10509

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AS/LAC/2014/0020**
Property	:	**Flats 1, 2, 3, 4, 11, 14, 15, 17, 18, 19, 20, 24, 26, 27, 28, 29, and 34 at Burlington House, 2 Park Lodge Avenue, West Drayton, UB7 9FE**
Applicant	:	**St George West London Limited**
Representative	:	**Ms Lina Mattson, instructed by JB Leitch LLP**
Respondent	:	**Brian MacGoey and Desmond O'Malley**
Representative	:	**Ms Elizabeth Tremayne, instructed by Healys LLP**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Robert Latham** **Mrs Sarah Redmond BSc (Econ) MRICS**
Date and venue of hearing	:	**3 December 2014 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**22 December 2014**

DECISION

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(1) The Applicant claims administration charges in the sum of £15,309.83. We find that £322 + VAT (£64.40) is payable. This relates to the costs associated with the service of seventeen Section 146 notices, dated 16 July 2013.

(2) The other costs sought were not incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925. Accordingly, such costs do not fall within the scope of paragraph 6, Part 1 of the Eighth Schedule of the lease. Such costs being irrecoverable under the terms of the lease, are not strictly administration charges under Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(4) The Tribunal declines to make any order for the refund to the Applicant of the tribunal fees that it has paid.

The Application

1. The Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("Act") as to the amount of administration charges payable by the Respondent in respect of legal charges.

2. The Applicant issued its application in respect of the administration charges payable by the Respondents who are jointly lessees of 17 flats at Burlington House, 2 Park Lodge Avenue, West Drayton, UB7 9FE, namely flats 1, 2, 3, 4, 11, 14, 15, 17, 18, 19, 20, 24, 26, 27, 28, 29, and 34 ("the Flats"). The Applicant Company is based in Cobham, Surrey. Their Solicitors are based in Liverpool. The flats have been managed by Consort Property Management ("Consort") based in Luton. The Respondents live in Limerick, Ireland. Their Solicitor is based in London. All the Flats have been let out under assured shorthold tenancies.

3. The total claim is not quantified. We compute this to be £15,309.83. Four administration charges are claimed against the 17 lessees:

(i) 17 June 2012 ("**the first administration charge**"): "Legal costs and disbursements incurred in pursuing a County Court claim for unpaid arrears under claim number 1LV30091", namely £156.66. x 17: £2,663.22;

(ii) 7 March 2013 ("**the second administration charge**"): "Legal costs and disbursements incurred in dealing with the LVT applications under LON/00AS/LSC/2012/0550 & 0640", namely £401.94 x 17: £6,832.98;

(iii) 18 February 2014 ("**the third administration charge**"): "Legal costs and disbursements incurred in dealing with the LVT applications under LON/00AS/LSC/2012/0152", namely £137.78 x 17: £2,342.26;

(iv) 29 August 2014 ("**the fourth administration charge**"): "Legal costs incurred in respect of dealing with the recovery of unpaid historic service charges which were paid in September 2014", namely £193.61 x 17: £3,291.37.

In addition, three administration charges of £60 are claimed against Flat 1 dated 28 October 2013; 14 February 2014; and 11 March 2014, a total of £180.

4. On 25 September, the Tribunal gave Directions. Given that the Applicant had indicated that the matter should be dealt with on the papers, the Tribunal directed a paper determination. Either party was permitted to request an oral hearing.

5. The Applicant was directed to serve a Statement of Case by 17 October. The Statement of Case is dated 15 October. It was accompanied by a bundle of 274 pages of documents.

6. The Respondents were to serve a Statement in Answer by 7 November. Their Statement in Answer is dated 7 November. It was accompanied by a bundle of 239 pages of documents.

7. The Applicant was directed to serve a Statement in Reply by 14 November. The Applicant requested, and was granted, an extension of time until 21 November. The Statement in Reply is dated 19 November. It was accompanied by a bundle of 251 pages of documents.

8. In the following week, the Applicant filed a Bundle of Documents totalling 844 pages. On 26 November, a Procedural Judge issued further directions. The Judge was satisfied that the quantity of papers generated by this application rendered it inappropriate for a paper determination. This is normally the cost effective and proportionate means of determining disputes as to costs. He set the case down for hearing on 3 December with a time estimate of two hours. Each party was to be given one hour in which to present their case. Each party was directed to bring a bundle of essential documents consisting of no more than 25 pages.

9. On 28 November, the Respondents requested an adjournment so they could instruct their Counsel of choice. On 1 December, a Procedural Judge refused this application. The Respondents were permitted to renew this application at the start of the hearing. The application was not renewed.

The Hearing

10. Both parties were represented by Counsel. Ms Lina Mattson appeared on behalf of the Applicant instructed by LB Leach LLP. Ms Elizabeth Tremayne appeared on behalf of the Respondents and was accompanied by her instructing solicitor, Mr Niall Boland, of Healys LLP.

11. The Tribunal expressed our concern that the quantity of documents which had been filed by both parties seemed wholly disproportionate to the sums in dispute. Much of the documentation tended to confuse, rather than to assist us in identifying and determining the substantive issues in dispute between the parties. Both Counsel were asked to convey these concerns to their respective clients.

12. We are grateful to both Counsel for the assistance that they provided the Tribunal in guiding us through this labyrinth of 844 pages of documents. It would have been impossible for the Tribunal to have determined this application on the papers. Ms Mattson provided us with a Skeleton Argument and a bundle of essential documents.

13. Ms Tremayne outlined three issues upon which we should focus:

(i) Do the administration charges claimed legitimately fall within the scope of the terms of the lease? In particular, were the administration charges incurred in contemplation of proceedings or the service of a notice under Section 146 of the Law of Property Act 1925?

(ii) Is the landlord estopped from demanding administration charges where the legal costs have been resolved by the County Court or a Tribunal? She reminded us of the famous dicta of Nicholls LJ in *Holding & Management Ltd v Property Holding & Investment Trust plc* [1989] 1 WLR 1313, namely that a landlord should not "get through the back door what has been refused by the front" (at p.1324).

(iii) Have the administration charges been reasonably incurred? The onus is on the landlord to establish that the charges are payable. She identified the striking lack of particularity when one came to analyse the documentation in relating to the demands.

14. Neither party adduced any evidence. The Applicant's Statement of Case and Statement in Reply are attested by a statement of truth by Philip Parkinson, it's Solicitor. The Respondent's Statement in Answer is attested by a statement of truth by Niall Boland, their Solicitor.

15. The background to this dispute is a long drawn out dispute between the parties. Ms Mattson suggests that the tenants are "persistent/late-payers of service charges". If so, we would look on them with grave

disfavour. Ms Tremayne asserts that her clients have always been willing to pay any sums that were lawfully due. Their problem has been the lack of transparency in the manner in which the landlord has operated the service charge accounts. They have sought relevant information, but this has been denied to them.

16. The parties agreed that we should treat Flat 1 as the lead case. The Statement of Account is respect of this flat is at 1.114-116. It is dated 23 September 2014. However, it seems that the respective credits and debits may not have been made at the dates recorded in the statement. The landlords contend that their systems do not isolate years, demands, payments, etc. These rather have to be done manually (see 3.751). This may explain the difficulties that have arisen in this case. However, this Statement of Account is the best evidence available from which to compute what sums have been payable. This has been complicated by the various administration charges which have been debited from the account at various dates. None of the original demands relating to these charges seem to be available.

17. Towards the end of the hearing, Ms Mattson presented us with a Schedule of Costs in the sum of £5,887.86 relating to the costs of this application. Ms Mattson recognised that this Tribunal is normally a "no costs jurisdiction". She therefore put her application in two ways. First, she sought to amend her application to include this as an additional administration charge. Alternatively, should the Respondents oppose this application, she sought a costs order in the sum under Regulation 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Regulations").

18. Ms Tremayne opposed the application to amend on the grounds that it had been made too late and she was not in a position to deal with the additional claim. The Tribunal agreed and refused the application. We consider the application under Rule 13(1)(b) hereafter.

19. The Tribunal asked Ms Mattson what steps would be taken by the landlord should we find that the Respondents are not liable for any administration charges which are claimed. Would the landlord seek to recover them against the 16 lessees at Burlington House who are not party to this application through the service charge account? Having taken instructions, Ms Mattson informed us that the landlord would consider its options in the light of our determination.

20. We indicated to the parties that we would seek to consider these outstanding costs issues in our determination in the hope that this might prevent further litigation. We make clear that we have no jurisdiction to bind the hands of any Tribunal that might hear such applications at some future date.

21. We are satisfied that this application touches upon a question of general importance to tenants seeking access to justice through the tribunal system. In what circumstances does a covenant for the reimbursement of costs of proceedings under Section 146 render a tenant liable for costs incurred by their landlord in tribunal proceedings to determine the amount of a service charge or administration charge?

The Lease

22. The lease in respect of Flat 1 is at p.15-43. We were told that all leases are in similar terms.

23. Our starting point is the Seventh Schedule which makes provision for the Service Charge Account, which is referred to as "maintenance expenses". Whilst there is a covenant to pay these expenses, these are not reserved as rent. The lease contains a forfeiture clause (Clause 5.1). This extends to any breach of covenant.

24. The accounting year is the calendar year. Interim service charges are payable on 1 January and 1 July. The landlord is to prepare and have audited by an independent accountant a Service Charge Account as soon as practical after the relevant accounting period. The landlord is then to serve a copy of the account and the accountant's certificate on the tenants. Within 14 days thereafter, the tenant is obliged to make up any shortfall between budgeted and actual expenditure or the landlord is obliged to credit any overpayment.

25. By paragraph 2, Part I of the Eight Schedule, the tenant covenants to pay "the Lessee's Proportion in accordance with the provisions of the Seventh Schedule hereto". The "Lessee's proportion" is defined in Clause 1 as "a fair proportion as varied by the Lessor from time to time in respect of the Maintenance Expenses each payable by the Lessee in accordance with the provisions of the Seventh Schedule hereto". We were told that different sums were payable under different leases. We were not provided details of this. It is apparent some of the 34 Flats at Burlingham House were still being built in February 2013, when the matter first came before the Tribunal.

26. The landlord must satisfy us that it has operated the service charge account in accordance with these provisions. Whilst the tenant is obliged to pay any interim service charges which are based on an estimate of expenditure, the subsequent reconciliation between actual and budgeted expenditure in an essential to enable the tenant to ascertain whether he is being required to pay (i) for unnecessary services or services which are provided to a defective standard; or (ii) more than they should for services which are necessary and are provided to an acceptable standard.

27. Ms Mattson relies on paragraphs 6 and 9, Part 1 of the Eighth Schedule in support of her claim for the administration charges. The critical provision is paragraph 6 under which the lessee covenants (emphasis added):

> "To pay all costs charges and expenses (including legal costs and fees payable to a Surveyor) properly incurred by the Lessor in or in contemplation of any proceedings or service of any notice under sections 146 and 147 of the Law of Property Act 1925 including the proper costs charges and expenses aforesaid of and incidental to the inspection of the Demised Premises the drawing up of schedules of dilapidations and notices and any inspection to ascertain whether any notice has been complied with and such costs charges and expenses shall be paid whether or not forfeiture for any breach is avoided otherwise than by relief granted by the Court."

28. Ms Mattson relies upon paragraph 9 in respect of the claim by Consort for administration fees. The lessee covenants:

> "to keep the Lessor indemnified in respect of charges for other services payable in respect of the Demised Premises which the Lessor shall from time to time during the said term be called upon to pay such sums to be repaid to the Lessor on demand"

29. Ms Tremayne emphasised the similarity between the wording of paragraph 6 and the wording of the provision considered by the Upper Tribunal in *Barrett v Robinson* [2014] UKUT 0322 (LC) at [9]:

> "To pay all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court."

The Law

30. The relevant statutory provisions are set out in the Appendix to this decision. Both Counsel relied on two decisions: (i) The Court of Appeal decision in *Freeholders of 69 Marina v Oram ("69 Marina")* [2011] EWCA Civ 1258; [2012] L&TR 4 and (ii) the decision of the Deputy President, Martin Rodger QC, in the Upper Tribunal in *Barrett v Robinson ("Barrett")* [2014] UKUT 0322 (LC).

31. In *69 Marina*, the Court of Appeal considered a second appeal from the County Court. The issue was whether the landlord's costs of appearing at a Tribunal were recoverable from the tenant as an administration

charge as "expenses including solicitor's costs ... incurred by the landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925" under Clause 3(12) of the Lease. The Court noted that as a consequence of Section 81 of the Housing Act 1996, in the absence of an admission by the tenant that a service charge is due, a determination by a Tribunal is a condition precedent to the service of a notice under Section 146 of the Law of Property Act 1925. The ratio of the decision is to be found in the judgment of Sir Andrew Morritt (the Chancellor) at [20]:

> "Given that the determination of the tribunal and a s.146 Notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the Freeholders' costs before the tribunal fall within the terms of cl.3(12). If and insofar as any of them may not have been strictly costs of the proceedings they appear to have been incidental to the preparation of the requisite notices and schedules"

32. In *Barrett*, the Deputy President gave guidance on how this decision should be applied. Such guidance is essential if the First-tier Tribunals are to adopt a consistent approach. We set out the relevant passages of the judgment with our emphasis added:

> 47 I reject the respondent's argument that the clause is wide enough to cover the landlord's costs of *any* proceedings, whether connected to section 146 or not. The clear sense of the clause is that all of the costs which it covers are costs incurred in taking steps preparatory to forfeiture such as are envisaged by section 146 . Both parties are likely to have regarded it as fair that costs incurred by the landlord in dealing with a breach of the tenant's covenants in the lease should fall on the tenant and not on the landlord. Neither party could have considered it fair for the tenant to be liable to pay the landlord's costs of any proceedings, whatever their subject matter or outcome. If the reference to "any proceedings" in clause 4(14) is not narrowed in its scope by the reference to section 146 , the parties would have given the landlord an improbably generous indemnity against the costs of even speculative and unmeritorious proceedings.
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> 48 The real purpose of a clause in the form of clause 4(14) can be seen from its concluding words: "notwithstanding forfeiture is avoided otherwise than by relief granted by the Court." Where a forfeiture is avoided by relief granted by the court, the terms of relief reflect the principle that the landlord should be put in the position it would have been in but for the forfeiture (i.e. if the tenant had not committed the breach of covenant on which the forfeiture was based)(see *Woodfall: Landlord and Tenant*, para 17.169; *Egerton v Jones [1939] 2 KB 702)*. That principle will normally require that the tenant reimburse any costs incurred by

the landlord in serving the required section 146 notice and in bringing the proceedings. However, the purpose of a notice under section 146(1) is to allow a tenant who is in breach of covenant the opportunity to remedy the breach. Where a breach has been remedied within a reasonable time, the notice will have been complied with and the landlord will have no continuing cause of action, nor any reason to commence proceedings to forfeit the lease. The same landlord may nonetheless have incurred significant costs in the preparation of the notice itself. The object of a clause such as clause 4(14) is to give the landlord the contractual right to recoup the costs incurred in taking those preparatory steps, even where no proceedings eventuate in which the payment of the landlord's costs could be made a condition of relief against forfeiture.

49 Clause 4(14) must therefore be understood as applying only to costs incurred in proceedings for the forfeiture of a lease, or in steps taken in contemplation of such proceedings. Moreover, even where a landlord takes steps with the intention of forfeiting a lease, a clause such as clause 4(14) will only be engaged (so as to give the landlord the right to recover its costs) if a forfeiture has truly been *avoided*. If the tenant was not in breach, or if the right to forfeit had previously been waived by the landlord, it would not be possible to say that forfeiture had been avoided – there would never have been an opportunity to forfeit, or that opportunity would have been lost before the relevant costs were incurred. In those circumstances I do not consider that a clause such as clause 4(14) would oblige a tenant to pay the costs incurred by their landlord in taking steps preparatory to the service of a section 146 notice.

50 In principle such a clause is obviously capable of giving a landlord a contractual right to recover costs incurred in proceedings before the LVT or the First-tier Tribunal, but whether in any particular case such an entitlement exists will depend on the language of the particular clause, on the existence of a breach of covenant and on the nature and circumstances of the proceedings.

51 For costs to be recoverable under clause 4(14) a landlord must show that they were incurred in or in contemplation of proceedings, or the preparation of a notice, under section 146. Sometimes it will be obvious that such expense has been incurred, as when proceedings claiming the forfeiture of a lease are commenced, or a notice under section 146 is served. In other circumstances it will be less obvious. The statutory protection afforded by section 81 of the 1996 Act requires that an application be made to the first-tier tribunal for a determination of the amount of arrears of a service charge or administration charges which are payable before a section 146 notice may be served, but proceedings before the First-tier Tribunal for the

> determination of the amount of a service or administration charge need not be a prelude to forfeiture proceedings at all. The First-tier Tribunal's jurisdiction under section 27A of the 1985 Act covers the same territory, and proceedings are often commenced in the County Court for the recovery of service charges without a claim for forfeiture being included. A landlord may or may not commence proceedings before the First-tier Tribunal with a view to forfeiture; a landlord may simply wish to receive payment of the sum due, without any desire to terminate the tenant's lease, or may not have thought far enough ahead to have reached the stage of considering what steps to take if the tenant fails to pay after a tribunal determination has been obtained.
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> 52 Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not *in fact* contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as clause 4(14) as providing a contractual right to recover its costs."

33. The Upper Tribunal reversed the finding by the LVT that costs of £6,250 had been incurred in or in contemplation of proceedings, or the preparation of a notice, under section 146. The Deputy President concluded (at [53]) that there was "no evidence whatsoever that the respondent contemplated proceedings for the forfeiture of the appellant's lease or the service of a notice under section 146 as a preliminary to such proceedings". The first LVT proceedings had been commenced by the tenant under section 27A of the Landlord and Tenant Act 1985 for a determination of the extent of her liability to pay the insurance rent. Nothing in the landlord's statement submitted to the first LVT had suggested that she had any intention of forfeiting the lease, none of the correspondence from her solicitors suggested that that such a course of action was in her mind, even before it was discovered that the appellant was entitled to a net credit for overpayments in previous years, and there was no mention of forfeiture, or of section 81 of the 1996 Act, in the skeleton argument prepared by her counsel.

34. A further illustration of how a Tribunal how approach this issue is to be found in the decision of the First-tier Tribunal in *Flat 3, 10 Lennox Gardens* (LON/00AW/LAC/2013/0002) which was also chaired by Martin Rodger QC.

35. Whilst this decision provides essential guidance on the circumstances and factors which we are obliged to consider, it leaves us with the difficult task of assessing the landlord's motivation in commencing

various proceedings. It is for the landlord to satisfy us that the administration charges claimed are both payable and reasonable.

The Background

36. Burlington House now consists of some 34 flats. Initially, the Respondents leased 18 of these. At some stage, Flat No.25 was assigned. On 21 June 2004, the Applicant was registered as freehold owner. The leases granted to the Respondents are dated 7 February 2008 and grant terms of 999 years from 31 December 2006. Not all of the flats in the development were completed by this date and this has led to an issue as to the "Lessee's Proportion" to the service charge

37. On 5 December 2011, the landlord issued Claim 1LV30091 in the Liverpool County Court seeking a declaration under Section 81 of the Housing Act 1996 and a money judgment for arrears of service charges in the sum of £24,897.36 (at 3.611). This was brought against the Respondents in respect of their 18 flats, including Flat 25. We were told that this was issued at the local County Court where the Applicant's Solicitors are based.

38. On 25 May 2012, District Judge Wright approved a Consent Order which had been signed by the parties on 2 May (at 3.618). The Order recorded that the Respondents had discharged the arrears of service charges in the sum of £17,443.38. It is apparent from the Statement of Account (at 1.115) that £1,880.51 was credited to Flat 1 (the flat which we are treating as the lead case), on 13 February 2012 putting the tenant into credit. A sum of £7,453.98 was in dispute and this was transferred to the Tribunal. Paragraph 3 of the Order specifically provided "No Order as to costs".

39. On 17 June 2012, despite the Consent Order agreeing that there be no order as to costs, the landlord debited **the first administration charge** of £156.66 against the Respondent's leasehold interests (see 1.115). The total charged against the 17 flats is £2,663.22. The first demand that the landlord is able to produce in respect of this charge is and invoice dated 16 December 2013 (at 1.209).

40. The outstanding claim was transferred to the Tribunal and allocated the case number: LON/00AS/LSC/2012/0550 ("2012/0550"). On 25 September 2012, the Tribunal gave Directions (at 2.368). It confirmed that the claim for £7,453.98 related solely to legal costs. These related to the following sums which had been levied against the 18 leases then held by the Respondents: £60 (31.1.11) and £354.11 (12.8.10). The landlord was directed to file its Statement of Case by 10 October. It failed to do so. On 13 December, the Tribunal issued further directions indicating that it was minded to dismiss the application (at 2.372).

41. On 7 February 2013, the application was listed for hearing before a Tribunal chaired by Judge Korn. The decision, dated 4 March 2013, is at 2.355. The Applicant was represented by Counsel. The Respondents appeared in person. Despite the landlord's default, the tenants were anxious to have the matter resolved (see [9]). The Tribunal found that the costs of £7,453.98 were not payable. The Tribunal concluded (at [30]) "that on a balance of probabilities these legal costs were agreed to form part of the settlement figure such that they are not payable on top of the sums already paid by the Respondents". In respect of the landlord's alternative argument that these costs were incurred in contemplation of forfeiture proceedings, the Tribunal went on to conclude that they were not (at [34]).

42. In the interim, the landlord had issued a further application, LON/00AS/LSC/2012/0640 ("2012/0640"). We have not been referred to the application form or the correspondence which led to this application. The application related to the interim service charges for the year 2012. The Tribunal gave Directions and the landlord was directed to file its Statement of case by 7 November. It failed to do so.

43. The further Directions given by the Tribunal (at 2.372) also related to this application. This application was also determined by the Tribunal on 7 February 2013. The Tribunal found that the interim service charges for 2012 were payable in full. One issue raised by the tenants was that they had not been provided with the Service Charge Accounts and had therefore been unable to reconcile actual expenditure against budget. On 12 January (at 3.627), the tenants had written to the Tribunal complaining about the difficulty in obtaining the audited accounts. However, they accepted that these had been provided in December 2012.

44. The Tribunal made a penalty costs order against the landlord in the sum of £250 in respect of its failure to comply with the Directions. The Tribunal also made an order under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") providing that the landlord could only add 50% of its reasonable legal costs incurred by it in connection with the proceedings. The Tribunal made the following observation (at [42]): both parties "should also note that, in the Tribunal's view, the Applicant does not seem to have spent much time for either application and that therefore the tribunal would not expect the Applicant's costs to be high. If on receiving details of these costs as part of the service charge the respondents consider them to be too high they will have the option at that stage of challenging the amount of those costs through the LVT."

45. Strictly, this order would only protect the 18 leasehold interests (all held by the Respondents) and not the 16 lessees who were not parties specified in the application (see Section 20C (1) of the 1985 Act). However, it would always be open to these tenants to bring their own application were they to consider that the legal fees for which the

landlord sought to make them liable under their service charges to be unreasonable.

46. The landlord has taken no steps to seek to recover any of its legal charges through the service charge account whether against the Respondents or the other 16 "innocent lessees". Ms Mattson stated that it would have been wrong to prejudice these other tenants. Whether the landlord could now seek to do so is questionable given the terms of Section 20B of the 1985 Act. The landlord rather seeks to recover 100% their costs, claimed in the sum of £6,832.98, **the second administration charge**, against the Respondents under Paragraph 6 of the relevant schedule of the lease. This is a matter that we must consider hereafter.

47. On 7 March 2013, the landlord rather debited **the second administration charge** of £401.94 against the Respondent's leasehold interests (see 1.115). The first demand that the landlord is able to produce in respect of this charge is the invoice dated 11 June 2013 (at 1.245).

48. The landlord was somewhat more tardy with complying with the order of the Tribunal. The administration charges of £414.11 were only credited to the tenants' accounts on 17 April 2013 (see 1.115).

49. On 4 March 2013, the same day as the Tribunal had issued their decision in 2012/0550 and 2012/0640, the landlord issued its next application in LON/00AS/LSC/2013/0152 ("2013/0152") against the Respondent's 18 leasehold interests. This application related to the interim service charge for 2013.

50. On 9 March 2013, the Tribunal gave Directions in 2013/0152. Rather than file their Statement in Response, the tenants paid a substantial part of the interim service charge for 2013 which had become due on 1 January 2013. A total of £846.42 was due, namely £258.79 for the "estate" and £587.63 for the "block" service charges. A sum of £623.60 was credited to the account of Flat 1 on 20 March 2013 (see 1.115). This was not sufficient to cover the full charge, but we compute that the service charge account would have been in credit in the sum of £288.32, but for administration charges totalling £972.71 which had been debited from the account, namely (i) £354.11 (12.8.10); (ii) £60 (31.1.11); (iii) £156.66 – **the first administration charge** (17.6.12); and (iv) £401.94 – **the second administration charge** (7.3.13). The first two of these should have been re-credited to the service charge account as a result of the Tribunal's earlier decision. As we have noted, this credit was not made until 17 April 2013 (1.115).

51. It is apparent that the tenants anticipated that the Tribunal application would be cancelled as a result of this payment (see correspondence at 2.440-447). On 30 May 2013, they wrote to both the Tribunal and the

landlord stating that the 2013 service charges were not in dispute and that the dispute arose from the previous year which had now been settled. However, there was a dispute as to whether any outstanding sums were due, the tenants seeming to accept that they had only paid "60% of the year's service charge to date" (see 2.447).

52. On 3 June, 2013/0152 was listed before a Tribunal chaired by Judge Leighton. The landlord was represented by Counsel. The tenants did not appear. The Tribunal noted that the application appeared to be unopposed. The Tribunal determined that the 2013 interim service charges were payable in full. There was no application for an order under Section 20C of the 1985 Act and no such order was made.

53. The landlord has taken no steps to charge its legal expenses in respect of this application through the service charge account. Rather, on 18 February 2014, the landlord debited **the third administration charge** of £137.78 against at least 17 of the Respondent's leasehold interests, a total of £2,342.26 (see 1.116).

54. After this hearing, there was correspondence between the tenants and the managing agents as to the outstanding sums that were due (see 2.438). But for the administration charges which were in dispute, the Tribunal computes that the tenants were, in fact, in credit (see 1.115). It was apparent that the landlord had difficulty in satisfying the tenants what demands and payments had been made. The landlord stated that this was an exercise that had to be done manually (see 3.751).

55. On 1 July 2013, the second instalment of the 2013 interim service charge became payable. For Flat 1, the sum due was £846.42 (see 1.115). On 16 July 2013, the landlord issued a section 146 Notice in respect of this sum (at 3.667). On 23 July, the tenants paid the sum due (see 1.116).

56. On 29 August 2014, the landlord debited **the fourth administration charge** of £193.61 against the 17 leasehold interests held by the Respondents, a total of £3,291.37 (see 1.116).

Our Decision

(i) The First Administration Charge (17 June 2012)

57. The landlord claims £2,663.22 in respect of "legal costs and disbursements incurred in pursuing a County Court claim for unpaid arrears under claim number 1LV30091", namely £156.66 against 17 leasehold interests held by the Respondents. This is evidenced by 17 invoices issued by JB Leitch to Consort dated 17 June 2012 (see 1.207). We were told that the total fees were split 18 ways (including Flat 25). On 17 June 2012, £156.66 was debited from the service charge account

of Flat 1 (1.115). The first demand that the landlord has been able to produce in respect of this administration charge is an invoice dated 16 December 2013 (at 1.209). Surprisingly, this charge does not appear in the earlier demand dated 11 June 2013 (at 1.245)

58. The Tribunal are satisfied that these administration charges are not payable for two reasons. First, the costs relating to this County Court claim were compromised on 2 May 2012 in the Consent Order which was approved by DJ Wright on 25 May (3.618). This settlement made express provision that there should be "No Order as to costs". Ms Mattson sought to argue that the landlord had not intended to resolve the issue of costs of these County Court proceedings. The Tribunal cannot accept that. The landlord was agreeing to bear its own costs of these proceedings.

59. Secondly, the landlord would need to satisfy us that these costs were incurred "in or in contemplation of any proceedings or service of any notice under Section 146" (see [27] above). This had been addressed by the Tribunal in [34] of their decision of 4 March 2013 (at 2.362):

> "As regards the Applicant's alternative argument that the costs were incurred in contemplation of forfeiture proceedings and therefore (if payable) would be recoverable under the costs recovery clause in paragraph 6 of Part I of the Eighth Schedule, against this point has not been argued in much detail but the tribunal's view on the basis of the limited information provided is that it seems too much of a stretch to describe these costs as having been incurred in contemplation of forfeiture proceedings, given that no real evidence has been offered to suggest that forfeiture was seriously being considered as an option".

60. Ms Mattson argued that we were not bound by these findings. We disagree. Neither party appealed this decision. We are not willing to revisit these issues. In any event, the evidence adduced before us is no clearer than that adduced before the Tribunal in March 2013.

(ii) The Second Administration Charge (7 March 2013)

61. The landlord claims £6,832.98 in respect of "legal costs and disbursements incurred in dealing with the LVT applications under LON/00AS/LSC/2012/0550 & 0640", namely £401.94 against 17 leasehold interests held by the Respondents. This is evidenced by 17 invoices issued by JB Leitch to the landlord dated 7 March 2013 (see 1.227). We were told that the total fees were again split 18 ways (including Flat 25). On 7 March 2013, £401.94 was debited from the service charge account of Flat 1 (at 1.115). The first demand that the landlord has been able to produce in respect of this administration charge is an invoice dated 11 June 2013 (at 1.245).

62. The Tribunal is satisfied that this administration charge is not payable. Again, the landlord would need to satisfy us that these costs were incurred "in or in contemplation of any proceedings or service of any notice under Section 146". The first and second administration charges are linked. Both relate to the County Court action which was issued in the Liverpool County Court (1LV30091). The Tribunal made an express finding that these County Court proceedings were not issued for this purpose. We are not willing to revisit that decision.

63. We note that the Tribunal also determined the second application 2012/0640. We have not been provided with a copy of the application form or of any pre-action correspondence. In these circumstances, there is no evidence that this application was issued for a separate purposes, namely "in contemplation of proceedings under Section 146" rather than to recover a debt. The invoice submitted by JB Leitch to their client (at 1.227) suggests that both applications were issued for a similar purpose. The Applicant could have waived legal privilege and disclosed any relevant legal advice or internal consideration of the option of forfeiture. It has not done so.

64. Given our finding that this is not an administration charge that is payable, it is not strictly necessary for the Tribunal to consider the issue of reasonableness, were this to be an administration charge. However, we make two observations:

(i) The Tribunal made an order under Section 20C restricting the landlord to recovering just 50% of its costs against the Respondents. The reasons for doing so were twofold: (i) the landlord's claim for an administration charge of £7,453.98 had been dismissed; (ii) the landlord had failed to comply with the directions given by the Tribunal. Paragraph 6 of the relevant Schedule of the lease must be construed strictly (see [47] of *Barrett*). The parties could not have contemplated that this clause would allow the landlord to claim the costs of an ill founded claim.

(ii) The Tribunal noted that in their view, the Applicant had not spent a great deal of time in preparing for either application (see [44] above). That comment does not seem to have been heeded when the landlord came to assess the costs which are claimed.

(iii) The Third Administration Charge (18 February 2014)

65. The landlord claims £2,342.26 in respect of "legal costs and disbursements incurred in dealing with the LVT applications under LON/00AS/LSC/2013/0152", namely £137.78 against the 17 leasehold interests held by the Respondents.

66. This is evidenced by 17 invoices issued by JB Leitch to OM Property Management Limited (a Company linked to Consort), dated 12 February 2014 (see 1.279). Ms Tremayne noted that the invoice is for "professional fees for acting on your behalf in the above matter resulting in debt recovery". There was no reference to forfeiture. Again, the fees were split 18 ways (including Flat 25). On 18 February 2014, £137.78 was debited from the service charge account of Flat 1 (1.116). The first demand that the landlord has been able to produce in respect of this administration charge is an invoice dated 15 October 2014 (at 1.298).

67. The Tribunal first consider the sums claimed. JB Leitch claim £900 + VAT and describe the work done. We have not been provided with a detailed costs schedule detailing when the work was done. We were told that no such schedule is available as JB Leitch is under a general retainer for the legal services which they provide to the landlord. £900 (inc VAT) is claimed for Counsel's attendance at the Tribunal Hearing on 3 June 2013.

68. In addition, £500 is claimed for the application and hearing fees paid to HMCTS. These are not an administration charge. In their decision, dated 3 June 2013, the tenants were ordered to pay these fees to the Applicant within 28 days. It is unclear whether they did so. If not, it is recoverable as a debt.

69. The first issue for the Tribunal to determine is whether these costs were incurred in contemplation of proceedings or the service of a notice under Section 146. Ms Mattson argues that it is clear that the determination sought from this Tribunal was in contemplation of forfeiture. We disagree. The landlord has failed to satisfy us that this was the intended purpose of the proceedings. We have regard to the following matters:

(i) We note that this application was issued on 4 March 2013 (see 2.435). This is the same day as the Tribunal had issued their decision in 2012/0550 and 2012/0640. The Tribunal would have expected the landlord to have carefully considered the effect of this decision before launching further litigation.

(ii) At the very least, the landlord should have given effect to the decision, before embarking upon further proceedings. The Tribunal had found that the administration charges of £7,453.98 were not payable. These had been wrongly debited from the tenants' accounts on 12 August 2010 and 31 January 2011 (see 1.114). They were not credited back into the account until 17 April 2014 (1.115). The landlord was ordered to pay penalty costs of £250. We have seen no evidence that this has been paid.

(iii) The Tribunal had found that the previous proceedings had not been issued "in or in contemplation of any proceedings or service of any notice under Section 146" (see [59] above). Despite this finding, the landlord debited **the second administration charge** from the service charge accounts of the tenants on 7 March (see 1.115). It is difficult to see how it could have thought that this was justified.

(iv) The landlord should have been put on notice that they would need to establish that the further proceedings were issued for this purpose. No pre-action correspondence has been disclosed. Indeed, the timetable would suggest that there was no such correspondence. Tribunal proceedings should only be issued as a matter of last resort.

(v) The Applicant could have waived legal professional privilege and disclosed the relevant legal advice or internal consideration of the option of forfeiture. It has not done so. Rather, the Solicitor's invoice to their client referred to "debt recovery".

(vi) The Tribunal had found that the interim service charges for 2012 were payable. Before issuing further proceedings, we would have expected the landlord to ascertain whether the tenant now accepted that the interim service charges for 2013 were payable. There is no evidence that the landlord did so. Had there been such an admission, the conditions of Section 81 of the 1996 Act would have been satisfied and a Section 146 notice could have been served.

70. Most of the costs claimed under this administration charge relate to 2013/0152. On 3 June 2013, the Tribunal both heard this application and gave its determination. On this date, the service charge account for Flat 1 records arrears of £270.28 (see 1.115). However, we compute that the account would have been in credit in the sum of £288.32, but for **the first and second administration charges** totalling £558.60(see [50] above).

71. However, on 1 July 2013, the second instalment of the 2013 interim service charge became payable, namely £846.42. The tenants did not pay this by the date due. The landlord put the matter promptly in the hands of their Solicitor and on 16 July, LB Leitch served s.146 Notices against all the leasehold interests held by the Respondents (see 3.667). The service of this notice was clearly served in contemplation of forfeiture. Indeed, by their e-mail of 18 June 2014 (at 3.759), JB Leitch had indicated that the landlord had legal proceedings in mind, albeit that any such proceedings on that date would have been misconceived, given our computation that the service charge account was in credit.

72. Ms Tremayne accepted that the tenants are obliged to pay the costs relating to this Section 146 Notice. The Notice had its desired effect and the sum due was paid on 23 July 2014 (see 1.116). The Applicant claims £161 for drafting the 17 Section 146 Notices and an additional £161 for

corresponding with the mortgage lender and Respondents (see [26] at 1.61). We accept that these sums are reasonable and find that £322 + VAT is payable.

The Fourth Administration Charge (29 August 2014)

73. The landlord claims £3,291.37 in respect of "legal costs and disbursements incurred in "Legal costs incurred in respect of dealing with the recovery of unpaid historic service charges which were paid in September 2014", namely £193.61 against the 17 leasehold interests held by the Respondents. On 29 August 2014, JB Leitch invoiced the landlord £193.61 for each flat for "our professional fees for acting on your behalf in the above matter resulting in debt recovery" (see 1.316). On 29 August 2014, this sum was debited from the tenants' service charge accounts (see 1.116).

74. The Tribunal has not been provided with a detailed costs schedule detailing when the work was done. We are told that the sum claimed includes a disbursement fee of £245 to HMCTS ([28] of 1.62). We know not when this fee was incurred or to what it relates. £161 is claimed for drafting documents. We know not when these documents were drafted or what they were.

75. It is apparent that there was extensive correspondence between the parties as to what service charges were outstanding. We are satisfied that there has been a lack of transparency in the manner in which Consort have maintained the service charge accounts. We have found it difficult to ascertain the true state of the accounts. The problem has arisen from the various administration charges that have been added. The accounts were not rectified promptly when such charges were found not to be payable. The landlord failed to have adequate regard to the terms of the Consent Order which was agreed on 2 May 2012 (at 3.618) or the findings made by the Tribunal in 2012/0550 and 2012/0640.

76. There are two issues for the Tribunal to determine:

(i) Were these costs incurred in contemplation of proceedings or the service of a notice under Section 146? The landlord has failed to satisfy us that they were.

(ii) If we are wrong on (i), were the administration charges reasonable? Had it been necessary for us to determine this issue, we would have concluded that these were not reasonably incurred. We have not been provided with sufficient information as to what work was done. Further, we accept the argument of the tenants that Consort, the managing agents, should have kept proper records of the service charge

accounts. This is not a matter that should necessitate the involvement of solicitors.

(v) Three Administration charges of £60 against Flat 1

77. The landlord claims £180 against Flat 1 in respect of three administration charges of £60, dated 28 October 2013; 14 February 2014; and 11 March 2014. All these administration charges have been raised against Flat 1. We are told that they were incurred "by the Applicant in respect of late payment made to Consort" ([12] at 1.156).

78. The Tribunal have not been provided with copies of the letters to which these charges relate. The service charge accounts record the following arrears: £479.50 (28.10.13); £305.18 (14.2.14); and £502.14 (11.3.14). We compute that the tenants would have been in credit on these dates but for the **first and second administration charges** totalling £558.60 which we have found were not payable. In these circumstances, we disallow these three administration charges.

The Additional Claims for Costs and the Refund of Fees

79. The Applicant made an application for a refund of the fees that it has paid in respect of the application and hearing. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal does not order the Respondents to refund any of these fees. They have been largely successful in opposing this application.

80. The Respondents have applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge. The Respondents have been largely successful in opposing this application.

81. The Applicant produced a Statement of Costs in the sum of £5,887.68. Even had the Applicant been successful, we would have been minded to substantially reduce the amount of these costs that it would have been appropriate to pass on through the service charge. The amount of papers that have submitted in support of this application, are out of proportion to the sums in dispute. The Tribunal only set it down for an oral hearing because the application had become too complex to determine on the papers.

82. Ms Mattson made an application for costs against the Respondents under Rule 13(b) of the Tribunal Rules on the basis that they had acted

unreasonably in defending or conducting these proceedings. Her main complaint was that the Respondents had unreasonably opposed her application to amend her claim to see the costs of the proceedings as a further administration charge. We are satisfied that Ms Tremayne was entitled to oppose the application to add this new claim given the late stage at which the application had been made. In any event, we find it difficult to see how the landlord could contend that this additional claim was recoverable under paragraph 6 of the relevant schedule of the lease given our findings on the merits. We agree with the Deputy President in *Barrett* (at [47]) that it would not be in the contemplation of the parties that this clause would give the landlord the right to be indemnified against the costs of an unmeritorious claim.

83. We note that the Order which we have made under Section 20C only protects the 17 leasehold interests held by the respondents. It does not protect the 17 other leaseholders who are not specified in this application. Were the landlord to seek to pass on these costs through the management charge, it would be open to those tenants to make a separate application to this Tribunal. However, we suggest that it would be difficult for the landlord to persuade a Tribunal that it would be reasonable for these tenants to be held liable to pay the costs of an unmeritorious claim which has failed against the lessees who the landlord wrongly contended to be in default. However, this is no more than an indication, as we cannot prejudge the outcome of such an application.

Robert Latham
Tribunal Judge

22 December 2014

Appendix of Relevant Legislation

Housing Act 1996 – Section 81

Restriction on termination of tenancy for failure to pay service charge

(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless:

> (a) it is finally determined by (or on appeal from) the appropriate tribunal or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or
>
> (b) the tenant has admitted that it is so payable.

.....

(4A) References in this section to the exercise of a right of re-entry or forfeiture include the service of a notice under section 146(1) of the Law of Property Act 1925 (restriction on re-entry or forfeiture).

Commonhold and Leasehold Reform Act 2002 – Schedule 11

Paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
- (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
   (a) in a particular manner, or
   (b) on particular evidence,
   of any question which may be the subject matter of an application under sub-paragraph (1).

Landlord and Tenant Act 1985

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

.....

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

.....

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Regulation 13

(1) The Tribunal may make and order in respect of costs only .... (b) if a person has acted unreasonably in bringing, defending, or conducting proceedings in .... (ii) a residential property case ....."

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.