10600

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2014/0173**
Property	:	**36 Ormonde Terrace, London NW8 7LR "the property")**
Applicant	:	**Ormonde Terrace Limited**
Representative	:	**Mr. Carl Fain counsel (also in attendance) Ms. A Chinery Solicitor Mr. S Ellman, Rendall & Rittner Managing Agent**
Respondents	:	**Mr. Charalampos Kafetzidis**
Representatives	:	**Mr. A Wijeyaratne Counsel Mr. M Economides**
Type of Application	:	**Application for a determination under Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Ms. M W Daley LLB (Hons) Mr. P Roberts Dip Arch RIBA**
Date and venue of Hearing	:	**10 November 2014 and 12 November 2014 for the determination at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	

DECISION

Decision of the tribunal

1. **The issues central to the determination under Section 27A of the Landlord and Tenant Act 1985, which fall within the Tribunal's jurisdiction (pursuant to the referral from the county court) are as follows-:**

2. **Has the Landlord served demands which comply with-: (i) the requirements of the lease (ii)has the Applicant demanded sums for service charges which were not due under the terms of the lease(iii)Is the landlord statute barred from pursing sums due pursuant to section 20B of the Landlord and Tenant Act**

3. **The Tribunal determines that the service charges for all the years prior to 2012 cannot be recovered, pursuant to section 20B of the Landlord and Tenant Act 1985.**

4. **The Tribunal has determined that the Respondent's counterclaim falls within the jurisdiction of the county court, and therefore should properly be determined by the county court. Accordingly the Tribunal makes no findings of facts and has not determined liability in respect of this issue.**

The application

5. The Applicant sought a determination under section 27A of the Landlord and Tenant Act 1985 and Schedule 11 of the Commonhold and Leasehold Reform Act 2002. By a claim issued in the county court in November 2013, the Applicant claimed the sum of (i) £6,536.93 on account of service charges and £282.00 for Administration charges. Following receipt of a full Defence and counterclaim, proceedings were transferred from the county court to the property chamber by order dated 14 March 2014.

6. A case management conference was held by the property chamber on 15 April 2014. This was followed by further directions on 23 September 2014, setting the matter down for hearing on 10 November 2014.

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The matters in issue

7. At the case management conference on 15 April 2014. The Tribunal identified the following issues from the Respondent's Defence-: *"(i) Some or all of the service charges claimed are not payable pursuant to the terms of the Respondent's lease as varied by a deed of variation dated 17 September 1987 (ii) a denial that service charges are reasonable or have been reasonably incurred. (iii) A demand that the Applicant proves that it has complied with section 20 of the Landlord and Tenant act 1985 (iv) a demand that the Applicant prove that it has complied with section 20B of the Landlord and Tenant act 1985."*

8. The Directions noted that there was also a counterclaim in the county court brought by the tenant in which (a) a declaration was sought, concerning the validity of the claims for service charges since 2000 (b) a claim in the Respondent's capacity as a shareholder of the Applicant company to be paid an appropriate share of the sums realised from the sale of company assets. (c) A claim in respect of damage caused as a result of two floods to the Respondent's flat.

9. The Directions further stated at F-: "... *This Tribunal can only deal with the issues of reasonableness and payability of Service Charges and so do not have jurisdiction to deal with the Respondent's counterclaims in respect of the sale of assets or the floods."*

The background

10. The Respondent holds a long lease of the flat, in a purpose built block, The Applicant is the freehold owner. Pursuant to a lease dated 8 August 1958, which was subsequently varied on 17 September 1987, the landlord is required to provide services and the Respondent leaseholder, to contribute towards the cost of the service, by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The hearing

11. The Applicant was represented by Counsel Mr. Fain; also in attendance on the Applicant's behalf were the instructing solicitor Ms. Chinery and the managing agent Mr. Ellman of Rendall & Rittner. At the commencement of the hearing, Mr. Bhama an accountant with Rendall & Rittner was also in attendance on behalf of the Applicant; however he was not present for the duration of the hearing, as the Applicant decided not to call him to give evidence.

12. The Respondent was present and represented by Mr. Wijeyaratne Counsel, and also in attendance was instructing solicitor Mr. M Economides.

Preliminary Matters

The following additional documents were provided to the Tribunal

- Supplementary documents to be added to the bundle under cover of section (E)
- The Respondent's bundle of authorities
- Letters from the Respondents solicitor dating from 7 May 2014
- Calculation of percentage of the actual service charge for the year ending 24/12/12

The Applicant's application to admit further documentary evidence

13. The Tribunal was informed by the parties that although there had been agreement for the Applicant to adduce the documents referred to above, there were additional documents which the Applicant wished to rely upon which were not agreed, These documents were considered by the Applicant to be relevant to the matters in issue.

14. The Tribunal was informed that the Applicant wished to produce emails which had been sent by the director of the Applicant company, together with enclosed unsigned/certificated accounts together with a summary of the accounts. The Applicant counsel stated that these documents dated from 4 November 2008 (for the service charges for the year ending 31/12/2007 to date.

15. Mr. Fain stated that although these documents were produced late, they were documents which on his instructions, were within the Respondent's knowledge and should have been in his possession. Mr. Fain asserted that Mr. Wijeyaratne could take instruction from his client as to whether he had received the documents. He accepted that although it was not ideal, if it was considered that there was any prejudice to the Respondent, it could be dealt with by an adjournment if it was considered necessary.

16. The Tribunal asked why the documents had not been served in compliance with direction 2 of the April directions, which stated -: *"The Applicant must by the same date send to the Respondent any certification of the yearly accounts and copy of any demands for payment".*

17. In reply Mr. Fain informed the Tribunal that the information had been held on Mr. Dixon's computer and unfortunately his computer had crashed, as a result the information had not been available until recently.
18. In reply Mr. Wijeyaratne stated that his client had filed a well particularised Defence, which had been filed and served in December 2013. This had included the section 20B Defence. He submitted that there was no reason why the Applicant could not have provided this information before.

19. Counsel referred to the directions and stated that the date for disclosure was the 29 April 2014, and that the Applicant's failure to disclose had prejudiced the Respondent's preparation of their case. Mr. Wijeyaratne stated that the documents which the Applicant was proposing to adduce went back to 2008, and that the Respondent could not be expected to have an accurate recollection of these documents, neither would he have the opportunity to go back through his own files and check whether or, not these documents were within his possession.

20. Although the Tribunal could adjourn the hearing, the Respondent would also be prejudiced by an adjournment as this would add to the cost of this hearing in that counsel had been instructed and cost had been incurred for today's hearing.

The Tribunal's determination on Application

21. The Tribunal determined that the emails referred to by Mr. Fain ought not to be admitted. The Tribunal noted that the directions given on 15 April 2014 had provided for disclosure of all of the relevant documents, and that the matter had originally been set down for hearing on 4 August 2014. This hearing date had been vacated and further directions had been given on 23 September 2014 on neither of these occasions had the Applicant indicated that there was further evidence, and that they had or were experiencing difficulties in producing copies of these documents.

22. Mr. Fain stated that the Applicant had not been able to produce these documents because of a "computer crash", the Tribunal is not satisfied that this was sufficient to prevent either the documents or this issue being raised at an earlier stage. The Tribunal noted the Respondent's objections and the grounds given that the Applicant had knowledge of the issues raised in the Respondent's Defence prior to the Directions hearing in April 2014, and that the Respondent had been put to the cost and expense of attending the hearing today with his counsel and solicitor

23. The Tribunal consider that there would be real prejudice to the Respondent, which given the cost of these proceedings, and the need to give effect to the overriding objective, could not adequately be addressed by an adjournment. Given this, the Tribunal is not persuaded that the Applicant's additional documents ought to be admitted. The Tribunal therefore determines that the Applicant's

request to admit these documents and to be able to rely upon them ought to be refused.

24. Mr. Fain in his opening submitted that the issues for the Tribunal to determine were (i) has the landlord served demands compliant with clause 2 (21) of the lease. (ii) Has the landlord charged for sums which are not recoverable under the lease (iii) were the charges reasonably incurred in accordance with section 19 of the landlord and tenant Act 1985(iv) whether parts of the Applicant's claim is barred pursuant to section 20B of the Landlord and Tenant Act 1985(v) whether the Applicant has complied with section 20 of the landlord and tenant act 1985 in respect of the arrangements for consulting with the leaseholders.

25. Counsel referred to Clause 2 (21), and Clause (3) sub clauses (2), (3) and (4) of the lease. Clause 2 (21) sets out that the service charges due were payable on actual expenditure, the service charges were payable in arrears, on production of a landlord's accountants certificate. Clauses 3 (2) (3) and (4) dealt with the landlord's obligation in respect of insurance, the repair of the premises, provision of hot water, heating and maintenance of the lift The tribunal was referred to a breakdown provided by the landlord that set out the Respondent's contribution to the service charges.

26. Clause 2(21) of the lease was worded as follows-: " *To pay to the landlords in each year a sum equal to one fifty third of the expenditure reasonably and properly incurred by the landlord in the preceding fiscal year (such expenditure to be certified by the landlord's accountant) in and incidental to (i) observing and performing the covenants on the part of the landlords contained in sub-clause (2) (3) and (4) of the next succeeding clause hereof (ii) insuring against Employers and third party liability in respect of the performance of the said covenants and in respect of the parts of the Building retained by the Landlords (iii) paying usual fees to a reputable firm of Estate Agents to act as Managing Agents in respect of the building such amounts to be paid to the landlords on the quarter day next following the service on the Tenant of a demand therefor containing a copy of the certificate of the accountants hereinbefore mentioned.*"

27. Counsel for the Applicant referred the Tribunal to a copy of the accounts prepared for the year ending 31 December 2009 together with the breakdown provided, which set out the Respondent's contribution as 1.8868% of the expenditure.

28. The Respondent's case (as set out in the detailed Defence) filed in answer to the county court claim, was that the demands for payment served by the Applicant did not comply with the wording in the lease. The Respondent also relied upon the exact wording of the lease, as the lease provided a limit upon the items for which service charges were payable.

29. On the Applicant's behalf, Mr. Fain accepted that there were sums for service charges which had been demanded which were not payable under the terms of the lease. Given this, the landlord conceded that the following payments had been incorrectly demanded; the sums charged for items relating to the internal common parts and were not recoverable.

30. The Tribunal also noted that there were sums which had been demanded in previous years which were conceded as not payable by the Respondent such as cleaning and electricity, and light bulbs. These items were not now being charged as service charge items.
31. It was not clear to the Tribunal whether the landlord was conceding that these sums were not recoverable under the terms of the lease, therefore the Tribunal determines that the Applicant should within 21 days of this determination draw up a schedule of such charges that have been previously claimed as a service charges with a statement as to whether this sum was payable under the terms of the lease. The Applicant should where such sums have been paid set out their position on whether a credit is due to the Respondent on such sums as have been paid.
32. Mr. Fain in respect of the other service charge items, set out how (in his submission) the Applicant had complied with clause 2(21) of the lease which was referred to above. Mr. Fain referred the Tribunal to a letter sent to the Respondent together with calculation certificate. The Tribunal was referred to the following documents a letter dated 11 July 2013 which had been sent to the Respondent by The Beavis Partnership on behalf of the Applicant.

33. Mr. Fain stated that the letter enclosed a breakdown of the charges, in a spreadsheet (the calculation certificate) which set out the respondent's share of the cost together with the percentage payable by him. The letter referred to the certified accounts for year ending 31 December 2012, these accounts which were included in the bundle were stated by Mr. Fain to comply with the requirements and were attached to the letter referred to above.

34. The letter stated in the penultimate paragraph, that-: Under the terms of the Lease, we note that you pay service charges in arrears, please therefore find enclosed herewith the service charge accounts for the year ending 31 December 2012 together with an application for payment detailing the amount required for the service charge period 1st January 2012 to 31 December which are also now due.

35. Counsel also referred to the letter dated 29 April 2014 which was served by the Applicant's solicitors The Beavis Partnership in compliance with the directions. This included copies of service charge accounts for 2008 onward, demands for payment, and certified accounts. The demands were enclosed for the period referred 2008 onward.

36. Mr. Wijeyaratne Counsel on behalf of the Respondent did not accept that his client had been served service charge demands in compliance with clause 2 (21) of the lease.
37. The Respondent's case was set out in paragraph 24 of his witness statement, the respondent referred to a "serial and systematic disregard" by the Applicant to "respect the terms of my lease and a complete failure to provide me with proper demands or any proper breakdown of my liability."
38. The Respondent in paragraph 13 referred to a demand for payment sent on 1 June 2011 by Rendall & Rittner. The Respondent stated-: This application arrived without any covering letter or explanation. Again, this application does not comply with the terms of my Lease. It cannot be said to be a demand accompanied by a copy of the certificate of the accountant. In fact, it appears to include half yearly payments on account for which I am not liable to pay. In consequence as with all the previous Applications for Payment this Application for Payment did not constitute a proper demand under the terms of my Lease..."
39. In respect of the Applicant's case concerning the service of the documents under cover of a letter dated 11 July 2013, Counsel queried whether the information had been served, and whether it amounted to a valid demand. He also stated that the Respondent did not accept that the spread sheets accurately set out what was payable by the Respondent.
40. He also did not accept that the service charge accounts had been included with the demands as required by the lease.
41. In relation to the issue of whether the service charge demands complied with the terms of the lease.
42. Mr. Wijeyaratne submitted that he had taken his client's instructions concerning the Applicant's case, and his client Mr. Kafetzidis disputed that an application for payment ("the demand") and copies of the accounts had been provided with the letter dated 11 July 2013.
43. The Tribunal was referred to a copy of a letter dated 27 June 2013 from Ethel Nsubuga-Alaka of Rendall Rittner (the managing agent) which referred to a copy of the accounts for 2012 being enclosed. It was accepted by the respondent that a copy of the service charges for the year ending 31 December 2012 was served under cover of this letter but the demand for payment this was served separately. The Respondent did not accept that these documents had been served together.
44. Counsel for the Applicant in reply stated that the letter dated 29 April 2014 (E11) dealt with the service charge years 2008, 09, 10, 11 and 2012. This included both the demands and the service charge accounts in compliance with clause 2(21) of the lease.
45. Mr. Fain tendered Mr. Stephen Michael Ellman who was a director of Rendall Rittner to give evidence on behalf of the Applicant. He stated that he managed Tim Josh and Ethel Nsubaga-Alaka who had been responsible for managing the property and for serving demands.
46. He stated that the Application for payment dated 20.06.2013 was a computer generated document, which was normally generated on a quarterly basis. A covering letter was sent out once a year.
47. Mr. Ellman had noticed that the demand had the word "Beavis" printed on the right hand corner, and that the demand dated 11.6.2010 had the words "manager

dealing". Both of these codings suggested that these demands were generated differently to the normal computer generated run of demands; 'Beavis' denoted the fact that the demand had been referred to the client's solicitors, and 'manager dealing' indicated that an issue had been referred to the manager.

48. Mr. Ellman stated that he had no reason to doubt that the solicitor would then have sent the enclosed documents which were referred to in the letter.
49. In cross examination, Mr. Wijeyaratne referred to Mr. Ellman's witness statement, he noted that in paragraph 8 the statement set out specific dates that were relied upon for when each of the demands were served but they were not in the bundle. Counsel then asked why the letter dated 11 July 2013 was not referred to in the witness statement.
50. In answer to the questions, Mr. Ellman stated that the information in his statement was that provided by the accounts department. Mr. Ellman was asked about when the demands referred to above had gone out.
51. Mr. Ellman accepted that he had no direct knowledge. In answer to the question of when the application for payment dated 20 June 2013 had been sent out he stated that *"... it was logical that the application had gone out undercover with the letter dated 27 June 2013..."* As the demands were referred to in the letter.
52. Mr. Ellman admitted that he could not be sure what had been sent out in the letter dated 11 July 2013. He stated that the demand dated 20 June 2013 could have been sent out more than once. He stated that the property manager would normally send out a copy of the demand in the first instance. However the reference on the right hand side of the document indicated that the account had been referred to the Applicant's solicitor.
53. Mr. Wijeyaratne called the Respondent Mr. Charalampos Kafetzidis who set out his case in relation to the documents received by him.
54. Mr. Kafetzidis relied upon his statement dated 29 October 2014 at paragraph 18. The respondent stated that-: "... On 11 July 2013 the Beavis Partnership responded enclosing what they refer to as being the actual service charge expenditure for the period 2001-2011 with their calculation of my alleged liability. This letter did not answer my previous enquiries and was merely a repeat of the letter from Rendall & Rittner dated 26 May with an up dated expenditure. I did not accept this calculation nor did I accept the attached spreadsheet. I specifically draw attention to the spreadsheet which includes payments towards the general reserve and also half yearly payments neither of which I am liable to pay. I also again repeat that this letter does not conform to the terms of the lease. It cannot be said to be a demand accompanied by a copy of the accountant's certificate...I responded to the Beavis Partnership again providing a detailed account of the background to my dispute and the reasons for me challenging the sums claimed. I also made a payment of £10,000 on account as a good will gesture."
55. Counsel for the Respondent asked him to confirm the documents that he had received. Mr. Kafetzidis stated that he recalled the letter dated 11 July 2013 and "possibly there was also another letter". He knew that he had received a number of documents; however he could not understand what he was receiving, and was of the view that a number of the documents which were said by the Applicant to be enclosed in the letter dated 11 July 2013 had come separately.

56. The Respondent stated that he had "received a number of letters over the years". He was referred by counsel to a letter dated 26 May 2009. Mr. Kafetzidis noted that he had received this letter however no accounts, were included therefore he took no notice of these letters. He was also aware of having received unsigned/certified copies of the accounts for 2007 and 2008. Mr. Kafetzidis did not believe that he had kept copies of these letters.

Whether the service charge demands are subject to section 20B, and if so whether the Applicant may place reliance upon section 20 B (2) in the tenant was notified in writing that those costs had been incurred and that he would subsequently be required to contribute to them by payment of a service charges.

57. Mr. Fain on behalf of the Applicant referred to the letters dated 27 June 2013 (E1) which enclosed a copy of the service charge accounts, these account dealt with a two year period, the year ending 2011 and 2012 And the letter dated 11 July 2013 (C217) which included the enclosure at C223, which he said the Respondent accepted was received. Mr. Fain considered this to be valid demands; his analysis which he invited the Tribunal to adopt was that the only part of the service charges which fell outside of the eighteen month period was 11 days, he accordingly invited the tribunal to find that a reduction of 11/365 could be made. He also invited the Tribunal to consider the decision in *Brent London Borough Council –v- Shulem B Association Ltd [2011] EWHC 1663*
58. This was a case in which one of the issues that the court was required to consider was whether the landlord had served a valid demand under the terms of the lease, and in the event that the landlord had not complied with the terms of the lease whether the demand was notification in accordance with section 20B (2) of the 1985 Act.
59. Mr. Fain invited the Tribunal to consider paragraph 51 in which Morgan J considered whether a letter complied with the requirements under the terms of the lease -: *The letter makes it clear that the lessor requires the lessee to pay the specified sum of £19,359.81. As I have explained , the fact that the letter does not specify the actual expenditure and then specify the due proportion leading to a calculation of the sum demanded, does not result in the requirement being invalid... Although the letter is somewhat confusing on the point, the overall message in the letter is that the lessor has carried out major works and has incurred actual costs..."* The court subsequently considered that the letter served did not comply with the terms of the lease, accordingly the issue was whether it was sufficient to comply with section 20B (2) of the 1985 Act.
60. Mr. Fain considered that in respect of the periods 2011 and 2012 the letters dated 27 June 2013 and 11 July 2013 were sufficient.
61. Mr. Fain did not seek to rely on any other letter for the purpose of a compliant section 20B (2) notice, for any of the other years in question.

62. Mr. Fain considered that the letter was sufficient. He referred the Tribunal to a breakdown of the charges included in the bundle.. He stated that the last two entries together with 4 entries over the page totalled £10969 which was the service charge liability set out in the service charge for the year ending 2011. The figure of £3554.00 was the total of the service charge for year ended 31 December 2012, which was set out in the Applicant's case.
63. In reply Mr. Wijeyaratne referred to the wording of clause 2(21) of the lease). He stated that the demand must include the certified accounts, and that in order for the accounts to be certified they must include the accountant's certificate. He relied upon reference in *Woodfall* volume 1 7.180 which stated-: " *Where a lease provides for the amount payable to be certified by the landlord's surveyor or accountant , the issue of a valid certificate will usually be a condition precedent to the tenant's liability to pay...*"
64. Counsel stated that the certified accounts must be served with the demand. Counsel referred to *Brent –v- Shulem B* (cited above) Paragraph 53.
65. He stated that there were only two candidates for a valid demand which were the letters dated 27.6.2013 and the letter 11.7. 2013. He stated that the letter dated 27.6.2013 was not reliable. There was no evidence that it included a demand. Counsel also rejected the letter dated 11 July 2013, as he stated that there was no evidence of what was included with this letter. He accepted that there may be liability if section 20B (2) applied however in his submissions the letters were not notification as to costs subsequently incurred, which were required to be paid under the terms of the lease. In his submission the letter dated 27 June 2013 did not set out that the sums were incurred or that payment was required under the terms of the lease. This was also the case for the letter dated 11 July 2013 which he submitted was a request for payment within 7 days. This was also the case for the document which was stated to have been enclosed in the letter, as this document was a breakdown not in his view a notification of cost incurred.
66. Mr. Wijeyaratne stated that the rationale behind section 20B (2) was that it warned the tenant to set aside provision for the expenditure, a letter that was a nullity was not such a notice and that the wording in section 20B (2) could not be ignored.
67. In reply to the approach suggested by Mr. Fain of reducing the expenditure by 11/365, Counsel stated that the approach was not to be favoured as the Tribunal did not know when the actual expenditure had been incurred.
68. In respect of the letter dated 29 April 2014 this was served in compliance with the directions, even if the Tribunal considered this to be valid the last date which could be considered to be caught by such notice was 30.10.2012 this was at the very end of the years in dispute. In any event this letter post- dated the issues of the claim and in counsel's submission could not "bring life to the dispute."
69. In order for payment to be made the landlord would have to use the contractual route, which was in effect what was set out in the lease, this required payment to be made on the next quarter date subject to any limitation which may apply under section 20B. This meant that even if the landlord could rely upon the letter dated 29.04 2014 the sum would not be payable until June 2014 which was the next quarter date.

70. Counsel for the Respondent stated that the lease should be considered to have contractual effect and should be construed as a contract. Accordingly the Tribunal should give effect to the plain and ordinary meaning of the lease. Counsel relied upon *Chitty on Contracts* in respect of how the terms of the contract were to be construed. He referred the tribunal to para 12-051 which stated that-: *"The starting point in construing a contract is that words are to be given their ordinary and natural meaning... The courts assume that the parties have used language in the way that reasonable persons ordinarily do."*
71. Mr. Wijeyaratne submitted that the lease used clear and unambiguous language. Counsel stated that the Applicant had not complied as the Respondent was not served with certificated accounts; save possibly for the letter dated 11 July 2013, should the Tribunal find that the demand was enclosed.
72. Counsel stated that in his submission all the other years fell afoul of section 20 B. Counsel concluded that a these documents taken at their highest were requests for payment. Counsel in his submission stated that the non- compliant demands were not notices under section 20B (2). The documents provided were not documents which stated-: *"...these are the costs that have been incurred..."* which then warns the tenant that the costs are likely to be payable by the tenant. Mr. Wijeyaratne stated that such notice had it been given would have been valid.

73. Counsel referred to the enclosed statement of the Respondent's accounts documents as attached to the Court Claim. There was reference to a general reserve; this sum was not payable by the Respondent under the terms of his lease. There was also reference to lift electricity in the attached breakdown of charges and general repairs and maintenance. There was also an issue with the management charges, for example there were charges for management which were in addition to the managing agents' fee. Counsel for the Applicant stated that the landlord paid one of the leaseholders Dr. Matthew Dixon for assistance, the cost of these services were included in the accounts as Landlord's management fee.
74. Counsel for the Respondent stated that the general repairs were large in amount and were not specific enough and could relate to parts of the building which were not the responsibility of the Respondent... Mr. Wijeyaratne also referred to accountancy charges, sundry and pest control by way of examples.
75. Mr. Wijeyaratne then sought to deal with the section 20 notices and the charges that the respondent stated did not comply with the lease. The Tribunal was referred to the section 20 notice dated 8 August 2011.The works were in relation to replacement and upgrading of the buildings electrical installation, to include new emergency light fittings and early warning fire alarm system.
76. Mr. Wijeyaratne stated that the sums claimed in relation to the major work (as set out in the above section 20 notice) were claimed under the lease heading "general maintenance". In his submission the work described in the notice was wider than maintenance, as it was a replacement and upgrade, given this it is outside the scope of the lease, and the cost cannot be recovered from the respondent.
77. Counsel relied upon the strict lease terms in relation to the sums claimed for the replacement of the lift and boiler and also in relation to the boundary wall; there

is an obligation to maintain, there is an evidential burden on the landlord to show those renewals were necessary.

78. Mr. Wijeyaratne criticised the Applicant's case, stating that the Applicant had not provided sufficient details for the Respondent to advance a positive case in relation to the major works. The lift was a capital charge and there was no evidence that the boiler was defective, it was for the landlord to provide evidence of why a replacement was considered necessary. Without more details the respondent could not be certain whether the work fell within clause 3(4) of the lease.
79. It was submitted that the Respondent was not by the terms of his lease required to contribute to the cost of the major work.
80. The Tribunal was invited to inspect the section 20 notices in relation to the lift replacement dated 8 July 2010 and in relation to the section 20 notice served on 18 March 2009 that set out the details of the work required to external repairs and redecoration and additional work to the internal common parts electrical wiring. In counsel's submission this work was not specific enough and was wider in scope than provided for by the lease.
81. In reply, Mr. Fain stated that the leaseholder had received the section 20 Notices and that the notices gave an explanation of what works were necessary, and that the Respondent could have replied to the invitation to make observations, which was issued with these notices, This would have afforded him the opportunity to raise any issues of concern that he had. In relation to the complaint that the fire prevention work fell outside the scope of the lease, these works were necessary and were required by, and were incidental to the provision of insurance. In relation to the boundary wall, this was in Mr. Fain's submission covered by clause 3(3) of the lease.
82. Mr. Fain did not accept that the schedule of charges was not detailed enough. He stated that the Applicant relied upon the wording of the lease, which was wide enough to encompass the charges. The landlord's case was that the charges fell within clause 2(21). Where there were items which should not have been charged for this had been rectified; one example was the cleaning, this had been wrongly charged for the years 2010-2012 and the cleaning cost would be reimbursed. In relation to the reserve fund; this was conceded as not payable and where this item was charged it would reimbursed if this had not already been done.
83. Mr. Fain stated that the Respondent had a right to inspect the vouchers and invoices, and raise any queries with the managing agents, and that it was up to Mr. Kafetzidis to exercise that right. In relation to the management fee in Mr. Fain's submission clause 2(21) (i) provided for observing and performing the covenants on the part of the landlord contained in sub-clauses (2) (3) and(4). The Applicant stated that Dr. Dixon assisted with this, and that this was separate from clause 2(21) (iii) which stated-: " *paying usual fees to a reputable firm of Estate Agents to act as Managing Agents in respect of the building.*" In counsel's opinion the lease was wide enough to provide for the payment of fees to Dr. Dixon.
84. The Tribunal had directed that within 14 days the Applicant should provide details of the sums charged which were now conceded by the Applicant as not payable in accordance with the terms of the lease. The Respondent had a right to reply within

7 days setting out any dispute. This document if agreed would be appended to the Tribunal determination.

85. The Tribunal was provided with a schedule of the items in dispute together with the Applicant's response. The Schedule was a copy of schedules which had been included in the bundle of documents at section A with the addition of a column setting out the credits due to the Respondent. The Applicant recorded a total of £936.21. The Respondent's solicitor in a letter dated 28 November 2014 set out the Respondent's position. The Applicant had replied by letter dated 1 December 2014.
86. The Respondent's solicitor stated that they were unable to agree the credit as they stated that the Applicant had not complied with the Tribunal directions given on 15 April 2014 setting out the category of expenditure so as to enable the Respondent to state whether they considered the expenditure recoverable under the terms of the lease. This was not accepted by the Applicant. This matter therefore will be determined by the Tribunal on the basis of the evidence provided to the Tribunal at the hearing on 10 November 2014.

The tribunal's decision

87. The Tribunal are asked to determine firstly, whether the Applicant, in relation to the outstanding service charges has served demands which comply with the terms of the lease. Two further issues were raised by the Respondent firstly whether the Applicant has included items within the demands which are not payable in accordance with the terms of the lease. And secondly whether, if the landlord had served demands that complied with the lease, the landlord was now 'time barred' because of the provisions of Section 20 B (1) of the Landlord and Tenant Act 1985.
88. The Tribunal noted that by clause 2 (21) of the lease the landlord was required to provide a copy of (i) the service charge demand, (2) the service charge accounts and a breakdown of the tenant's individual expenses.
89. The Applicant firstly claimed that this information was provided on the dates set out in Mr. Ellman's witness statement, and secondly, that this information was provided in two parts firstly by the demand and breakdown and secondly by accounts which were sent to the Respondent initially by email and later enclosed in the letters dated 11 July 2013 and by the letter dated 29 April 2014.
90. The Respondent also criticised the breakdown included, in that it refers to services which are not payable by the Respondent. This was acknowledged by the Applicant and is dealt with below.

91. The Tribunal noted that the Applicant had first sought to rely on demands which were said to have been served on dates set out in the statement of Mr. Ellman; however no evidence was adduced to support this at the hearing. The Applicant also stated at the outset of the hearing, that compliance with the lease had been effected by a series of emails which included the accounts. For reasons which have

been set out above, the Tribunal declined to accept this evidence as it had not been served in compliance with the directions.

92. The Tribunal was invited to consider that the Applicant had complied by reference to two letters which were referred to above.
93. The Tribunal has noted that the letter dated 11 July 2013 lists various documents as having been enclosed that is a breakdown " a spreadsheet listing the items you were required to contribute towards and amount and the amounts actually received from 2008 to December 2012..." "*...the service charge account for the year ending 31 December 2012 together with an application for payment (a demand) sics. Detailing the amount required for the service charge period 1st January2012 to 31 December 2013 which are also now due...*"
94. The Tribunal noted that if this letter was considered to accurately reflect the enclosures the Applicant had for the period ending December 2012, provided a demand, a breakdown and a copy of the service charge accounts as required by the terms of the lease.
95. The Respondent did not accept that all of these documents were provided in this letter, however the Tribunal noted that the Respondent does not seek to rely on a letter sent by him querying the fact that the documents, that were said to be enclosed were missing.
96. The Tribunal had regard to the evidence of Mr. Kafetzidis and noted that he acknowledged that there were documents that he was sent and that sometimes these documents were ignored by him. This was in the context that he had a history of proactive correspondence with the Applicant and had queried issues in the past, where he had not agreed with the context or understood the content.
97. The Tribunal finds on a balance of probabilities that the Applicant served these documents in a manner which accords with the wording of the lease, accordingly we find that the Respondent was served a demand for the year ending 31 December 2012 which accorded with the terms of the lease.
98. In respect of the earlier service charge years the Tribunal noted that the letter dated 29 April 2014 was served in compliance with the directions of the Tribunal. The Tribunal finds that this cannot be relied upon. The Tribunal accepts Mr. Wijeyaratne submissions that this post-dates the Applicant's claim and cannot be used to validate a claim which did not comply with the terms of the lease. The Tribunal is aware that the Applicant cannot now serve a complaint demand. Therefore the Tribunal determines that the charges prior to 2012 are caught by section 20B (1) of the Landlord and Tenant Act 1985.
99. The Tribunal noted that Mr. Fain conceded that although there were demands that were served these could not be relied upon as notice in accordance with section 20 (B) (2). The Tribunal were accordingly not asked to consider whether these demands could be construed as notice for the purpose of section 20 (B) (2) of the 1985 Act.
100. The Tribunal has not found it necessary to determine whether charges that pre dated 2012 included matters which were not payable under the terms of the lease, giving its findings that the demands cannot now be served in compliance with either section 20B(1) or 20B (2).

101. In respect of the general repairs payable, these fall to be considered under clause 3(3) and (4) of the lease, this provides amongst other matters, in relation to the lift to "*maintain the lift serving the flat in working order and condition*". In the Tribunal's opinion this provision was wide enough to include works of replacement and renewal. The Tribunal considers that "working order" is sufficiently wide to provide for the provision and replacement of lighting within the lift.
102. The Tribunal is also satisfied on a balance of probabilities that the work undertaken during this period fell within the scope of clause 3(3) and (4).
103. In respect of the managing agents fees the Tribunal consider that these are payable under clause 2(21) (iii) and that no serious challenge was raised by the Respondent that the current managing agents do not fall within the scope of this definition. However the Tribunal is not persuaded that any fees are payable to Dr. Matthew Dixon as no evidence was provided as to any work carried out by him in respect of the covenants in the lease.
104. The Tribunal noted that the sum claimed for the year ending 2012 is £3554.00. As the compliant demand was served on 11 July 2013, the earliest date that charges can be recovered from is 11 January 2012. The Tribunal is not satisfied that the approach urged on it by Mr. Fain is correct, that is that the sum demanded should be reduced by 11/365. The Tribunal determines that the Applicant should prove that the service charges were incurred after that date, by the production of the relevant vouchers/invoices where any sums are disputed.
105. The Applicant shall within 28 days of this decision set out the sum due, the Respondent shall within 14 days indicate whether this sum is accepted, if there is any dispute for each of the disputed items vouchers/ invoices must be produced. In the absence of invoices or **vouchers establishing the date when the cost was included, the item shall not be payable by the Respondent.**
106. The Tribunal noted that the Applicant and Respondent both agreed that the lease did not provide for costs incurred in these proceedings before the Tribunal to be payable.
107. The Tribunal therefore makes no order in respect of the cost of the preparation and attributable to the hearing on 10 November 2014

108. This matter should be returned to the county court in respect of any enforcement and for the Respondent's counterclaim to be determined.

Name: Judge Daley

Date:11 February 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
   (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
   (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
   (a) an amount prescribed by, or determined in accordance with, the regulations, and
   (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in

connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
  (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

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.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 5

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

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.