that it had no jurisdiction to determine any question concerning the use of the reserve fund to meet the costs of the High Court litigation. The application was not in respect of an amount of money payable by the leaseholders. In order to be "an amount payable by a tenant" (and therefore a "service charge" within the meaning of section 18(1), 1985 Act), the amount would have had to be included in the respondent's estimated expenditure or be an actual cost shown in the final accounts in respect of which the leaseholders were liable to contribute. The litigation costs had not been included in the demands for half-yearly instalments to meet the respondent's estimated expenditure, nor had they been included in

the expenditure certified at the end of an accounting period. The expenditure was not, therefore, a service charge payable by the tenant.

45. Mr Upton acknowledged that the money held in the reserve account had been demanded and collected as service charges, but pointed out that the appellants did not challenge whether the contributions to the reserve fund were payable. Their challenge related only to whether the reserve funds held by the respondent had been wrongly depleted. That was an allegation of breach of trust which the FTT had no jurisdiction to entertain.

46. On behalf of the appellants Mr Eshraghi referred to the decision of the Tribunal in *Cannon v 38 Lambs Conduit LLP* [2016] UKUT 371 (LC) concerning the effect of a landlord's failure to comply with section 47, Landlord and Tenant Act 1987 (which requires that certain information be provided with any demand for service charges). It was argued by the tenant that the FTT in that case had lacked jurisdiction to decide questions about the recoverability of legal costs when those costs had not yet been properly demanded as a service charge. In rejecting that submission, the Tribunal (HHJ Bridge) emphasised the breadth of the jurisdiction conferred by section 27A, 1985 Act, at paragraph [31]:

> "Section 27A is intended to provide a low cost, easily accessible machinery for dispute resolution. It is facilitative, enabling parties to resolve whatever their service charge dispute may be by referring the issue to the tribunal. The provision itself is, consistent with this objective, widely drawn. The tribunal is required to consider the provisions of the lease, and then to consider whether 'a service charge' is 'payable'. If it is 'payable', then the tribunal may be asked to determine the persons by or to whom it is payable, the amount payable, and (significantly for this case) the date at or by which it is payable. It does not have to be satisfied that the charge is payable here and now (the appropriate word might be 'due')."

47. Mr Eshraghi submitted that the questions whether the costs incurred in the litigation were a service charge, and if so whether they were payable by the leaseholders were clearly questions within the scope of section 27A. Answering those questions required consideration of the purpose for which the sums had been expended and the terms of the lease. The sum of £78,247 had been included in the 2017 service charge accounts as "legal costs" but no explanation had been provided of the basis on which they were said to be payable as a service charge. The appellants case was that the lease did not permit the recovery of the costs.

48. In my judgment the FTT took too narrow an approach to its jurisdiction in this case. I do not accept Mr Upton's argument that the FTT was powerless to consider whether money from the reserve fund could be used to meet the costs of litigation.

49. The central questions posed by section 27A are whether a service charge is payable on the basis of events which have already happened, or would be payable if costs were incurred in future for particular services, repairs, management etc. If either of those questions is answered in the affirmative subsidiary questions arise, including the amount which is or would become payable.

50. Section 27A is clearly intended to have a wide ambit. The FTT has jurisdiction to consider whether a service charge is payable whether or not any sum has already been paid (section 27A(2)) and whether or not any valid demand has been made in respect of costs already incurred (*Cannon v 38 Lambs Conduit LLP*). In addressing the most basic question of whether a service charge is payable at all the route by which the person who incurred the relevant costs intends to recover them does not seem to me to be relevant. That question simply requires consideration of the terms of the lease and the nature of the cost incurred. If the costs fall within the charging provision in the lease they are, or may become, the subject of a service charge payable by the tenant and may therefore be the subject of scrutiny under section 27A.

51. The appellants asked the FTT for a determination that the Company's litigation costs "are not recoverable from the applicant and the lessees as service charges under the lease." The also requested a determination in respect of the costs of the High Court trial which had not yet taken place. Those costs, which had not yet been incurred, plainly fall within section 27A(3). Although no provision had been made by the Company for the litigation costs in its estimates of service charge expenditure for the year, the appellants had no means of knowing when they made their application whether the Company intended to meet those costs from the reserve fund or whether, if it did, it intended subsequently to include them together with the costs already incurred in the end of year accounts. The determination which they sought from the FTT that the costs were not recoverable as service charges under the lease was a live issue when the application was made, and did not cease to be an issue by the Company opting not to include the costs in the end of year accounts.

52. It goes without saying that the FTT has no jurisdiction under section 27A (or any other power) to order repayment of money held in trust, or to consider whether a breach of trust had occurred. But the fact that money used to meet an item of expenditure is held on trust does not mean that the FTT cannot consider whether the expenditure can be recovered as a service charge. After all, the regular service charge contributions made by leaseholders to meet anticipated expenditure in the current year are held on the statutory trust imposed by section 42, Landlord and Tenant Act 1987 for the benefit of the contributing leaseholders.

53. The ramifications of the respondent's submission are quite startling. If, as Mr Upton submitted, the costs of litigation were off limits to investigation by the FTT because they had been drawn down from the reserve fund rather than being demanded as contributions towards anticipated expenditure, it would not be possible for an application to be made under section 27A in respect of any works which had been funded from reserves. If, for example, money accumulated in a reserve fund was used to replace the roof of the building, or to install new window, the effect of Mr Upton's argument would be that the FTT would be unable to consider whether the relevant costs had been reasonably incurred or the works had been done to a reasonable standard. Those questions are squarely within section 27A, from whatever source the work is funded.

54. In setting aside the LVT's decision in *Solitaire*, the Tribunal did not suggest that it would have been beyond the LVT's jurisdiction to consider whether a service charge was properly payable in respect of the works which had been funded from the reserve fund. The dispute was not about whether the leaseholders were liable to contribute towards the cost of those works, which they do not appear to have disputed, but concerned whether the

reserve fund should have been used to meet the cost. The issue in this case is quite different. It is whether the legal costs are recoverable as a service charge at all, or whether the costs should be met by the respondent from some other source. I agree with Mr Eshraghi that that is a question within the scope of section 27A.

55. I therefore allow the appeal on the first issue. The FTT had jurisdiction to consider whether the costs of litigation were payable by leaseholders as a service charge.

56. That conclusion gives rise to two resulting questions. The first is whether the lease includes provisions which enable the High Court litigation costs to be recovered as service charge items. The second question, if the first is determined in the respondent's favour, concerns the amount payable.

57. In response to Mr Eshraghi's submissions (foreshadowed for the first time in his skeleton argument) Mr Upton proposed that the litigation costs were recoverable through the service charge under paragraph 11 of the Second Schedule (see paragraph [10] above). He submitted that the dispute had been about who was to manage the building. Following the AGM Mrs and Mr Eshraghi had issued instructions to Faraday and to the contractor preparing to undertake work to the lifts, and had then purported to terminate Faraday's appointment as managing agents. They told the contractors not to attend the building and, understandably, the contractors had declined to proceed with the contract until the dispute was resolved. In the High Court proceedings, the appellants had contended that they were validly appointed as directors of the respondent and had made valid decisions, including to postpone the lift refurbishment contract.

58. Mr Upton submitted that the respondent's decision to obtain confirmation that the appellants were not validly appointed as directors and to seek an injunction preventing them from interfering with lift refurbishment works was vindicated by the outcome of the proceedings. The costs incurred were in respect of matters which the respondent properly and reasonably caused to be done "for the benefit of the building or the occupiers thereof as a whole and/or in the interests of good estate management."

59. Mr Eshraghi disputed that analysis. He submitted that the High Court litigation had not been about the safety or management of the building, it had been an internal squabble over control of the respondent company, and the costs were incurred in putting the respondent's house in order after the mismanaged AGM.

60. I was referred to numerous decisions both on general principles of contractual interpretation (including *Arnold v Britton* [2015] UKSC 36) and on particular examples of litigation costs through a service charge being allowed or refused. The meaning of a particular contractual provision turns on an assessment of "the meaning of the relevant words … in their documentary, factual and commercial context" (as Lord Neuberger had put it in *Arnold v Brittan* at paragraph [15], and Mr Upton therefore acknowledged that little was to be gained by comparing decisions on different words used in different leases.

61. There are elements of both parties' submissions with which I agree. In my judgment the costs of the High Court proceedings should be viewed in two parts.

62. From the AGM on 26 September 2016, and in particular after the first meeting of the "new directors" convened by Mrs Eshraghi on 30 September, there was a period of intense activity and dispute. During this phase the new directors took steps relating directly to the management of the building and the carrying out of works, including purporting to dismiss the managing agents and suspending the lift refurbishment contract. The High Court subsequently found that the new directors had had no authority to interfere as they had done. I have no difficulty in regarding the steps taken by the respondent to prevent the new directors from acting in that way as having been taken for the benefit of the building and its occupiers as a whole and in the interests of good estate management. For so long as the new directors were wrongly holding themselves out as entitled to make fundamental decisions concerning the management of the building, good estate management was impossible and paralysis was imminent.

63. This phase ended on 26 October 2016. On that date the new directors gave undertakings that they would not hold themselves out as directors, purport to enter into contracts on behalf of the Company, or give instructions to the Company's agents or contractors. A week before, on 19 October 2016, an injunction had been granted to the same effect in the absence of the new directors. From that point onward, the dispute was no longer about interference with the management of the building, and it became instead a dispute about control of the Company. That is reflected in the judgment entered by Judge Cooke on 23 October 2017, after the trial of the High Court proceedings. The learned Judge found at paragraphs [5] and [11] of her judgment that the delay in the lift maintenance contract was brought to an end by the injunctions of 19 and 26 October which "ensured that work could go ahead on the lift and that the ordinary business of the claimant could continue."

64. I do not think it is possible to regard the dispute over the corporate governance of the respondent as being "for the benefit of the building or the occupiers thereof as a whole and/or in the interests of good estate management." Once the immediate threat to the management of the building was resolved by the undertakings given by the new directors, the position of Faraday and the continuation of the lift refurbishment contract were secure. The status of the new directors remained to be resolved, but that raised no issue of estate management. It is pointed out by the Company that as a condition of being granted the injunction it was required to commence the main proceedings. That is no doubt true, but it does not change the subject matter of those proceedings.

65. I do not consider that the litigation costs incurred after 26 October 2016 fall within paragraph 5 of the Second Schedule. Whether or not the costs of employing lawyers may in principle fall within that provision, the relevant costs were not incurred "in and about the performance of the Lessor's obligations hereunder or in carrying out any improvement to the building or in providing any service for the benefit of the tenants or occupiers thereof".

66. I am therefore satisfied that service charges are payable in respect of the costs of the High Court proceedings incurred up to and including 26 October 2016, but that no service charges are payable in respect of the costs of those proceedings after that date.

67. As for the amount which is payable, no breakdown of costs is in evidence and it would not be possible for me to make any determination. Nor is it necessary for me to do so. To the

extent that the costs of the litigation were not recovered from Mrs Eshraghi and the other new directors they were funded from the reserve account and, so far, they have not been included in any demand for service charges. Mr Upton told me that the unrecovered balance was £78,247 not the £82,561 mentioned by the FTT. So much of that shortfall as was incurred in relevant costs up to 26 October 2016 could properly be the subject of a service charge, but the remainder could not. The Tribunal has no jurisdiction to direct the respondent to restore the latter part. It is for the Company, conscious of its obligations as a trustee, now to decide what steps to take in the light of the Tribunal's determination, and for the appellants to take proceedings elsewhere if they consider the Company has acted in breach of trust.

Issue 2: Are the legal costs incurred in the disputes with the leaseholders of Flat 48 and Flat 50 recoverable through the service charge?

68. I was told that the costs incurred in the proceedings against the leaseholder of Flat 50 had largely been recouped from his mortgagee. The position is different as regards the costs incurred in the proceedings brought by the leaseholder of Flat 48 to compel the respondent to repair the dilapidated balcony. Not only was the respondent left to pick up its own costs of those proceedings, but it made a contribution of £20,000 towards the costs incurred by Mrs Hoffman.

69. Mr Upton relied on the decision of the Court of Appeal in *Iperion Investment Corporation v Broadwalk House Residents Ltd* [1995] 2 EGLR 47 in support of his case that the costs of litigation against leaseholders was potentially recoverable even where the litigation was unsuccessful. The landlord had there been entitled to recover "all costs properly incurred … in the proper and reasonable management of" the building. The Court of Appeal accepted that the charging provision included "costs of unsuccessful proceedings properly brought in managing the property". On the facts the Court of Appeal was satisfied that the landlord had acted reasonably in bringing forfeiture proceedings provoked by a tenant who had carried out unauthorised alterations and whom the trial judge had found acted deliberately and dishonestly in breach of covenant persisted in over several months.

70. More recently, in *Bretby Hall Management Company Limited v Pratt* [2017] UKUT 70 (LC) a management company incurred substantial legal costs in a dispute with a former director over his liability to pay service charges. Mr Pratt had resigned as a director and appointed a surveyor to determine the dispute pursuant to an arbitration clause in the lease. The surveyor's report was favourable to Mr Pratt who threatened to issue proceedings against the management company. In the event no proceedings were ever instituted by Mr Pratt but the management company incurred substantial legal costs in the relation to the dispute. The management company was entitled to a service charge covering "all expenses in and about the maintenance and proper and convenient management and running of the development." The Tribunal (HHJ Behrens) held that the legal costs were recoverable at [37]:

> "It was, to my mind, plainly contemplated that the reasonable costs of managing the development should be recoverable under the service charge. Subject to the question of reasonableness the costs of defending threatened

> proceedings would seem to me to fall squarely within such a definition. I can think of no reason why the parties should have intended that the costs would only be recoverable under the service charge if proceedings were actually commenced."

71. In *Assethold Limited v Watts* [2014] UKUT 0537 (LC) I held that the legal costs incurred by the landlord in (successful) party wall proceedings were recoverable through the service charge as the cost of "all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development". I was satisfied that the language was sufficiently clear, even though it was not specific.

72. Mr Eshraghi relied on my decision in *Fairbairn v Etal Court Maintenance Limited* [2015] UKUT 0639 (LC) where I held that a sum paid by a landlord in damages arising out of a breach of its own repairing covenant and the reasonable legal costs incurred by it in defending a valid claim, did not readily fall within the scope of expenditure on "proper management and administration of the building."

73. Mr Eshraghi argued that in 1973, when the leases were entered into, the parties would not have intended that the costs of proceedings to recover unpaid service charges (which at that time would have been conducted in court) would be an expense recoverable through the service charge. The parties also included a covenant by the leaseholder at clause 2(9) which covered certain legal costs, but not the costs of tribunal proceedings. Referring to the Tribunal's decision in *Union Pension Trustees v Slavin* [2015] UKUT 103 (LC) at [61] to [63] Mr Eshraghi argued that the absence of an express provision making leaseholders collectively responsible for legal costs of proceedings against one of their number indicated an intention that no such costs should be recovered under the more general provision of paragraph 11. I see the force in both of those points, but the lease was for a term of 99 years and in paragraph 11 of the Second Schedule the parties used language which was intended to cover unforeseen expenses in the provision of any service, matter or thing properly and reasonably provided or done in the interest of good estate management. The question is whether the costs in question fall within that language. The language used in *Union Trustees* was significantly different and dealt much more specifically with legal costs.

74. I have no difficulty in relation to the costs incurred in pursuing the recovery of service charges from Mr Freedman. Good estate management requires that service charges be collected, including by proceedings if necessary. To the extent that the costs of such proceedings are not recovered from the defaulting leaseholder, or their mortgagee, I see no reason why they should not be recovered under a charging provision in the terms of paragraph 11. The fact that the costs of the proceedings are primarily recoverable from the defaulting leaseholder (or his mortgagee) under clause 2(9)(a) does not mean that any uncollected shortfall arising on an assessment of costs by the court or caused by an inability of the leaseholder to pay, is outside the scope of paragraph 11.

75. The much more substantial costs incurred in the dispute over Mrs Hoffman's balustrade are not so straightforward. As *Iperion* demonstrates, the proper management of a building

may sometimes involve a landlord in the costs of unsuccessful proceedings. In this case the question is whether the relevant costs, which were incurred in defending proceedings for specific performance of the respondent's own obligations, were costs of something "proper and reasonable to be provided done or carried out" for the benefit of the building as a whole or in the interests of good estate management. If so, such costs would be recoverable subject to the statutory limitation in section 19, 1985 Act, to the extent that they were reasonably incurred on services of a reasonable standard.

76. Mr Upton resisted the appellants' suggestion that the disputed costs had been incurred in "unsuccessfully defending the claim". He pointed out that the respondent had made no admission as to its liability to repair the balustrade. The Company had been advised that it was not in breach and it had defended the proceedings on that basis. The parties had agreed to instruct a single joint expert, at their joint expense, and to be bound by the expert's opinion. Mrs Hoffman's claim for damages had been dismissed as part of the settlement, no order for specific performance had been made, and Mrs Hoffman had agreed to pay the withheld service charges in full. Although the respondent had agreed to pay a contribution towards Mrs Hoffman's costs that contribution had been set off against the service charge arrears and the balance paid by way of a credit to Mrs Hoffman's service charge account.

77. Valiantly though Mr Upton sought, to portray the outcome of the litigation between the respondent and Mrs Hoffman as a score draw, it was clearly no such thing. The respondent first admitted its liability to carry out works and commissioned a specification with that in mind, then adopted the opposite stance, claiming that the balustrade was not in disrepair. As the independent expert subsequently determined, that change of approach was misguided and the balcony was indeed in need of remedial work. The expert's conclusions and the respondent's agreement to pay £20,000 towards Mrs Hoffman's costs demonstrate where success lay in the litigation. Whether or not Mrs Hoffman chose to pursue her claim for damages, it is apparent that the respondent was in breach of its repairing obligation from about early 2015 until late 2017 and that proceedings were required before it would agree to revert to its original decision to carry out the necessary work. As for the respondent's counterclaim there was no dispute over the unpaid service charges, which were being withheld as a result of the respondent's failure to comply with its own obligations.

78. Mr Upton submitted that the Company had been guided by the advice of Olivers, its second structural engineer (having dispensed with the services of its first engineer who had advised in favour of remedial work). Mr Cann exhibited that advice to his second witness statement (so it was not available to the FTT). It comprised a report of stress tests carried out to the balcony by a testing company, Building Testing Ltd, which showed that it met the relevant British Standard on barriers in and about buildings (BS 6180:2011). Although the report noted that, before the tests were performed, there was "some slight inherent flexibility of the barrier system when hand pressure was applied", the deflection measured on application of different loads did not exceed the 25mm permitted by the British Standard. The testing engineers advised that a barrier which was structurally safe would nevertheless still fail to meet the British Standard if it possessed flexibility to a point which would cause alarm to building users under normal service conditions. Although the barriers moved slightly they advised that "in our opinion [the movement] was not

significant enough to cause alarm under normal service conditions". That view was endorsed by Olivers, the Company's structural engineers, who expressed themselves "confident that no remedial structural works are required at the present time."

79. It is apparent from the reports provided to the Company, and the outcome of the independent surveyor's evaluation, that the question of whether the balustrade fell below the standard reasonably to be expected of a residential building in St John's Wood involved a matter of judgment on which different expert opinions were possible. The Company chose to follow the advice of its professional advisers. This case is therefore significantly different from *Fairbairn v Etal Court* in which the landlord, having at first refused to investigate the causes of damage to the floor of a ground floor flat, was advised in November 2011 that it was responsible for the necessary remedial work to the foundations of the building. Despite that advice the landlord chose to defend proceedings for specific performance, and to deny that it was in breach of covenant. The Tribunal concluded that the costs of conspicuously poor management could not be recovered through a clause requiring tenants to pay for "proper management and administration".

80. Notwithstanding the advice of their original engineer that work should be carried out, in my judgment the Company behaved reasonably and properly when it decided to act on the basis of the advice received in October 2015 that no remedial work was required. Faced with the difference of opinion between its original advisers and Olivers the Company might have sought a definitive view at an earlier stage, but there is no guarantee that another report would have come down clearly in favour of undertaking repairs. Had the Company decided to carry out work which its own advisers said was unnecessary it would have been at risk of criticism from leaseholders and a dispute over their liability to contribute through the service charge. In the event, the Company avoided a trial of the dispute (the estimated cost of which was in excess of £70,000) by agreeing to be bound by the view of the jointly appointed surveyor. Again, I consider that was a proper and reasonable thing to do.

81. I have considered whether the payment of a contribution of £20,000 towards Mrs Hoffman's costs of the proceedings is distinguishable from the Company incurring its own costs, but I do not think it is. That liability was a consequence of the Company following the advice of its professional advisers in an unsuccessful attempt to avoid spending money unnecessarily. The lack of success of the Company's efforts does not mean that it was unreasonable to follow that course.

82. I have therefore concluded that the costs of the proceedings in respect of Flat 49 and 50 were payable by the appellants as a service charge, subject to costs recovered in respect of Flat 50 being credited to the service charge account.

83. In relation to the dispute over Flat 48 the relevant costs in 2016 were £3,848.84. In 2017 the £33,304 taken from the reserve fund could instead have been included in the annual service charge demand.

84. As for Flat 50, Mr Eshraghi identified invoices totalling £6,477.32 in 2016 and a further £1,256.80 in 2017, totalling £7,734.12 which I am satisfied could have been collected

through the service charge. The costs ordered to be paid by Mr Freedman were £16,244.76 and I understood that sum to have been paid by his mortgagee. On that basis there may have been little or no shortfall to be met by the leaseholders and Mr Cann said that only the sum of £2,236.80 had been included in the 2016 service charge. The sum of £24,957 is shown as a withdrawal from the reserve fund in 2017 in relation to the dispute over Flats 19 & 50 (it is not clear to me what the dispute over Flat 19 was, but it may have concerned the allocation of shares). On the basis of the evidence it is not possible to break that figure down further as between the two flats, nor is it apparent how it relates to the costs recovered from Mr Freedman's mortgagee. If it is of importance to achieve further clarity on those questions I will remit the appeal to the FTT at the request of either party made within 14 days of this decision.

Issue 3: Corporate accountancy fees

85. The appellants' section 27A application sought a determination that the cost of advice given to the Company by its solicitors concerning relations with its members, corporate expenses such as company accountancy and secretarial costs, and the cost of the managing agent's time spent on corporate matters, should not be recoverable through the service charge. In its response the Company denied that its own running costs were charged to the service charge. Its case was that Faraday attended Company meetings and carried out company secretarial tasks at no additional cost, other than in respect of disbursements such as postage. It produced no evidence to the FTT in respect of corporate accountancy and legal costs related to corporate advice.

86. The FTT noted the appellants' submissions but, apart from the sum of £193 volunteered by the Company, it found that there was no evidence that any other items relating to the running of the Company had been put through the service charge. It did not refer to sums of £450 included in the 2016 and 2017 service charge estimates for company secretarial costs. In the service charge accounts themselves the amounts shown under this head were much smaller, being £193 in 2016 and £13 in 2017, but very substantial items for audit fees and trust tax fees were included in the 2016 accounts (£12,430) and a smaller sum in 2017 (£2,208) which the appellants say included the cost of corporate accounting services. The 2017 accounts also showed that £2,942 had been withdrawn from the reserve fund to meet "Company legal costs".

87. Mr Cann's witness statement before the FTT did not refer to corporate accountancy or legal costs. In the face of the entries in the accounts and the absence of any reference to the scale of charges, particularly in 2016, the Tribunal gave permission for the appellants to argue that the FTT had been wrong to rely on the absence of evidence as justifying a decision to make no apportionment between corporate and service charge expenditure, and that an explanation was called for from the Company.

88. The appellants case on appeal was that the accountancy charge of £2,208 in 2017 suggested that the figure of £12,430 in 2016 was excessive, unreasonable and required explanation.

89. The Company's statement of case conceded that a further £5,042 ought not to have been included in the service charge, but did not identify clearly where in the accounts these sums had been included. That sum was said to have been reimbursed to the service charge account.

90. At the hearing of the appeal (and foreshadowed in his skeleton argument served a few days earlier) Mr Upton asked for permission to withdraw the admission that a further £5,042 was not recoverable through the service charge because it related to the affairs of the Company. That request was made on the basis that in *Chiswick Village Residents Limited v Southey* [2019] UKUT 148 (LC) the Tribunal had allowed a landlord company which was wholly owned by the leaseholders themselves to include expenditure necessarily incurred in conducting its own AGMs and in obtaining advice on rights of attendance at AGMs to the service charge. The Tribunal accepted that the parties to the lease would not have intended any clear distinction between the management of the company and the management of the estate. In that context, the necessary costs of the AGM were recoverable as costs incurred "in the running and management of the Building" and/or "relating or incidental to the general administration and management of the Lessor's Property".

91. I refuse permission to withdraw the admission for the following reasons.

92. Section 27A(4)(a), 1985 Act deprives the FTT of jurisdiction to determine whether a service charge is payable in respect of any matter which has been agreed or admitted by the tenant. Although there is no statutory prohibition on a tribunal considering matters which a landlord has admitted cannot be the subject of a service charge, the policy of promoting agreement and reducing occasions of dispute which underlies section 27A(5)(4)(a) militates against allowing a landlord to withdraw admissions which have been made.

93. Additionally, in this case the Company has been professionally represented throughout and the concession must be assumed to have been a considered one. Although the Tribunal's *Chiswick Village* decision was published after the concessions were made, the approach to interpretation which it reflected was not new, having already been applied by the Tribunal to the necessary administration costs of a leaseholder owned management company in *Solar Beta Management Co Ltd v Akindele* [2014] UKUT 416 (LC).

94. Finally, the withdrawal of the concession would make it necessary for the Tribunal to investigate expenditure which had not been the subject of evidence filed in advance of the hearing (since there was no issue which needed to be resolved). It would not be fair to the appellants to put further items in issue in this way.

95. In any event, it is not clear that the approach taken in *Chiswick Village* can be applied in this case. The distinguishing feature of this case is that not all leaseholders are members of the Company and not all leases were granted by the Company. Mrs Eshraghi's lease was granted by the Company's predecessor and the assumption that the original parties would have intended the lessor's corporate management to be treated as part of the cost of managing the building is inapplicable.

96. I therefore refuse permission to the Company to withdraw its concession that expenditure of £721 in 2016 and £4,321 in 2017 was wrongly included in the service charge under the heading of professional fees.

97. These sums do not include any part of two invoices by the Company's accountants which were paid during 2016 and which refer to the preparation and audit of the 2015 draft statutory accounts and preparation of the 2015 draft service charge accounts. The total sum included in these invoices is £6,030. Invoices in the same amounts were paid in 2017 for the preparation of the draft 2017 accounts. Mr Eshraghi submitted that in the absence of evidence on which to base an apportionment, invoices covering both corporate and service charge accounting should be excluded from the service charge.

98. Mr Cann's evidence was that the work done in respect of the corporate accounts was minimal because the Company was not trading. I accept that evidence. Mr Upton submitted that 10% of the mixed invoices (£603) should be apportioned to corporate accounting and I accept that as a realistic estimate. The sums conceded in the Company's statement of case must be added to that apportioned amount. The cost of corporate accountancy which ought not to have been included in the 2016 accounts is therefore £1,324 and not the £193 conceded before the FTT. The costs which should not have been included in 2017 is £4,924.

Issue 4: Managing agent's fees

99. The FTT made no reduction in the fees of the Company's managing agents, Faraday. As explained in the witness statement of Mrs Eshraghi and in the grounds of appeal, the basis of the appellants' case that the fees charged were excessive was by comparison to the fees of the previous managing agents, Regency Management, who had managed the building for more than 20 years and who had been paid, it was said, only £19,200 in their last year (this figure excluded VAT). That was said to compare unfavourably to the basic fee of £24,160 (inclusive of VAT) said to have been charged by Faraday, which was supplemented by an additional fee of 3% on the cost of major works. The FTT did not address that comparison in its decision, which it ought to have done since it was the basis of the appellants' case.

100. In her evidence in support of the appeal Mrs Eshraghi introduced additional evidence of an approach made by the managing agent of another block in the vicinity who offered to undertake management for a fixed fee of £13,000. A second quotation of £15,600 plus payroll administration costs was procured from another agent.

101. In his oral evidence Mr Cann explained that the appropriate fee depended in part on the amount of work involved. Managing this building, which was riven with disputes, involved more work than the management of any other block he was involved with. He attended the building on a weekly basis and liaised with the porter daily. He explained that his firm charged a basic fee of £400 to £450 per unit (inclusive of VAT), with this block at the higher end. He considered the rate of £250 per unit suggested by the lowest alternative quote was based on an outdated rate which he found hard to believe would be acceptable to any agent taking on the management of this block.

102. The sum shown in service charge accounts as Faraday's management fee is £23,400, not the higher figure mentioned in the appellants' grounds of appeal. That figure includes VAT and represents £450 per unit. The lower alternative quotation obtained by Mrs Eshraghi of £13,000 was for a period of 12 months and included quarterly visits by the manager. An additional fee of £500 was payable if company secretarial duties were required. In addition, the agent was entitled to retain any commissions received without the approval of the client.

103. The question which the FTT correctly posed for itself was whether there was evidence that the charges of Faraday were unreasonable. As has often been said, a landlord is not required to procure services at the cheapest rate available. The difference between the fees charged by Regency Management and those of Faraday appears to be explained by VAT; Mrs Eshraghi's witness statement before the FTT asserted "as the building cannot recover VAT, Faraday's fixed fees already cost us 20% more than [Regency's] fees." That was the only evidence before the FTT and, although it ought to have addressed the comparison specifically, it justified its conclusion that the fees had not been shown to be unreasonable. I do not accept that the evidence of the two significantly lower quotations, based on different service levels, establishes that the charges made by Faraday were unreasonable. They may have been at the top of the range, but there is nothing to suggest they were above the level of a reasonable fee for the level of management provided to a building in this locality.

104. The quotations from other agents suggest that a fee of £500 is the going rate for the provision of company secretarial services. Mr Cann explained that no additional fee was charged by Faradays for those services and suggested that the fee was not higher because they were included in the basic charge. Nevertheless, an apportionment of the basic fee is required because it includes services to the Company which do not fall within the service charge provisions of the lease. The evidence suggests that £500 is attributable to those services.

105. Apart from reducing the management fee by £500, to £22,900 in each year, I make no other adjustment in the management fee. There is no evidence of any amount charged by Faraday in respect of the cost of the major works, which in any event are not the subject of this appeal.

Disposal

106. For the reasons I have given I make the following determinations:

(1) I allow the appeal on issue 1.

(2) The costs of the High Court proceedings were recoverable through the service charge only to the extent that they were incurred before 26 October 2016 and not thereafter.

(3) I dismiss the appeal on issue 2. The costs incurred in the proceedings against Mr Freedman, to the extent that they were not recovered from his mortgagee or from him, were properly included in the service charge, although it is not apparent how

much that sum was. The £3,848.84 in 2016 and the £33,304 in 2017 incurred in the dispute with Mrs Hoffman could also properly be treated as costs to be included in the service charge.

(4) I allow the appeal on issue 3. Accountancy costs of £1,324 should have been omitted from the 2016 service charge accounts and £4,924 from the 2017 accounts.

(5) I allow the appeal on issue 4, but only to the extent of reducing the management fee in 2016 and 2017 by £500.

107. Both parties wished to make further submissions on the FTT's refusal of an order under section 20C, 1985 Act in the light of the outcome of the appeal. I direct that any such submissions on behalf of the Company should be received by 17 July, and any submissions in response from the appellants should be received by 31 July. At the same time the parties should make any submissions they wish concerning the making of an order under section 20C in respect of the costs of the appeal.

Martin Rodger QC

Deputy Chamber President

2 July 2020