FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT AT THE MAYORS & CITY OF LONDON,

sitting at 10 Alfred Place, London WC1E 7LR

Tribunal Case Reference	:	**LON/00BG/LSC/2019/0384**
Court claim number	:	**F41YX381**
HMCTS Code		**V: CVPREMOTE**
Property	:	**Flat 15, Stanborough House, Empson Street, E3 3LY**
Applicant/Claimant	:	**Poplar HARCA**
Representative	:	**Richard Granby (Counsel)**
Respondent/Defendant	:	**Ahmed Golam Zelany, Fatima Khatun**
Representative	:	**Matthew Feldman (Counsel)**
Tribunal members	:	**Judge Robert Latham** **Trevor Sennett MA FCIEH**
In the county court	:	**Judge Robert Latham (sitting as a District Judge of the County Court)**
Date of hearing	:	**30 September 2020**
Date of handed down decision	:	**30 October 2020**

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has not been objected to by the parties. The form of remote hearing was V: CPVEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which we were referred are specified at [7] below.

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be: (a) If an application is made for permission to appeal within the 28-day time limit set out below – 2 days after the decision on that application is sent to the parties, or (b) If no application is made for permission to appeal, 30 days from the date that this decision was sent to the parties.

Summary of the decisions made by the First-tier Tribunal

1. The Tribunal is satisfied that the service charges demanded are not payable until the Applicant has made a lawful determination of the Respondents' application under its Discretionary Reduction Scheme.

2. The Tribunal is further satisfied that he Applicant's decisions dated 1 August 2016 and 4 December 2019 are unlawful in that they are vitiated by irrationality and procedural unfairness.

3. The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the proceedings may be passed to the lessees through any service charge.

4. The Tribunal declines to make an order of costs against the Applicant under Rule 13(1)(b) of the Tribunal Rules.

Summary of the decisions made by the County Court

5. The Claimant's claim is dismissed.

6. The Court makes no order for contractual costs.

Introduction

1. This application raises an issue of some importance. The applicants acquired a 125-year leasehold interest in their flat under the Right to Buy Legislation. They have been invoiced £20,576 for major works to their block. As a result of a government Direction, their social landlord operates a discretionary scheme whereby it may reduce the sum payable by the tenant. The applicants made an application under the Scheme and contend that this has not been lawfully determined. Are they entitled to withhold the payment of their service charge until their landlord has made a lawful determination of their application?

The Application

2. On 16 April 2019, Poplar HARCA ("the Landlord") issued proceedings against Mr Ahmed Golam Zelany and Ms Fatima Khatun ("the Tenants") in the Northampton County Court Money Claims Centre claiming arrears of service charges in the sum of £20,575.88. The claim relates to major works, the relevant demand having been made on 30 June 2014. In the pre-action correspondence, the Landlord made it

clear that these proceedings are brought in contemplation of forfeiting the Tenant's lease. The Landlord further claims interest pursuant to Section 69 of the County Courts Act 1984 and costs.

3. On 16 May 2019, the Tenants filed a Defence. The sole issue raised by the defence is whether the Landlord has made a lawful determination of the Tenants' application under its Discretionary Restriction Scheme ("the Scheme"). The Social Landlords Discretionary Reduction of Service Charges (England) Direction 2014 permits a social landlord to waive or reduce the service charge payable in respect of major works if the landlord considers this to be reasonable. The Tenants accept that they would still be liable to pay £10,000 in respect of the works. They are willing to pay this once the dispute has been resolved. However, had they started to pay before the matter is resolved, they considered that their case would have been weakened.

4. On 20 September 2019, Deputy District Judge Evans, sitting at the County Court at the Mayors & City of London Court, transferred the case to this Tribunal.

5. On 5 November 2019, Judge Latham gave Directions at a Case Management Hearing ("CMH"). Ms Ceri Edmunds (Counsel) appeared for the Landlord; Ms Piara Mayenin (a friend) appeared for the Tenants. Both parties agreed that the Tribunal had jurisdiction to determine whether a lawful determination has been made of the Tenants' application under the Scheme. They accepted that all the Tribunal could do was to consider whether the Applicant has made a lawful determination of the application; it would have no jurisdiction to determine the merits of the application. It was apparent that the manner in which the application had been determined, had not been entirely satisfactory. Judge Latham suggested that the Tenants were entitled to know the reasons for the adverse decision. Ms Edmunds agreed that the Landlord would reconsider the application. A timescale was agreed for the reconsideration:

> (i) By no later 19 November, the Landlord would notify the Tenants of the procedure to be followed, the identity of the decision-maker, and the criteria which were to be applied. On 15 November 2019, the Landlord notified the Tenants of the procedure that was to be followed.
>
> (ii) By no later than 20 December, the Landlord would notify the Tenants of its decision. In so far as the application was not successful, the Landlord would give sufficient reasons so that the Tenants could understand why any adverse decision has been reached. On 4 December, the Landlord issued a decision refusing the application for assistance under the Scheme.

6. On 7 January 2020, Judge Latham held a further CMH. Mr Richard Granby appeared for the Landlord; Ms Piara Mayenin again appeared

for the Tenant. The Landlord contended that it had made a lawful determination of the application under its Scheme in accordance with the agreed procedure. The Tenants disputed this and contended that they did not know what criteria would be applied and had not been afforded any opportunity to satisfy the Landlord that they met the criteria under the Scheme. Judge Latham indicated that the Tribunal was therefore required to determine whether the Landlord had now made a lawful determination of their application. The Tenants argued that a lawful determination of their application under the Scheme is a condition precedent to the payability of the service charge for the major works.

7. The Tribunal gave further Directions, pursuant to which:

(i) On 14 January, the Landlord disclosed (a) particulars of the criteria in respect of the Respondent's discretionary Scheme and (b) copies of all documents originally supplied by the Respondent's in support of their application.

(ii) On 3 February, the Tenants served their Statement of Case and a Bundle of the Documents upon which they seek to rely. This extends to some 125 pages. It is divided into six Sections A-F. References to this bundle will be prefixed by "R1.A___" – namely a reference to a document in Section A. The Tenants' Statement of Case is at R1.A1-7.

(iii) 18 February, the Landlord served its Statement of Case and the Bundle of the Documents upon which it seeks to rely. This extends to 334 pages. References to this bundle will be prefixed by "A.___". The Landlord's Statement of Case is at A.170-8.

(iv) On 2 March, the Tenants served a Reply in response to the Landlord's claims for interest and costs and provided some additional documents (32 pages). It is divided into three Sections A-C. References to this bundle will be prefixed by "R2.A___". The Tenants' Reply is at R2.A1-4. Should the Tenants succeed in their defence, the Tribunal is asked to make an award of costs against the Landlord pursuant to Rule 13(1)(b) of the Tribunal Rules.

(v) The Tribunal proposed that this application should be determined on the papers. The Landlord requested an oral hearing.

8. On 28 September, the Landlord served a Statement of Costs seeking contractual costs pursuant to Clause 3(9) of the Lease in the sum of £12,642.69.

9. The County Court transferred the proceedings to this Tribunal under the Deployment Scheme. The effect of this is:

(i) The Tribunal now administers the whole case on behalf of the County Court, and Judge Latham, sitting as a District Judge of the County Court ("DJ Latham"), is entitled to make directions having regard to the provisions of the Civil Procedure Rules 1998 (the "CPR").

(ii) Judge Latham and Mr Sennett, sitting as a First-tier Tribunal ("FTT"), determine any issue relating to service charges pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act). This jurisdiction is governed by the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules").

(iii) DJ Latham determines the issues which fall outside the traditional jurisdiction of the FTT, namely the claim for interest and costs.

DJ Latham and the FTT have had regard to the decision of the Upper Tribunal ("UT") in *Avon Ground Rents Limited v Childs ("Avon Ground Rents")* [2018] UKUT 204 (LC); [2018] HLR 44, and identify the decisions taken respectively by DJ Latham and the FTT.

The Hearing

10. Mr Richard Granby (Counsel), instructed by Capsticks Solicitors LLP, appeared for Applicant Landlord. Mr Matthew Feldman (Counsel), instructed under the Direct Access Scheme, appeared for the Applicant Tenants. Both Counsel had drafted their client's Statement of Case. Mr Granby also provided a Skeleton Argument. No witnesses gave evidence. Mr Granby confirmed that any claim for administration charges was superseded by the claim for costs. On 21 October, the Tribunal invited Counsel to comment on three points; both responded. The Tribunal is grateful to the assistance provided by both Counsel.

11. The Deployment Scheme has presented some procedural difficulties. To avoid these, and to enable us to focus on the substance of the dispute, the parties were content for DJ Latham to make the following directions:

(i) The case is allocated to the fast track;

(ii) The parties are granted permission to amend their pleadings to enable the FTT to consider the lawfulness of the decision, dated 4 December 2019;

(iii) Should it be suggested that the substantive issues fall within the jurisdiction of the County Court, rather than the FTT, DJ Latham appoints Mr Sennett to sit with him as an assessor in the County Court on these issues.

The Issues to be Determined

12. The FTT is required to determine the following substantive issues:

(i) Mr Granby argues that as a matter of law, the service charge demanded is payable regardless as to whether a lawful determination has been made of the application which had been made under the Scheme.

(ii) Whether the Landlord's decision, dated 1 August 2016 is a lawful determination of the Tenants' application for assistance under their Scheme. Mr Granby argues that whilst the Landlord agreed at the CMH on 5 November 2019, to reconsider this decision, it did not concede that it was flawed. Both parties agreed that the Landlord is a public authority, susceptible to judicial review, in determining any application under the Scheme.

(iii) Whether the Landlord's decision, dated 4 December 2019 is a lawful determination of the Tenants' application under the Scheme. Mr Granby argued that it was not open to the FTT at the first CMH to dictate to a public body how it should operate its discretionary scheme.

(iv) Mr Granby asks the FTT to consider the consequences should we find in favour of the Tenants on Issues 1, 2 and 3. First, he asks us to confirm that it would still be open to the Landlord to rely on the service charge demand, subject to a further determination of the application under the secondary scheme. Secondly, he suggests that we should still find in favour of the Landlord if we are satisfied that it is "highly likely that that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

13. The FTT is required to determine the following procedural issues:

(v) The Tenant's application for an order under Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").

(vi) The Tenant's application for costs pursuant to Rule 13(1)(b) of the Tribunal Rules.

14. DJ Latham is required to determine the following issue:

(vii) The Landlord's claim for interest.

(viii) The Landlord's claim for contractual costs pursuant to Clause 3(9) of the Lease.

The Lease

15. The Lease is dated 14 June 2004 (at A.180). The Parties have highlighted the following provisions:

(i) Clause 4(4) the Tenants covenant to: "pay the Interim Charge and the Service Charge at the times and in the manner provided in the Fifth Schedule hereto both such charges to be recoverable in default as rent in arrear".

(ii) Paragraph 1(2) of the fifth schedule of the lease defines "the Service Charge' as being 'such reasonable proportion of Total Expenditure as is attributable to the demised premises". There is no challenge to the apportionment of the service charge.

(iii) Clause 3(9): The Tenants covenant "to pay to the Lessors all costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the said term incurred by the Lessors in or in contemplation of any proceedings in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under the said Sections and of and incidental to the inspection of the Demised Premises and the drawing up of Schedules of Dilapidations such costs charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court."

The Direction

16. Sections 219(1)(b) of the Housing Act 1996 ("the 1996 Act") provides that the Secretary of State may give directions to social landlords permitting the waiving or reduction of service charges in such circumstances "as may be specified in the directions". Section 220(3) provides that such Directions "may specify criteria to which the social landlord is to have regard in deciding whether to do so or to what extent".

17. On 11 August 2014, the Secretary of State made two Directions which replaced the previous directions for mandatory and discretionary service charges. These reflect recognition by the government that those who have bought their flats under the statutory Right to Buy may face high service charge demands for major works which they are unable to pay. The Two Directions are:

(i) The Social Landlords Mandatory Discretionary Reduction of Service Charges (England) Directions 2014 which imposes a cap of

£15,000 (in London) where works have been undertaken wholly or partly with financial assistance from the government. It has no relevance to this case; and

(ii) The Social Landlords Discretionary Reduction of Service Charges (England) Directions 2014 ("the Direction").

18. Paragraph 2 of the Direction permits a social landlord to waive or reduce a service charge by the amount it considers to be reasonable. Paragraph 3 specifies the "criteria" to which a social landlord should have regard, should it decide to operate discretionary scheme (emphasis added):

> "The social landlord should have regard to the following criteria in deciding whether to waive or reduce the service charge under paragraph 2:
>
> "(a) any estimate of the costs of the works of repair, maintenance or improvement notified to the lessee or any predecessor in title before the purchase of the lease of the dwelling;
>
> (b) whether the purchase price paid by the lessee took account of the costs of the works of repair, maintenance or improvement;
>
> (c) any benefit which the social landlord considers the lessee has received or will receive as a result of the works of repair, maintenance or improvement, including an increase in the value of the lease (including the reduction of a negative value of the lease), an increase in the energy efficiency of the dwelling, an improvement in the security of the dwelling and an improvement in services or facilities;
>
> (d) whether, upon receipt of an application by a lessee, a social landlord, having regard to the criteria set out in paragraph 4, considers that the lessee would suffer exceptional hardship in paying the service charge; and
>
> (e) any other circumstance of the lessee which the social landlord considers relevant".

19. Paragraph 4 defines "exceptional hardship":

> "In considering an application to reduce the service charge because of exceptional hardship a social landlord should have regard to:
>
> (a) whether the dwelling is the lessee's only or principle home;
>
> (b) the total amount of the service charges paid or are payable by the lessee since the purchase of the dwelling;

(c) the amount of the service charge payable in the year in which the lessee applies for the reduction because of exceptional hardship;

(d) the financial resources available to the lessee;

(e) the ability of the lessee to raise funds to pay the service charge;

(f) the ability of the lessee to pay the service charge if the landlord extended the period for payment; and

(g) any other relevant consideration."

20. The Tribunal noted that the statute uses the word "should" rather than "shall", the directive which is more usually to be found in statute. Mr Granby suggested that the enjoinder to the social landlord was less than "shall", but more than "may" which would be discretionary. It suggested a "light touch". The Tribunal is satisfied that "should" is synonymous with "shall" and is a mandatory direction to the landlord to have regard to these relevant matters.

The Landlord's Scheme

21. The Landlord has decided to operate a Discretionary Reduction Scheme, the details of which are set out in a document "Major Works Invoicing - £10,000 CAP Information Sheet" ("the Scheme"), a copy of which appears at A.155.

22. The Introduction to the Scheme states (emphasis added):

> "Poplar Harca's policy is to limit recharges to a maximum of £10,000 for resident leaseholders.
>
> The reduction is discretionary and Poplar Harca will follow the guidelines below when deciding that a leaseholder is resident in the property and therefore can claim (subsidy) benefit from the discretionary cap.

23. The statement that the policy is to limit recharges to "a maximum of £10,000" suggests a resident leaseholder will pay a maximum of £10,000 and may be required to pay less than this. However, it becomes apparent later in the document that the policy is rather to cap the recharge at £10,000. It also becomes apparent that the discretion not only relates to whether the leaseholder is to be treated as "resident" but is also means related.

24. The Document then specifies "Guidelines":

> "The leaseholder must provide evidence of residency in the property and that they are entitled to have their recharge limited. Only after the

> Poplar Harca is satisfied that the leaseholder meets the residency qualification will any adjustment be made to the account."

25. The Document then specifies the "Required Documentation" to prove residency:

> "Leaseholders will need to provide two separate pieces of documentation to prove residency. The following documents are acceptable as evidence but they must cover the period for the previous 12 months:
>
> • Council Tax Demand
> • Recent Bank/Credit Card statement
> • Utility Bill (gas/electric/water/telephone)"

26. The document the specifies the requirements in respect of "Length of Residency":

> "Leaseholders are required to be resident in the property for a period of at least 12 months prior to the invoice being issued."

27. The document then states:

> "If you are in receipt of a means tested benefit or you are a pensioner, you may be eligible to apply for the Discretionary Restriction Scheme. This scheme allows for your Major Works recharge to be capped at £10,000, if your bill exceeds that amount. You may qualify for a Discretionary restriction if you meet all the rules listed below:
>
> 1. You are the original RTB purchaser.
> 2. The property is your only or principal home and you live there full-time.
> 3. Your home is not owned by a company or sublet.
> 4. The works were not detailed on the section 125 Landlords offer notice
> 5. There are no service charge arrears in relation to your home.
> 6. You are a pensioner and/or in receipt of a means tested state benefit.
> 7. You must Demonstrate Hardship."

28. The FTT notes that the document is silent as to what additional criteria (if any) will be applied if an applicant satisfies: (i) the 12-month residence requirement; and (ii) the seven rules. Whilst it refers to some of the criteria specified in the Direction as matters to which a landlord "should have regard", it does not specify all of these. The Landlord has not suggested that any additional policy document exists.

29. The "rules" refer to "hardship" rather than "exceptional hardship". However, the Direction provides that a landlord who has decided to operate Discretionary Scheme "should have regard to" a number of criteria apart from exceptional hardship. These include "any other

circumstance of the lessee which the social landlord considers relevant".

30. Mr Granby argued that a Scheme applying the Direction, must, as far as possible, be read in a way that is consistent with the Direction. The FTT agrees. The Landlord has adduced no evidence as to how the Scheme has operated in practice. Thus, the Tribunal has been provided with no material to enable it to assess what threshold must be met before a discretionary reduction is awarded. Mr Granby stated that the Landlord no longer operates the Scheme in its original form and that any relief is now restricted to pensioners.

The Background

31. The Tenants were secure tenants of the London Borough of Tower Hamlets (Tower Hamlets). They acquired a 125-year leasehold interest in their flat under the Right to Buy Legislation. The lease is at A.180. The lease is dated 14 June 2004. The term runs from 4 December 1989, which the FTT understands is the date on which the Tenants submitted their RTB1 application form. Their flat was valued at £142,000 on the relevant valuation date, but they had a statutory discount of £38,000 and only paid a premium of £104,000. They purchased with the assistance of a mortgage from the Bank of Scotland PLC.

32. The Tenants occupy their flat with their four children. At the material times, they have been in receipt of income support. Their second eldest son, Muhammad Islam (dob 18.9.93) is autistic, the degree of which is sufficient to entitle them to carer's allowance. This is known to the Landlord who has provided them with a parking space free of charge. Both Tenants also suffer from ill health.

33. In about December 1998, Tower Hamlets transferred this Block to the Landlord. Poplar HARCA is a "registered social landlord" governed by the Housing and Regeneration Act 2008.

34. On 16 June 2014 (at A83), the Landlord notified the Tenants that they were finalising the bills for works which had been carried out on their estate. Any leaseholder who lived in their flat were offered six payment options. These options included payment in full; a 2-year interest free loan; a 25-year loan at interest; a charge on the property; and a service charge loan. The letter noted that some leaseholders may be eligible to a discretionary cap on the cost of the works. Mr Granby stated that had the debt been registered as a charge, the Santander Base Rate would be charged, which is the base rate + 1%. He was unable to confirm that these payment options are still available.

35. On 30 June 2014 (at A86), the Landlord sent the Tenants a service charge demand in the sum of £20,575.88. A covering letter (at A85) from Ms Shouba Begum, Billing Coordinator, stated that the sum was

payable within 90 days. The Tenants were invited to contact the Service Charge team to arrange a suitable repayment plan.

36. On 1 August 2014, the Tenants telephoned Ms Begum. On 4 August (at A.88), Ms Begum sent them an application form so that they could make an application under the Scheme. She asked them to provide the following original documentation: (i) Full 3 months bank statement for both leaseholders (Showing payments from DWP/State Benefit); (ii) Copy of pension credit letter/means tested state benefit letter, (iii) Utility Bill, and (i.e. Council Tax demand letter).

37. On 9 September 2014 (at A90), the Tenants completed an application form which was received by the Landlord on 12 September. The form attached the "Major Works Invoicing - £10,000 CAP Information Sheet". The application form read:

> "I/we apply to reduce the costs of our major works to a maximum of £10,000 in line with the policy of Poplar Harca (If you are in receipt of a means tested benefit or you are a pensioner, you may be eligible to apply for the Discretionary Restriction Scheme. This scheme allows for your Major Works recharge to be capped at £10,000, if your bill exceeds that amount.
>
> You may qualify for a Discretionary restriction if you meet all the rules listed below:
>
> • I/we are the original RIB purchasers.
> • The property is our only home and we live there full-time.
> • Our home is not owned by a COMPANY or SUBLET.
> • These works were not detailed on the section 125 Landlords offer notice
> • There are no service charge an-ears in relation to my/our home.
> I/we are pensioner(s) and/or in receipt of a means tested STATE BENEFITs
> • You must Demonstrate Hardship"

38. The Tenants enclosed the following documents (as had been requested): (i) An EDF Bill (at A159); (ii) A NatWest Bank Statement for the period 1 June to 28 August 2014 (A.160); and (iii) A Council Tax demand form (A.166-8). At this time, the Tenants were living at the flat with their four dependent children. The documentation provided showed that (i) the family were in receipt of income support of £405.50 per fortnight and carer's allowance of £61.35 per week and (ii) they were paying £375 per month by standing order in respect of their mortgage (Ref: "A.G.ZELANY 3402504975427000N").

39. The Tenants heard nothing for eleven months. On 7 August 2015 (at R1.B3), Adnan Rahman, Private Tenures Team wrote in these terms (emphasis added):

> "Re: Major Works Capping
>
> Thank you for your recent application for Major works capping which was received.
>
> Your application is currently being assessed by a new team and apologise for any delay in processing your application.
>
> If any further information or documentation is required, we will write to you.
>
> I trust that the information detailed above is sufficient. If you have any concerns or can be of any further assistance, then you can contact me or a member of my team by calling 0207 510 0500 or by emailing privatetenures@poplarharca.co.uk.

40. Mr Granby stated that there had been a reorganisation of staff in the relevant office. The Landlord had been concerned that the office had been too lax in collecting arrears of service charges. It seems probable that Ms Begum knew about the personal circumstances of the Tenants, whilst subsequent officer did not.

41. The Tenants heard nothing for a further year. On 1 August 2016 (at A1.B4) James Kennedy, Collections Officer, wrote in these terms highlighting certain passages in bold:

> "We regret that we are not able to offer your client a £10,000 reduction for their Major Works Bill. As you probably know, we look at each application as a whole. The Discretionary Restriction Scheme allows their Major Works Recharge to be capped at £10,000, if your bill exceeds that amount. For you to qualify for a Discretionary Restriction you must meet all of the following rules;
>
> 1. You are the original *Right To Buy* purchaser.
> 2. The property is you're only or principal home and you live there full-time.
> 3. The works were not detailed on the section 125 Landlords offer notice
> 4. There are **no service charge arrears** in relation to your home.
> 5. You are a **pensioner (over 68) and/or in receipt of a means tested state benefit**.
> 6. **You must Demonstrate Hardship**
>
> Under Poplar Harca policy Leaseholders must prove extreme hardship. Depending on your circumstances Poplar Harca are flexible and open to arrangements to help support you with your finances. We can also refer you to external benefit agencies to help you apply for benefits which you may be eligible for."

42. Mr Granby stated that the conclusion that the Tenants had not demonstrated that they would suffer extreme hardship was clearly open to the Landlord for the reasons given in the decision. This begs the question as to what reasons were given?

43. The FTT asked Mr Granby why certain passages in the letter had been highlighted in bold. Was this because Mr Kennedy had concluded that the application had failed on these grounds? Mr Granby responded that this was one interpretation which was open the FTT. If so, it is now accepted that there are no arrears of service charges, apart from the demand in dispute. If Mr Kennedy had concluded that the Tenants were not in receipt of a means tested state benefit, this was clearly irrational. The bank statement provided evidence that the family was in receipt of income support. If they had failed to prove "extreme hardship" this was not what the Scheme required.

44. On 3 March (at R1.B5) and 2 May 2017 (R1.B7), the Sonali Legal Advice Service wrote to Mr Kennedy and the Landlord's Complaints Team. On 25 October 2017 (at R1.B8), the Tenants submitted a complaint to the Housing Ombudsman. On 7 December 2018 (at R1.B9), the Ombudsman wrote to the Tenants agreeing to review the matter. However, the Ombudsman subsequently declined to investigate the complaint on the basis that the Tenants had failed to exhaust the Landlord's complaints procedure, that the complaint has been subject to legal proceedings, and that the issue should be raised with the FTT.

45. On 16 April 2019 (at A.8-55), the Landlord issued their claim at the Northampton County Court. On 16 May (at A.71-130), the Tenants filed their defence. On 20 September 2019 (at A.143) Deputy District Judge Evans sitting at the County Court at the Mayors & City of London Court, transferred the case to the tribunal.

46. In their Defence, dated 16 May 2019 (at A.71), the Tenants provide details of their ill health. This is supported by medical evidence at R1.F1. Mr Zelany (dob 7 January 1969) has a history of ischaemic heart disease. An operation was deferred pending the determination of this application. Ms Fatima Khatun has suffered stress caring for her autistic son. He has been violent and has been under the care of a Consultant Psychiatrist.

47. On 5 November 2019, the FTT held a CMH the purpose of which is to identify the issues in dispute and to determine how these can be determined fairly and in a proportionate manner. Without conceding that the decision was legally flawed, Ms Edmunds agreed that the Landlord would reconsider the application.

48. Judge Latham gave directions for the redetermination of the matter. Ms Edmonds, who appeared for the Landlord, agreed to these. These included a direction that the Landlord should give sufficient reasons for any adverse decision which might be made so that the Tenants could understand why the decision had been reached. Mr Granby has argued that it was not open to the tribunal to dictate to a public body how it should apply its statutory scheme. The Tribunal did not seek to do so.

49. The Tribunal directed the Landlord to notify the Tenants of the procedure to be followed, the identity of the decision-maker, and the criteria which were to be applied. On 15 November 2019 (at A.203), the Home Ownership wrote to the Tenants in these terms:

> "As per the FTT Case management conference dated 05th November 2019, your application form from 2014 along with the documents provided is currently being assessed by the Executive Homeownership manager and we will write to you with a decision on or before the 20th December 2019.
>
> The cap is being assessed on the same criteria as set out in the application form back in 2014.
>
> If you have any questions regarding the cap please contact the homeownership team on 0800 035 1991 or E-mail us on info@Poplarharca.co.uk."

It is to be noted that the Tenants were not afforded any opportunity to make further representations. Although they had been notified on 7 August 2015, that they would be notified if "any further information or documentation is required", there was no suggestion that the information that they had provided was insufficient.

50. On 4 December 2019, Mr Paul Stannard, the Executive Homeownership Manager, notified the Tenants of the Landlord's adverse decision:

> "I write further to the First-Tier Tribunal's decision dated 5 November 2019 to inform that Poplar HARCA has reached a decision regarding your application to reduce the major works invoice dated 30 June 2014 pursuant to the Association's discretionary major works charges reduction ('major works cap").
>
> Having considered your application dated 9 September 2014, we note the following:
>
> 1. You are the original RTB purchasers.
>
> 2.The property was your only home at the time you made the application and you lived there full-time.
>
> 3. You were the registered proprietors of the property at the time you made the application and it does not appear that you were subletting the property
>
> 4. The major works were not detailed on the section 125 Landlord's offer notice.
>
> 5. At the time you made the application, your service charge account was not in arrears.

6. You were not a pensioner but was in receipt of means tested state benefits at the time you made the application.

7. You have failed to demonstrate hardship.

The bank statements provided as part of your application show that you had deposits exceeding the sums withdrawn over a three months period between June and August 2014. This means that you had at your disposal at least £200.00 a month to use towards the repayment of the service charges.

You have also failed to provide us with all the necessary information in order to consider your application for the discretionary cap. We note that the Natwest Bank statement provided with your application shows no incoming regular wage paid into the account, no outgoing mortgage monthly repayment (despite the title register of the property showing a registered charge in favour of The Bank of Scotland PLC) and a monthly standing order in the sum of £350.00 made to A G Zelany.

We further note that the bank statement does not mention a monthly direct debit for the EDF energy bill, a copy of which was provided as part of your supporting documents for the application.

We therefore have reasons to suspect that the Natwest account is not your only bank account and we are therefore unable to consider the full extent of your financial situation.

The value of the property has increased since the lease was granted to you in 2004. We are aware that a property with similar characteristics as yours was sold in October 2014 for £315,000.00 and we believe that your property has similarly increased in value. This would allow you to release equity in order to raise funds to repay the service charges.

For the reasons listed above, we have decided that you failed to qualify for the discretionary major works charges reduction. This means that the major works invoice is payable in full."

The FTT's Determination

51. Any social landlord has a discretion whether to adopt a Scheme whereby service charges for major works can be capped. Any social landlord who adopts such a Scheme must ensure that it is applied fairly and rationally. There are three management tools to ensure that this occurs: (i) guidelines so that leaseholders know the criteria which are to be applied; (ii) clear procedures for determining such applications; and (iii) decision letters explaining why an application has failed.

52. The Tenants complain that their application under the Landlord's Scheme has not been determined fairly. They are aware of other tenants whose applications have been successful. Their complaint can be summarised in these terms:

(i) On 30 June 2014, the they were required to pay an invoice of some £20,576 for major works which they could not afford. They live on income support. They have four children, one of whom is autistic, the degree of which entitles them to carer's allowance. They also suffer from ill health.

(ii) On 9 September 2014, on the advice of their housing officer, they submitted an application under the Scheme providing all the information which the housing officer had requested. There was no suggestion that this was inadequate or incomplete. They had a reasonable expectation that their application would be determined without undue delay.

(iii) On 7 August 2015, the Landlord notified them that the application was to be assessed by a new team. They would be notified if they were required to supply any further information or documentation. No further information was requested. The "new team" did not interview them about their application or investigate their personal circumstances.

(iv) On 1 August 2016 (a year later), they are notified that their application has been rejected. They did not understand why their application had been rejected.

(v) On 5 November 2019, the landlord agreed to reconsider their application. They were not interviewed as part of the review or afforded the opportunity to make further representations. By this stage, they had provided further information in the Defence about their ill health.

(vi) On 4 December 2019, they received the second decision letter. This also seemed to be irrational and based on an erroneous analysis of the financial information that they had provided.

53. Mr Granby notes that it is for the Tenants to establish that the decisions are vitiated by illegality, irrationality and/or procedural impropriety. He argues that statute does not impose any decision-making process on the social landlord. He compares this with Part VII of the 1996 Act which imposes specific duties on a local housing authority to make such inquiries as are necessary to satisfy themselves as to what duty is owed to a homeless applicant and to provided a reasoned decision letter for an adverse decision. The Tribunal notes that there is no duty to give reasons for all decisions, for example as to the suitability of accommodation that may be offered.

54. Mr Granby argues that there is no general duty on a public authority to give reasons. He refers the Tribunal to the leading authority of the Divisional Court in *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 WLR 242, a case involving the

allocation of research grants. Sedley J (as he was then) summarised the law at p.263:

> "In summary, then: (1) there is no general duty to give reasons for a decision, but there are classes of case where there is such a duty. (2) One such class is where the subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right. (3) (a) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengable) or apparent; (b) it follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision. And (c) procedurally, the grant of leave in such cases will depend upon prima facie evidence that something has gone wrong. The respondent may then seek to demonstrate that it is not so and that the decision is an unalloyed exercise of an intrinsically unchallengeable judgment. If the respondent succeeds, the application fails. If the respondent fails, relief may take the form of an order of mandamus to give reasons, or (if a justiciable flaw has been established) other appropriate relief."

55. Mr Feldman referred the Tribunal to *Nzolamenso v Westminster CC* [2015] UKSC 22; [2015] 2 All ER 942, a decision relating to the suitability of accommodation offered pursuant to Part VII of the 1996 Act. Lady Hale gave the judgement of the Supreme Court:

> "31 The Secretary of State for Communities and Local Government has also intervened in this case, in order to emphasise that when making decisions about where to accommodate homeless persons, local authorities have a number of duties to evidence and explain their decisions. They are required to take the Code and Supplementary Guidance into account. If they decide to depart from them they must have clear reasons for doing so: see *R. (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] Q.B. 37 at [47]. Very good reasons are required to depart from a policy formulated after public consultation: *Royal Mail Group Plc v Postal Services Commission* [2007] EWHC 1205 (Admin) at [33]. This is especially so where the Code is designed to protect vulnerable people: *R.(Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 A.C. 148. By definition, any homeless household in priority need will be vulnerable in this sense. The authority must also have a proper evidential basis for their decision: *R. (Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin); [2006] H.L.R. 58 at [32].
>
> 32 It must be clear from the decision that proper consideration has been given to the relevant matters required by the Act and the Code. While the court should not adopt an overly technical or "nit-picking" approach to the reasons given in the decision, these do have to be adequate to fulfil their basic function. It has long been established that an obligation to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost

> and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid and therefore open to challenge: see *R. v City of Westminster Ex p. Ermakov* (1996) 28 H.L.R. 819 at 826–827. Nor, without a proper explanation, can the court know whether the authority have properly fulfilled their statutory obligations."

56. Mr Feldman also referred the Tribunal to the following passage from the speech of Lord Neuberger of Abbotsbury in *Holmes-Moorehouse v Richmond upon Thames LBC* [2009] UKHL 7; [2009] 1 WLR 413:

> "49. In my view, it is therefore very important that, while circuit judges should be vigilant in ensuring that no applicant is wrongly deprived of benefits under Part VII of the 1996 Act because of any error on the part of the reviewing officer, it is equally important that an error which does not, on a fair analysis, undermine the basis of the decision, is not accepted as a reason for overturning the decision.
>
> 50. Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision. That is not to say that the court should approve incomprehensible or misguided reasoning, but it should be realistic and practical in its approach to the interpretation of review decisions.
>
> 51. Further, as the present case shows, a decision can often survive despite the existence of an error in the reasoning advanced to support it. For example, sometimes the error is irrelevant to the outcome; sometimes it is too trivial (objectively, or in the eyes of the decision-maker) to affect the outcome; sometimes it is obvious from the rest of the reasoning, read as a whole, that the decision would have been the same notwithstanding the error; sometimes, there is more than one reason for the conclusion, and the error only undermines one of the reasons; sometimes, the decision is the only one which could rationally have been reached. In all such cases, the error should not (save, perhaps, in wholly exceptional circumstances) justify the decision being quashed."

Issue 1 (for the FTT): Is a lawful determination of the application relevant to these proceedings?

57. Mr Feldman argues that the Landlord's two decisions under its Scheme are vitiated by illegality, irrationality and/or procedural impropriety, and that a lawful determination of their application is a condition precedent to the payability of the service charge for the major works. He relies upon the decision of the Supreme Court in *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661 ("*Braganza*").

58. Mr Granby responds that as a matter of landlord and tenant law there, is no discretion for the Landlord to exercise. The liability for the service charge has been identified, to which there is no challenge. It is not suggested that the charge is unreasonable, so the sum demanded is

payable under the Lease. He notes that *Braganza* concerned the exercise of a contractual discretion, whereas the instant case does not.

59. The facts of in *Braganza* could not be further from the current case. The claimant's husband was serving as chief engineer on board a vessel under a contract of employment that provided for a death in service benefit save where his death had resulted from his own wilful act. When working on the vessel in mid-Atlantic, he disappeared overnight and, after a search, was declared to be lost overboard, presumed drowned. An investigation team discounted foul play and the employer decided that for the purposes of the death in service benefit clause that the deceased had committed suicide and that no benefit was payable. The Claimant brought proceedings in the High Court seeking recovery of such benefit. The judge held that the decision to refuse the payment of benefit on the ground of suicide was unreasonable. The Supreme Court held that where contractual terms gave one party to a contract the power to exercise a discretion or form an opinion as to relevant facts, it was not for the court to make that decision for them, but where the decision would affect the rights and obligations of both parties there was a conflict of interest and the court would seek to ensure that the power was not abused by implying a term in appropriate cases that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational in the sense in which that term was used when reviewing the decision of a public authorities. Mr Feldman referred the Tribunal to the following passages: [30] (Baroness Hale of Richmond DSPC); [55] (Lord Hodge JSC) and [103] (Lord Neuberger of Abbotsbury PSC).

60. The Tribunal notes that the Court of Appeal applied *Braganza* in the context of service charges in *Waaler v Hounslow LBC* [2017] EWCA Civ 45; [2017] 1 WLR 2817. The case concerned improvements to a block of local authority flats, the tenants arguing that the windows should have been repaired, rather than replaced. The principle issue was the objective test of reasonableness under section 19 of the Landlord and Tenant Act 1985. However, the court also considered an implied term as to reasonableness derived from *Braganza*. Lewison LJ (at [20]) formulated the test as follows:

> "the exercise of a contractual discretion is constrained by an implied term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose; and that the result is not so outrageous that no reasonable decision-maker could have reached it."

61. *Braganza* was also applied by Judge Waksman QC in the Commercial Court in *Watson and others v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm); [2017] Bus LR 1309. The issue was whether a contract for a shares option was subject to an implied term that the company

could not exercise its discretion over the grant of consent in a way that was arbitrary, capricious or irrational. He defined "the *Braganza* duty" on the exercise of the discretion at [102]:

> "The fulfilment of that duty will entail a proper process for the decision in question including taking into account the material points and not taking into account irrelevant considerations. It would also entail not reaching an outcome which was outside what any reasonable decision-maker could decide, regardless of the process adopted."

62. The Tribunal has also had regard to the decision of *Wandsworth LBC v Winder* [1985] 1 AC 461. The issue was whether the tenant in a possession action based on arrears of rent was entitled to argue that the authority's decision to increase the rent had been unlawful. The landlord applied to strike out the defence as an abuse of process arguing that the decision could only be challenged by an application for judicial review. The House of Lords held that this was a defence which the tenant was entitled to raise. Lord Fraser of Tullybelton stated (at 509E):

> "It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff."

63. The Landlord has not only issued proceedings for arrears of service charges; it states that it is contemplating forfeiting the Lease. The Landlord has elected to operate a Scheme whereby it has a discretion to reduce the sum payable. The Tenants have made an application under the Scheme. The Tribunal is satisfied that the Tenants are entitled to raise by way of defence their argument that the application has not been lawfully and rationally determined. It would have been in the contemplation of all the parties (namely the Government who made the Direction, the Landlord who elected to operate a Scheme and the Tenants who made an application under the Scheme) that it would be determined before legal proceedings would be issued.

64. The FTT is satisfied that, having elected to operate its Discretionary Scheme, there was an implied term that the Landlord would make a lawful and rational decision on the application before issuing proceedings. It is difficult to see how a discretionary scheme could be operated, if an application is not determined before enforcement action is take. This is necessary to give efficacy to the Scheme. This is a matter of private, rather than public law.

Issue 2 (for the FTT): Is the decision, dated 1 August 2016, lawful?

65. The decision, dated 1 August 2016, was taken by James Kennedy, Collections Officer, and is set out at [41] above. Whilst accepting that the delay was not satisfactory, Mr Granby argued that the decision was lawful. The Tenants had not proved extreme hardship. This needed to be considered against the background of the payment options which had been offered (see [34] above). He did not know why the decision-maker had highlighted certain passages in the letter.

66. Mr Feldman argued that this decision is flawed on a number of grounds: (i) it did not explain how decision-maker had reached his adverse decision; (ii) it provided no reasons for the adverse decision or the matters to which the decision-maker had had regard; and (iii) the decision-maker applied the wrong test, namely that it was necessary for the Tenants to prove 'extreme hardship' as opposed to 'hardship'.

67. The Tribunal accepts that it should not take too technical a view of the language used or adopt a nit-picking approach. On the other hand, we must be astute to detect "incomprehensible or misguided reasoning". Adopting this approach, the Tribunal is satisfied that this decision is irrational:

(i) Against the background of this case, the Tenants were entitled to be informed why their application had been rejected. It is impossible from this decision letter to discern the substance of the adverse decision. The mere assertion that they had not proved extreme hardship is not sufficient. The relevant background facts are that the Tenants had provided all the information that had been required of them. There had been a delay of some two years before their application was determined. They had been told that they would be informed if any further information or documentation was required; no such documentation had been requested. There is a lack of precision in the Landlord's Scheme (see [28]–[29] above), and the Tenants were therefore entitled to know what criteria had been applied. Procedural fairness required reasons if a landlord is to ensure consistency between different applicants.

(ii) Mr Kennedy required the Tenants to establish "extreme hardship". However, the Landlord's Scheme only required an applicant to establish "hardship" (see [27] above). This was known to the decision-maker who had highlighted the words "You must establish hardship". The letter is silent on the factors which were relevant to hardship, and had no regard to the personal circumstances of the Tenants.

(iii) The Tribunal accepts that the Scheme must be read in a manner that is consistent with the Direction. However, Paragraph 2(e) of the Direction (at [18] above) specifies as a criterion to which a social landlord should have regard: "any other circumstance of the lessee which the social landlord considers relevant". The scheme is silent on

the factors which are relevant to the issue of hardship, a matter which could have been, but which was not, remedied by a reasoned decision.

(iv) The fact that Mr Kennedy highlighted certain passages in his decision, suggests that these were relevant to the adverse decision that he had reached. It appears that Mr Kennedy was unaware that there were no service charge arrears or that the Tenants were on income support. These were relevant factors which he should have taken into account.

(v) Paragraph 4 of the Direction (see [19] above) specifies a number of matters to which a landlord "should have regard" in considering exception hardship. Mr Kennedy failed to have regard to the following: (a) the amount of the service charge payable in the year in which the lessee applied for the reduction because of exceptional hardship; (b) the financial resources available to the lessee; (c) the ability of the lessee to raise funds to pay the service charge; (d) the ability of the lessee to pay the service charge if the landlord extended the period for payment; or (e) the personal circumstances of the Tenants.

Issue 3 (for the FTT): Is the decision, dated 4 December 2019, lawful?

68. The decision, dated 4 December 2019, was taken by Mr Paul Stannard, Executive Manager Homeownership and is set out at [49] above. Mr Granby stated that the application had been refused on two grounds:

(i) Mr Stannard was not satisfied that they would suffer hardship for the following reasons: (a) the bank account provided by the Respondents did not show all income or outgoings that must exist; and (b) the bank account provided showed a surplus of £200 per month.

(ii) He also had regard to the increase in the value of the flat. The Tenants had acquired their flat for £104,000. A similar flat had recently sold for £315,000. There was therefore a substantial equity which could be released to pay the service charge bill.

69. Mr Feldman argues that this decision is also unlawful in that it is irrational. He notes that no explanation has been provided as to what constitutes hardship. He criticises the manner in which the Mr Stannard approached the Natwest bank statement. There was no justification for the conclusions that there was a second bank account, that there was a second income from a regular wage, that there was a regular standing order of £350 to Mr Zelany, or that the mortgage was being paid from a second account. Procedural fairness required these matters to be put to the Tenants. Here was no justification that the family had a surplus of £200 per month. Mr Stannard had had no regard to the personal circumstances of the Tenants and their family.

He further argues that the increase in the value of the property was not a relevant consideration

70. The Tribunal is satisfied that this decision is irrational and that Mr Stannard did not approach the Matter with an open mind. A rational analysis of the bank account (at A.160-4) would have shown that:

(i) this was a joint bank statement for Mr Zelany and Mrs Khatun (the Tenants);

(ii) the family was in receipt of £405.50 per fortnight income support under reference "NW626877B DWP IS". This was the income support paid for the whole family. There was therefore no justification for the conclusion that there was a regular wage being paid into a second account.

(iii) The family were also in receipt of carer's allowance of £61.35 per week in respect of their autistic son (under reference "NW626877B DWP CA"). The son's autism was a relevant matter to the issue of hardship.

(iv) The monthly standing order of £375 under reference "A G Zelany FP 30/06/14 30; 340245049754527000N" was not a payment to "A G Zalany", but was rather the reference for their monthly standing order to the Bank of Scotland PLC. If this was not apparent to Mr Stannard, procedural fairness required him to clarify this with the Tenants, before making an adverse finding against them.

(v) The mere fact that there was not a monthly direct debit to EDF did not entitle Mr Stannard to conclude that there was a second bank account from which it was paid. The EDF bill (at A159) did not indicate that it was paid by direct debit. Mr Feldman stated that this was paid over the telephone. Again, procedural fairness required him to clarify this with the Tenants, before making an adverse finding against them.

(vi) The bank accounts did not suggest that the tenants had resources from which they could discharge a service charge debt of £20,576. On 2 June 2014 (the first entry), the Tenants were overdrawn by £96.62; on 28 August 2014 (the last entry) they were in credit by £444.60. On that day, they had received their fortnightly income support of £405.50.

71. The Tribunal is satisfied that the Landlord was entitled to take into account the fact that there was a substantial equity in the property. However, there was no evidence to justify the conclusion that this could be released to discharge the debt. They were in receipt of income support. It is therefore unlikely that the Royal Bank of Scotland would have agreed to a further advance.

72. Paragraph 4 of the Direction (see [19] above) required that Mr Stannard "should have regard" (a) the amount of the service charge payable in the year in which the lessee applied for the reduction because of exceptional hardship; (b) the financial resources available to the lessee; (c) the ability of the lessee to raise funds to pay the service charge; (d) the ability of the lessee to pay the service charge if the landlord extended the period for payment; or (e) the personal circumstances of the Tenants. Mr Stannard failed to have regard to these matters.

73. Mr Granby highlighted the six payment options which the Landlord had offered in their letter of 16 June 2014 (see [34] above). Mr Granby was unable to confirm whether these payment options are still available to the Tenants. Mr Stannard made no reference to these in his decision.

74. Mr Stannard only had regard to the limited material that the Tenants had provided on 9 September 2014 (see [37]-[38] above). The tenants had provided all the information that Ms Begum had requested from them. On 7 August 2015 (see [39] above, the Landlord had told them that it would write to them if further information or documentation is required. No further information was required. The Tenants had provided further information about their ill health in their Defence. Mr Stannard did not have regard to this. He decided that it was not necessary to interview the Tenants or afford them the opportunity to make further representations. It was for the Landlord to decide on the scope of the inquiries that were made. However, in the light of those inquiries, the Tribunal is satisfied that the Landlord failed to have regard to the relevant matters to which it was obliged to have regard by the Direction. The personal circumstances of the Tenants were critical factors to which Mr Stannard should have had regard.

Issue 4 (for the FTT): What are the consequences of these findings?

75. Mr Granby asks the FTT to consider the consequences should we find in favour of the Tenants on these issues. First, he asks us to confirm that it would still be open to the Landlord to rely on the service charge demand, subject to a further determination of the application under the secondary scheme. In our judgment, the Landlord is entitled to do so. We discuss this further at the end of our decision.

76. Secondly, he suggests that we should still find in favour of the Landlord if we are satisfied that it is "highly likely that that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". He refers us to section 31(2A) of the Senior Courts Act 1981. We are reluctant to stray into areas of public law when we are dealing with a private law claim.

77. We are, however, satisfied that the Tenants have a real prospect of a successful outcome if their application is reconsidered rationally and with an open mind. We identify the following factors:

(i) In 2014, the family were in receipt of income support, which provides for only basic needs. Their financial position has not improved, albeit that it is possible that they may now be in receipt of universal credit.

(ii) Both tenants suffer from ill-health and have an autistic son.

(iii) The Tenants made the application at the instigation of Ms Begum who sent them the application form. Knowing their financial and personal circumstances, she clearly thought that there was merit to their application.

(iv) The Landlord has provided no evidence as to how the Scheme was intended to operate in 2014. The FTT is thus in no position to consider how hardship was defined, the threshold that needed to be met or the other circumstances which the Landlord consider to be relevant.

Issue 5 (for the FTT): The Tenants' application under Section 20C

78. Mr Feldman applied for an order under section 20C of the 1985 Act. Having regard to our findings, the FTT is satisfied that it is just and equitable in the circumstances for an order to be so that the Landlord may not pass any of its costs incurred in connection with the proceedings through the service charge.

Issue 6 (for the FTT): The Tenants' application for costs under Rule 13(1)(b)

79. Mr Feldman applied for a penal costs order under Rule 13(1)(b) of the Tribunal Rules on the grounds of the Landlord's unreasonable conduct in bringing or conducting proceedings. This tribunal is normally a no costs jurisdiction. The Upper Tribunal has set a high threshold for such conduct in *Willow Court Management Company* [2016] UKUT 290 (LC). The Tribunal indicated to Mr Feldman that the conduct of the Landlord in bringing or conducting these proceedings could not be considered to meet this high threshold.

Issue 7 (DJ Latham): The Landlord's claim for interest

80. Mr Granby applied for interest at the rate of 8% pursuant to section 69 of the County Courts Act. He conceded that this was way above any interest payable in the current money markets and indicated that he

would accept a figure of 6%. Mr Feldman argued for a rate of between 1.5% and 2%.

81. Had DJ Latham been minded to award interest, he would have assessed the rate at 4%. However, no interest is award given that the Landlord's claim has failed. Even had the Landlord succeeded, the Court would have reduced the period of time over which interest is payable given the unacceptable delays by the Landlord in determining the Tenants' application under its Scheme.

Issue 8 (DJ Latham: The Landlord's claim for contractual costs

82. Mr Granby applied for costs pursuant to Clause 3(9) of the Lease. The Judge is satisfied that these proceedings were brought in contemplation of forfeiture. This is expressly stated in the pre-action letters dated, 26 September 2017 (at A.208) and 2 November 2017 (at A.214).

83. On 28 September 2020, the Landlord provided a Schedule of Costs in the sum of £12,642.69 (inc VAT) using Form N260. The total costs claimed are:

Court Fees:	£ 1,670.79
Solicitors' Costs:	6,440.25
Counsel's Fees:	2,700.00
Disbursements:	293.60
VAT:	1,538.05
Total:	£ 12,642.69

84. In assessing this claim for contractual costs, the Court has had regard to *Church Commissioners v Ibrahim* [1997] EGLR 13. An order for the payment of costs of proceedings by one party to another is always discretionary (section 51 of the Supreme Court Act 1981). Where there is a contractual right to costs, the discretion should ordinarily be exercised so as to reflect the contractual rights. Costs should be assessed having regard to CPR 44. CPR 44.5 provides that there is a rebuttable presumption that the costs have been reasonably incurred and are reasonable in amount.

85. Paragraph 5(a) of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 also comes into play. This now gives the Court a discretion to reduce or extinguish the tenant's liability to pay such costs when it considers it to be just and equitable.

86. Mr Feldman referred the Court to the decision of Martin Rodger QC, the Deputy President, in *John Romans Park Homes Limited v Frederick Hancock and Julie Hancock* (17 October 2019). DJ Latham accepts that costs incurred during the tribunal stage of the proceedings are not costs of proceedings in the County Court. However, the

Landlord is not seeking to recover costs under the CPR, but rather under the Lease.

87. In the light of the FTT's decision to dismiss the landlord's claim, DJ Latham is satisfied that it is just and equitable to make an order under paragraph 5A extinguishing the Tenant' liability to pay any contractual costs.

88. Mr Granby argued that the Tenants have made no payment, even though they accepted that they are liable for a minimum of £10,000. DJ Latham accepts the argument which the Tenants raised in their Defence (see [3] above), namely that they considered that their application under the Discretionary Scheme would be weakened had they made any payment. Further, it is difficult to see how they could have paid this sum without assistance under one of the Landlord's payment options.

89. Had the claim succeeded, the Court would have been satisfied that the sums claimed by the Landlord are reasonable. However, DJ Latham would have reduced the costs under paragraph 5A, given the unacceptable delays by the Landlord in determining the Tenants' application under its Scheme.

Conclusions

90. The Court is dismissing the Landlord's claim because it has not made a lawful determination of the Tenants' application under its Discretionary Reduction Scheme. At the CMH, the FTT gave the Landlord the opportunity to reconsider the application. The poor quality of the second decision is a matter of great regret. The Landlord did not approach the reconsideration with an open mind; the decision-maker rather concluding, without any rational justification, that the Tenants were not being open about their financial circumstances.

91. The Landlord must now reconsider the tenants' application under their Scheme. Any reconsideration after six years will be a challenge for the Landlord. The FTT has seen no evidence as to how the Scheme was intended to operate in 2014. The published Scheme gives little detail about this. It is unclear whether the payment options which were offered in 2014 are now available. It would be wrong for the Tenants to be prejudiced by the Landlord's delays in handling their application.

92. It seems extremely unlikely that the Bank of Scotland will be willing to increase their charge, given the inability of the Tenants to pay any increase in monthly payments. However, it would be different were the Landlord to register the debt as a charge, allowing the interest to accumulate at the Santandar Base Rate. This was an option offered in June 2014 (see [34] above), but one which would only have come into play after the Landlord had determined the Tenants' application.

93. The fact that the Tenants' application is unresolved after six years reflects solely on the Landlord. Both this delay and these proceedings have cause stress and anxiety to the Tenants, both of whom suffer from ill health. The Tenants accept that even if their application is successful, they will still have to pay £10,000.

94. In redetermining the application, the Landlord must take into account all relevant matters, and in particular the personal circumstances of the tenants and the matters specified in the Direction. Paragraph 4 of the Direction, requires the Landlord to consider the payment options available to the Tenants. In so far as any adverse decision is reached, the Tenants are entitled to know why. The FTT is not seeking to impose undue burdens on a housing officer exercising a discretion relating to a matter of housing management. However, there are basic principles of procedural fairness with which any housing officer should be familiar.

Judge Robert Latham
30 October 2020

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

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

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.

Appealing against the decisions made by the Judge in his/her capacity as a Judge of the County Court

5. Any application for permission to appeal must arrive at the tribunal offices in writing within 28 days after the date this decision is sent to the parties.

6. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.

7. If an application is made for permission to appeal and that application is refused, or if no application for permission to appeal is made but, in either case, a party wants to pursue an appeal, that party must file an Appellant's Notice at the County Court office (not the tribunal office) within 28 days of the Hand Down date.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

8. In this case, both the above routes should be followed.