9056

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UN/LSC/2013/0033**
Property	:	**Flat 1, 20 Northdown Road, Margate, Kent CT9 2RW**
Applicant	:	**Deborah Wall**
Representative	:	**In person**
Respondent	:	**David Thornelow**
Representative	:	**In person**
Type of Application	:	**Application to determine liability for service charges under Landlord & Tenant Act 1985 s.27A**
Tribunal Members	:	**Judge M Loveday (Chairman) R Athow FRICS MIRPM P Gammon MBE BA**
Date and venue of Hearing	:	**22 July 2013 Canterbury Christchurch University, Northwood Road, Broadstairs, Kent CT10 2WA**
Date of Decision	:	**1 August 2013**

DECISION

BACKGROUND

1. This is an application under Landlord and Tenant Act 1985 ("LTA 1985") s.27A for a determination of liability to pay service charges in relation to Flat 1, 20 Northdown Road, Margate, Kent CT9 2RW. The Applicant is the lessee of the flat, and the Respondent is the current freehold owner of the property.

2. By an application dated 27 March 2013, the Applicant sought a determination in respect of her liability to pay service charges for the calendar years 2009, 2010, 2011 and 2012 (Jan-Jun). Directions were

given on 3 April 2013. On 10 April 2013, the Tribunal directed that the matter should be listed for hearing on the same date as the hearing of a linked application by the landlord for a determination that a breach of a covenant or a condition in the lease has occurred under Commonhold & Leasehold Reform Act 2002 s.168 (CHI/29UN/LBC/2013/0021).

3. The matter was listed for hearing on 22 July 2013 and the Tribunal inspected the property before the hearing. The hearing of the present matter then took place immediately before the breach of covenant application. The parties both appeared in person at the hearing.

THE LEASE

4. By a lease dated 20 August 2009, the flat was demised by Melltree Properties Ltd to the Applicant for a term of 125 years from 29 September 2008. By clause 1, the Applicant covenanted to pay a maintenance charge as set out in the eighth schedule. The Eighth Schedule provided as follows:

   "Maintenance Charge
   1. 45% of the amount or amounts which the Lessor may from time to time expend in complying with its covenants contained in the Seventh Schedule hereto as relate to the common parts of the Property and 45% of such amount as relates to the Reserved Property
   2. To pay to the Lessor on demand the amounts due to the Lessor pursuant to the last preceding sub-clause (hereinafter called "the cost to the Lessor") the sum on the basis of the proportionate contribution contained in Paragraph 1 hereof as the Lessor shall determine Provided that in the event of an exceptional item of expenditure being incurred by the Lessor in performing the covenants in the Seventh Schedule to pay to the Lessor before commencement of the necessary works such sum on the basis of the proportionate contribution contained in Clause 1 hereof as the Lessor shall determine.
   3. If the Lessee makes a request in writing to the Lessor for a certificate of the Lessors accountants as to the costs to the Lessor in any year ending on the thirty-first day of December such a certificate shall be supplied to him at the cost of the Lessee."

5. The Respondent acquired the reversion from Melltree at auction in August 2011. For most of the period since the grant of the lease, the building had been managed by the managing agents Right to Manage Organization Ltd ("RTMO").

INSPECTION

6. Before the hearing, the Tribunal carried out an accompanied inspection of the flat and the building. 20 Northdown Road is a mid-terrace building c.1900 on three floors and basement located on a major bus route in

central Margate. The property is of brick construction under a complex part-pitched and part-flat roof. The building itself is an irregular shape (roughly triangular) with a courtyard to the rear giving access to a narrow alleyway. The windows are uPVC double glazed units throughout. The front elevation shows signs that the top few courses of brickwork to the parapet have been replaced in recent years and that it has been re-capped.

7. Internally, the property has been converted into two flats. For the purpose of the service charge application, the main inspection related to the upper flat. This was on two floors plus rear addition, and was in the process of being refurbished. There were no signs of damp apparent, although the ceilings in some rooms had been re-plastered in parts (particularly the kitchen to the rear beneath a flat roof and bathroom and bedroom at second floor level).

THE STATUTORY PROVISIONS

8. The general jurisdiction of the Tribunal is under LTA 1985 s.27A:

> **"27A. Liability to pay service charges: jurisdiction**
> (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.

(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 a leasehold valuation 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.

9. "Service charges" are in turn defined by s.18 of the Act:

"18. Meaning of 'service charge' and 'relevant costs'
— (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 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."

10. The provisions applicable to reasonableness are at s.19:

"19. Limitation of service charges: reasonableness
(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) ...

11. A further limitation on costs is afforded by LTA 1985 s.20B:

"20B. Limitation of service charges: time limit on making demands
(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."

12. Section 21B states:

    "21B. Notice to accompany demands for service charges

    (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

    (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations."

    (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

    (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it."

THE APPLICANT'S CASE

13. The Applicant identified the service charges in issue as follows:
    a. 2009: A sum of £250 paid upon the grant of the lease of the flat on August 2009. There was also a contribution of £118.90 towards the landlord's relevant costs of £264.23 incurred in the period 20 August– 31 August 2009. These two sums appear in various statements prepared for Mellrose: see for example a Request for Payment dated 26 April 2010.
    b. 2010: Two "Service Charge" contributions of £216 for the period 1 January-30 June 2010 and 1 July–31 December 2010: see the Request for Payment dated 4 July 2010. The Request for Payment also included a contribution of £595.66 as a "Balancing SC Excess"[1] for the year ending 31 December 2010.
    c. 2011: Two "Service Charge" contributions of £216 for the period 1 January-30 June 2011 and 1 July – 31 December 2011: see Request for Payment dated 4 July 2011.
    d. 2012: A "Service Charge" contribution of £216 for the period 1 January-30 June 2012: see "Request for Payment" dated 3 January 2012.

14. The initial payment. The Applicant explained that she paid the sum of £250 to Melltree Properties on the grant of the lease on 20 August 2009. The sum had appeared in the Completion Statement for the grant of the lease and was paid as part of the completion monies, but the Applicant had no documentation to confirm this. The Applicant stated that no correctly

[1] The Request for Payment dated 3 January 2012 describes this as a "Balancing Service Charge Excess Year Ending 31st Dec 2010".

itemised demand for payment had ever been made, although the £250 had been credited to her service charge account.

15. The Applicant explained the background history to the management of the property. Initially, RTMO sent demands for payment and statements of account to the Applicant's old address at Flat 22, 372 Old Street London EC1V 9AU: see Requests for Payment dated 26 April 2010, 2 July 2010, Statements of Account dated 28 September 2010 and 8 June 2011. The first demand served on the Applicant at the Flat was a Request for Payment of £1,528.56 for service charges and ground rent dated 4 July 2011. This did not expressly show the credit of £250, because the Request started with a "Balance b/fwd" of "£184.98dr for the period before 2 July 2010." However, this opening balance took into account the credit of £250: see Request for Payment dated 26 April 2010.

16. The Applicant contended that the landlord's relevant costs that were the subject of the £250 were incurred more than 18 months before the date of the demand (4 July 2011). The charge was first demanded on 4 July 2011, which was more than 18 months after costs were incurred during the 2009 service charge year. By reason of LTA 1985 s.20B, the Applicant was not therefore liable to pay the service charge of £118.90. When asked the date that the costs were "incurred" for the purposes of s.20B, the Applicant was unable to say. The Tribunal summarised the principles in ***Gilje v Charlegrove Investments Ltd*** [2004] 1 All ER 91 and ***Holding & Management (Solitaire) v Sherwin*** [2010] UKUT 412 and asked the Applicant to comment on them. However, the Applicant submitted that these principles did not apply to the £250 initial payment, since the payment was not an interim charge at all.

17. <u>2009 relevant costs.</u> As far as the sum of £118.90 is concerned, this had again first emerged in 2011. This appeared to be a 45% contribution to relevant costs incurred by the lessor in 2009. The Applicant referred to the "Accounts and Balance Sheet" prepared by RTMO for the year ending 31 December 2009. The Income and Expenditure Account purported to show that the lessor incurred relevant costs of £199 for insurance and £65 for management fees/accountancy for that year. The total of this was £264, of which the Applicant's 45% contribution was £118.80[2].

18. The Applicant believed that Melltree had laid out £199 in insurance premiums, but she did not accept that it incurred any costs on management fees – there were no receipts.

19. No challenge was made to the reasonableness of the cost of insurance under LTA s.19. However, the Applicant argued that the management fees were not reasonably incurred, because they were excessive. The agents only really arranged insurance, and a fee of £65 was too high for this. The

[2] The figures in the accounts are evidently rounded to the nearest pound. Although not referred to by the parties, the Tribunal notes that the insurance premium for 18 August 2009 to 19 May 2010 was in fact £198.63: see Allianz Insurance quotation dated 19 August 2009. Some minor discrepancies therefore arise with the figures.

applicant argued that no more than £40 should be allowed for these relevant costs, and the 2009 service charge should be reduced accordingly.

20. The Applicant contended that in any event, all these relevant costs were incurred more than 18 months before 4 July 2011. By reason of LTA 1985 s.20B, the Applicant was not liable to pay the service charge of £118.90.

21. The interim charges. As to the various demands for £216 in 2010, 2011 and 2012, the Applicant observed that these were evidently demands for interim service charges on account of the landlord's expenditure. There were a number of objections to these charges. Principally, they were not recoverable under the terms of the lease. However, the interim charges were intended to cover some of the major works carried out in 2010 (see below) and costs of managing agents (see below). They were also not always demanded in accordance with LTA 1985 s.21B (again, see below).

22. 2010 Relevant costs. The Applicant referred to the balancing service charge excess of £595.66 for 2010, which had first been demanded on 8 June 2011: see Statement of Account. This sum made no sense, and it was impossible to work out how it had been calculated.

23. The main objection was that the charge included a contribution to expenditure of £1,770 for major works carried out by the landlord in 2010[3]. The works included repairs to the parapet walls and roof, which followed water ingress into the upper flat. The Applicant contended that these works were subject to the consultation requirements of LTA 1985 s.20 and Schedule 4 to the Service Consultation Requirements (England) Regulations 2003. There had been no consultation at all and no consultation notices served. There was also a possibility that one of the contractors who carried out the work, namely JDP Roofing, were linked to Melltree. One of the contractors had told the Applicant that the firm "did a lot of work for" Melltree. It followed that the contribution to major works should be capped at £250.

24. Insofar as the landlord applied for an order to dispense with the consultation requirements under LTA 1985 s.20ZA, such dispensation should not be allowed. The Tribunal referred to the Applicant to the principles that applied to dispensation derived from the Supreme Court decision in ***Daejan v Benson*** [2013] UKSC 14. The Applicant had suffered actual prejudice. There had been historic neglect at the property over a number of years that increased the cost of works.

25. The Applicant also objected to a contribution to expenditure of £300 for Managing Agents Fees in 2010.[4] She accepted that the landlord had incurred these costs, but they were not reasonably incurred under LTA 1985 s.19. The agents did have to co-ordinate the major works, but she had not seen anything of the agents on site throughout the whole period of the works. The agents were only really concerned with collecting rent from the

[3] See Summary of Costs for 2010 provided by the landlord under LTA 1985 s.21.
[4] *Ibid.*

upstairs flat. She had contacted them on more than one occasion and they were "elusive and difficult". The Applicant argued that only £150 should be allowed for agents' fees.

26. In her closing remarks, the Applicant raised one objection to the relevant cost of insuring the building (£214). She referred to emails from The Property Tailors to RTMO dated 3 May 2012 dealing with renewal of the policy on 20 May 2012. The Applicant pointed out that RTMO has ceased managing the property by that stage, and suggested that the landlord had no real evidence that Melltree had used brokers to handle the 2010 insurance.

27. Summary of Rights and Obligations. The Applicant raised a general complaint that demands for payment were not in all cases accompanied by a summary of rights and obligations in accordance with LTA 1985 s.21B. In particular, the Request for Payment dated 4 July 2011 did not have any statement attached. She accepted that later Requests for Payment (3 January 2012 and 12 January 2013) did have summaries attached.

28. The Applicant was asked to produce the actual copies of any demands and summaries that she had received. She was able to produce her copy of the Statement of Account dated 8 June 2011, which the Applicant confirmed was accompanied by a summary. However, she believed there were a number of minor errors with the wording of the summary (although on further consideration of the regulations, the objection to the form of summary was not pursued).

29. Right to collect charges. Finally, the Applicant argued that Melltree Properties had never properly assigned to the Respondent the right to collect service charges due before August 2011. He therefore had no right to collect the charges. The Applicant accepted that there were documents in the bundle which suggested the right was to be assigned, but the actual contractual assignment of the right was missing.

THE RESPONDENT'S CASE

30. The initial payment. The Respondent stated prior to acquiring the freehold at the auction, he had had no involvement with the property. However, on the basis of the present evidence, the payment did not seem to be a "service charge" at all. It was a fixed contribution paid on completion of the grant of the lease. The money was applied to the service charge account on 20 August 2009 as a "payment made", but that did not mean it was a "service charge".

31. The Respondent did not make any submissions in relation to the argument that s.20B applied to the initial payment.

32. 2009 Relevant costs. The Respondent accepted that the sum of £118.90 was a 45% contribution to costs incurred by the lessor in 2009. The fact that Melltree had incurred insurance premiums of £199 was accepted. The

management fees of £65 were also incurred, and referred to in the accounts.

33. The Respondent did not accept that £65 was excessive for managing a building for a period of over 4 months and for preparing accounts.

34. As to the s.20B argument, the 2009 expenditure was not incurred over 18 months before any demand was made.

35. The interim charges. As to the various demands for £216 in 2010, 2011 and 2012, the Respondent believed that these had initially been calculated by reference to anticipated relevant costs of £960 per annum. The Applicant's share of this (45%) was £432, which resulted in two half yearly contributions of £216. The Tribunal took the Respondent to the provisions of the Eighth Schedule to the Lease, where (on the face of it), there appeared to be no provision for payment of any interim charge (save that paragraph 2 provided for an interim charge in the event of "an exceptional item of expenditure"). The Respondent stated that he had always assumed the interim charge had been agreed on completion between Melltree and the Applicant. He accepted that the sums were advance contributions to what the landlord estimated his relevant costs would be in each year.

36. 2010 Relevant costs. The Respondent's main submissions related to the service charge excess for 2010, which arose after he acquired the freehold. The calculations were made by taking the landlord's relevant costs of £2,284 incurred in 2010: see 2010 Summary of Costs. From this, the Respondent derived a figure for the Applicant's balancing charge (45%) of £595.66. This could be reconciled by adding it to the equivalent freeholder's contribution (55%) of £690.98 shown in the freeholder's Statement of Account dated 8 June 2011. The total balancing charges came to £1,323.68. The balancing charges could be added to the advance contributions demanded from the Applicant (45%) and the freeholder (55%), which were respectively £216 and £264. This came to £960. The total of advance contributions and balancing charges for 2010 came to the £2,284 – which was the same as the landlord's relevant costs shown in the accounts.

37. As to the landlord's relevant costs in 2010:
   a. The costs of the management fees (£300) for the building were not excessive. The fees were modest for managing a building for a year. There had been continuous issues about non-payment of service charges, and the agents had actively pursued the debts. They also had to liaise with the Applicant, deal with requests for repairs and answer queries about the charges and other matters: see for example letter from RTMO dated 25 July 2010.
   b. The insurance premium (£214) was obtained through the brokers Insurance Tailors and placed with Zurich: see emails 3v May and 10 May 2010 and insurance certificate dated 13 May 2010. This was a competitive quotation.

38. The balance of the costs incurred in 2010 was for the major works to the roof and parapet (£1,770). The Respondent produced receipts of £560 and £250 for roofing works (JDP Roofing dated 24 September and 1 October 2010), £280 and £680 for repairs to the parapet (Specialist Loft Conversions dated 4 and 22 September 2010).

39. The Respondent accepted that no consultation had been carried out under LTA 1985 s.20 in respect of those works. In the circumstances, the Tribunal asked the Respondent whether he wished to apply for dispensation from the consultation requirements under LTA 1985 s.20ZA: see the guidance given in ***Warrior Quay v Joaquim*** (2007) LRX/42/2006 at para 41. The Respondent stated that he wished to make such an application. He contended that there was no evidence that the lessee had suffered any actual prejudice. Indeed, he considered that the work carried out for only £1,770 was impressive.

40. Summary of Rights and Obligations. The Respondent contended that all the statements and demands were accompanied by the appropriate summery of rights and obligations. Two copies of the notices in the bundles before the Tribunal (a Request for Payment dated 3 January 2012 and one dated 12 January 2013) had summaries attached. The other notices all had the following rubric "Please reads the accompanying summary of your rights and obligations with regard to service charges which is attached to this service charge demand". RTMO has sent these other demands to him by email, so he could not tell whether they had summaries of rights and obligations attached. However, he believed that they did.

41. Right to collect charges. On the issue of whether the right to recover charges had been assigned, the Respondent produced a number of documents relating to the completion of the acquisition of the freehold. He referred to the Special Conditions of Sale for the auction on 25 July 2011 which stated that:

> "The buyer will on completion pay to the seller any arrears of rent or other monies due and owing to the seller under the tenancies from the tenants up to and including the date of actual completion and the seller will at the request and cost to the buyer assign to the buyer the right to recover such arrears of rent or any other monies due and owing to the seller."

This was supported by a completion statement dated 22 August 2011 which referred to payment by the Respondent to the vendor of "ground rent and service charge arrears £1,500". On the same day, Fosters Law (for Melltree) wrote to the Applicant enclosing notice under LTA 1987 s.48. The Respondent had therefore paid Melltree for the service charge arrears due from the Applicant. There was also an email from RTMO dated 8 November 2011, which confirmed that the Respondent was to collect "arrears from Ms Wall".

THE TRIBUNAL'S DETERMINATION

42. The initial payment. The Tribunal is satisfied that (on the limited evidence available), the payment of £250 made by the Applicant on completion of the grant of the lease was not a "service charge" within the meaning of LTA 1985 s.18. The sum is not specifically referred to in the lease, and it does not appear to have been calculated in accordance with paragraph 2 of the Eighth Schedule to the lease. Moreover, the sum appears to have been fixed (at a round figure of £250) by the vendor. It was not a sum which "varies or may vary according to the relevant costs" of the landlord. The Tribunal accepts the submission by the Respondent that the mere fact a sum of £250 was in practice credited to the Applicant's service charge account does not make the payment of the £250 a "service charge". The Tribunal therefore has no jurisdiction to determine that the sum of £250 was not payable on 20 August 2009.

43. The above finding means that it is strictly unnecessary to decide the question as to whether the Respondent is precluded from recovering the initial payment of £250 by LTA 1985 s.20B. The matter does not relate to a "service charge" within the meaning of the provision. However, the Tribunal will deal briefly with the Applicant's contention that the relevant costs taken into account in determining the payment of £250 were incurred more than 18 months before any demand for payment was served on her: LTA 1985 s.20B. The Tribunal rejects this argument. First, it is hard to see how the first demand for payment was as late as 4 July 2011. The sum of £250 was included in the Completion Statement in August 2009. This was a "demand for payment" and the time limit in s.20B was therefore not 'counted back' 18 months from 4 July 2011. Secondly, there is clear authority that a charge paid before costs are in fact incurred is not caught by s.20B: ***Gilje v Charlegrove Investments Ltd*** [2004] 1 All ER 91. The Applicant's answer to this – that the £250 was not an interim charge under the Eight Schedule to the lease does not take things any further. The fact is that the relevant costs incurred in 2009 (£264) were not and could not have been taken into account in "determining the amount" of the £250.

44. 2009 Relevant costs. The charge for £118.90 falls into a different category, since both parties agree that this was a 45% contribution to costs incurred by Melltree in 2009. In effect, this is a conventional 'balancing' charge payable after a landlord has incurred relevant costs and seeks to recover a contribution to that expenditure.

45. The Tribunal finds that Melltree did in fact incur relevant costs of £264 in 2009. There are the accounts prepared by RTMO for which break the figure down into £199 for insurance and £65 for Management fees/Accountancy. The Applicant accepts the landlord incurred the costs of insurance. As to the management fees, and (despite the absence of any receipts or invoices) the Tribunal accepts that the accounts properly reflect the fact that the landlord incurred relevant costs of £65 for RTMO's fees.

46. As to arguments under LTA 1985 s.19, no suggestion is made that the costs of insurance premiums for 2009 were not reasonably incurred. However,

the Applicant does object that the costs of Management/Accountancy were not reasonably incurred because they were excessive. On the limited evidence available, the Tribunal finds that the services provided by RTMO in 2009 were fairly basic. However, it finds that the fee charged by the agents for those services over the last 4 months of 2009 was fairly modest. There was apparently some work involved with insurance and a little correspondence (for example, there is a letter to the Applicant from RTMO dated 13 October 2009 in the papers). Moreover, in the Tribunal's own experience, managing agents would frequently charge more than £65 for preparing (fairly basic) annual accounts alone. The Tribunal sees no reason to reduce this figure to £40, as suggested by the Applicant.

47. Finally, there is the argument that the Applicant is not liable to pay any service charge which reflects the 2009 costs under LTA 1985 s.20B. In this instance, the Applicant repeats the assertions that (i) the date of the first effective demand for payment was 4 July 2011, and (ii) the costs were all incurred before 31 December 2009, which is a date more than 18 months before 4 July 2011. These two propositions were not in dispute. In particular, the Tribunal was not asked to consider whether earlier demands for payment served on the Applicant at the Old Street address were valid for the purposes of s.20B.

48. On this point, the Tribunal finds the decision in ***Holding & Management (Solitaire) v Sherwin*** (supra) to be decisive. The President of the Upper Tribunal dealt with s.20B as follows:

> "21. Section 20B(1) has potential application where a "demand for payment" of a "service charge" is made. Relevant for present purposes were [demands for payment and invoices for advance payments]. Each of the amounts to which each of these demands related (whether advance payment or balancing charge) was a service charge within the meaning of section 18, and the application of section 20B(1) has to be considered, therefore, in relation to each of the demands. The section would apply so as to limit the tenant's liability to pay if any of the relevant costs taken into account in determining the amount of the service charge to which the demand related were incurred more than 18 months before the demand. Since the costs taken into account in determining each of the advance payments were prospective costs they clearly had not been incurred more than 18 months before each of the demands for advance payments. Thus section 20B(1) does not apply so as to limit the tenant's liability in respect of the advance payments. That is what was held to be the case in ***Gilje***, to which I will refer shortly.
>
> 22. The demands for balancing charges, on the other hand, related to costs that had been incurred. The balancing charges represented the Maintenance Adjustment provided for by paragraph 3(b) of the Fourth Schedule to the lease (see paragraph 8 above), ie the amount by which "the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in

the Fifth Schedule" fell short of the actual expenditure in that year. One possible application of section 20B(1) in relation to these provisions of the lease would be to treat as "the relevant costs taken into account in determining the amount" of the balancing charges the whole of the actual expenditure for the year, since that is what the Maintenance Adjustment is expressed to relate to. The reality, however, is that the balancing charges simply reflect the costs incurred after the amounts of the advance payments received by the landlord for the year in question have been used up, and in my judgment it is those costs, therefore, that are material for the purposes of section 20B(1); so that the tenant would not liable to pay a balancing charge in respect of any of such costs as were incurred more than 18 months before the demand. Any amount that was payable and was paid as an advance payment would be unaffected. To apply the subsection in this way accords with the approach of the court in ***Gilje***."

...27. Applying section 20B in the way that I have concluded to be correct (see paragraph 22 above) would produce the following results. The amount by which "the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in the Fifth Schedule" fell short of the actual expenditure in the Maintenance Year 2006/7 was £2,686.79. The schedule of expenditure shows that those costs were incurred on and after 20 March 2007, the date on which the amounts received as advance payments were used up. The demand for the balancing charges was issued on 11 September 2008. Since none of the costs to which the demand related were incurred before 11 March 2007 it follows that no part of the balancing charge would be rendered irrecoverable by section 20B(1). For 2007/8 the costs to which the balancing charge related amounted to £7,206.50. The schedule of expenditure shows that those costs were incurred on and after 19 December 2007, the date on which the amounts received as advance payments were used up. The demand for the balancing charges was issued on 2 December 2008, so that only costs before 2 June 2007 would be irrecoverable. None of the balancing charge costs were incurred before that date, however, so that none would be rendered irrecoverable under section 20B."

49. In effect, the decision in ***Sherwin*** requires the Tribunal to assess the date when any advance payments were (in the words of the President) "used up", and the 18 month period in s.20B then runs from that date. In this case, the credit of £250 given in August 2009 was not "used up" at all during the 2009 service charge year. That credit exceeded the contribution of £118.90 towards the landlord's relevant costs during the whole of 2009. The demand for payment dated 4 July 2011 was only a demand for payment of the balance of charges which arose once the £250 credit was

"used up" at some stage in 2010. It follows that the Tribunal rejects this argument as well.

50. It follows that the Tribunal finds that the Applicant is liable to contribute to the landlord's relevant costs for 2009, which were (as suggested by the Respondent) £264. That contribution is 45%, or £118.90 (although as explained above, that sum is covered by the credit of £250 given by Melltree).

51. The interim charges. The Tribunal will deal together with all of the half-yearly charges of £216 made in 2010, 2011 and 2012.

52. In the Tribunal's view, there is a simple answer to this issue. There is no provision in the lease for an interim charge payable in the way that is suggested. The parties are agreed that the charge were made on account of expenditure that still had to be incurred by the landlord. For example, the Request for Payment dated 4 July 2011 demanded payment of "Service Charge 1 July – 31 Dec 11 £216". However, the lease provides for payment of "45% of the amount or amounts which the Lessor may from time to time expend in complying with its covenants contained in the Seventh Schedule": paragraph 1 of the Eighth Schedule. It also provides for payment on demand of those sums: paragraph 2. The proviso to paragraph 2, reinforces the conclusion that paragraph 1 does not allow for any advance service charge contributions for non-"exceptional" cases.

53. The Tribunal has some sympathy with the lessor who has tried to operate a conventional interim service charge/balancing charge regime, but unfortunately that is not the machinery provided for by the lease. The draftsman has adopted a simple scheme which requires that a landlord who wishes to incur costs must first pay for them. The landlord may then demand a 45% contribution from the lessee of Flat 1 on an *ad hoc* basis in arrears – save that where an "exceptional item of expenditure" arises it may also claim an interim charge "before [any] works commence".

54. It follows that none of the interim charges of £216 are payable.

55. 2010 Relevant costs. The Tribunal accepts the Respondent's explanation as to how the balancing charge of £595.66 was derived from the landlord's relevant costs of £2,284 in 2010.

56. In respect of 2010, the principal argument relates to the relevant cost of major works (£1,770). The Applicant contends that these works were subject to the consultation requirements of LTA 1985 s.20. There is no dispute that the consultation requirements set out in Schedule 4 to the Service Consultation Requirements (England) Regulations 2003 apply and these have not been met. *Prima facie* the amount of the Applicant's contribution to the cost of these works is limited to £250: see LTA 1985 s.20(7) and regulation 6 of the 2003 regulations.

57. The only question which therefore arises in relation to the works is the Respondent's application for dispensation under LTA 1985 s.20ZA. The

considerations to be applied were set out by Lord Neuberger in ***Daejan v Benson*** at paras 44-47:

> "**[44]** Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.
>
> **[45]** Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be i.e. as if the requirements had been complied with.
>
> **[46]** I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the requirements. That view could only be justified on the grounds that adherence to the requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them.
>
> **[47]** Furthermore, it does not seem to be convenient or sensible to distinguish in this context, as the LVT, Upper Tribunal and Court of Appeal all thought appropriate, between 'a serious failing' and 'a technical, minor or excusable oversight', save in relation to the prejudice it causes."

58. In this instance, there is no suggestion that the extent, quality and cost of the works were in any way affected by Melltree's failure to comply with the consultation requirements. It is not suggested that (i) the works were inappropriate or that (ii) the Applicant is being asked to pay more than would be appropriate. The Tribunal's own observations did not suggest that there was any problem with the works to the parapet, and the sum of £1,770 for such works and other roofs appears modest. The Tribunal therefore finds that the Applicant was not prejudiced in either respect by the failure of the landlord to comply with the requirements. If dispensation were granted, the Applicant would be in precisely the position that s.20 intended them to be i.e. as if the requirements had been complied with.

59. The Applicant says there was historic neglect which increased the cost of the works. There is no evidence of this before the Tribunal, and in any

event it is hard to see how Melltree could have adjusted the scope of works in response to any observation that they were in part necessitated by historic neglect.

60. In the absence of evidence that the Applicant was caused prejudice, the Tribunal dispenses with the consultation requirements under LTA 1985 s.20ZA. The element of the service charges that related to the 2010 works is not therefore limited by LTA 1985 s.20.

61. The Tribunal finds that the relevant cost of management fees (£300) for the building was reasonably incurred under LTA 1985 s.19. The Tribunal accepts that RTMO provided substantial services, including correspondence, supervision of the works (which the Applicant accepted), arranging insurance and the preparation of accounts for 2010. In the Tribunal's experience, a fee of £300 is modest for managing a building for a year.

62. In her closing remarks, the Applicant raised an objection to the relevant cost of insuring the building (£214). It was suggested that the email dated 3 May 2012 shows that Melltree had not used brokers to handle the 2010 insurance. The Tribunal does not accept the inference the Applicant suggests should be drawn from the email. The email plainly shows that the brokers had dealt with the building insurance before 2012. Moreover, the Respondent gave evidence that brokers were indeed used. The Tribunal concludes that the cost of insurance was reasonably incurred.

63. It follows that the Tribunal finds that the Applicant is liable to contribute to all the landlord's relevant costs for 2010, which were (as suggested by the Respondent) £2,284. That contribution is 45%, or £1,027.80.

64. Summary of Rights and Obligations. This is essentially a question of fact, which is not helped by the record keeping of the agents and/or the landlord. Save in two cases, the copies of Requests for Payment retained by the landlord did not have any summary of rights and obligations attached. One copy of a demand produced by the lessee was also accompanied by a summary.

65. On balance, the Tribunal finds that the demands (and in particular the demand dated 4 July 2011) was accompanied by a summary in proper form. Each of the Requests for Payment included a rubric to that effect, and the three copies which were known to have been accompanied by summaries were in similar form. In particular, the Tribunal was impressed that the only copy of a demand produced by the Applicant from her own records was accompanied by a proper summary of rights and obligations. In any event, any defect in the form of demand was cured by service of later demands for the same money given dated 3 January and 12 January 2012. It follows that the Applicant is not entitled to withhold payment under LTA 1985 s.21B(3).

66. Right to collect charges. The Tribunal includes that there is no bar to the Respondent recovering charges for the period before he acquired the

reversion on 25 August 2011. First, on balance the Tribunal finds that there was an express agreement to that effect. The evidence produced by the Respondent suggests that there was a contractual agreement that Melltree would assign the right to collect the arrears, and that the agreement was acted upon by both parties.

67. In any event, the lease was made after the Landlord and Tenant (Covenants) Act 1995 came into force. Section 3 provides:

> **"3. Transmission of benefit and burden of covenants.**
> (1) The benefit and burden of all landlord and tenant covenants of a tenancy—
> (a) ...
> (b) shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them."

The Respondent is the assignee of the reversion of the part in relation to which the service charges are payable. The Tribunal cannot see how the Tenant could avoid liability on this basis.

LTA 1985 S.20C

68. The Applicant also applied for an order under LTA s.10C that the costs of the Respondent incurred before the Tribunal should not be added to the service charge. She contended that after the hammer had fallen at the auction in 2011, she approached the Respondent, but he had been dismissive. Since then, "he had not acquiesced in any way". There was never any middle ground.

69. The Respondent confirmed that it would seek to recover its 'in-house' costs if possible, for the time and resources taken up before the Tribunal. He relied on paragraph 15 of the Seventh Schedule to the Lease, which required the lessee to pay:

> "...all expenses (including Surveyors and legal fees) incurred by the Lessor in connection with the preparation and service of a Notice under s.146 and 147 of the Law of Property Act 1925 ... (whether or not forfeiture shall be avoided otherwise than by relief granted by the Court)"

It had been reasonable for the Respondent to resist the application. The Applicant had paid nothing towards the service charges since the lease completed in 2009. All he had tried to do was to enforce the tenant's obligations under the lease, so that repairs could be carried out. There had been a catalogue of disruptive actions by the Applicant.

70. The Tribunal finds there is no obvious provision in the lease which would enable the Respondent to include in the service charges any part of his costs before the Tribunal. Paragraph 15 of the Seventh Schedule deals with a very different kind of cost. However, having regard to the guidance given by the Lands Tribunal in ***Church Commissioners v Derdabi*** [2010] UKUT 380 the Tribunal declines to make any order under LTA 1985 s.20C.

The Respondent has successfully resisted part of the application. It was not unreasonable for the Respondent to contest the application, and there was no suggestion that he failed to meet any of the directions in respect of the service charge application, or that he otherwise behaved unreasonably.

CONCLUSIONS

71. To summarise the Tribunal's decision:
    a. The Tribunal does not have jurisdiction under LTA 1985 s.27A to determine liability for the £250 paid on completion of the lease in 2009.
    b. Under LTA 1985 s.27A, the Tribunal determines that the interim charges of £216 demanded in 2010, 2011 and 2012 are not payable.
    c. Under LTA 1985 s.27A, the Tribunal determines that a service charge is payable in respect of the landlord's relevant costs of £264 for 2009. That contribution is 45% or £118.80.
    d. Under LTA 1985 s.27A, the Tribunal determines that a service charge is payable in respect of the landlord's relevant costs of £2,284 for 2010. That contribution is 45% or £1,027.80
    e. The demands for payment were properly accompanied by a summary of rights and obligations under LTA 1985 s.21B.
    f. Under LTA 1985 s.27A(b), the service charges are payable to the Respondent. The right to arrears of service charges which accrued before he acquired the lease is properly vested in him.
    g. The Tribunal declines to make any order under LTA 1985 s.20C.

72. The Tribunal determines that the Applicant is liable to pay service charges of £1,146.60 (£118.80 + £1,027.80) for the period from 20 August 2009 to 31 December 2010. Credit should also be given for the sum of £250 paid on the grant of the lease.

Judge Mark Loveday (Chairman)
1 August 2013

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Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.