I I

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2019/0324**
Property	**:**	**Flats 1 and 2, 114 Crawford Street, London W1H 2JQ**
Applicant	**:**	**Dr M Sharon**
Representative	**:**	**Mr D Kilcoyne of counsel**
Respondent	**:**	**Dow Properties Limited**
Representative	**:**	**Mr E Blakeney of counsel**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr J Barlow JP FRICS**
Date and venue of Hearing	**:**	**19 December 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**5 June 2020**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years from 2005 to 2019.

2. The relevant legal provisions are set out in the Appendix to this decision.

The properties

3. Both flats are studio flats above commercial premises in a terrace of similar properties. Flat 1 is on the first floor and flat 2 on the second. There is one other flat.

4. Both flats are let on assured shorthold tenancies by the Applicant.

The lease

5. The leases to flats 1 and 2 are in similar terms. Both were granted in 1991, for 125 years running from June of that year.

6. The tenant is obliged to contribute a fair and proper proportion to the landlord's costs of insurance premiums (as a service charge), the obligation being expressed as "by way of further rent" in the lease (clause 1).

7. By clause 2, the tenant covenants to pay a fair and reasonable proportion of lighting and cleaning "of the ground floor access leading to the stairway on the ground floor of the property to the upper part", and to similarly pay a proportion of "the costs to the lessor in carrying out the repair maintenance and upkeep of the Reserved Property"(sub-clause (xxix)(a) and (b)). The "Reserved Property" is set out the second schedule. It comprises the ground floor access and stairway and the main structural parts of the property. That the appropriate proportion payable in respect of each flat was 22% was not contested.

8. The landlord covenants (clause 3(C)) to insure the building, to keep the ground floor access and stairway cleansed and lit (clause 3(D)), and to decorate externally (clause 3(F)((1)).

9. Notices or demands by either party "shall be in writing and may be given in any of the modes provided by section 196 of the Law of Property Act 1925" (as amended) (clause 5).

10. Other clauses in the lease are set out where relevant below.

Background to the dispute

11. The Respondent acquired the freehold of the building (that is, the three flats and the commercial premises) in 2005. It was agreed that the Applicant had paid no service charges from 2005 to the date of the hearing.

12. The Applicant's case was that he had paid no service charge because neither he, his managing agent nor his tenants had ever received a demand for a service charge.

13. The issue came to light when the Applicant's attempted to sell the properties in early 2019. As a result of enquiries made as part of the conveyancing process to the Respondent, the Respondent claimed that the Applicant owed arrears of service charge of £33,480.

The hearing

14. The Applicant was represented by Mr Kilcoyne of counsel, with Ms Green, of his instructing solicitors. The Respondent was represented by Mr Blekeney of counsel, with Mr Bishop, of his instructing solicitors.

15. The Tribunal considered, as a preliminary issue, whether the Tribunal should accept a witness statement from Mr Arefin.

16. The directions set down on 1 October 2019 required the service of witness statements on or before 22 November 2019. The Respondent did not serve Mr Arefin's witness statement until 29 November 2019. The Applicant objected to the admission of the witness statement, and it was accordingly not supplied in the hearing bundle.

17. The issue was dealt with in both parties' skeleton arguments, and counsel addressed us orally.

18. The Respondent submitted that we should nonetheless admit the witness statement. Mr Blakeney argued that:

    (i) The witness statement was short – three pages. This was not a case of a large amount of new information being sought to be provided late.

    (ii) The witness statement had only been served a week late, and the Respondent's solicitors had refrained from reading Mr Sharon's timeously served witness statement until Mr Arefin's was served.

(iii) The witness statement did not deal with wholly new material, but without it, the Respondent would be at a disadvantage in deploying its case in an appropriate and structured way.

(iv) It was a disproportionate approach to the lateness of the witness statement to exclude it altogether. Mr Blakeney referred to the over-riding objective in the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 3.

19. For the Applicant, Mr Kilcoyne submitted:

(i) That the Respondent's application was rendered unreasonable by the background circumstances – the directions had failed to state that there should be a formal response from the Respondent to the application, although the context in the directions indicated that this was merely an oversight. The Applicant's solicitors had requested such a formal response, but none had been forthcoming. If there were further documents to be introduced, the Applicant had not been made aware of them.

(ii) There was no good reason why the witness statement was late, and it was important that directions be adhered to.

20. In his reply, in relation to the issue about new material, Mr Blakeney said that he would apply for some additional examination in chief. In doing so he would not seek to introduce wholly new points, but rather to amplify points already evident. Mr Kilcoyne said he would object to further examination in chief.

21. The Tribunal allowed the admission of the witness statement. Directions of the Tribunal should be adhered to. Nonetheless, we concluded that reception of the evidence would assist the Tribunal in coming to conclusions on the issues before it. We had regard to the overriding objective. It was not a case where the evidence sought to be admitted by way of the witness statement amounted to an ambush.

22. However, we declined to allow additional examination in chief. The Applicant had had notice of the contents of the witness statement, albeit late. It would not, in the circumstances, be reasonable or fair to allow the Respondent to introduce matter via examination in chief, regardless of whether it was wholly new evidence or a re-presentation of evidence of which notice had been given.

23. Both Mr Amin, for the Applicant, and Mr Arefin, for the Respondent, gave oral evidence, in addition to the evidence in their witness statements and the documents exhibited thereto, by way of cross-examination, re-examination and questions from the Tribunal.

24. Following the evidence, the Tribunal heard submissions from counsel (who had both also submitted skeleton arguments at the outset). The Tribunal heard completed submissions on issues relating to the construction of the lease, but could not hear full submissions on the other issues arising. With the agreement of both parties, the Tribunal gave written directions for the exchange of written submissions covering outstanding issues. As a result, we received closing submissions from the Applicant dated 6 January 2020, the Respondent closing submissions, in response, dated 13 January, and the Applicant's reply dated 20 January.

25. In addition, the Tribunal, in the written directions, indicated that we were not satisfied that we could reasonably come to conclusions on the reasonableness of the service charge as it related to insurance premiums on the evidence provided in the hearing. We accordingly made provision in the directions for the Respondent to provide further specified information, and for the Applicant to provide comparable estimates and any other material it considered would assist the Tribunal.

The issues and decisions

26. In ordering this decision, it is most convenient to consider each of the substantive issues in turn, referring to such evidence as is relevant, rather than to engage in a general summary of the evidence in advance of applying the evidence to the issues.

27. The issues raised by the parties are dealt with in this decision in the following order:

(i) Limitation;

(ii) Whether service charge demands were served;

(iii) Consequences of our finding in relation to (ii): sections 21 and 20B of the 1985 Act;

(iv) The construction of the lease; advance service charge;

(v) The construction of the lease; management fees;

(vi) Application for orders under section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A.

Issue 1: Limitation

28. In their skeleton arguments produced at the hearing, Mr Kilcoyne, for the Applicant, argued that the Limitation Act 1980 applies so as to prevent the Respondent claiming service charges outwith the limitation periods applied by the Act. Mr Blakeney argued that the Limitation Act did not apply at all to applications under section 27A of the 1985 Act at all, citing *Parissis v Blair Court (St John's Wood) Management Ltd* [2014] UKUT 503 (LC), [2014] L & T R 7 and *Cain v Islington Borough Council* [2015] UKUT 542 (LC), [2016] L & T R 13.

29. In his submissions of 6 January, Mr Kilcoyne sought to distinguish *Parissis* and *Cain*, and relied on the relevant passage in Tanfield Chambers, *Service Charges and Management*, 4th edition, paragraphs 32-02 to 32-04. In his response (13 January), Mr Blakeney argued that the cases could not be distinguished. He also indicated that he understood that the Applicant was no longer contesting the issue, but invited the Tribunal to make a finding. In his reply (20 January), Mr Blakeney does not refer to the issue, but did provide copies of the paragraphs from Tanfield, in addition to the materials provided at the hearing.

30. The discussion in Tanfield seeks to confine the authority of both cases to the proposition that a tenant's application under section 27A does not engage the Limitation Act 1980.

31. The discussion in Woodfall's Landlord and Tenant, however, makes the broader claim that "[t]he Limitation Act 1980 does not apply to applications under s.27A" (paragraph 7.192.1), citing *Cain*.

32. In that case, HHJ Gerald quotes both sections 8 and 19 (it is not necessary for us to consider the difference between a service charge reserved as rent and one that is not, and we do not do so). He then said, at paragraph [34]:

> "The application to the F-tT is a claim for determination as to the reasonableness of the service charge made under s.27A of the 1985 Act. It is not a claim to recover rent or arrears or service charge (both brought by the landlord) or damages in respect thereof (brought by the tenant). If successful, it would result in a determination as to the reasonableness of the amounts claimed and nothing more."

33. This view expressed by the Upper Tribunal is general in its application, and in our respectful view clearly supports the proposition attributed to the case in Woodfall.

34. We add that, before coming to a conclusion that the Limitation Act did apply, we would have had to hear argument as to how it could be applicable to a tenant's application that unpaid service charges were not payable and/or reasonable, rather than one in which the tenant sought a determination in respect of service charges that had been paid, as in both *Parissis* and *Cain*.

35. *Decision*: To the extent that the issue remains a live one, we find that the Limitation Act 1980 has no application to this application.

Issue 2: The service of the service charge demands

36. The Applicant's case is that the service charges contended for were never served on the Applicant, and that accordingly the Applicant is not liable to pay any service charge arising out of costs incurred more than 18 months before a valid demand was served (section 20B of the 1985 Act). The Respondent says that the demands were timeously and effectively served by means of the ordinary post.

37. There are therefore two distinct issues before the Tribunal. The first is the legal issue of whether service of demands under the lease can be effected by ordinary post. This is a matter of construction of the lease, statutory interpretation and stare decisis. The second issue is whether the demand were, as a matter fact, sent by ordinary post, which only arises if the answer to the legal question is that service may be effected by the ordinary post.

The legal issue: could service be effected by ordinary post?

38. The parties' submissions were developed briefly at the hearing and at greater length over the course of the exchange of written submissions provided for in the further directions.

39. It is convenient to set out the Respondent's submissions first.

40. Clause 5 of the lease provides that

> "Any notice or demand hereby required or authorised to be given by the lessor or the lessee shall be in writing and may be given in any of the modes provided by section 196 of the Law of Property Act 1925 [as amended]".

41. Section 196 of the 1925 Act provides a set of modes by which notices required under the Act may be served. Sub-section (4) (as amended) provides, so far as is relevant:

> "(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee … by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned by the postal operator … concerned undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered."

42. Mr Blakeney argues that clause 5 incorporates the modes of service in section 196 for the purposes of the lease.

43. The argument that service by ordinary post, not just registered letter, is rendered effective by section 196 is based on *London Borough of Southwark v Akhtar* [2017] UKUT 150 (LC), [2017] L & T R 36.

44. The argument relies on section 7 of the Interpretation Act 1978. That section is headed "references to service by post", and provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

45. In *Akhtar*, having decided that a notice under section 20B(2) was a notice "under the lease", and that the lease effectively incorporated the section 196 modes of service, HHJ Cooke found that therefore, section 7 of the Interpretation Act 1978 had the effect of extending the mode of service set out in sub-section (4) to the ordinary post.

46. This, the Judge said, "has the effect of considerably widening the helpful effect of section 196 of the Law of Property Act 1925; the later statute is changing the meaning of the earlier one in a way that accords with modern business practice."

47. Mr Blakeney submits that this approach to the application of section 7 to the interpretation of section 196 is of general import, and not limited to the specific notice concerned in *Akhtar*.

48. We understand Mr Kilcoyne to attack this reasoning on two bases – in this decision, we have reordered his submissions, which developed somewhat over time.

49. In the first place, he submits that clause 5 does not incorporate section 196. Unlike the clause in *Akhtar*, which stated that the section "shall

apply" to notices, Mr Kilcoyne argued that clause 5 "is clearly intended to exclude section 196 (ie by contrary intention) and impose a different regime" (his submissions of 6 January 2020), that is, one providing for a notice to be in writing, and then via the section 196 modes, such that thereafter service will be given whether it is received or not, delivered or not, or returned undelivered. Once there is an intention in the lease to exclude section 196, section 7 is also inevitably excluded.

50. Mr Blakeney contends that this approach is "searching for a distinction where there is none" (his submission of 13 January 2020).

51. We agree with Mr Blakeney's conclusions, although not necessarily for the same reasons as he advances. Clause 5 is slightly awkwardly drafted – it sets out on its own authority, as it were, that the notice is to be in writing, which is the effect of section 196(1), and then stipulates that the "modes provided by Section 1996" should apply. The "modes" are obviously those specified in subsections (2) to (4). The clause, to this limited degree, disassembles section 196 and then puts it back together again. The overall effect is to provide that (*inter alia*) sub-section (4) operates, in its entirety, in relation to the service charge demands.

52. It is evident from the terms of clause 5 that the parties intended to incorporate section 196 in the lease to regulate the service of notices under it.

53. Mr Kilcoyne's contention that the clause is excluded by "contrary intention" also misreads the nature of section 7 of the 1978 Act. We discuss this issue further below at paragraphs [60] to [63].

54. Thus we accept that the precondition to Mr Blakeney's argument derived from *Akhtar* is made out. This leads us to the second of Mr Kilcoyne's arguments, which is that *Akhtar* is wrongly decided and we should not follow it.

55. Mr Kilcoyne argues that *Akhtar* is wrong for two reasons. First, because "post" in section 7 refers to ordinary post, whereas section 196(4) is concerned only with registered post, so cannot automatically attract the operation of section 7. He referred to *dicta* in *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch), [2003] 1 WLR 2064, [67]-[71].

56. Secondly, Mr Kilcoyne argued that there was no Court of Appeal authority to support the conclusion in *Akhtar*, discussing variously *Chiswell Estates v Griffin Land* [1975] 1 WLR 1181, *Trafford Housing Trust v Rubinstein* [2013] UKUT 581 (UT) and again *Beanby*; and referring us to a passage in Halsbury's Laws on *ratio decidendi*.

57. Mr Blakeney takes issue with Mr Kilcoyne's analysis of these authorities, the dispute largely taking the form of disagreement about the significance of *obiter dicta*. It is not, however, necessary for us to consider these issues. As Mr Blakeney also argues, we are bound by *Akhtar*. In that case, the Upper Tribunal accepted the argument as deployed before us by Mr Blakeney, as part of the decision taken. While it is true that the notice in issue there was the statutory notice in section 20B(2) of the 1985 Act, the reasoning by which the Upper Tribunal arrived at its conclusion applies equally to service of any notice under a lease which incorporates the modes of service provided by section 196, including the service charge demands in this case. It is a binding precedent which we must loyally apply, and we do.

58. At one point, Mr Blakeney suggested that there was nothing that would allow us to find that *Akhtar* had been decided *per incuriam*. We certainly agree with this observation – that doctrine, allowing a court to disregard an otherwise binding previous authority, derives from *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. It only applies to the Court of Appeal considering whether it may depart from its own previous decisions, or decisions of courts of co-ordinate jurisdiction. It may, perhaps, by extension, also apply to other appellate courts or tribunals in a similar position to that of the court of appeal, but it does not apply to the High Court, including when exercising an appellate jurisdiction: *Willers v Joyce and Another* [2016] UKSC 44, [2018] AC 843, [9]. It is fundamental that it does not apply to a lower court considering a decision of a higher court (*Cassell and Co Ltd v Broome* [1972] AC 1027, 1054).

59. However, we add that, had the matter been devoid of authority, we would not have accepted Mr Blakeney's argument as to the application of section 7.

60. Our view is that the argument mis-applies the Interpretation Act 1978. That Act "makes a modest contribution to simplifying Acts and making them shorter by eliminating the need for repetition." (Bennion on Statutory Interpretation, 7th ed, paragraph 19.1). It is "a drafting convenience. It is not expected that it would be used to change the character of legislation" (*Blue Metal Industries Ltd v Dilley (RW)* [1970] AC 827, PC, per Lord Morris of Borth-y-Gest, quoted in Bennion, above).

61. The Act consolidates (*inter alia*) the Interpretation Act 1889, and the application of definitional provisions in the 1978 Act reflect that history. Section 7 (which was section 26 of the 1889 Act) applies to Acts passed after 1889 (Schedule 2, paragraph 3). This provision in the 1889 Act was in force and known to those drafting the 1925 Act.

62. It is a basic feature of the Interpretation Act 1978 that its definitional provisions give way to an alternative Parliamentary intention, as

encapsulated in the text of the Act under interpretation. Thus, the definitional provisions in the 1978 Act are expressed as applying "unless the contrary intention appears".

63. It appears to us that, in section 7, both counsel considered that the phrase "unless the contrary intention appears" immediately before the substantive postal rule is set out referred to the intentions of the parties to the instrument (although they disagreed about what those intentions were as to). In fact, it refers (as it does in most of the other provisions of the 1978 Act) to the intentions of Parliament.

64. The substance of the specific rule that the section imposes includes the similar looking phrase "unless the contrary is proved", which relates to the possibility of rebutting the deemed presumption of service.

65. We think that the provisions in section 196 of the 1925 Act, drafted and enacted by Parliament in the full knowledge of the rule now in section 7 of the 1978 Act, then section 26 of the 1889 Act, show just such a contrary intention. Section 196(4) allows for service using a restricted and more certain as to receipt form of postal delivery, rather than allowing service by the ordinary post. It is difficult to understand how that provision could have been drafted and enacted in the knowledge that the rule in section 7/section 26 would automatically effectively subsume it.

66. However that may be, we are bound by *Akhtar*, and as a result must find that the ordinary post may be effective to serve a demand, and that the presumption in section 7 applies, subject to proof of the preconditions upon which the presumption relies.

The factual issue: where the demands served by the ordinary post?

67. We start with a consideration of the relevant evidence.

68. In his witness statement, Mr Sharon says that since 2008, the letting of the flats on assured shorthold tenancies had been managed for Mr Sharon by Mr Rida Amin (Mr Amin said it was since 2007). Mr Sharon had engaged another managing agent before then. He says that he has never been served with any service charge demands, either by the Respondent or by its predecessor in title. He is evidently making the factual point that he has not received a demand, rather than a legal point, in making this statement.

69. Mr Amin explains in his witness statement that he undertakes the functions of a managing agent in relation to Mr Sharon's tenants in the flats. He received no communication at any time from the Respondents. The demands made at the time of the attempted sale of the leasehold interest in the flats came as a surprise to him. He contacted the tenants

of the flats. One had been resident for about five years, the other for ten years. He states that both tenants "categorically confirmed to me that they had never received or been served with any service charge or ground rent demands, and that no correspondence address to [the Applicant] had been sent to the flats which could have contained any demands."

70. In cross-examination, Mr Amin explained that there is a shelf in the communal hallway upon which post was placed. He checked the communal areas about twice a month. He had never seen an envelope addressed to Mr Sharon there.

71. Mr Sharon did have his own keys to the communal door and the flats. Mr Amin said that Mr Sharon attended sometimes, as a consequence of Mr Amin telling him of a burglary a long time ago. Nonetheless, Mr Amin said that he was in charge of everything in relation to the management of the flats. He denied that his evidence contradicted that of Mr Sharon.

72. Mr Blakeney put it to Mr Amin that there were problems with post at the address. He referred Mr Amin to Mr Arefin's witness statement, in which Mr Arefin stated that in February 2018, the Respondent received a demand and statement from EDF Energy for £10,673 in respect of "flat A". EDF were threatening legal action. Mr Arefin established from the company that they had failed to make contact with the Applicant, and had obtained the Respondent's details from the Land Registry. Mr Blakeney put it to Mr Amin that the fact that the EDF letter, which was exhibited to Mr Arefin's witness statement, was properly addressed to "flat A" must mean that there were difficulties with the receipt of post at the property. Mr Amin said he did not know about the bill. Although he did not know anything about the bills that tenants would be sent, he had specifically asked them whether they had received service charge demands, and was told they had not.

73. Mr Amin's witness statement closed with the statement that he "strongly believe the Respondent is not being truthful in their claims that any demands were indeed served". Mr Blakeney put this statement to Mr Amin, and asked if he was saying that the demands were prepared at the time to which they related and not served, or were not prepared at all until the issue of the sale came up. Mr Amin responded that Mr Sharon said he had never received demands, and the he did not want to comment on whether "they" – presumably, Mr Arefin – were lying. Asked if he wanted to row back from his allegation in the witness statement, he said that he did not. There was some slight confusion in the way he answered this question – he initially said "yes", but it immediately became apparent that he had confused the form of the answer, and that he intended to affirm that he stood by his statement. Mr Blakeney's follow-up question was to put it to Mr Amin that he was maintaining that there was a "grand conspiracy". Mr Amin answered

with the observation that if the standing charges were outstanding, the Respondent could have taken action. Why, he asked rhetorically, had they not done so for all these years, but were now asking for it. This was a clear indication that his final word was that he was standing by the view he gave in his witness statement.

74. In his witness statement, Mr Arefin states that he is the company secretary of the Respondent, and that until mid-2018, when Fifield Glyn Ltd were instructed, he managed the property on behalf of the Respondent. It became apparent in cross examination that he retained responsibility for arranging the insurance after Fifield Glyn were appointed.

75. Since 2005, service charge demands have been sent to the Applicant at the flat addresses, which are the only addresses, he says, that the Respondent had for the Applicant. The demands were sent by post, and were accompanied by a summary of rights and obligations in the prescribed form, which, he says, were provided by the Respondent's solicitors.

76. In cross-examination, Mr Arefin said that the service charge demands were based on records kept on a computer. The demands were generated as Microsoft Word documents. These, he stated, where posted to the flat addresses.

77. Mr Kilcoyne cross-examined Mr Arefin on a number of matters that he was to argue were relevant to Mr Arefin's credibility.

78. The insurance for the property, the cost of the premiums for which were recoverable in the service charge, was arranged by way of a block policy for the whole of Dow's portfolio. Mr Arefin described the portfolio as consisting of about 14 larger properties and 16 smaller ones. Most consisted of mixed commercial and residential units. Mr Kilcoyne asked Mr Arefin about the failure of his solicitors to disclose a schedule showing how the cost of the block insurance policy was distributed between the properties. Mr Arefin stated that it was he who determined how much each property should contribute towards the overall bulk policy premium. He said that size was an important factor, but that he worked out what he considered the appropriate amount for each property, using his judgement.

79. Mr Kilcoyne asked Mr Arefin about a statement in the correspondence that it was the broker that advised the split between the properties. Mr Arefin said it was an erroneous statement, and he could not explain how the solicitor came to make the error. He denied that he had been consulted about it, and that he was reluctant to release information. A little later, Mr Arefin said that he had told the solicitor that it was he who determined the split.

80. In answer to Mr Kilcoyne's questions about an apparent inconsistency between the figures given for insurance during the service charge year June 17-18, Mr Arefin said he had no knowledge of the figures, which he did not provide to Fifield Glyn. He was not aware of the accountants engaged by the managing agents and did not know if there were signed and dated versions of the unsigned, undated service charge accounts provided in the bundle. He said both that he did not provide any figures to Fifield Glyn, and that he supplied them with the figure for the building as a whole. He attempted to explain marked differences in the figures between 2016-17 and 2017-18, but eventually said that he could not explain the difference.

81. Mr Arefin said that in general, other than some specific emergency work, there had been little expenditure on maintenance, because of a lack of co-operation, by way of payment of service charges, by the leaseholders. He said that demands sent to them had not been replied to. He was asked about the lack of invoices provided to justify service charge demands. He said that the emergency work had been paid in cash, so there was no invoice. He suggested that there was some evidence of expenditure, in relation to fire protection matters. It was not in the bundle because he had only become aware of the contents of the bundle the previous day. When questioned about this own fees as managing agent before the appointment of Fifield Glyn, he said he had issued fee invoices. There were no such invoices in the bundle.

82. In response to questions about delays in responding to requests for information from the Applicant in early 2019, Mr Arefin said he had been busy, and that he did not have the service charge demands issued by Fifield Glyn. To some questions, he simply said he could not answer.

83. Pressed on why he had failed to pursue the Applicant for debts which were, by 2017, approximately £26,000, he said that he did not know where the Applicant was. He said that when cooperation was absent, there was a danger of creating ill-feeling, which they sought to avoid. As a result, they did not wish to take action. It could also take too much time to chase debts. When Mr Kilcoyne returned to the issue somewhat later in his cross-examination, Mr Arefin conceded that not pursuing the Applicant may not have been business-like, but it could cost money to do so, and it was possible to reclaim arrears either from the mortgagee or on sale.

84. Mr Arefin denied that he had put together the package of service charge demands in 2019, when it was put to him by Mr Kilcoyne. He denied that, being primarily concerned with the commercial properties, his management of the residential units was lax.

85. The parties made developed submissions on the facts in the exchange of written submissions.

86. For the Applicant, Mr Kilcoyne attacked the credibility of Mr Arefin. He specifically relied on:

(i) The lack of any invoices supporting expenditure referable to the service charge;

(ii) The lack of a breakdown of the cost of insurance between buildings; and what Mr Kilcoyne claimed were inconsistencies as to who undertook the breakdown, and as to the sums sought to be recovered as the cost of premiums; and

(iii) Mr Arefin's inconsistency in saying he had no work other than as an officer of Dow, and that he acted as an independent managing agent for Dow.

87. Mr Kilcoyne also relied on his analysis of the evidence relating to posting and delivery of the service charge demands. The Applicant's evidence was that no demands had been received by him, nor, according to Mr Amin's evidence, by his tenants.

88. In respect of the demands it was claimed were issued by Fifield Glyn, Mr Kilcoyne notes that the managing agents themselves provided no evidence of posting. He describes their lack of involvement in the case as "extraordinary".

89. Mr Kilcoyne goes on to observe that the Applicant's case that he had not received service charge demands at his managing agent's office, or at his own home address, could have been "completely undermined" by evidence from Fifield Glyn that the demands had been posted. The point builds on the fact that there were 20 demands said to have been "issued" by Fifield Glyn, and these were posted not to the flat addresses, but to the managing agent's office and to the Applicant's home address.

90. In respect of the third flat at the property, unlike in *Akhtar*, there was no evidence of the leaseholder of flat 3 having paid service charge, and therefore impliedly received the demands. Further, Mr Kilcoyne in his written submissions dated 6 January asserts that HM Land Registry indicated the leaseholder, a Ms Webster, had acquired her interest in October 2014 (a copy of the register demonstrating this was attached to his reply to Mr Blakeney's submissions dated 20 January). Mr Kilcoyne drew our attention to the service charge accounts for the year ending in June 2019, which showed a level of arrears of service charge for Ms Webster consistent with her never having paid her service charge up to that date (that is, including one year of Fifield Glyn's period as managing agent).

91. In those 6 January submissions, Mr Kilcoyne refers to a letter to a Ms McGurk, who preceded Ms Webster as the leaseholder of flat 3, which he said was attached. The letter was, in fact, not attached, a point mentioned by Mr Blakeney in his response (13 January), but was attached to Mr Kilcoyne's reply of 20 January 2020.

92. The letter is addressed to Ms McGurk from the Respondent and dated 26 August 2014. The letter sets out arrears from 2006 to 2014. The sums specified are the same as those demanded in respect of the Applicant's properties, indicating that Ms McGurk has not paid any service charge over that period (subject to a deduction in respect of a total of £1,481.25, stated "to be reimbursed for monies paid to the contractors on our behalf"). A handwritten note on the copy of the letter says "paid up to date". The demand includes a sum as an administration fee for dealing with conveyancing enquiries. This demonstrates, argues Mr Kilcoyne, that MsGurk, too, had not paid any service charge until she came to sell her leasehold interest.

93. Mr Kilcoyne relies on what he says are significant delays in the disclosure of service charge demands to the Applicant's solicitors. He further points out that according to an email chain before the Tribunal ([181]), it appears that service charge demands that Mr Arefin stated were kept in files on his computer, were provided to him, electronically, by Fifield Glyn.

94. That Dow at no time sought to enforce the obligation to pay the service charge is relied on by Mr Kilcoyne. Mr Arefin's response to this in cross-examination was, Mr Kilcoyne claims, not credible. Further, Mr Arefin's statement that sums due could be recovered when the flats were sold suggested, Mr Kilcoyne submitted, a long term strategy consistent with not serving demands as they came due, so as to not alert a leaseholder to challengeable charges, and then claiming the sum when the leaseholder was under pressure to finalise a sale.

95. Finally, Mr Kilcoyne draws attention to the sheer number of demands not, on the Applicant's case, received. During the relevant period, there had been, on the Respondent's case, forty-four demands posted. That all were posted but none received is not likely.

96. Mr Blakeney argued that Mr Arefin was a frank and honest witness, and his acceptance that some matters could have been dealt with better by others enhanced his credibility.

97. Criticisms of the preparation of the case and of Mr Arefin's interactions with his solicitors were explicable as merely minor faults or miscommunications that did not bear the weight of inference sought to be drawn by Mr Kilcoyne.

98. Mr Blakeney submits that Mr Kilcoyne advances an allegation of fraud without adequate basis. Mr Blakeney states that when he put to Mr Amin the question whether or not he was alleging untruthfulness or fraud on the part of the Respondent, "no coherent answer was forthcoming" (our account of Mr Amin's evidence on this is at paragraph 73 above).

99. Rather, Mr Blakeney submits, in the light of the production of the dated and signed service charge demands, and Mr Arefin's evidence, the only conclusion we could reach would be that the demands were in fact sent, and that remained the case in the absence of a witness statement from Fifield Glyn. That the Applicant states he did not receive the demands was attributable to errors with the post, sub-tenants or memory. Mr Blakeney draws a parallel with the factors raised in *Akhtar*, at [84].

100. In relation to the letter addressed to Ms McGurk, Mr Blakeney, noting that the letter was not with the Applicant's submissions to which he was responding (see [91] and [92] above), says that "it appears that [Mr Kilcoyne] is now attempting to give evidence on [the Applicant's] behalf, which should be treated cautiously (although this evidence does support R's case that there are issues at the property concerning post reaching its intended destination)".

101. Mr Blakeney also relies on the electricity bill as indicative of problems with communications reaching the Applicant. Either, Mr Blakeney submitted, there was a problem with the post at the property, or the Applicant was deliberately putting himself out of reach of documents so as to plead ignorance.

102. We now turn to our consideration of the evidence and submissions and come to our conclusions.

103. In terms of the oral evidence, we found Mr Amin a straightforward and honest witness. We have explained his answers in relation to his views of the honesty of the Respondent's case above.

104. We considered Mr Arefin a less satisfactory witness. On a number of occasions, he seemed to contradict himself, albeit largely in relation to matters of secondary importance. On some occasions, he implausibly denied knowing about a matter he found difficult to explain, for instance, in relation to the provenance of the sums relating to insurance in Fifield Glyn's service charge demands, after he had already said that he had retained responsibility for insurance after the appointment of the firm.

105. Before discussing the principal issue, we first consider two preliminary matters.

106. First, we reject Mr Blakeney's contention that the allegation of fraud was lately introduced during submissions. Mr Amin's witness statement included the statement that he believed the Respondent was not being truthful. We do not agree with Mr Blakeney that Mr Amin's response to his questions on this were not coherent, although it is true to say that there was some confusion. Mr Amin did, at one point, say that he did not want to comment on whether "they" were lying, but he did immediately afterwards expressly decline to withdraw his statement, and said that the demands were not sent. While his response to Mr Blakeney putting to him that it was all a "grand conspiracy" was to say that the Respondent could have taken the Applicant to court, in context, in our view, that amounted to an affirmation of his position, that the Respondent's case was not a truthful one.

107. Further, Mr Kilcoyne in cross-examination put it to Mr Arefin that he had not sent the demands (which was denied). The thrust of much of Mr Kilcoyne's thorough cross-examination of Mr Arefin was to support the case that the demands were never sent. It is clear to us that the Applicant's primary case is that the demands were never sent.

108. Secondly, the letter addressed to Ms McGurk was only referred to, and provided, during the exchange of submissions, in the circumstances indicted in [91] and [92] above.

109. The letter must have been disclosed by the Respondent, but was not produced in the hearing bundle. Mr Blakeney did not object to our considering it at all, but did call for us to treat it cautiously. He did, however also suggest that it could support an aspect of this case, that there were problems with the receipt of post at the property.

110. Mr Kilcoyne, no doubt inadvertently, did not copy it in his submissions of 6 January, to which Mr Blakeney's submissions of 13 January were the reply, but did do so in his further response of 20 January. Mr Blakeney, in making the statement about the letter referred to above, may not have actually seen the letter. No further response was provided for by Mr Blakeney in our further directions. Had he, upon reading the letter, wished to make a stronger case for us disregarding it, it would have been open to him to seek to do so, although equally there could be no criticism of him for not doing so.

111. We agree with Mr Blakeney's approach. Although, as material emanating from the Respondent, it was not unknown to them, if Mr Kilcoyne wanted to rely on it, it should have been produced it in the bundle. Had it been put to Mr Arefin in cross-examination, he may have been able to suggest something (what, we cannot speculate) which might have put the letter in a different light.

112. So caution is called for. We consider that the most for which we can rely on the McGurk letter is that there was no proof, and indeed no

possibility of proof, that any leaseholder had received a service charge demand in the period during which the Respondent was the freeholder.

113. No such objections apply in relation to Mr Kilcoyne's submissions in respect of the circumstances of the sale of the leasehold interest in flat 3 to Ms McGurk by Ms Webster, which is derived from material in the bundle. We may, we consider, conclude from that material that Ms Webster had not paid any service charges during her tenancy, up to that point.

114. As a matter of law, there was no dispute that the effect of the rule in section 7 was as explained in *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501 (Ch), [2012] l & T R 3. It is for the sender to establish the pre-conditions for the operation of the rule, that the documents were properly addressed, pre-paid and posted. The conclusion that service was properly effected followed unless the contrary were proved – the contrary being the effect of the presumption, that is, service.

115. The core of Mr Blakeney's case is that the evidence of Mr Arefin, and of the documents provided to us, is sufficient to satisfy us that those pre-conditions were met, and that the evidence and arguments deployed by the Applicant were not sufficient to dislodge the resulting presumption.

116. We remind ourselves that there is a single civil standard of proof (the exceptional categories such contempt of court and quasi-criminal contexts such as sex offender orders aside), and that is on the balance of probabilities. However, the more grievous the allegation, the more compelling the evidence that will, in general, be necessary to prove it, as a matter of probabilities.

117. In *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, a case now understood to have disapproved the notion of a heightened civil standard in some contexts, including allegations of fraud, Lord Nicholls of Birkenhead said this, at page 586:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under-age stepdaughter than on some occasion to have lost his temper and slapped

> her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

118. Having quoted this, Lord Hoffman in *In re B (Children)(Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [12] said:

> "Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. … It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did."

119. In this case, we are faced with the different54 situation to that facing the courts in *Re B*, where the inherently improbable event had certainly occurred. In this case, the choice is between two apparently improbably alternatives.

120. In terms of ordinary common sense, the allegation made by Mr Kilcoyne is a very serious one. If Mr Arefin never sent the service charge demands, then it is more likely than not that his conduct was criminal, indeed seriously so. If Mr Kilcoyne's submission is right, then giving evidence in his witness statement and orally before us, Mr Arefin was lying about the fundamental issue.

121. Further, it is not just Mr Arefin who is involved in the fraud. Fifield Glyn must also have taken at least some positive role. They must have agreed to generating service charge demands and not issued them as the demands themselves stated on their face, although there was no direct evidence to support posting from Fifield Glyn before us.

122. Furthermore, this dishonest behaviour must have continued ever since Dow acquired the freehold in 2005. At that point, Mr Arefin must have decided not to issue service charge demands (whenever he generated them), but rather to secure payment from mortgagees or at the point of sale.

123. However, in also common sense terms, Mr Blakeney's submissions are inherently improbable.

124. If the Respondent's case is correct, then the Respondent issued a total of forty four demands addressed to the Applicant, none of which (if Mr Sharon and Mr Amin are to be believed) reached the addressee. While those sent by Mr Arefin were addressed to the Applicant at the flats, those sent by Fifield Glyn – twenty demands – were sent to Mr Sharon's personal residential address and to his agent's business address.

125. Further, there is positive evidence that one of the two leaseholders of the third flat never paid a service charge, and (adopting a cautious approach to the McGurk letter), no evidence that the other leaseholder paid any service charge. Had there been some payment, there would have been cogent evidence that someone at the address received some service charge demands after 2005. There is none. That is a negative conclusion. However, again, as a matter of common sense, most leaseholders pay their service charge demands. So the lack of payment is also some positive evidence that service charge demands were not received at the address. Consideration of flat 3 is, of course, quite independent of the honesty or otherwise of Mr Sharon and Mr Amin.

126. Mr Blakeney argues that, even if the intended recipients say that they did not receive the service charge demands, there is still scope for a factual finding that they were properly posted and the section 7 presumption is made out. Noting a factual parallel with *Akhtar*, the fact that Mr Sharon (and presumably Mr Amin) did not receive the demands is "more easily attributable to errors with the post, errors with sub-tenants, or errors with memory" than with them not having been sent (Blakeney 13 January, paragraph 19.5). Factual parallels with other cases have limited utility, but it is perhaps worth noting that in *Akhtar*, one notice was in issue, in a context in which 15,000 such notices had been sent by the landlord under a contract which provided very clear evidence of posting (and the Tribunal approached the issue on an erroneous basis).

127. Mr Blakeney does not put the case on the basis that Mr Sharon and Mr Amin are lying. The furthest he went was to suggest that, in connection with the electricity bill, Mr Sharon was deliberately keeping himself out of the way of receiving post.

128. If, at this point, the honesty of Mr Sharon and Mr Amin is to be assumed, then we conclude that the Respondent's case cannot stand.

129. It is wholly incredible that the demands were sent, but that they all went astray for innocent reasons. It is, we think, incredible to suggest that forty four demands were sent to three separate addresses, and in each of those cases, the demands were not delivered. While it is not wholly impossible that none were recalled as having been received as a cumulative effect of defects in the post, failures of sub-tenants, or failures of memory by the recipients, it is highly implausible. This is particularly so of the twenty recent demands sent to Mr Sharon's home address and Mr Amin's business address. If we take into account the demands sent to Ms Webster and Ms McGurk, some 60 or so demands must have been sent, and no one at any time responded to them by paying to the Respondent any part of the service charge owed.

130. Our conclusion can be stated in one of two ways. The first is that such overwhelming evidence of non-receipt, or non-receipt plus honest non-recollection of receipt, is sufficient to prove that, despite being properly posted, the demands were not, in fact, served. This level of negative evidence is amply sufficient to rebut the presumption of service imposed by the section 7 postal rule. The contrary is proved.

131. The other possible implication of our conclusions as to the relative probabilities is that the evidence of posting is false. The reason there was non-receipt, or non-recollection of receipt, on such a scale, to so many people over such a long time, was that they were never posted.

132. We conclude, then, at this point, that on the approach so far, that one of these alternatives must be right, and in either case, there was no effective service of the service charge demands.

133. We noted above at [127] the way that Mr Blakeney put his case included the possibility that Mr Sharon may have deliberately kept himself out of the way of service. It is not entirely clear what is meant in practice by this, particularly in the context of post addressed to his home address and Mr Amin's business address. Nonetheless, the formula may amount to an accusation of at least some level of dishonest conduct. But even if Mr Blakeney does not allege outright fraud or a dishonest case, it is not impossible to suppose that Mr Sharon and Mr Amin were lying. In the particular and somewhat unusual circumstances of this case, we consider it would be appropriate to at least consider what our conclusions would be if that were part of the Respondent's case. If we are wrong to do so, it would be an error to the advantage of the Respondent.

134. In the event of a contest of honesty between the two parties, we would prefer the Applicant's account.

135. In terms of the plausibility of the Applicant's account, that Mr Sharon and Mr Amin are telling the truth about the non-receipt of the demands is supported by the evidence in relation to flat 3.

136. That they are lying is also puzzling in terms of the immediate history of this claim. If they were, really, aware of the arrears, it seems very unlikely that Mr Sharon would have gone a considerable way to secure a sale of the flats and then pretended surprise when the arrears were revealed in a form that threatened the sale. It would have been much more obviously in his interests to have made this application to clear the issue up before attempting to sell the flats. To postulate a plot to use a claim of non-receipt as a means of escaping liability is implausible in the extreme.

137. If one turns to consider the plausibility of the Respondent's claim, it is challenged by other factors. Three we think carry weight.

138. The first is the complete lack of any follow up whatsoever by the Respondent to non-payment. It might be plausible that a rational freeholder would not take legal action against even repeated non-payment in some circumstances, but it is much harder to understand the failure to issue even a single follow up letter.

139. Secondly, as Mr Kilcoyne noted, there is no witness statement from Fifield Glyn, although a representative of the firm did attend the Case Management Conference on behalf of the Respondent. Mr Blakeney claims that the proper posting of the demands issued by them can be implied from the production of the demands. That may be narrowly true, but it is nonetheless surprising that no witness statement was secured.

140. Thirdly, the failure of the Respondent to produce any invoices at all is at least suspicious. In the experience of the Tribunal, it is close to a unique occurrence. It is possible that it is the result of a very singular level of incompetence. But that the invoices were not properly collected and processed because no demands were made seems more plausible.

141. Our conclusion, therefore, is that either the Respondent did not send the service charge demands contended for, or, if they were sent, there is sufficient evidence to displace the presumption that they were served.

142. We add that we place little if any reliance on the minor inconsistencies and delays in the preparation of the case relied on by Mr Kilcoyne. Our conclusion relies principally on the competing inherent probabilities involved in the parties' cases. It is, to a degree, reinforced by the view we have taken of Mr Arefin as a witness.

143. *Decision*: The service charge demands were not, as a matter of fact, posted and served on the Applicant.

Issue 3: sections 21B and 20B of the 1985 Act

144. Section 21B of the 1985 Act requires that summaries in a prescribed form of a tenant's rights and obligations be served with service charge demands. The Applicant had submitted, as a distinct issue, that even if the demands were served, there was insufficient proof that these summaries had been served. As a result of our finding in respect of issue 2 above, this is no longer a live issue.

145. Section 20B provides that costs incurred more than 18 months' before a service charge demand is made may not be recovered as part of the service charge (unless a notice has been served under section 20B(2)). It is therefore possible that the Respondent may now serve demands in respect of expenditure incurred up to 18 months ago. The question of whether management costs are recoverable in the service charge under the lease was argued before us (as an argument in the alternative to the service issue, on the part of the Applicant). It may now be relevant to any demand that may be made by the Respondent within the 18 months period. Accordingly, we set out our conclusions on that issue below.

146. If such demands are made, another question also argued before us may be relevant to them – whether the lease allows for an advance service charge. We accordingly also set out our conclusions in respect of that issue below.

147. Issue 4: construction of the lease: management fees

148. For the Applicant, Mr Kilcoyne argued that the cost of management was not recoverable under the lease.

149. The evidence was that Mr Arefin acted as a managing agent, before the instruction of Fifield Glyn, rather than undertaking the management of the property in house, in his capacity as an officer of the Respondent. We understood it to be agreed he was acting as an external managing agent. The issue of recovery of the costs of management was, however, argued before us both on the basis of whether the fees of a managing agent were recoverable and, alternatively, whether in house management costs were covered. We have accordingly dealt with both issues.

150. The obligation imposed by clause 1 of the lease was to pay "by way of further rent a fair and proper proportion of the sum or sums spent by the lessor from time to time by way of premiums for the insurance of the property…". This, Mr Kilcoyne submitted, was clearly limited to the actual cost of premiums.

151. In respect of cleaning and lighting, the lessee covenanted by clause 2(xxix)(a) to pay "a fair and reasonable proportion of the cleaning and lighting …". Similarly, Mr Kilcoyne said, all that could be recovered was the direct cost concerned.

152. By contrast, the obligation in clause 2(xxix)(b) was to pay "a fair and reasonable proportion of the *cost to the lessor* in carrying out the repair maintenance and upkeep of the reserved property" (emphasis added). This, Mr Kilcoyne argued, was sufficient to allow the lessor to recover in house management costs of repair etc work, but not allow the employment of a managing agent.

153. Mr Kilcoyne took us to *Woodfall's Landlord and Tenant* paragraph 7-170, and the statement that "[a]s a general rule the cost of employing managing agents will not be recoverable by way of service charge unless the lease expressly so provides." The authority cited is *Embassy Court Residents' Association Ltd v Lipman* [1984] 2 EGLR 60 (in which the Court of Appeal found, by way of an exception, that in the case of a residents' association with no funds of its own, a term allowing the recovery of such expenditure could be implied). Whether in-house management costs were capable of being recovered is a matter of construction of the lease (*Woodfall* paragraph 7-170.1).

154. In respect of the insurance obligation, Mr Blakeney argued, first, that if the obligation was only to pay the appropriate proportion of the premium, and not of the management of its payment, the clause would not have mentioned the lessor at all. Further, he said, that the clause used the expression "by way of", which must be given sufficient weight. This expression made the obligation wider that it would have been (we assume, if it had just said "on"). And, he argued, if it were wider, the first thing that an expanded obligation would encompass would be management fees.

155. Similar considerations applied to the obligations in clause 2(xxix). It was inevitable that the organisation of both cleaning and lighting, and of repairs, maintenance and upkeep, would involve expenditure.

156. We prefer Mr Kilcoyne's submissions.

157. There is evidently no explicit provision for the recovery of fees of managing agents. There is no general provision allowing for the paying of fees to a broad category of professionals, including managing agents, as one might typically see in a lease making more elaborate provision for the recovery of costs through the service charge.

158. Further, there is a clear difference between the clauses dealing with insurance premiums and cleaning and lighting on the one hand, and repair, maintenance and upkeep on the other. Both items in the former

category are closely drafted to refer to the recovery of the direct costs concerned only.

159. In respect of insurance, the clause limits recovery to premiums. Mr Blakeney's ingenious argument that "by way of premiums" meant something broader than "of premiums" (and that anything broader must be management costs) is not persuasive. The expression "sums or sums spent … by way of premiums" as a whole *limits* the "sum or sums" recoverable to the lessor's outlay on the premium itself. Whether the words chosen were "by way of" or "on", or any other similar expression, the meaning of the phrase as a whole is clear. The narrow category of "premium" is identified, not something broader, as for instance "the costs of insurance" might be. Had the parties intended the obligation to cover something other than the premium, it would have said so, and not limited it strictly to the premium itself.

160. Likewise in respect of the cleaning and lighting obligation. The obligation does not refer expressly to the cost of cleaning and lighting. In a strict sense, that is what it must mean, and is logically necessary to read the clause as meaning "a fair and reasonable proportion *of the cost* of the cleaning and lighting". But there is no warrant to go further and imply a term identical to that which *does* occur in the immediately following obligation in respect of repair etc – that the cost should be expressed as "the cost *to the lessor*".

161. That clause 2(xxix)(b) does include that phrase marks it as different in the obligation it imposes to the two discussed above. And in the context of the lease as a whole, this difference is readily explicable. As we have discuss below in connection with whether advance fees are provided for ([178] and [165]), the lease is deliberately one which imposes only basic obligations on the parties in terms of the service charge. It is rational to suppose that in that context, the parties did not intent to include management costs in relation to the insurance premiums and the no doubt minor costs of cleaning and lighting, but that they did intend that direct management costs should be included, where the obligation was to repair, maintain and upkeep the property. Such an obligation could, depending on chance and circumstance, be a very minor one or a very major one, and in the event that it was the latter, could involve a great deal of expenditure in project management of significant works.

162. We conclude, first, that there is no provision for the recovery of the fees managing agents at all. Secondly, there is provision for the recovery of internal management costs in respect of discharging the lessor's obligation to repair, maintain and upkeep the reserved property, but not such costs in relation to the insurance obligation or that to provide cleaning and lighting of the reserved property.

163. *Decision*: Service charges referable to the fees of managing agents are not payable by the Applicant. In house management costs are recoverable under 2(xxix)(b), but not otherwise.

164. Issue 5: construction of the lease: advance service charge

165. From June 2018, Fifield Glyn had (on the Respondent's case) commenced issuing quarterly in-advance demands. It was on the basis that such service charge demands had been issued that the argument before us proceeded.

166. The Applicant argued that the lease contained a simple and basic mechanism for the recovery of a narrow range of costs, and operated so that any service charge became payable on demand. There was no structure of a defined service charge year or advance payments, and no provision for reconciling advance payments with actually incurred costs and so on. Thus, it was argued, any number of demands could be made, with an immediate right to re-imbursement: but necessarily, on the basis of costs actually incurred by the landlord.

167. Mr Kilcoyne referred us to *Daitches v Blue Lake Investments* [1985] 2 EGLR 67. In that case, the Court said it was likely that a covenant referring to the recovery of "the costs of maintaining" etc a block did not authorise the demanding of service charges before costs had been incurred. This was *obiter*, and related to a differently structured lease (the Court, in particular, contrasted that covenant with another allowing the building up of a reserve to cover "reasonable sums").

168. Mr Kilcoyne also referred us to clauses 3A and 3F, by which the lessor covenants to maintain the reserved property and paint external woodwork etc respectively, "subject to the lessee making payment as referred to in clause 2(xxix)(b)", that is, the lessees obligation to "pay on demand a fair and reasonable proportion of the cost to the lessor in carrying out repair maintenance and upkeep of the reserved property". These provisos, he argued, relate to payment of (incurred) costs that had been previous demanded. It did not indicate that an advance payment in respect of the work to be undertaken by the lessor in discharge of its obligations under the covenant.

169. For the Respondent, Mr Blakeney argued that the reference to payment of the "cost" of repairs etc under clause 2(xxix)(b) was sufficiently broad to include future costs as well as past costs.

170. Mr Blakeney said that it was indeed the case that the provisos in clauses 3A and 3F did not take effect as a condition precedent for the discharge of the lessor's obligations (he referred to *Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289, [2004] L & T R 23), but the terms of those clauses did, he submitted, show that here was a clear connection between the obligations on the lessor and payment by the

lessee. The use of "subject to" cleared indicated, he said, that payment could be demanded first. The Applicant's reading was, he argued, strained.

171. As to the argument from the lack of a reconciliation mechanism, Mr Blakeney argued that it was not determinative. If an advance demand was inadequate, then a further demand could properly be made under the lease. On the other hand, if the advance demand exceeded the actual costs incurred, then the excess would be held on the statutory trust and no unfairness to the lessors would result.

172. We do not understand Mr Blakeney to have sought to rely on *Bluestorm* for the proposition that the provisos in clauses 3(A) and (F) created an obligation to pay an advance service charge before the lessor's obligations therein were required to be performed. In *Yorkbrook Investments v Batten* [1985] 2 EGLE 100, the Court of Appeal held that the obligation to provide services was independent of the obligation to pay a service charge, and that therefore where a lease contained a proviso of the sort in question here, it did not mean that payment of a service charge was a condition precedent to the landlord's liabilities.

173. In *Bluestorm*, two members of the Court of Appeal said that, had they been required to, they would have distinguished *Yorkbrook*. So the potential distinguishing of *Yorkbrook* was *obiter*, and furthermore, the factual situation in which those members of the Court would have distinguished the earlier case (where a tenant's failure to pay the service charges was a substantial cause of the lessor's non-performance of a repairing obligation) was not relevant here.

174. However, Mr Blakeney nonetheless posited, first, that there was a "connection" between payment of the service charge and discharge of the lessor's obligations; and secondly, that the obligation on behalf of the lessee must, specifically, be to pay an *advance* service charge.

175. We reject these contentions. *Yorkbrook* is binding authority that an obligation in a covenant by a lessor containing words similar to those found in the relevant clauses of this lease is binding independently of these sort of provisos. If that is so, the two obligations – that *referred to* (but not made a condition precedent) in a proviso; and that upon the lessor – are independent of one another, and we do not see how that stands with Mr Blakeney's contention that there is nonetheless a "connection" between the two; and in particular that that connection must be read as relating specifically to the payment in advance of a service charge in relation to works which should be undertaken by the lessor in accordance with those clauses.

176. Nor do we consider that it is not semantically apt for the proviso to apply to otherwise arising obligations on the lessee. The arrears

involved in *Yorkbrook* itself were those built up over a period of time in relation to other obligations to those in issue in that case.

177. Further, provisos such as those relied on by Mr Blakeney are almost ubiquitous in leases. If, each time they occurred, they functioned to impose an obligation for a lessee to pay an advance or interim service charge, those forms of service charge would be similarly ubiquitous. We do not consider this plausible.

178. Normally, in more modern leases, an advance fee is expressly provided for. Where that is so, the lease also – almost invariably – makes provision for reconciliation of over and under-payment. This lease does neither. The only argument for an advance service charge is that reliant on the provisos in clauses 3(A) and (F). For reasons we set out above, we do not consider that compelling.

179. Standing back and considering the lease as a whole, we agree with Mr Kilcoyne's overall characterisation: the lease provides basic and simple provision for payment of service charge in relation to costs already incurred on demand.

180. If follows that the quarterly in advance demands for the period June 2018 to December 2019 are not effective.

181. *Decision*: There is no provision in the lease for an advance service charge.

Issue 6: Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

182. The Applicant applies for orders under section 20C of the 1985 Act that the costs incurred by the landlord in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant and under paragraph 5A of schedule 11 to the 2002 Act that any obligation to pay as an administration charge the litigation costs – that is, the costs of these proceedings to the landlord – should be extinguished.

183. The application suggests that the orders are sought also in favour of other service charge payers at the property. However, no authorisation has been provided in relation to these third parties. Mr Kilcoyne has not referred to these additional third parties in relation to the applications. As Mr Blakeney correctly points out, in such circumstances, the Tribunal has no jurisdiction to make such third party orders: *Plantation Wharf Management Ltd v Fairman* [2019] UKUT 236 (LC), [2020] L & T R 7. They are at liberty to make their own free-standing applications.

184. It is apparent that the parties do not agree as to whether the lease allows for the recovery of legal costs, either under the service charge or as an administration charge. However, the question is not one upon which we have heard developed submissions.

185. Accordingly, for the purposes of these applications, we will assume that it is possible to recover legal costs, by one or other avenue, but we do not decide the question, which remains open should the matter be litigated in the future.

186. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

187. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd [2013] UKUT 592 (LC); [2014] 1 EGLR 111.*

188. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

189. In this case, the Applicant has been broadly successful. If we were to decline to make the relevant orders, it would lead to just the problem of an unsuccessful landlord recovering its costs by the backdoor for the avoidance of which the provisions were enacted.

190. As to the effect on the landlord, Dow is, as Mr Arefin's evidence makes clear, a reasonably substantial property company, relying substantially on the rents of commercial premises, as well as long leasehold properties. If the legal costs are recoverable under the lease by way of service charge, then the other leaseholders are at liberty to make their own applications.

191. On balance, we conclude that the just and equitable outcome is that we should make the orders.

192. *Decision*: We order (1) under section 20C of the 1985 Act that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant; and (2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any

liability of the Applicant to pay litigation costs as defined in that paragraph be extinguished.

Application for costs

193. Mr Kilcoyne formally makes, in his skeleton argument and submissions, an application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

194. The application was not argued in any detail. Having regard to the test set out in *Willow Court Management v Alexander* [2016] UKUT 290 (LC), [2016] L & T R 34, [28] and following, we do not consider that there is a sufficient case that the conduct of the Respondent in defending the application reaches the threshold of unreasonableness set out in that case.

195. *Decision*: The application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 is refused.

Rights of appeal

196. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

197. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

198. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

199. The application for permission to appeal must identify the decision of the Tribunal to which it relates, give the date, the property and the case number; state the grounds of appeal; and state the result the party making the application is seeking.

Name: Tribunal Judge Professor Richard Percival **Date:** 5 June 2020

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 provision 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 the appropriate 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 the appropriate 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.

(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 of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

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) the appropriate 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 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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 tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , 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 the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

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

(c) in the case of proceedings before the Upper Tribunal4 , 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 the 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.

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 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]1 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).