12466

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/LSC/2017/0002**
Property	:	**4F Sidmouth Parade, Sidmouth Road, London NW2 5HG**
Applicant	:	**Leonora Baird-Smith**
Representative	:	**N/A**
Respondent	:	**Cartwright Estates Limited**
Representative	:	**Mr de Beneducci of counsel**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Tribunal Judge Richard Percival** **Mr T Sennett MA, FCIEH**
Date and venue of Hearing	:	**21 September 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 October 2017**

DECISION

The application

1. The applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the applicant in respect of the service charge years from 29 September 2014 to 28 September 2017.

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

The property

3. The property is a two bedroom flat on the third floor of a purpose built block, above a parade of shops. There are in total 24 flats. Access to the flats is by four staircases, each having its own street door.

The lease

4. The lease grants a 125 year term from 1999. Provision is made for the payment in advance on 29 September every year of a service charge. The tenant is required to pay "a fair and proper proportion of the proper and necessary expense to the superior landlord of performing [its repairing etc obligations]". The amount charged is one twenty-fourth. A reconciliation of the service charge is to take place as soon as possible after the end of the landlord's financial year (which runs from 25 June each year) upon the basis of a summary of expenses certified by the landlord's "Accountants Surveyors or Managing Agents" (4th schedule, paragraph 2).

5. By paragraph 30 of the 4th schedule, the tenant is liable to pay by way of administration charge interest on unpaid service charges of 5% over the Midland Bank's base rate.

6. Further service charge obligations are imposed on the tenant by the 7th schedule. Paragraph 9 allows for the recovery of the "proper and reasonable costs and fees payable to any solicitor accountant ..." engaged for "the collection of rents or in connection with the Landlord's obligations hereunder or with the general management, security and maintenance of the Estate".

7. Paragraph 10 of the 7th schedule provides for recovery of the reasonable costs of, *inter alia*, managing agents; and paragraph 12 provides that, if no managing agents are appointed, the landlord may charge a management fee of 15% of the total of the sums recoverable by way of service charge.

Procedural background

8. The application was first considered at a case management conference on 7 February 2017. The applicant appeared in person. The respondent was represented by Mr Sunil Pau, director of the respondent company. Mr Pau is also in practice the manager of the property. The normal directions were made, requiring first the landlord to make disclosure to the tenant of service charge accounts, demands etc; and then for the exchange of material relevant to each of the landlord and tenants' cases, including case statements, and a Scott schedule. The application was assigned to be determined on the papers.

9. On 15 May 2017, the application came before the Tribunal as presently constituted for determination on the papers. The Tribunal found that it was unable to determine the issues, however, given the state of the papers available. We therefore gave further directions. Those directions recorded that the original directions:

> "... were not adhered to by either party. The bundle prepared by the Applicant is not in the required form. The disclosure by the Respondent was limited to service charge demands and ledger entries, and included only one invoice (in respect of the charge for the service charge audit for the year ending 20 September 2015), some emails and photographs. There is no proper Respondent's statement."

10. The directions accordingly provided for the matter to be determined at an oral hearing on 24 July 2017, and gave further directions in an attempt to clarify the facts, issues and cases. The respondent was directed to prepare the bundles for the hearing.

11. Shortly before the hearing date, it became apparent that these arrangements had gone awry. The hearing was converted into a case management conference on 21 July 2017 (a Friday), it having become apparent that at least the applicant was unaware of the fixture. The applicant, understandably, was unable to attend the CMC at such notice, although Mr Pau did do so.

12. It transpired that neither party had received the further directions issued by the Tribunal, as a result of an administrative oversight in the Tribunal office. The Tribunal office has now apologised.

13. We accordingly issued second further directions, making similar provision to those issued on 15 May 2017, on an appropriate timetable. Those directions clearly stated the "Tribunal will accordingly hear the matter on 21 September 2017 at 10.00" and made provision for a time estimate. Both parties acknowledged receipt of the directions.

14. The adherence of the parties, particularly the respondent, to these directions was limited. In particular, the hearing bundle provided to the Tribunal was wholly inadequate. Only one bundle was provided, with the result that the members of the Tribunal were required to share. The bundle was also unpaginated, inadequately indexed and chaotically organised. We deal with a further failure to adhere to the directions below at paragraphs [27] to [35].

The hearing and the issues

Preliminary: appearances

15. The applicant did not appear. We allowed additional time for her to arrive, and efforts were made to reach her by the Tribunal office. We decided to continue in her absence.

16. During the lunch adjournment, when we had heard nearly all of the respondent's evidence and submissions, an email from the applicant was brought to our attention. It was timed 10.25, and was in response to a voicemail message left for the applicant by the Tribunal office. It appears from the email that the applicant was not aware that her presence was necessary (and also that she said that she had been told that the listing was for a further case management conference). On receiving the email, we reconsidered our decision to proceed in the absence of the applicant. We concluded that the second further directions made it clear that we would hear the application on this date, and that our decision to proceed in the absence of the applicant had been right.

17. At the hearing, the respondent was represented by Mr de Beneducci of counsel. We are particularly grateful for his assistance and realism in the face of the difficulties apparent with the documents. He was accompanied by Mr Pau, who gave evidence.

Preliminary: the lease

18. In both sets of further directions, the following direction appeared:

> "In advance of the preparation of the bundle ... , the parties will seek to agree the terms of the lease. The Tribunal notes that there may be a discrepancy in relation to the lease, in that the copy of the lease provided to the Tribunal by the Applicant makes provision for the ground rent to be a peppercorn, whereas the Respondent appears to charge ground rent of £250 a year (the Tribunal has no jurisdiction in relation to the ground rent as a substantive matter)."

19. At the hearing, the respondent agreed that the lease we had been provided with by the applicant was accurate, and could be treated as determinate by the Tribunal in the proceedings. He added that he

charged ground rent on the basis of a schedule he had been provided with by the previous owner when the respondent acquired the freehold, rather than having himself consulted the lease.

20. The Tribunal was accordingly reassured that it was appropriate to rely on the copy of the lease provided. We reiterate that the Tribunal has no jurisdiction in relation to ground rent, although the parties may wish to clarify the position.

Preliminary: the issues

21. At the start of the hearing, with the assistance of Mr de Beneducci and the written submissions of the applicant, the Tribunal identified the relevant issues for determination. They are set out in this decision in the following order:

(i) Whether a section 20 consultation was properly conducted in respect of major works arising from a fire risk assessment; and whether, if not, the requirement to do so should be dispensed with under section 20ZA of the 1985 Act;

(ii) Whether the service charge demands were valid, and accordingly whether interest and late payment fees were payable;

(iii) Payability under the lease of the management fee;

(iv) Payability of the accountancy fees under the lease; and

(v) The reasonableness of the service charge demanded from September 2014 to September 2016; and

(vi) The reasonableness of the interim charge for 2016-17.

Items (iii) and (iv) were considered at the hearing under (v), but it is convenient to deal with them separately in this decision as the issue in each case turned on payability under the lease rather than reasonableness. The applicant raised breaches of sections 21 and 22 of the 1985 Act in her written submissions. In each case, these are obligations enforced as criminal offences (as the applicant notes), and therefore do not fall to us to determine.

The section 20 consultation

22. In October 2013, the respondent secured a fire risk assessment from a company called Help and Safety at Work Ltd. The assessment recommended that various works should be undertaken.

23. The respondent referred us to an undated letter said to have been sent by the respondent to the tenants headed "Re section 20 notice, Landlord and Tenant Act 1985". The letter was undated, but was said to have been sent on 20 May 2014. The letter refers in brief terms to two quotations sought, one of which, the letter states, had been accepted. For obvious reasons, it made no provision for consultation.

24. Mr de Beneducci accepted that he was unable to direct us to any other documents that would indicate compliance with section 20.

25. The undated letter does not accord with the requirements of any of the notices required by Services Charges (Consultation etc)(England) Regulations 2003, schedule 4, part 2.

26. *Decision*: No section 20 procedure was carried out. Unless the requirement to undertake the consultation is dispensed with under section 20ZA, the service charge relating to the works is therefore limited to £250 for each tenant.

27. Mr de Beneducci then sought to argue that we should dispense with the requirements of section 20 in exercise of our jurisdiction under section 20ZA.

28. In the further directions, the Tribunal had expressly provided that:

> "If the Respondent wishes the Tribunal to dispense with the requirements of section 20 under section 20ZA of the 1985 Act, it must send the Tribunal and the Applicant an application for dispensation on the proper form ...".

The directions went on to provide that the applicant's response should include details of any prejudice suffered by the tenants "*If* the Respondent has made an application to dispense with the requirements of section 20 of the 1985 Act under section 20ZA..." (emphasis added).

29. No such application was made by the respondent. Nonetheless, Mr de Beneducci argued that we should entertain an oral application at the hearing. He submitted that the tenant had not been prejudiced as a result of the failure to comply with section 20, because the works were necessary to satisfy the requirements of a fire safety report; that three quotations had been obtained and the cheapest selected, and the applicant had not sought to identify any prejudice.

30. Mr de Beneducci's arguments (and the Tribunal's directions) were based on the judgment in *Daejan Investments Ltd v Benson and others* [2013] UKSC 14, [2013] 1 WLR 854. In that case, the Supreme Court set out the proper approach for the Tribunal in respect of retrospective dispensation at paragraphs [40] and following, including the proper

approach to considering whether dispensation prejudices the tenants, at paragraph [65] and following.[1]

31. Following *Daejan*, the question for the Tribunal on an application to dispense with the consultation requirement is whether the tenant had been prejudiced, in the sense of having to pay for inappropriate works or paying more than was appropriate for such works, by the landlord's failure to comply with the consultation obligations. Further, the Tribunal may dispense subject to conditions. In a case where the tenant can demonstrate prejudice, the Tribunal should allow a dispensation on condition that the landlord reduce the service charge by the amount attributable to that prejudice, rather than refuse dispensation.

32. As to the respondent's failure to adhere to our directions, Mr de Beneducci argued that we should consider the question on the basis of analogue with the rules relating to the relief from sanctions under CPR 3.9. Specifically, he argued that, while acknowledging that the breach was not trivial, some thought had been given to section 20, and in the circumstances taken as a whole, the application was likely to be successful, the applicant having failed to identify any prejudice.

33. We made the original direction because we considered it necessary for the applicant, a litigant in person, to be given the opportunity in advance of the hearing to consider the question of prejudice and to seek to meet the evidential burden on her to demonstrate prejudice, if she so wished. Without determining whether the analogy with CPR3.9 is an apt one (or, if it is, whether Mr de Beneducci's submissions would have been successful), our view is that that necessity remains. If we consider that this procedural step is necessary to allow the applicant to be given a proper opportunity to argue prejudice, we cannot coherently allow the respondent to side-step that procedure because she has not, in advance of it, demonstrated prejudice.

34. We note in passing, in the context of the submissions that it was relevant that the respondent procured three quotations for the work, that it appeared to the Tribunal that the quotations were not, in fact, on a like-for-like basis with each other. In the light of our decision on the application to hear an application to dispense, any issues this may raise are not relevant to this decision.

35. *Decision*: The Tribunal declines to consider the respondent's application to dispense with the requirements of section 20 under section 20ZA. This is not a refusal to dispense with the obligations. It is open to the respondent now to make an application to dispense on the proper form. If such an application is received, the Tribunal will issue directions in the ordinary way, which should, of course, be complied

[1] The judgment is available free at https://www.supremecourt.uk/cases/uksc-2011-0057.html or http://www.bailii.org/uk/cases/UKSC/2013/14.html

with. The extent to which these proceedings are relevant to such an application will be a matter for the Tribunal hearing that application.

The validity of the service charge demands and liability for interest etc

36. The directions required the respondent to produce, with each relevant demand for the service charge, the related summary of rights and obligations required by section 21B of the 1985 Act and the Services Charges (Summary of Rights and Obligations and Transitional Provision)(England) Regulations 2007 and any notices relevant to Landlord and Tenant Act 1987, sections 47 and 48.

37. In at least some of the papers provided to us, a summary of rights and obligations was included with the demands, as was a section 48 notice, as though it had been served in that form.

38. However, in evidence, Mr Pau said that the demands under consideration were not accompanied by a summary of rights and obligations, and nor were they accompanied by separate notices under either section 47 or 48 of the Landlord and Tenant Act 1987. Later in his evidence, Mr Pau appeared to suggest that the summary of rights and obligations had been handed to the applicant at some later time, but he did not provide particulars. He also stated that the applicant knew the address of the company, which was also its address for service, because she had received some notice thereof at the time that his company acquired the freehold.

39. The demand was made on the respondent's headed paper, which included its address. Mr de Beneducci submitted that this satisfied the requirements of section 47 of the 1987 Act. We accept that submission. Although the submission was not explicitly made, it appears that the same notice would also have satisfied section 48 (*Rogan v Woodfield Building Services Ltd* (1995) 27 H.L.R. 78 and *Drew-Morgan v Hamid-Zadeh* (2000) 32 H.L.R. 216), if, which was unclear, a section 48 notice in the form provided to us had not been provided at some other time.

40. Nonetheless, the clear failure to provide the summary of rights and obligations means that the applicant was entitled to withhold payment of the service charge, and that provisions of the lease relating to late payment do not apply (section 21B(3) and (4)).

41. Section 21B is in effect suspensionary. The applicant will become liable to pay the relevant service charges if and when the applicant demands the services charges with the summary of rights and obligations. The demand must, however, "be accompanied" by the summary of rights and obligations. Even if we accept Mr Pau's evidence that the applicant was, later, given the summary of rights and obligations, such a step would be insufficient if it was not accompanied by a re-demand, a claim Mr Pau did not make.

42. The effect of this finding on the service charge payable is that, after a compliant demand is made, it may not include any charge for interest or administration fees, on the basis of late payment. In addition, in respect of one demand, the respondent included a small sum (£24) for the resubmission of a dishonoured cheque, demanded in an invoice dated 16 October 2016. The Tribunal floated the suggestion that somewhat different considerations may apply in relation to this element of the service charge, but we did not hear developed submissions on the question. In the circumstances, where the applicant paid a service charge (or part of it) she was entitled not to pay, but her cheque was dishonoured and a charge arose on resubmission, we conclude that that sum is not now chargeable to the service charge.

43. *Decision*: The relevant service charge demands were not accompanied by the summary of rights and obligations required under section 21B of the 1985 Act and the Services Charges (Summary of Rights and Obligations and Transitional Provision)(England) Regulations 2007. Accordingly, the applicant was entitled to withhold payment of the service charge and no interest or administration fee may be levied in relation to non- or late payment. The sum charged in respect of the resubmission of a dishonoured cheque is likewise not chargeable to the service charge. The applicant's liability is accordingly reduced by £294.23.

The payability of the management fee

44. Mr de Beneducci accepted that, in each year, there was a small error in the calculation of the management fee. The lease limits the management fee to 15% of the service charge payable (7th schedule, paragraph 12). The respondent had wrongly calculated that 15% on the basis of the estimated interim service charge, rather than the actual expenditure, as the lease requires. In each year, the interim charge was in excess of the actual expenditure, with the result that in each year slightly more than was allowed under the lease was charged as management fee.

45. The sum being very small, Mr de Beneducci agreed that we should allow a reduction in the service charge payable over the period as a whole of £20, as that would certainly accommodate the correction of the error.

46. *Decision*: The service charge payable over the period under consideration should be reduced by £20 to correct the erroneous calculation of the management fee on the basis of the interim service charge demand rather than the actual expenditure incurred.

The payability of the accountancy fees

47. The service charges in relation to accountancy fees in 2014-15 and 2015-16 were £1,020, and the same sum is provided for in the estimate for 2016-17.

48. For each relevant year, the respondent produced a report signed by a company of chartered accountants. These reports recording that the company was exempt from audit under the Companies Act 2006. The reports record that they are related to "unaudited financial statements [compiled] in order to assist you to fulfil your statutory responsibilities...". Those for each year were in largely identical form and comprised two pages, the first of which appeared to be a form for submission by the respondent company, and signed by Mr Pau. No figures appeared appended to the reports.

49. Mr Pau's evidence in relation to the accountancy fees was confused. He accepted that the documents provided to us related to Companies Act requirements, not the preparation of the service charge accounts. It was also apparent from his evidence that he personally prepared the material upon the basis of which the service charge was calculated (and in answer to question from Mr Sennett, it became clear that in doing so he did not prepare individual service charge accounts for each tenant in the normal way). At one point in his evidence, we thought he was saying that the accountants provided two separate reports, one of which was the short-form Companies Act report supplied to us, and the other a set of accounts relevant to the calculation of the service charge. However, either his evidence, or our understanding of it, changed as his evidence progressed, to the effect that the report provided was the only output provided by accountants.

50. We put it to Mr de Beneducci that at the end of the evidence, the only accounts the existence of which we had evidence of were those provided in connection with returns to Companies House, rather than those anticipated by paragraph 2 of schedule 4. He agreed that that was indeed the state of the evidence.

51. On this evidential foundation, the accountancy fees are not chargeable to the service charge. We do not accept that expenditure which is only incurred in discharge of statutory obligations imposed on the freeholder company *qua* company can be charged under paragraph 9 of the 7th schedule.

52. Such expenditure may be related to the management of the freehold company, but it is not expenditure on "the general management security and maintenance *of the estate*" (emphasis added). Even taken in isolation, this general phrase is insufficient to accommodate such expenditure. That conclusion is fortified by the fact that the generality of this provision must in any event be read in context as coloured by the specificity of the preceding words, which refer to rights and obligations of the landlord under the lease.

53. *Decision*: The expenditure on accounts cannot, on the state of the evidence presented to the Tribunal, be recovered through the service charge. For 2014-2016, this represents £2,040 for the building as a whole, and £85 for the applicant. For the position in relation to 2016-17, see paragraph 81 below.

The reasonableness of the service charges 2014-2016: management fees

54. The applicant sought to challenge the reasonableness of the management fee. She relied on what she said were failures of communication and the inadequate provision of services.

55. One particular issue raised by the applicant was that the respondent allowed bare wiring to be left in the stairwell in 2015. She provided photographs.

56. In his evidence, Mr Pau indicated the work he undertook to manage the building. This included arranging insurance, including regular market testing and administering claims, providing maintenance, inspecting monthly, dealing with queries from tenants, maintaining and testing fire safety equipment, arranging for the electricity supply and maintaining the entry phones on each of the four external doors.

57. In his first statement of case, the respondent claims that the landlord's fees are "at the lower end of the scale".

58. As regards the wiring left unfinished, Mr Pau's evidence was that this only occurred for a temporary period while works were being undertaken.

59. It may be that there have been failures of communication, as the applicant alleges, and as some of the written material she submits appears to bear out. The failure to provide services is not particularised (beyond those considered below); but even if additional services should have been obtained, it is difficult to see how doing so could do other than increase the service charge.

60. We accept the respondent's evidence that the charge, if considered on a per unit basis (at about £120 to 125 per year), is on the low side, albeit the lease does not provide for a higher charge. Were a managing agent to be appointed, the per unit charge for a building of this type and age would, in all probability, be significantly higher.

61. In respect to the wiring, we accept Mr Pau's evidence that the state of affairs recorded by the applicant's photograph was temporary, and occurred during the period when the fire-precaution works were being carried out. We are not convinced that this state of affairs can reasonably be characterised as a significant failure of management. But

even if it did represent some failure of management, the Tribunal does not consider it is a failing that could be expressed in a reduction in the management fee.

62. Considering the evidence as a whole, the Tribunal concludes that the management fees are within a reasonable range.

63. *Decision:* The service charge relating to the management fees was reasonably incurred (insofar as they fall within the amount allowed under the lease).

The reasonableness of the service charges 2014-2016: cleaning

64. The applicant contends that the cleaning of the communal areas was inadequate generally, and in particular during a period in late 2016 during which building work was being undertaken in one of the other flats on the applicant's staircase, flat 4A. She provided photographs, which showed staining and mess on the carpet.

65. Mr Pau's evidence was that cleaning was undertaken by a local firm called ACE. They attended the property fortnightly and cleaned the carpet, the windows and the stairwells. If necessary, carpet cleaning included stain removal as well as vacuum cleaning. They also replaced lightbulbs if necessary. The charge was £15.50 per visit before June 2015 and £17.00 thereafter.

66. Mr Pau said that his inspections confirmed that cleaning was carried out to a reasonable standard. In relation to the period during which works were undertaken to flat 4A, he said that the original intention had been to replace the carpet during 2015/16, but that this was delayed because it was known that work would be carried out to that flat. As a result, the quality of the carpet did deteriorate (although he maintained that the staining illustrated in the applicant's photographs would nonetheless have been removed by the cleaners each fortnight). It appears that it is agreed that the carpet was replaced in April 2017.

67. We consider that the applicant has failed to demonstrate that the cleaning was inadequate in general. We note that the fee is a moderate one, in any event. We also consider that the decision to prolong the life of the carpet during the works to flat 4A was a reasonable one, even if the result was, contrary to Mr Pau's evidence, that some staining persisted.

68. *Decision*: The service charge relating to the cleaning of communal areas was reasonably incurred.

69. *The reasonableness of the service charges 2014-2016: other issues*

70. In her initial application, and thus in advance of disclosure by the respondent, the applicant also said that she contested other items in the service charge. These were the cost of alarm systems, fire extinguishers and signs, entry phones and electricity.

71. These items were not substantively challenged in her subsequent statements. The respondent (after our further directions) produced invoices that supported this expenditure. Mr de Beneducci submitted that, in the absence of, for instance, alterative quotations, the expenditure was justified, and indeed the figures claimed low.

72. *Decision*: To the extent that at the hearing, there remained a challenge to other items referable to the service charge, the relevant expenditure was reasonably incurred.

The reasonableness of the interim demand for 2016-17

73. The applicant contests the reasonableness of the interim fee demanded for 2016-17.

74. Mr de Beneducci submitted that the fees sought were reasonable. It was an old building that was getting older, and a landlord could reasonably be cautious. While it was true that historically actual expenditure had been less than the interim demand, such shortfalls were returned to the tenants.

75. Most of the significant sums which go to make up the interim demand, such as the insurance, landlord's fees and cleaning, are known in advance and reasonable in amount. We deal with the interim charge for accounts below.

76. However, the major area which is not known in advance relates to repairs and maintenance, in respect of which the estimate is £8,000.

77. We have available the estimates and actual expenditures for three years (the figures for 2013-14, while not in issue, are set out in the budget document for 2014-5). The estimate for 2013-14 was £8,000 and the actual expenditure £2,305. The corresponding figures for 2014-15 were £8,000 and £5,740 and for 2015-16 £8,000 and £5,199.

78. Thus in each year, the estimate for repairs and maintenance has been significantly in excess of the actual expenditure.

79. Further, in each of those years, and in the demand for 2016-17, the estimate includes a figure of £1,000 for contingencies. As repairs and maintenance is the major category of expenditure which is unknown in

advance, the contingencies provision must be, at least largely, attributable to repairs and maintenance.

80. We accept Mr de Beneducci's submission that a reasonable landlord can be a cautious landlord. However, we conclude that in again estimating £8,000 for repairs and maintenance and, again, including £1,000 for contingencies, Mr Pau has gone beyond caution to a failure to learn from immediately past experience. We accordingly find that the interim service charge should be reduced by the sum of £1,000. That would reflect a reasonably cautious approach, while taking appropriate account of recent experience.

81. The figure for accountancy fees in the estimate is the same as in previous years, which presumably represents the fee agreed with the accountants. We have concluded above that the accountancy fee is not payable in relation to previous years. It is, of course, possible that accountancy fees that *do* fall within paragraph 9 of the 7th schedule to the lease could be incurred, and that such fees could feature in the interim demand. However, it appears that the sum which features in the actual demand made, being the same as previous years, would also represent the inadmissible expenditure set out above.

82. The interim service charge for 2016-17 must, as must the other demands, be reissued with the summary of rights and obligations required by section 21B of the 1985 Act. The respondent is entitled, when that demand is reissued, to include a sum for accountancy fees, but only those fees that are incurred on a basis that would bring them within the terms of the lease. Whether the respondent does so is a matter for it.

83. We note that these conclusions may have been rendered otiose, in that the respondent may prefer to issue a (compliant) demand for 2016-17 actual expenditure, rather than estimates. If, therefore, the demand relating to accountancy services is for the same services as the previous two years, it is not chargeable for the reasons set out above.

84. *Decision*: The interim service charge demand for 2016-17 is unreasonable in respect of the combination of sums demanded for repairs and maintenance and contingencies, and should be reduced by £1,000 for the building as a whole. A demand for accountancy fees should only be made if the services to which the fees relate would be chargeable to the service charge under the lease.

Application under section 20C of the 1985 Act

85. The applicant had indicated that she wished to apply for an order under section 20C of the 1985 Act that the costs of these proceedings may not be recovered through the service charge.

86. Mr de Beneducci submitted that we should make no order. There was nothing in the circumstances of the proceedings to justify an order, he argued. The applicant's failure to attend was relevant in that it meant that some issues were not fully explored.

87. While the question of whether an applicant is successful before us is not determinative on a section 20C application, it is of significance. In this case, both parties have been successful to a degree, although it is the respondent who has been preponderantly successful in terms of the value of the service charge.

88. We do not accept Mr de Beneducci's argument that the applicant's absence is relevant. Although we decided it was appropriate and proportionate to continue in her absence, it would not be right to punish her unexplained absence by taking it into account in relation to this application.

89. In all the circumstances, we decline to make an order under section 20C. There are no factors present here that require us to prevent the respondent from relying on a contractual right in the lease, if it has one (see below).

90. This conclusion is subject to two qualifications.

91. First, we considered the application for an order without considering whether the costs of these proceedings would be recoverable in the service charge under the lease. This finding is without prejudice to any argument that the applicant may wish to make as to payability, should she choose to challenge the relevant costs in a future service charge demand by way of application to this Tribunal under section 27A of the 1985 Act.

92. Secondly, if the cost of these proceedings are sought to be recovered in a service charge, or in an administration charge, it will be open to the applicant to challenge their reasonableness in an application as above. In the event of such a challenge, it will be a matter for the Tribunal considering that application whether it should have regard to the circumstances of this case, including the matters set out in paragraphs [8] to [14] above.

Name: Tribunal Judge Richard Percival **Date:** 18 October 2017

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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to 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.

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 20B

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

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

Section 20C

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

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

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

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

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 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).