10717

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2014/0413**
Property	:	**FLAT 3, 10 LENNOX GARDENS, LONDON SW1X 0DG**
Applicant	:	**MR F MASRI**
Representative	:	**IN PERSON**
Respondent	:	**10 LENNOX GARDENS LTD**
Representative	:	**ASTBERRYS PROPERTY SERVICE LTD**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Ms L Smith (Tribunal Judge)** **Mr A Manson, FRICS** **Mr C Piarroux**
Date and venue of Hearing	:	**Friday 27 February 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**26 March 2015**

DECISION

Decisions of the tribunal

(1) The Tribunal determines that costs were incurred by the Respondent in relation to the insurance at the point when payment was made on 20 November 2012 and not at the date of invoice on 29 June 2012. Accordingly, costs were incurred within an 18 month period prior to the demand on 31 March 2014 and the sum of £626.30 which remains the only item in dispute in this application is payable.

(2) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985

(3) The Tribunal declines to make any order for reimbursement of fees to the Applicant or any order for costs under rule 13 in favour of either party.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge year 2012. The application started life in relation to the sum of £4619.45 claimed by the Respondent as the balancing charge for that service charge year claimed by demand dated 31 March 2014. As noted below, the issues had narrowed considerably by the date of the hearing.

2. The legal provisions relied upon by the parties in the course of the hearing are set out in the Appendix to this decision.

The hearing

3. The Applicant appeared in person at the hearing (albeit he had received professional assistance from a barrister in preparation of his case). The Respondent was represented by Mr Armstrong.

4. Prior to the hearing, the Tribunal had been furnished with a number of (unpaginated) bundles. Firstly, the Tribunal had received a main bundle from the Applicant. Secondly, the Tribunal had received a separate bundle from the Respondent consisting of a letter to the Applicant dated 20 November 2014 together with various documents which had been served on the Applicant in the course of the proceedings and which the Respondent said were wrongly not included in the original bundle. Thirdly, the Applicant had submitted a supplementary bundle adding a number of letters which post-dated the original bundle. It was partly as a result of the inability to provide the Tribunal with an agreed set of documents that the hearing of this application proceeded by way of an oral hearing rather than on the

papers as had originally been intended. If the hearing had been concerned with documentary evidence, the Tribunal would have been hampered in hearing the case by the poor organisation of the evidence and lack of pagination. Fortunately, by the time of the hearing, the issues had narrowed to such an extent that it was only necessary for the Tribunal to refer to a handful of documents.

The background

5. The property which is the subject of this application is a 2 bed converted flat. In light of the nature of the issues, it was not necessary for the Tribunal to inspect the property and neither party requested an inspection.

6. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. There was no issue in relation to the wording of the lease or payability under the lease and therefore there was no need to refer to it in the course of the hearing.

The issues

7. As noted above, the application started life as relating to the balancing charge for the service charge year ending 25 December 2012. This first appeared in an account statement on 25 December 2013 described as "Service Charge Arrears Deficit Service Charge Year 2012 – Schedule 1". That sum was formally demanded by letter dated 31 March 2014. The Applicant had not been told how this figure had been derived and had assumed that it related to legal costs. However, his main complaint was that the costs had been incurred more than 18 months prior to 31 March 2014 ("the section 20B issue"). The Applicant raised a number of other issues in his response to the letter of 31 March 2014 but further correspondence ensued thereby narrowing the dispute to the £4619.45 which was the subject of the original application. By letter dated 31 July 2014, the Respondent threatened the Applicant with legal proceedings if he did not pay the sums due. In response, by letter dated 6 August 2014, the Applicant informed the Respondent that he had issued this application to deal with that outstanding issue.

8. On 16 September 2014, a case management hearing took place. The Applicant did not attend. The Respondent was represented. The issues at that stage were noted to be the section 20B issue and a reasonableness issue in relation to the legal costs which the Applicant at that stage surmised were the basis for the £4619.45. The reasonableness issue had in fact been taken by the Applicant in a letter to the Tribunal prior to the case management hearing which he had not copied to the Respondent. The Respondent sought a direction that the application be determined on the papers with the benefit of written submissions. The Tribunal Judge indicated that he would have agreed

with that assessment had reasonableness not also been in issue. The first direction given was for the Respondent to provide disclosure by 20 October. A longer than usual period was allowed for disclosure due to the need for the Respondent to consult its accountant on the section 20B issue.

9. On 24 September 2014, the Applicant withdrew the reasonableness issue. The Applicant admitted at the hearing that this part of his challenge had been misconceived and that reasonableness should not have been disputed. By way of further directions dated 21 October 2014 and noting that withdrawal, the Tribunal Judge ordered that the application be dealt with on the papers without an oral hearing.

10. On 15 October 2014, the Respondent produced a schedule in compliance with the directions setting out the items comprised in the service charge demand for the year ending 25 December 2012 and also showing the date on which (on its case) the costs were incurred and also disclosing invoices evidencing those sums. According to that schedule, £6304.23 was incurred after 1 October 2012. The Applicant's share was £888.27. The Respondent therefore accepted that it could only recover £888.27 from the Applicant and reimbursed the Applicant for the difference between the figure of £4619.45 and £888.27.

11. The amount of £888.27 was made up of 8 items being the last 8 entries in the schedule dated 15 October 2014. Of those items, the Respondent later conceded that it could not recover items 2 and 7 and refunded the Applicant the further sum of £78.23. The Applicant accepted in his statement of case dated 30 October 2014 that he was liable for items 3 and 8 (together totalling £164.85).

12. Of the remaining items 1, 4, 5 and 6, the Applicant at the hearing indicated that he was no longer pursuing any challenge in relation to items 1 and 6. Item 1 related to a payment of £90 in respect of repairs to a door. The Applicant's share of this figure is £12.61. Item 6 related to a payment of £44 for supply of electricity. The Applicant's share of this figure is £6.20.

13. The only items on which the Tribunal's decision was sought therefore related to items 4 and 5 which concerned insurance. The claims in respect of the insurance were £2484.46 of which the Applicant's share is £350.06 and £1960.52 of which the Applicant's share is £276.24.

14. The factual basis for this issue is an invoice dated 29 June 2012 from St Giles Insurance & Finance Services Ltd. This claimed the sum of £6944.98 for insurance for the period 1 July 2012 to 1 July 2013. The witness statement of James Mark dated 18 November 2014 explained that *"When this invoice was sent the service charge account did not have sufficient funds to pay it. I spoke to Dawn Gerrard of St Giles around August/September 2012. We agreed that Urang would pay*

the invoice as and when the service charge account had sufficient funds. The first payments totalling £4444.98 were made on 20 November 2012 and the balance was agreed to be paid in February 2013." The Tribunal was also provided (in the Respondent's bundle) with an e mail from Dawn Gerrard confirming the above and which had been exhibited to Mr Mark's statement (although it appeared from discussions at the hearing that the exhibits may not originally have been served with the statement). The Applicant did not dispute the facts as stated. Accordingly, the only issue on which the Tribunal was asked to rule was the section 20B issue which was raised in the original application but in relation only to the sum of £626.30 being the Applicant's share of the £4444.98 paid in November 2012. There was no dispute by the Respondent that if the Tribunal were to find that the cost of the insurance was incurred at the date of invoice (as the Applicant contended) then it was outside the 18 month period prior to the demand and was not payable.

15. Since the only issue was the section 20B issue and because the Respondent was represented by Counsel and the Applicant was not, the Tribunal invited the parties to reverse the order of submissions so that the Respondent could set out its case on this issue first and the Applicant could respond to it. The parties agreed to this course. The Tribunal was also helpfully provided with skeleton arguments from the Respondent's Counsel and from the Applicant.

16. The issue in this case turned only on section 20B(1) of the 1985 Act. The issue put simply is "when were costs incurred by the landlord in relation to the insurance"? The Respondent accepted that if this was the date of the invoice then the disputed sum was not payable. If it was when the sum was paid to the insurance company then it was payable.

17. The Tribunal was referred by the parties to the cases of *Jean-Paul v Mayor and Burgesses of the London Borough of Southwark [2011] UKUT 178 (LC)* ("Jean Paul"), *OM Property Management Ltd v Thomas Burr [2012] UKUT 2 (LC)* ("Burr Upper Tribunal"), *Burr v OM Property Management Ltd [2013] 1 WLR* ("Burr Court of Appeal") and *Capital and Counties Freehold Equity Trust Ltd v B L plc [1987] 2 EGLR 49* ("CapCo") (although the Tribunal was provided only with a legal article in relation to this case rather than the full judgment).

Respondent's submissions.

18. Mr Armstrong relied on the distinction drawn in Jean Paul and Burr Court of Appeal between liability being incurred and costs being incurred. At paragraph 17 of Jean Paul, the Upper Tribunal President stated:-

"In my judgment, however, costs are only "incurred" by the landlord within the meaning of section 20B when payment is made. There is

clearly a distinction between incurring liability (ie an obligation to pay) and incurring costs, and it is the latter formulation that is used in the provision".

Mr Armstrong submitted that this paragraph was part of the ratio of the decision and binding on the Tribunal.

19. He accepted that the position was not as clear cut in Burr. In Burr Upper Tribunal, HHJ Mole QC reviewed Jean-Paul and CapCo as well as the cases of Hyams v Wilfred East Housing Co-op Ltd [LRX/102/2005] ("Hyams") and London Borough of Brent v Shulem B Association Ltd [2011] EWHC 1663 (Ch) ("Shulem B"). He concluded (paragraph 20):-

"In the current case I do not think that it is necessary or desirable to try and determine whether costs are incurred when an invoice or certificate is served or when payment is made....I do not get much help from dictionary definitions of 'incurred'. It is of greater assistance to recall that the statute declares that it is 'costs' that are 'incurred' which are relevant. In the present case it is sufficient to say that the costs were not incurred when the gas was used. I appreciate that the liability to pay somebody may have been incurred at that point, but the use of the word 'costs' is significant. As the President pointed out, it is the cost that must be incurred. A liability does not become a cost until it is made concrete, either by being met or paid or possibly by being set down in an invoice or certificate under a building contract"

20. HHJ Mole QC went on to seek to reconcile the various authorities in paragraph 21 and said:-

"I do not see that there is any tension between the decisions of the President in Hyams v Wilfred and Jean-Paul v LB Southwark. Each was decided on its own facts. In neither case was it necessary to distinguish between the issue of a certificate or invoice under a works contract and payment of it, nor was it suggested there was any gap between demand and payment that was of significance. The crucial and helpful point was the drawing by the President of the distinction between incurring a liability and incurring a cost. I am happy to adopt the formulation of HHJ Baker QC in Capital and Counties Trust that costs will be incurred when they are 'expended' or 'become payable'. The submissions recorded in LB Brent v Shulem, which seem to have earned at least the tacit approval of Morgan J are consistent with that."

21. At paragraph 23, HHJ Mole QC went on to say:-

"In my judgement the true answer is that as a matter of the interpretation of section 20B 'costs' are 'incurred' on the presentation

of an invoice or on payment; but whether a particular cost is incurred on presentation of an invoice or on payment may depend upon the facts of a particular case. It is possible to foresee that where, for example, payment on an invoice has been long delayed, the decision as to when the cost was actually incurred might be different depending on the circumstances; it might be relevant to decide whether the payment was delayed because there was a justified dispute over the amount of the invoice or whether the delay was a mere evasion or device of some sort. In the former case the tribunal of fact might find that the costs were not incurred until a genuine dispute was settled and the bill paid. In the latter case the tribunal might be very reluctant to allow deliberate prevarication to postpone the running of the time limit imposed by section 20B. That is the sort of factual matter that the LVT is well placed to decide."

22. Since this paragraph bore some resemblance to the facts of this case, the Tribunal explored with Mr Armstrong what was meant by the distinction drawn in that case. The Tribunal considered that what the Judge might have been referring to there was a deliberate device by a landlord of deferring the date on which costs would be incurred so as to avoid the application of section 20B(1). Mr Armstrong indicated that he did not read this paragraph as saying that but relied on it only to the extent that it showed that the facts of a case might be relevant to the issue of when costs were incurred. This was not a case where the landlord had failed to make payment for a considerable period but one where there had been an agreement with the creditor for deferred payment. Indeed, if the Respondent had considered that there might be an issue with a delay in claiming costs which were already due, it could easily have asked the insurer to provide a further invoice at the time when payment was made which would have avoided this dispute altogether. His primary submission though was that the issue of when costs were incurred did not depend on the facts since Jean-Paul had decided that costs were not incurred until payment.

23. In Burr Court of Appeal, Lord Dyson cited paragraphs 20-25 of Burr Upper Tribunal. He reached the same conclusion as the Upper Tribunal in that case for 3 reasons:-

(1) *"As a matter of ordinary language, there is an obvious difference between a liability to pay and the incurring of costs. ...as a matter of ordinary language, a liability must crystallise before it becomes a cost"* (paragraph 11)

(2) *"..the difference between a liability to pay and the incurring of costs is recognised by the draftsman in section 20B(1) itself. Where he wishes to refer to a liability, he does so: note the words "the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred". It is significant that the phrase "relevant costs" is defined in section 18(2) as "the costs or estimated costs incurred or to*

be incurred". It is not defined as "the liability or estimated liability for costs". Similarly, section 20B(1) does not say "if any liability for any of the relevant costs is 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 that liability so incurred." (paragraph 12)

(3) *"...section 19(2) provides strong support for the view that costs are incurred only when they are paid (or when an invoice or other demand for payment is submitted by the supplier or service provider) and not when services are provided or supplies are made...*(paragraph 13).

24. As Mr Armstrong was constrained to accept, the Court of Appeal had not gone so far as to decide whether it was the date of invoice or payment which was the point at which costs were incurred. At paragraph 15, Lord Dyson indicated that it was not necessary to decide that point in the Burr case (the dispute there being between date of supply of a utility and date of invoice or demand). Mr Armstrong did point out though that, although the Court of Appeal had not been directly referred to Jean-Paul in argument, the Court did approve the decision of HHJ Mole which had approved that decision albeit not needing to decide the distinction between presentation of an invoice and payment of expenses as being the relevant point at which costs were incurred. Furthermore, both the Tribunal and the Court of Appeal in Burr had approved the distinction between incurring a liability and incurring a cost which was at the heart of the Jean-Paul decision.

Applicant's submissions

25. Mr Masri sought to draw an analogy between the words "costs incurred" in section 20B and in contract and revenue law. He submitted that in contract law, costs are incurred instantly when a valid demand for payment under that contract is received (although he submitted no authority for this proposition and it did seem to the Tribunal that this too would depend on what the contract provided). He also submitted that revenue law was to the same effect – that costs were incurred at the date when the obligation to pay became unconditional. He submitted that a sale contract is formed of a continuum of points. His skeleton makes the point that "*At some stage, the contracted amount "becomes payable" normally through an invoice and then, after a slightly shorter or longer interval, the amount gets paid...*"

26. Mr Masri advanced his sale contract analogy by heavy reliance firstly on the CapCo judgment. He pointed out that there the Judge had decided that "*...incurred* [in the leases under consideration there] *includes both the other matters, the relevant amounts that have been expended or become payable. So that I do not see that in the context of this lease*

one should give 'incurred' a special meaning, and indeed I would construe it simply as synonymous with 'expended' or 'become payable'. 'Become payable' would be a phrase where the landlord is obliged to make payment though by the end of the financial year he has not in fact done so but of course obliged to become payable because the services have been rendered. On the other hand , 'expended' is work during the relevant year he has actually expended."

27. Mr Masri pointed out that CapCo had been relied upon in both Hyams and Shulem B (as reported in the Burr Upper Tribunal decision). It is worth noting at this juncture that Hyams was a case – as CapCo - where what was at issue was the meaning of "costs incurred" within the provisions of a lease and not under section 20B(1). Although Shulem B did concern section 20B(1), it is noted by HHJ Mole QC in Burr Upper Tribunal that *"this was not a case in which the precise date when a lessor should be taken to have incurred costs for the purposes of section 20B actually mattered (See paragraph 24)..."*. The competing dates in that case were the date of the certificate, the date of service of the certificate, the date of payment of the sum identified in the date of the certificate or the date of expiry of the period of 28 days after the certificate. In fact, whichever date applied in that case, costs were incurred more than 18 months before the demand. Mr Masri also pointed out though that CapCo had been cited with approval in Burr Court of Appeal. He submitted though that in its citation of CapCo, the Court of Appeal had been concerned to reconcile the various authorities and had therefore quoted the judgment out of context. He submitted that CapCo had decided that costs incurred included both of costs expended and those becoming payable whereas the Tribunal in Burr had cited it by emphasising the distinction between the two which had in turn led to the misconceived distinction between costs being incurred and liability being incurred.

28. Mr Masri also relied on the way in which the words "costs incurred" were used in all of sections 18-21 of the 1985 Act. He pointed out that those words appeared over 30 times in those provisions and must be taken to mean the same thing in each. In this context, he relied heavily on section 21 which provided for the tenant to be able to require a written summary of the "costs incurred". He pointed out that by s21(5) the summary had to include all of the costs at (a), (b) and (c) of that sub-clause which included costs demanded where no payment had been made. This strongly suggested that costs were incurred at the date of invoice not date of payment.

29. In relation to the authorities on which the Respondent relied, Mr Masri submitted that the paragraph relied on in Jean-Paul was obiter. This was because the case was mainly about notification under s20B(2) and the issue of when costs were incurred related only to 2 payments made after completion of the contract. In either case, since there had been no notification between those 2 later payments and the date of demand more than 18 months later, there was no liability on the tenants to pay

and so the decision that costs were only incurred at date of payment was not part of the ratio. Mr Masri also submitted that Jean-Paul was per incuriam because only section 20B had been cited to the Tribunal and no argument had been made about the effect of the wording of section 21 or indeed any other section in that part of the 1985 Act where the same words appeared.

30. Mr Masri submitted that the distinction drawn in Jean-Paul and the authorities which followed between liability being incurred and costs being incurred was misleading as the liability in section 20B(1) was that of the tenant and the incurring of costs was that of the landlord. He also submitted that there could be no such distinction because the incurring of costs was a quantitative assessment whereas the incurring of liability was a qualitative one. He agreed with the explanation of the Respondent as to the 3 reasons for the Court of Appeal's judgment in Burr but did not agree with the way in which the Respondent interpreted those reasons or applied them to this case. The issue was at which point the costs were incurred and that depended at what point the costs crystallised. By analogy with a sale contract, this must be at the point when an invoice was produced.

Respondent's reply

31. In reply, Mr Armstrong submitted that the Tribunal should be concerned with section 20B and not with the meaning of "costs incurred" in other context eg leases or sale contacts. Insofar as Mr Masri criticised the distinction drawn in Jean-Paul between costs and liability, this had been unequivocally adopted as part of the reasoning of the Court of Appeal in Burr. CapCo was of little assistance since that was a case turning on interpretation of a lease and had nothing to do with interpreting section 20B. In relation to whether Jean-Paul was obiter, Mr Armstrong pointed out that what the Tribunal had decided was that cost was incurred in relation to the main contract at contract completion. It could have decided the issue in relation to the remaining payments by reference to the invoices only but it had decided not to so confine its decision and this was therefore part of the ratio. The fact that the Tribunal had not in that case been referred to various other sections of the 1985 Act did not render the decision per incuriam.

Discussion

32. The Tribunal accepts the Respondent's submissions. Whether or not Jean-Paul was binding authority, on the facts of this case, the Tribunal accepts that the date at which costs were incurred was the date of payment. The issue of whether Jean-Paul lays down a principle applicable to section 20B(1) in all cases is not something which the Tribunal needs to decide here. As the Tribunal decided in Burr, the issue of when costs are incurred can be fact sensitive. In this particular case, even if it was anticipated by the insurance company at the date

when the invoice was delivered that costs were payable at that date, it subsequently agreed to defer payment. Even on Mr Masri's analogy with a sale contract, this might amount to a variation of the contract so as to alter the date of payment. As Mr Armstrong rightly pointed out, the Respondent could in fact have asked the insurance company to deliver a further invoice at a later date to provide for deferred payments to be made in stages. The fact that it did not do so ought not to be fatal to its ability to claim the sums paid from the Applicant.

33. The authorities of Jean-Paul and Burr clearly draw a distinction between when a liability is incurred and when a cost is incurred. At what point a liability becomes a cost may well depend on the context of the individual case. In this case, the Tribunal considers that the liability to pay for the insurance crystallised into the incurring of cost when payment was actually made. That was within 18 months of the date of demand.

34. The Tribunal did not find reliance on CapCo as of assistance. That case was concerned with the interpretation of 2 leases. Those leases provided for recovery of "*all amounts sums costs and expenses*" which were "*during the said term.. expended or incurred or become payable.*" Even if the Court were right to consider that incurred in the context of that lease included the other 2 words (rather than seeing the word incurred as disjunctive from the other 2 words in the clause) that says nothing about what "incurred" means in the context of section 20B. The citation of CapCo in Burr was simply by way of a shorthand for making the point that costs could be said to be incurred either when they were expended or when they became payable. In the context in which CapCo was cited, the Judge was clearly distinguishing between those 2 points in time but as he indicated, he did not need to decide which applied since there was no significant gap between demand and payment (as there is here).

35. Neither did the Tribunal find reference to other sections of the 1985 Act as of particular assistance. True it is that the distinction between liability and cost is drawn from the 2 words appearing together in section 20B(1) so that the point about the draftsman's intention emerges. However, one still needs to consider the context in which the words are used elsewhere in the Act. For example, Mr Masri relied on section 21 and the fact that section 21(1) referred to "costs incurred" which appeared to suggest that this included demands for payment which had not yet been paid at section 21(5). However, if one reads on in section 21(1) reference is made to the issue of which of those costs are relevant in relation to the service charges payable or demanded as payable in that or any later period. What follows then has to be read in that context as meaning the incurring of "relevant costs" which includes not only sums demanded and not paid and sums demanded and paid but also at (a) costs in respect of which no demand for payment was received. On any view of the authorities relating to section 20B(1) that category is not included in "costs incurred" under section 20B(1).

36. It is perhaps also notable that "relevant costs" are defined under section 18(2) as "*costs or estimated costs incurred or to be incurred*". Section 18(3)(b) also makes the point that costs are relevant costs "*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...*". It cannot be suggested that time starts to run for the purposes of section 20B(1) if costs remain an estimate and are not in fact incurred until the following service charge period and cannot be demanded until that service charge period. The Tribunal notes in this regard, that there is apparently no dispute between the parties about payment of the remainder of the insurance charge which was deferred for payment until February 2013 and not therefore demanded until the 2013 service charge year. When one comes to look at section 20B(1) in this context it is noted that although section 20B(1) does refer to "relevant costs" it refers only to those costs which are incurred and does not include those to be incurred.

37. **For all of the above reasons, the Tribunal determines that costs were incurred by the Respondent in relation to the insurance at the point when payment was made on 20 November 2012 and not at the date of invoice on 29 June 2012. Accordingly, costs were incurred within an 18 month period prior to the demand on 31 March 2014 and the sum of £626.30 which remains the only item in dispute in this application is payable.**

Application under s.20C and refund of fees

38. In the application form and at the hearing, the Applicant applied for an order under section 20C of the 1985 Act. The Applicant also made an application for a refund of the fees that he had paid in respect of the application/ hearing[1]. Both parties also made an application under rule 13 of the The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169 on the basis of unreasonable conduct of the other party. In the event that the Tribunal was minded to make an order under rule 13, the parties asked the Tribunal to summarily assess costs. Since no schedules of costs were produced for this purpose, the Tribunal gave both parties 7 days to produce and serve schedules and 7 days for both parties to make submissions in relation to the other's schedule.

39. Mr Masri submitted that he had brought the application in good faith and had been constrained to do so because of the threat of imminent legal proceedings if he did not pay the entire sum due. In fact, in the course of proceedings, the Respondent had conceded that the majority of the sum claimed was not payable because of the operation of section

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

20B(1) and the amount remaining was a very small percentage of the initial sum.

40. Mr Armstrong submitted that if the Applicant had not raised the reasonableness issue which he had abandoned shortly after the first set of directions, this would always have been a case suitable for determination on the papers. Further, if the Applicant had included all the documents in the bundle for the paper hearing, an oral hearing would not have been required either. In relation to section 20C, Mr Armstrong pointed out that this could only affect Mr Masri's service charge as all the other lessees were members of the Respondent company and would have to pay the Respondent's costs of the proceedings whatever the outcome. He submitted that the Tribunal should not make a section 20C order in the event that the Tribunal decided in the Respondent's favour. Even if the Tribunal were against the Respondent on the section 20B issue, he submitted that Mr Masri should be ordered to pay the costs of the hearing as it was his conduct alone which had led to the need for a hearing. He accepted that the Respondent had conceded a large part of the sum initially in dispute but submitted that it had also been unreasonable for Mr Masri to issue the application when he did given that there was ongoing correspondence which had narrowed the issues very quickly after the application was issued and disclosure was given.

41. Subsequent to the hearing and in accordance with the direction referred to at paragraph 38 above, the Respondent's solicitors wrote on 4 March 2015 supplying details of their costs in relation to which the rule 13 application was made in the sum of £3136.28. The letter also made submissions in relation to the application for payment of costs which the Tribunal had not directed be supplied but in any event simply repeated the application made orally at the hearing as set out in paragraph 40 above. Mr Masri also apparently wrote to the Tribunal, outside the time limit as directed, on 9 March 2015 (although that letter was received only via the Respondent's solicitor). In that letter, Mr Masri purports to make a formal rule 13 application within 28 days of the final decision of the Tribunal as provided for by rule 13(5) but without any reference to the fact that he has already made that application orally at the hearing on 27 February 2015 in accordance with rule 13(4) and that the parties were directed to make submissions in accordance with rule 13(4). Mr Masri also purports in that letter to apply to extend time until 27 March 2015 to deliver his complete application and representations. The Tribunal has taken into account the amount of costs sought as set out in that letter. As noted above, the Tribunal allowed the rule 13 application to be made orally at the hearing and heard representations on both sides in relation to their respective applications and did not therefore direct any further submissions. For those reasons, the request for further time to make representations is refused, those already having been made, and a purported further application under rule 13(5) is an abuse of process, that application having already been made under rule 13(4).

42. The Tribunal has considered the submissions carefully in the context of its determination and the background to the case which is referred to at the start of this determination. The Tribunal accepts that Mr Masri was constrained to bring this application and justified in bringing it when he did due to the precipitative action of the Respondent in threatening proceedings within 7 days from having apparently explained the figures claimed. The Tribunal also notes that the Respondent has conceded a large part of the sum in dispute although did so before much of the cost would have been incurred and refunded those sums to the Applicant speedily when it made those concessions. The Tribunal recognises that at least some of the reason that the case proceeded to an oral hearing rather than a paper determination was due to the Applicant's conduct. The Tribunal observes however, that as a lay person, the Applicant could not have been expected to set out his views on the legal issues in writing as clearly as might the Respondent. The Tribunal found the hearing useful and probably necessary to understand the points which the Applicant wished to raise.

43. For all of the above reasons, the Tribunal considers that all costs should lay where they fall and therefore declines to make an order under section 20C or any order for refund of fees or for costs to either party under rule 13.

Name: Lesley Smith **Date:** 26 March 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

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

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

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

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

Section 20

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

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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

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

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

Section 20B

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

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

Section 20C

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

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

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

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

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

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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