UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2017] UKUT 386 (LC)
UTLC Case Number: LRX/158/2016

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – validity of service charge demands – whether LVT properly took into account a previous LVT decision – reasonableness of electricity and water costs – whether landlord entitled to fund arrears of service charges through an uplift in service charges – Landlord and Tenant Act 1985 ss 20B & 21B, Landlord and Tenant Act 1987 ss 47 & 48 – appeal allowed in part

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

BETWEEN:

MARK ANDREW TUDOR ROBERTS

Appellant

and

COUNTRYSIDE RESIDENTIAL (SOUTH WEST) LIMITED

Respondent

Re: 6 Dray Court,
Caroline Street,
The Old Brewery Quarter,
Cardiff
CF19 1FN

26 September 2017

Before: Her Honour Judge Alice Robinson
Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

26 September 2017

The Appellant appeared in person
Simon Bradshaw instructed by SLC Solicitors for the Respondent

© CROWN COPYRIGHT 2017

The following cases are referred to in this decision:

Tingdene Holiday Parks Limited v Cox [2011] UKUT 310 (LC)

Tedla v Cameret Court Residents Association Limited [2015] UKUT 0221 (LC)
Elim Court RTM Company Limited v Avon Freeholds Limited [2017] 2 P&CR 8
Natt v Osman [2015] 1 WLR 1536
Johnson v County Bideford Limited [2012] UKUT 457 (LC)
Skelton v DBS Homes (Kings Hill) Limited [2017] EWCA Civ 1139
Hayes Point (LVT/CH/SC/32)
Gilje v Charlgrove Securities Limited [2004] 1 All ER 91
London Borough of Brent v Shulem B Association Limited [2011] 1 WLR 3014, ChD
Georgiou (t/a Marios Chippery) v Customs and Excise Commissioners [1996] STC 463
Sheffield City Council v Oliver [2017] EWCA Civ 225
Windermere Marina Village Limited v Wild [2014] UKUT 0163 (LC)
Gater v Wellington Real Estate Limited [2014] UKUT 0561 (LC)
Skilleter v Charles [1992] 1 EGLR 73, CA

The following cases are cited in argument:

Cannon v 38 Lambs Conduit LLP [2016] UKUT 371 (LC)
Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, HL
Richards and Evans v Talygarn Manor (LVT/CH/SC/51)

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal (Residential Property Tribunal Wales) ("LVT") dated 7 September 2016 in which it made a determination as to the amount of service charges payable by the appellant to the respondent. The respondent ("the Landlord") is the leasehold owner pursuant to a head lease of a mixed residential and commercial development forming part of the Old Brewery Quarter in Caroline Street, Cardiff ("the Development"). The appellant (who I shall refer to as "the Tenant" save when describing his oral submissions to the Tribunal) is the leasehold owner of 6 Dray Court ("the Flat") forming part of the Development pursuant to a lease dated 10 November 2003 ("the Lease") for a term expiring on 25 July 2201.

2. The Development is described in paragraph 5 of the LVT decision. The residential part comprises 42 flats split into 4 sections: Hop House (6 flats), Coopers Court (12 flats), Malt House (12 flats) and Dray Court (12 flats). There are in addition a range of commercial uses.

3. The Landlord began proceedings in the Telford County Court for recovery of service charges and other sums said to be due pursuant to the Lease for the calendar years 2009 to 2015 inclusive. The proceedings were transferred to the LVT for determination of the disputed sums. The LVT gave directions for service of a Scott Schedule. By the time of the LVT hearing the issues had narrowed marginally but there remained a claim for service charges for the years 2009 to 2015 inclusive none of which had been paid by the Tenant. The LVT convened on 1 August 2016, inspected the Development and conducted a hearing lasting 2 days. In its decision the LVT determined pursuant to sections 19 and 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") that all of the service charges then claimed were payable and reasonable. It refused to make an order under s.20C of the 1985 Act.

4. The Tenant applied for permission to appeal to the Tribunal. By an order dated 23 January 2017 the Deputy President of the Tribunal (Martin Rodger QC) granted permission to appeal on certain limited grounds only. Those grounds can be summarised briefly as relating to (1) ground rent, (2) the validity of the service charge demands, (3) compliance with s.20B of the 1985 Act, (4) the effect of an earlier LVT decision, (5) electricity charges, (6) water charges and (7) a 'surplus'. He ordered that the appeal be dealt with by way of review.

5. In directions given by the Deputy President when granting permission to appeal, he ordered both parties to serve Skeleton Arguments not later than 7 days before hearing date. Despite that, at 5am on the day of the hearing, the Tenant emailed to the Tribunal a document called a Suggested Reading List but which incorporated a Skeleton Argument. At the outset of the hearing Mr Bradshaw, who appeared on behalf of the Landlord, objected to Mr Roberts relying on the Skeleton Argument. He pointed out that the day before the LVT hearing the Tenant had served a 42 page Skeleton Argument which had caused problems before the LVT and resulted in the parties having to provide information after the hearing, see paragraph 35 of the LVT decision.

6. Mr Roberts gave no specific reason for the lateness of the Skeleton Argument other than to say that he had been unwell, relying on a medical certificate stating he had attended a clinic in India for a month at the

end of last year for joint problems. He said the Skeleton Argument was intended to be helpful and assist in understanding his case.

7. I took the view that the document, although short, did not assist in clarifying Mr Roberts' case. On the contrary, it descended into many figures and page references and made new points. I declined to take the Skeleton Argument into account but made it clear Mr Roberts was free to use it as an aide memoire for his oral submissions which he did. I am quite satisfied that neither party was prejudiced by this approach.

The Lease

8. By clause 4.1 of the Lease the Tenant covenants with the Landlord (and the Superior Landlord) to observe and perform the Tenant's Covenants at all times during the term of the Lease.

9. The Tenant's Covenants are set out in the Fifth Schedule to the lease. By paragraph 1.2 the Tenant covenants to pay the Service Charge on the days and in the manner stipulated in the Eighth Schedule without any deduction (by way of set-off, counterclaim or otherwise).

10. Provisions regarding the Service Charge are set out in the Eighth Schedule. Part 1 defines Services, in summary, as keeping in good repair the main structure and common parts of the Estate, repairing and renewing plant and machinery and providing refuse facilities.

11. Part 2 of the Eighth Schedule defines "Expenditure" as being all costs and expenses incurred by the Landlord in, or incidental to, the operation and management of the building and in the provision of the Services defined in Part 1 and a list of other services. The list comprises, broadly, maintenance, management and payment of outgoings.

12. Part 3 of the Eighth Schedule sets out the machinery for payment of the Service Charge.

(i) Paragraph 1 provides definitions, including that Expenditure is the aggregate of the costs and expenses mentioned in Part 2 of the Eighth Schedule, less recovery under insurance. The Service Charge period is defined as the calendar year. The Service Charge Proportion means:

"one forty-second (1/42) or such other fair and reasonable proportion to be determined by the Landlord's Surveyor whose decision (except in the case of manifest error) shall be conclusive."

(ii) Paragraph 2 defines the Service Charge as:

"the Service Charge Proportion of the Expenditure paid or incurred in that Service Charge Period"

(iii) Paragraph 3 provides that the Service Charge may include recurring expenditure, whether paid or incurred before or during the term of the Lease, and including reasonable provision for future Expenditure.

(iv) Paragraph 4 provides that the Landlord may at any time notify the Tenant of a reasonable estimate of the Expenditure and of the Service Charge and may from time to time revise that estimate.

(v) Paragraph 5 provides that the Tenant shall pay the Landlord the estimated Service Charge by equal instalments on the Quarter Days. If no estimated Service Charge has been notified, the Tenant will pay at the rate last payable for a Service Charge period.

(vi) Paragraph 6 makes provision for payment of additional sums in respect of revised estimates of Expenditure or Service Charge. Sums paid under paragraphs 5 and 6 are defined as Interim Payments.

(vii) Paragraph 7 provides for separate additional payments in respect of large and exceptional items of Expenditure.

(viii) Paragraph 8 states:

"As soon as practical after the end of each Service Charge Period the Landlord will supply to the Tenant the Service Charge Statement [defined as a certificate from the Landlord's Surveyor of the Service Charge including a summary of Expenditure] for that Service Charge period which will (in the absence of manifest error) be conclusive of the matters stated in it for the purposes of this Lease."

(ix) Paragraph 9 states:

"If for any Service Charge Period the Service Charge exceeds the Interim Payments the Tenant will pay the difference to the Landlord within ten (10) working days of receipt of the Service Charge Statement."

(x) Paragraph 10 makes corresponding provision:

"If for any Service Charge Period the Service Charge is less than the Interim Payments, the overpayment will be credited to the Tenant against the next payment of estimated Service Charge…"

(xi) Paragraph 11 provides for omitted Expenditure to be included in a subsequent Service Charge Statement.

(xii) Paragraph 12 provides that documentation on Expenditure will be made available by the Landlord or the Landlord's managing agents for one month after the Service Charge Statement is delivered.

Legislation

13. Section 27A of the Landlord and Tenant Act 1985 Act provides:

"(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 to whom it is payable

(b) the person by whom it is payable

(c) the amount which is payable

(d) the date at or by which it is payable

(e) the manner in which it is payable

(2) Sub-section 1 applies whether or not any payment has been made"

14. Section 18(1) of the 1985 Act defines "service charge" as:

"an amount payable by a tenant…

(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."

15. Section 19(1) of the 1985 Act provides:

"Relevant costs should be taken into account in determining the amount of a service charge payable for a period:-

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

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

and the amount payable shall be limited accordingly."

16. Section 20B of the 1985 Act provides:

"(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."

17. Section 20C of the 1985 Act provides so far as relevant:

"(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 the proceedings before a … Leasehold Valuation Tribunal … 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) ….

(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."

18. Section 21B of the 1985 Act provides:

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

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

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

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

19. Section 47 Landlord and Tenant Act 1987 (the 1987 Act") provides so far as relevant:

"(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely –

(a) the name and address of the landlord, and ….

(2) Where –

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then … any part of the amount demanded which consists of a service charge … shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant."

(2) …

(3) In this section demand means a demand for rent or other sums payable to the landlord under the terms of the tenancy."

20. Section 48 Landlord and Tenant Act 1987 provides:

"(1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.

(2) Where a landlord of any such premises fails to comply with subsection (1), any rent, service charge or administration charge otherwise due from the tenant to the landlord shall … be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection."

The LVT decision

21. The LVT summarised the parties' cases from the Scott Schedule in respect of each service charge year. It then set out the decision under a number of headings. As to 'Quality and quantum of services delivered', the LVT held that in general terms the quality of services delivered was of a reasonable standard but some matters needed attending to, paragraph 20. In respect of each service charge year it found that the charges relating to the lifts, basic service contract, various repairs not covered by the contract, water rates, management fee and cleaning to be reasonable, paragraphs 21 to 27. In the light of the non-payment of service charges by 7 tenants, the LVT found the Landlord's approach of prioritising payments to essential services to be appropriate, paragraph 28.

22. As to 'To whom and when service charges are payable' and in relation to the Tenant's argument that he had not been notified of costs within 18 months of the costs being incurred in accordance with s.20B of the 1985 Act, the LVT said:

> "The Tribunal found that the Tenant had been notified as such for each of the years in dispute", paragraph 29

23. In relation to the Tenant's argument that the surplus should have been credited to the tenant's service charge accounts, the LVT said:

> "The Landlord explained that repayments have never been possible as several of the leaseholders have never paid at all which resulted in an accumulated debt of £165,439 at December 2015. The Tribunal agreed with the Landlord's explanation and believe that if this amount of accumulated debt had not arisen the level of service provision and overall viability of maintenance would have been much improved", paragraph 31

24. In paragraph 33 the LVT referred to the Tenant's argument that all the service charge demands were defective for failing to comply with ss.47 and 48 of the 1987 Act and s.21B of the 1985 Act. The decision continues:

> "The Landlord accepted that such demands were defective but that they were subsequently rectified and amended demands were issued. The Tribunal agreed that the Landlord had corrected the errors and the demands were now payable."

25. In paragraph 36 the LVT referred to a recent LVT decision on an application by the Landlord pursuant to s.27A of the 1985 Act relating to another Flat in the Development. The LVT commented on that as follows:

> "On its own initiative the Tribunal examined the relevant findings of that Tribunal being cognisant that both Landlord and Tenant had seen a copy. In particular its detailed analysis of the

reconciliation of invoices to the service charge accounts. Taking account of this analysis and the further information provided by the Landlord in response to the 3rd August directions the Tribunal reviewed the financial information received and decided that the appropriate service charges for the period are…"

The figures then set out were what the Landlord had been claiming in full (subject to a deduction in 2009 to reflect the limitation period which is not in issue in this appeal). No reasons are given for departing from the figures set out in the earlier LVT decision.

26. The LVT dealt with ground rent in paragraphs 38 to 40. Despite recording in paragraph 44.2 that it had no jurisdiction to deal with ground rent, the LVT nevertheless went on to make a finding as to what was payable.

27. Finally, in paragraphs 41 to 43 the LVT considered the Tenant's application under s.20C of the 1985 but declined to make an order.

Decision

(1) Ground rent

28. Mr Roberts submitted that the LVT had no jurisdiction to determine what ground rent is payable and that the ground rent demands were defective. Mr Bradshaw agreed that the LVT had no jurisdiction to determine what ground rent is payable. In his order granting permission to appeal the Deputy President proposed that the Tribunal set aside paragraphs 40 and 44.2 of the LVT decision. I agree and I set aside those paragraphs of the LVT decision.

(2) Validity of the service charge demands

29. Mr Roberts submitted that the service charge demands were defective for two reasons. First, they failed to comply with s.21(B) of the 1985 Act because they were not accompanied by a summary of the rights and obligations of a tenant in relation to service charges which complied with the Service Charges (Summary of Rights and Obligations, and Transitional Provisions)(Wales) Regulations 2007 (2007 SI No.3160)("the 2007 Regulations"). Second, they did not contain the information required by ss.47 and 48 of the 1987 Act.

30. As to s.21B, he submitted that the first series of service charge demands had a summary of information but, contrary to the 2007 Regulations, the font size was smaller than 10 point, the Welsh language summary did not come first and the English language summary contained paragraph numbering errors. A second series of service charge demands were served but these contained the same errors.

31. Finally, the Landlord wrote to the Tenant on 30 November 2015 stating:

> "We refer you to the above and now enclose, by way of further service upon you, the Letter Before Action dated 15 October 2013, together with the arrears Schedule of that date and the relevant Summaries of Tenant's Rights and Obligations for both Service Charges and Administration Charges."

The letter was accompanied by a letter before action, a schedule showing arrears of service charges from 2008 to 2013 and a Summary of tenant's rights and obligations that complied with the 2007 Regulations.

32. Mr Roberts submitted that this did not comply with s.21B because the letter did not constitute a demand for payment of the service charges, it was merely an invitation to the Tenant to sign the arrears schedule and thereby agree to pay the service charges. It is not possible to serve a Summary complying with the 2007 Regulations independently of a demand for payment, see *Tingdene Holiday Parks Limited v Cox* [2011] UKUT 310 (LC), a decision of the President (George Bartlett QC) at paragraph 13. Further, the Summary had to accompany each demand for service charges and the failure to do so could not be remedied by sending the Summary with a compendious list of all the service charges owed covering many years. In addition, the schedule of arrears only goes up to 2013 so that, even if it was a valid demand for payment for the purposes of s.21B, the demand did not include the service charges for 2014 or 2015.

33. As to ss.47 and 48, Mr Roberts submitted that although the original service charge demands stated "Notice is hereby given for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987 the landlord's name and address details are shown above", the demands did not name the Landlord as required by s.47. Instead they merely stated:

> "Landlord:
> Accounts
> Countryside House
> Brentwood
> CM13 3AT"

34. He conceded that the second series of service charge demands did contain the necessary information as the Landlord's name had been inserted, apart from the demand dated 14 February 2014 which included the Landlord's name but omitted the word 'Landlord' above it. He submitted that the 2014 demand was ambiguous and did not comply because there were three "name and address details.. shown above" without identifying which one was the Landlord's. He accepted that the demands either side of that dated 29 April 2013 and 30 March 2015 complied with s.47. However, he submitted that the identity of the landlord can change and a tenant is entitled to know who it is when demands for service charges are made.

35. He also submitted that the demands failed to comply with s.48, although this point was only made in his Grounds of Appeal in relation to the 14 February 2014 demand. He said that the demand did not clearly differentiate which was the Landlord and which was the address for service of notices. He submitted that the LVT failed to deal with his arguments and wrongly concluded that the notices were valid, merely stating in paragraph 33:

> "The Tribunal agreed that the Landlord had corrected the errors and the demands were now payable."

36. Mr Bradshaw submitted that the letter dated 30 November 2015 and accompanying letter before action and arrears schedule constituted a demand for payment of the service charges. It was a re-statement of money owed. He distinguished *Tingdene* on the grounds that there, the Summary was sent on its own 11 days after the service charge demand, whereas here the appropriate Summary accompanied the letter demanding payment. Insisting that the Summary had to accompany separate demands for each year's service charge was neither necessary nor required by s.21B.

37. Further, he submitted that, notwithstanding the concession made by the Landlord at the LVT that demands sent prior to 30 November 2015 did not comply with s.21B, it was open to the Tribunal to hold that the Summary sent with the earlier demands did comply with the 2007 Regulations. The defects were de minimis and the summary was sufficient to provide the information sought by the Regulations. The Tenant had in no way been prejudiced by any lack of information.

38. Turning to s.47, Mr Bradshaw submitted that the effect of s.47(2) was that failure to include the Landlord's details in a demand only suspended the right to payment. The information could subsequently be provided at any time at which moment the service charges would become due, see *Tedla v Cameret Court Residents Association Limited* [2015] UKUT 0221 (LC), a decision of the Deputy President (Martin Rodger QC), at paragraph 38.

39. It is worth noting what was not in dispute. Mr Roberts did not suggest that any defects in demands previously served could not be remedied in subsequent demands, subject to the effect of the 6 year limitation period and the effect of s.20B. Further, he did not argue that, if valid demands had still not been served by the time of the LVT hearing, that that deprived the LVT of any jurisdiction to determine the amount of the service charges that would be payable once valid demands had been served.

40. In my judgment, whatever the position relating to the earlier service charge demands, the letter dated 30 November 2015 and accompanying documents can only sensibly be construed as a demand for payment of the service charges, coupled with a warning that if they are not paid, the Landlord will commence proceedings for their recovery. Although the schedule of arrears contains an invitation for it to be signed as agreed, that reinforces rather than detracts from the view that it is a demand for payment. The letter before action includes in the heading the words "Collection of overdue invoices" together with the name of the Landlord, the Tenant and the Flat. The body of the letter starts:

> "We, SLC Solicitors, are instructed by Countryside Residential (South West) Limited. We are advised that there are arrears outstanding on the property due under the Lease and that our client has previously requested payment from you. However, despite these requests, our client advises that you have not paid the amount demanded. We have therefore been instructed to recover these amounts from you.
>
> We enclose an Arrears Schedule which sets out the full amount outstanding. Our client is prepared to issue court proceedings against you to recover the arrears currently outstanding should payment not be received…
>
> If you wish to avoid court proceedings that may culminate in forfeiture of your lease and eviction you must send a cheque for £20,609.24 to this office on or before 2pm on 22nd October 2013. Please ensure your cheque is made payable to "SLC Solicitors".
>
> Alternatively, you are able to make payment by credit or debit card…"

41. Although the date for payment specified had by 30 November 2015 long since passed, I accept Mr Bradshaw's submission that the letter and enclosures contain a re-statement of money owed and a demand for payment. Accordingly, it is not a case where the Summary complying with the 2007 Regulations was sent on its own without accompanying a demand as required by s.21B(1) of the 1985 Act and this case is not analogous to *Tingdene*.

42. However, there is no dispute that this demand did not include a demand for the 2014 and 2015 service charge years. It is therefore necessary to consider Mr Bradshaw's alternative argument that the earlier demands in fact complied with the 2007 Regulations. In my judgment this is a question of law and accordingly it is open to the Tribunal to consider whether the concession by the Landlord at the LVT was correctly made.

43. Regulation 3 of the 2007 Regulations provides as far as relevant as follows:

> "Where these Regulations apply the summary of rights and obligations which must accompany a demand for the payment of a service charge must be legible in a typewritten or printed form of at least 10 point, and must contain—
>
> (a) the title "Taliadau Gwasanaeth—Crynodeb o hawliau a rhwymedigaethau tenantiaid / Service Charges—Summary of tenants' rights and obligations"; and
> (b) the following statement—"

There follows a statement in Welsh, then repeated in English, which sets out a tenant's rights and obligations concerning service charges.

44. Mr Roberts' case is that any deviation at all from the requirements of the 2007 Regulations invalidates the service charge demands, even if the dots on the letter 'i' in the required statement were missing (a hypothetical example considered during the course of argument). The only authority to which I was referred as to the validity of notices which do not fully comply with statutory requirements as to their formalities is *Tingdene*. In paragraph 14 the President held that it was not sufficient for the service charge demand to be accompanied by a copy of the relevant statutory instrument:

> "What was required to be sent was a document with a specific title – "Service Charges – Summary of tenants' rights and obligations" – and a specific text. The purpose is obvious: to ensure that the tenant, when he receives his demand, has clearly before him a statement of the rights and obligations that the Regulations set out; and the heading of the document is important in directing the tenant's attention to what it contains. The statutory instrument itself has its own title and contains the text of regulations 1 and 2 before the requirement for the heading and the statement is set out in regulation 3. It clearly does not itself constitute the document that it prescribes and it does not fulfil the purpose that underlies the requirement." (paragraph 14)

In this case it was not the 2007 Regulations that accompanied the service charge demands, rather the statement which regulation 3(b) requires but with certain errors. However, *Tingdene* does indicate that an important enquiry will be whether the notice fulfils the statutory purpose.

45. The Court of Appeal have recently considered this issue in the context of a notice seeking to acquire the right to manage under the Commonhold and Leasehold Reform Act 2002 in *Elim Court RTM Company Limited v Avon Freeholds Limited* [2017] 2 P&CR 8. Applying *Natt v Osman* [2015] 1 WLR

1536, Lewison LJ drew a distinction between two types of cases, those where a decision of a public body is challenged and those where a statute confers a property or similar right on a private person (paragraph 50). Although a demand for service charges does not involve the acquisition of a property right, it affects the landlord's right to recover sums that would otherwise be due and the second type of case extends to "similar" rights, see paragraph 53. In my judgment the present case falls into the second category.

46. Lewison LJ went on to describe the stricter approach that applies in such cases as follows:

> "52. The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case: see [32][in *Natt v Osman*]. The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see [33]. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see [34]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity."

47. Applying the approach in *Tingdene* and *Elim Court*, the purpose of the requirement in s.21B(1) of the 1985 Act that a demand for service charges include a summary of the tenant's rights and obligations is to inform the tenant as to what his rights are and what action he may take to protect them (and likewise to inform him of his obligations). These include the right to apply to the LVT for a determination as to liability to pay the service charge and the amount, the potential costs of doing so, the right to be consulted where service charge costs exceed a certain sum and rights to obtain information. The original service charge demands undoubtedly comply with s.21B(1) (and indeed there was no suggestion to the contrary by Mr Roberts) because they include a summary of the tenant's rights and obligations the content of which is identical to that required by the 2007 Regulations. There is no suggestion that some relevant information is missing or additional irrelevant information has been included. It is to be noted therefore that the non-compliance is with the 2007 Regulations, secondary legislation, rather than the statute itself.

48. The errors relied upon are the omission of the number (4) against the text of that paragraph in the English language version of the statement required by the 2007 Regulations and the sequential renumbering of subsequent paragraphs, the placing of the English language version of the statement before the Welsh language version whereas the 2007 Regulations place them the other way around and the fact that the size of the text is less than 10 point. In my view the lack of a paragraph number and consequent renumbering of other paragraphs is a trivial error that has no bearing on the content of the information provided or the ability to understand it. It is an error that has no significance in the context

of the statutory scheme. The same is true of the swopping of the different language versions of the text. While it is no doubt culturally important in Wales that the Welsh language has primacy over the English language, provided the requisite information is given in both languages and both are readily accessible to the reader, the statutory purpose of providing the tenant with a summary of his rights and obligations is fulfilled.

49. As to the size of the font, I was provided with no evidence as to what the actual font size of the statement is. There is no suggestion that the statement is difficult to read and I note that the Welsh language version is both larger than the English language version and larger than the text in the service charge demand itself. It is also worth noting that the argument that the statement accompanying the service charge notices failed to comply with the 2007 Regulations is not one raised by the Tenant but rather by the LVT. Although, as was pointed out in *Elim Court*, validity does not depend on lack of actual prejudice, that does not mean that prejudice in a generic sense is irrelevant, see paragraph 56. Regulation 3 of the 2007 Regulations requires the statement to be "legible in a typewritten or printed form of at least 10 point". In my judgment the key requirement is that the statement be legible. Whatever the actual font size used, and different fonts with the same point can be different sizes, I consider that the statement is clearly legible and that any person with normal eyesight, corrected with spectacles where appropriate, could reasonably be expected to be able to read it clearly. Again, despite the error, the statement fulfils the statutory purpose.

50. It is right that a service charge demand that fails to comply with the 2007 Regulations can immediately be re-served which Lewison LJ indicated is a "pointer" towards invalidity. Nevertheless, considering the statutory requirements as a whole and the nature of the errors I am quite satisfied that as a matter of statutory construction the service charge demands are "wholly valid" not "wholly invalid". It follows that s.21B provides no basis for the Tenant to withhold payment of service charges whether relating to 2014 and 2015 or earlier years.

51. I turn to the arguments relating to s.47 and s.48 of the 1987 Act. Mr Roberts conceded that the argument relating to s.47 only applied to the re-served demand for 2014 service charges. It is correct that this states that "the Landlord's name and address details are shown above" and three names and addresses are set out above that in the demand. However, one is that of the Tenant so there can be no question of that being confused with the name and address of the Landlord. Further, the Landlord's name and address is given. The issue is whether, because the word 'Landlord' does not appear above it, the recipient of the notice might confuse those details with those in the printed letterhead of the demand which are for 'Orchard Block Management Services Ltd' to such an extent that, properly construed, the demand does not contain the name and address of the Landlord. There is certainly some support for that argument in *Tedla* paragraph 37 where the Deputy President said this about s.47:

> "A demand which provides the name and address of two or more different companies without identifying which one of them is the landlord does not, in my judgment, provide the required information. The tenant is not to be left to guess which of two or more parties is the landlord, but is to be informed of the landlord's identity."

52. However, even if the 2014 demand failed to comply with s.47(1), s.47(2) is clear that the service charge shall be treated as not being due "at any time <u>before</u> that information is furnished" (emphasis added). It is conceded that the demand for 2015 service charges does furnish the information required by

s.47(1), therefore at that moment, the suspensory effect of s.47(2) was lifted and the 2014 service charges became due at that point in time. This is consistent with paragraph 38 of *Tedla*:

> "The effect of s.47(2) is suspensory only, in that any service charge or administration charge is treated as not being due from the tenant to the landlord "at any time before the information is furnished by the landlord by notice to the tenant". …all that is now required to satisfy the statutory requirement is for a notice to be given to the [tenant] informing her that the respondent is her landlord and of its address… It is not necessary for all the previous service charge demands to be re-issued. From the time at which such a notice has been given the service charges will be treated for all purposes as being due…"

53. It is also consistent with an earlier decision *Johnson v County Bideford Limited* [2012] UKUT 457 (LC). Although that case relates to s.20B of the 1985 Act, the President (George Bartlett QC) dealt with an argument that a demand which failed to comply with s.47 could not be a valid demand for the purposes of s.20B. He held that there was no reason why the notice contemplated by s.47(2) could not be included in a later service charge demand which has the effect of correcting retrospectively the previous demand that omitted the information required by s.47(1), see paragraphs 8 and 10. This aspect of the *Johnson* case was cited with approval by the Court of Appeal in *Skelton v DBS Homes (Kings Hill) Limited* [2017] EWCA Civ 1139, paragraph 20.

54. Mr Roberts sought to get around this by arguing that the landlord can change and a tenant needs to know who the landlord is at any moment in time. I agree. However, provision for that is made in ss.1 to 3 of the 1985 Act which require a landlord to disclose his identity on request and notify the tenant of any assignment of the landlord's interest. The suspensory effect of s.47(2) is lifted when the appropriate notice is given, which in this case was 30 March 2015, the date of the 2015 service charge demand.

55. The Tenant's Grounds of Appeal only raise the argument concerning compliance with s.48 in relation to the demand for 2014 service charges. Nevertheless I have some sympathy for Mr Roberts' submission that the re-served service charge demands for 2009, 2010, 2011, 2012 and 2013 are confusing. They all contain the statement "Notice is hereby given that the purposes of sections 47 & 48 of the Landlord and Tenant Act 1987 the Landlord's name and address details are shown above" and in the top right hand corner the demand sets out the Landlord's name and address under the heading 'Landlord'. However, they also contain a statement in the lower left hand corner "Address for service of notices including notices in proceedings" and give the managing agents name and address. Mr Roberts submitted that these did not comply with s.48 either because two different names and addressed were provided.

56. Section 48 does not require that each service charge demand provide an address for the service of notices. The demand dated 30 March 2015 contains the statement which refers to ss. 47 and 48 and has the Landlord's name and address under the heading 'Landlord' in the top right hand corner. The other statement referring to service of notices giving the managing agents name and address is omitted. In my judgment this complies fully with s.48 of the 1987 Act because the Landlord has plainly given the Tenant the information required, namely an address at which the Tenant could serve notices on *him* i.e. the Landlord, not some other landlord or the managing agent.

57. For all these reasons I consider that the LVT was correct to hold that the service charge demands complied with s.21B of the 1985 Act and ss.47 and 48 of the 1987 Act.

(3) Compliance with s.20B of the 1985 Act

58. Mr Roberts submitted that the landlord had failed to comply with s.20B(1) and s.20B(2) and accordingly the 18 month rule applies. No valid service charge demands have yet been made and none of the costs the subject of the 2009 to 2015 service charge demands can be recovered as they were all incurred more than 18 months ago. In reliance upon the LVT decision in *Hayes Point* (LVT/CH/SC/32) dated 20 April 2012 paragraph 344, he said that s.20B(2) has a number of disparate elements: there needs to be a date when the costs were incurred, that those costs have been incurred, the Tenant must be notified in writing that the costs have been incurred and he must be notified that he would subsequently be required under the terms of the Lease to contribute to them by payment of the service charge. He accepted that the second and third elements were satisfied by service of the annual service charge accounts. However, he submitted that these did not itemise the date of each cost incurred and did not notify the Tenant that he would be required to pay them through the service charges. He said this case is analogous to the position in *Hayes Point* when the service of accounts was held not to comply with s.20(B)(2).

59. Mr Bradshaw submitted that the annual accounts that were served on the Tenant provided all of the information that s.20B(2) required. It could not possibly be correct that each cost incurred had to be separately itemised and a date given for it. He said that the Landlord's annual accounts were much fuller than provided by most landlords. They set out the expenditure under a number of headings, the income and the difference between them. The Tenant knew full well that he was required to contribute 1/42 of the costs as required by the Lease. Mr Bradshaw sought to distinguish the *Hayes Point* decision on the grounds that there, the billing of service charges was so disorganised that the tenant could not work out how the overall service charges had been calculated. The lease in that case did not provide for payment of a specified proportion of the service charge expenditure, simply a "fair proportion" without any further guidance.

60. In order to deal with this issue it is necessary to set out how the Landlord calculated and claimed service charges relating to the Development. Each year a budget was prepared (called 'Estate Budget') with an estimate of expenditure for the calendar year. By way of example, the budget for 2009 shows an estimated expenditure of £57,215 plus £12,331.54 totalling £69,546.54. All of the sums in it are expressed in general rather than specific figures apart from management fees, insurance and general repairs. The service charge demand for 2009 appears to be based on this budget, being for £1,656 which is £69,546.54 divided by 42 (£1,655.87, rounded up). Subsequently, annual accounts are prepared called 'Service Charge Statement of Account.' The Statement of Account for 2009 shows the expenditure was £78,292. However, no demand was made for a balancing payment as anticipated by paragraph 9 of the Eighth Schedule to the Lease. This is because the Statement of Account also shows income, including service charges from previous years, ground rent and interest. Income therefore exceeded expenditure by £1,429. However, neither did the Landlord credit the Tenant with 1/42 of that as envisaged by paragraph 10 of the Eighth Schedule.

61. Mr Bradshaw submitted that, although the Estate Budget is headed '2009', it is dated 23 September 2009 and relates to projected expenditure in 2010. Even if this is correct, comparing the 2009 (i.e. 2010) Estate Budget with the Service Charge Statement of Account for 2010, there was an excess of income over expenditure by £7,246 and no credit was given.

62. This pattern was repeated for subsequent years up to and including 2015. An identical service charge of £1,656 was demanded based on a budget which was a figure consistent with (allowing for rounding) £1,656 multiplied by 42. The surplus for each year was carried forward to the next year. By the end of 2014 the accumulated surplus was £175,755. In 2015 the accounts show a significant increase in expenditure with the result that there was a deficit of £26,846, reducing the surplus to £148,909.

63. However, the Service Charge Statements of Account show income based on the amount of service charges owing by the tenants, not the amount actually paid. In a balancing statement they also show the amount of service charges owed by tenants. At one stage these exceeded £200,000, although by the end of 2015 the amount owed had reduced to £165,439. This, together with other assets are balanced against the accumulated surplus and some other liabilities to show a figure for net assets which is identified as 'Reserve Funds'. The net assets or reserve funds have fluctuated between about £20,000 to £28,000 and by the end of 2015 was £20,060. Thus, until 2015 when expenditure increased but the annual service charges demanded did not, the Landlord was funding the deficit in payment of service charges owed by tenants by demanding a service charge every year that was higher than net expenditure. No further service charges were ever demanded of (or credited to) tenants at the end of each year pursuant to paragraphs 9 and 10 of the Eighth Schedule to the Lease to reflect the surplus or deficit of income over expenditure for the year. It will be necessary to return to this when dealing with the last issue which arises in this appeal relating to the 'surplus'.

64. It follows that the only service charges ever demanded were based on estimates of expenditure rather than actual costs. For this reason Mr Bradshaw did not argue that the Landlord has ever complied with s.20B(1) (because the service charge demands were not based on 'costs incurred') and instead concentrated his submissions on s.20B(2). However, in the *Skelton* case already referred to, which was not drawn to my attention by either party, the Court of Appeal held that s.20B applies to service charges in respect of costs to be incurred as well as costs that have been incurred. The landlord in that case had demanded on-account service charges and no balancing charge had subsequently been demanded. However, because the demands were not accompanied by an estimate as required by the lease, they were contractually invalid. At first instance, the Tribunal (His Honour Judge Huskinson) held that the demands were validated on the date the estimate was subsequently served and there was no appeal against that. However, he also held, relying upon the decision in *Gilje v Charlgrove Securities Limited* [2004] 1 All ER 91, that because s.20B(1) did not apply to costs to be incurred in the future, at the date the demands were subsequently validated, the tenant became liable to pay the on-account service charges, even though by then the demands related to costs to be incurred more than 18 months earlier. The Court of Appeal disagreed.

65. Arden LJ (with whom Richards LJ agreed) held that s.20B(1) applied to the demands for on-account service charges and because by the date the on-account demands were validated the costs had been incurred more than 18 months earlier, the tenant was not liable to pay. Arden LJ said this:

> "17. In my judgment, it is clear from the definition of "service charge" in section 18 that section 20B applies to service charges in respect of costs to be incurred as much as costs that have been incurred. In my judgment, the judge was wrong to hold otherwise on the basis of *Gilje*. In *Gilje* the landlord served demands for 1999 and 2000 before incurring any costs. The landlord had spent less than the amounts demanded, and there was no balancing charge. The argument was that none of the on-account payments was payable. Etherton J held that there was no "metamorphosis" from an on-account demand and a demand for actual costs once costs had been incurred. Section 20B did not apply where the tenants made on-account payments of their service

charges, the landlord's actual expenditure did not exceed the estimated amount on which the service charges were based and the landlord did not serve any further demand on the tenant. There was then no "demand for payment" after the incurring of costs to which section 20B could apply. But that reasoning does not assist in this case because the demand was only validly served after the costs were incurred.

18. Further, in my judgment, it is not enough under section 20B that the tenant has received the information that his landlord proposes to make a demand. As Morgan J held in *London Borough of Brent v Shulem B Association Ltd* [2011] EWHC 1663, [53], there must be a valid demand for payment of the service charge. In that case, the landlord had served several different demands for payment but they were all invalid because they did not comply with the terms of the parties' contract. The content of the alleged demand did not comply with the service charge provisions of the lease. So there was no valid demand for the purposes of section 20B(1) of the 1985 Act…

20. Ms Gourlay also draws to our attention that retrospective correction of a demand is possible in certain situations. Thus, in *Johnson v County Bideford* [2012] UKUT 457 (Lands Chamber), the landlord had failed to comply with the requirement in section 47(1) of the 1985 Act to provide his name and address. The Upper Tribunal held that, by serving fresh demands, the landlord had provided the information required by section 47(2) to validate the original demands. Section 47(2) allows for this possibility. Ms Gourlay submits that *Johnson v County* is about statutory validity not contractual validity. I agree. We have not been shown any authority for the proposition that as a matter of contract law the delivery of the estimate validated the demands in this case as of the date of the demand.

21. If in the situation in this case, the tenant receives a windfall, that is the result of the landlord not having complied with the terms of the lease for service of a valid demand."

66. In my judgment the service charge demands in this case are contractually valid as demands for *estimated* service charges pursuant to paragraph 5 of Part 3 of the Eighth Schedule to the Lease. I have already held that they complied with s.21B. Further, they either complied with s.47 or were retrospectively validated and, for the reasons given in the *Johnson* case (see paragraph 53 above) and by Arden LJ in paragraph 20 of *Skelton*, failure to comply with s.47(1) in the 2014 service charge demand did not render the demand invalid for the purposes of s.20B. The Tenant has never argued that the costs were incurred more than 18 months prior to each service charge demand, the demands being based on estimated expenditure. The fact that invoices may have been paid and therefore expenditure incurred more than 18 months after the invoice was sent does not alter the fact that the service charge demands based on estimated expenditure were not made more than 18 months after the service charges were incurred. Accordingly, a demand for service charges was made pursuant to s.20B(1) not more than 18 months after the service charges were incurred. It follows that s.20B does not apply in this case and provides no grounds for the Tenant not to pay the service charges in issue in this case (2009 to 2015).

67. For these reasons it is not strictly necessary for me to deal with the alternative issue as to whether service of the Service Charge Statements of Account would have complied with s.20B(2). However, in case it becomes relevant in the future and in deference to the submissions made, I set out my conclusions on that issue.

68. Again, neither party referred me to the leading case on this issue: *London Borough of Brent v Shulem B Association Limited* [2011] 1 WLR 3014, ChD. There, Morgan J held that a demand for

service charges that did not comply with the relevant terms of the lease is not a demand which complies with s.20B. In paragraph 54 Morgan J said this:

> "… [s.20B(2)] requires the notification to relate to two matters. The first matter that must be notified is "that those costs had been incurred". The second matter is "that [the tenant] would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge". The parties do not agree as to the extent of the statutory requirements. In particular, they do not agree as to what information has to be given to satisfy the requirement that the tenant is notified "that those costs have been incurred".

He went to hold that the notice must specify the costs which have been incurred in sufficient detail that they can be related to the service charge demanded:

> "… the subsection appears to require the lessor to identify the costs which have been incurred so that when one comes to apply section 20B(2) to the relevant notification one will be able to say whether the costs, which the lessor wants to take into account in determining the amount of the service charge, were notified to the lessee." (paragraph 56)

69. As to the second matter (that the tenant would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge), Morgan J held that it is not necessary for the notice to spell out how much the tenant will have to pay:

> "Taken literally, this does not oblige the lessor to state the resulting amount of the service charge. On this reading, there will be a valid notification for the purposes of the subsection if the lessor notifies the lessee that it has incurred costs of £x on certain service charge matters without telling the lessee what sum the lessee will ultimately be expected to pay. It may be that in some cases, the lessee will know what proportion of the total costs it will have to pay. The lease in question may identify a fixed percentage of service charge costs. However, many leases do not specify a fixed percentage. It would no doubt be of more use to a lessee to be told what sum it will be expected to pay by way of service charge but, in my judgment, the words of section 20B(2) do not clearly so require." (paragraph 59)

In fact in this case, the Lease does specify a fixed percentage, 1/42. Insofar as there is any conflict between the analysis of s.20B(2) in paragraph 344 of the *Hayes Point* decision, I prefer the reasoning of Morgan J.

70. Applying these principles to the present case, the annual Service Charge Statements of Account specify the amount of expenditure which has been incurred and do so in sufficient detail to be able to determine if any service charge demanded relates to those costs. Further, all that is required is that the tenant is notified no later than 18 months after the date that the costs have been incurred that they have been incurred. There is no basis in s.20B(2) for asserting that the notice has to specify each and every date when a particular item of expenditure has been incurred. Further, in my judgment the provision of a 'Service Charge Statement of Account' makes clear what expenditure and income will be taken into account for the purposes of the service charge and the resulting surplus or deficit. If there were a deficit and a balancing charge were demanded pursuant to paragraph 9 of the Eighth Schedule to the Lease, it would clearly relate to the net deficit specified in the Statement of Account. It is not necessary for the Landlord to go further and specify what sum the Tenant will have to pay.

71. Accordingly, if it were necessary to decide this point, the provision of the annual Service Charge Statements of Account would satisfy s.20B(2).

72. For all these reasons I consider that the LVT was correct to hold that s.20B of the 1985 Act did not prevent recovery of the service charges.

(4) The effect of an earlier LVT decision

73. On 20 July 2016, shortly before the LVT hearing in this case, the LVT published a decision relating to the service charges payable by another tenant of the Development at 6 Coopers Court ("the Coopers Court decision"). Mr Roberts prayed in aid that decision and submitted that this LVT had failed to have regard to some important findings of the earlier LVT decision relating to the Reserve Funds, electricity payments and the overall service charge payable.

74. First, in paragraphs 49 to 54 of the Coopers Court decision the LVT held that there was no provision in the Lease which enabled the Landlord to collect service charges for a Reserve Fund. It is not clear whether the figures determined by the LVT in that case included a credit to reflect that, although Mr Roberts submitted that they probably did not do so because paragraph 54 concludes with the words "The Applicant [the Landlord] is to ensure that the tenants are properly credited for these overpayments." The issue of Reserve Funds is not mentioned at all by the LVT in this decision.

75. Second, in paragraphs 57 and 59 of the Coopers Court decision the LVT held that the tenant was being overcharged for electricity. In addition, a credit was due for the superior landlord's contribution towards electricity. The amount of the credit was specified to be £318.57 (£13,380 divided by 42). The issue of overcharging for electricity and the credit for the superior landlord's contribution towards electricity is not mentioned at all by the LVT in this decision.

76. Third, Mr Roberts submitted that, as to the overall figures for service charges, the Landlord had accepted that the reduced figures determined in the Coopers Court decision should be used in this case but the LVT had said nothing about that and had failed to limit the service charge payable by the Tenant to those figures. As each tenant is paying the same (1/42), the sums payable by the Tenant should be the same (or no more) than determined in the Coopers Court decision.

77. After some debate, Mr Bradshaw conceded that these points were correct and that the amount of service charge payable by the Tenant should be reduced accordingly. For that reason this case will have to be remitted to the LVT for a determination as to how much less the Tenant should pay. Because the LVT did not set out its calculations, it is not clear exactly to what the deductions made by the LVT in the Coopers Court decision relate. However, having carefully considered the decision, I am satisfied that the figures do not include credit for the Reserve Funds which this LVT will have to calculate separately and deduct from the figures determined in the Coopers Court decision. I have reached this decision by virtue of the reference to a credit being made in the future for this item in paragraph 54, the lack of any further reference to the Reserve Funds in paragraphs 55 to 59 and the fact that the adjustments detailed in paragraphs 55 to 59 appear to relate to a reconciliation between the service charge demands and invoices and documents. There are no invoices relating to the Reserve Funds and, having given examples of areas where a deduction has been made in paragraphs 56 to 58, if a deduction had been

made to reflect the Reserve Funds the LVT would have said so. This is further supported by the express reference to a credit for the superior landlord's contribution towards electricity.

78. This LVT wholly failed to explain in paragraph 36 of the decision why it considered that no deduction should be made for the Reserve Funds and electricity credit as had been done in the Coopers Court decision. However, in my judgment it goes beyond a mere failure to give reasons. In my judgment, no reasonable LVT could have failed to make those deductions. Further, although the LVT says it has taken into account the Coopers Court LVT's analysis of invoices, apart from saying it has "reviewed the financial information received", no reasons are given for not adopting the same reduced general service charge figures as in the Coopers Court decision (i.e. 2009 £2004.75, 2010 £1530.64, 2011 £1513.31, 2012 £1611.78 and 2013 £1,661.28) from which the Reserve Funds and electricity credits must then be deducted.

79. It follows that the LVT must reconsider the general service charge figures which the Tenant is liable to pay having regard to those specified in the Coopers Court decision and then make an appropriate credit for the Reserve Funds and a credit of £318.57 to reflect the superior landlord's contribution towards electricity shown in the 2013 accounts. Further, in the light of these errors, the LVT should reconsider the general service charge figures for 2014 and 2015 having regard to the evidence because the Coopers Court decision does not cover the years 2014 and 2015.

(5) Electricity

80. Mr Roberts submitted that the electricity bills for Dray Court included electricity supplied to one of the commercial parts of the Development which should not be included in the residential tenants' service charge. The bills themselves refer to the commercial use and the Dray Court bills are significantly higher than those for Coopers Court and Malt House which also contain 12 flats each, the same number as Dray Court. The LVT failed to consider this issue or make any adjustment for it. Mr Roberts also made a general complaint about the calculation of electricity costs for service charge purposes.

81. Mr Bradshaw submitted that the LVT had a lot of documentary evidence and heard oral evidence from the parties as well as doing an inspection. The Tribunal could only interfere if the LVT had made an error of law not because of a mere disagreement as to fact. In order to challenge a tribunal's findings on a question of fact, the appellant must ascertain the finding to be challenged, show its importance in relation to the decision, ascertain the evidence relating to the finding and show that the finding could not have been made on that evidence, *Georgiou (t/a Marios Chippery) v Customs and Excise Commissioners* [1996] STC 463. Mr Bradshaw submitted that the Tenant's complaints fell short in this respect, both relating to electricity and generally on matters of fact.

82. He also submitted that the Landlord was aware of the issue as a result of which a credit had been made in the 2013 accounts for that and previous years. The commercial use now has a separate electricity meter and a further credit to the service charge will be given for the period from 2014 until the supplies are separately metered.

83. In my view this aspect of the case is largely subsumed within the arguments relating to the Coopers Court decision. Insofar as the Tenant has any complaint about the cost of electricity generally, this will have to be reconsidered in the light of the service charge figures determined in the decision in Coopers Court. If the LVT is going to depart from the Coopers Court decision figures, it must give proper reasons. Further, as to the element of commercial use, the Coopers Court decision has concluded what the appropriate credit should be for the period to 2013. As this case is going to be remitted to the LVT in any event, it will be open to the Tenant to argue that the service charges for 2014 and 2015, which were not considered in the Coopers Court decision, should be reduced to reflect the true cost in the electricity invoices and to argue that there should be a further credit or deduction for the years 2014 and 2015 in relation to supply to the commercial use, if that can be made good on the evidence.

(6) Water

84. Mr Roberts submitted that he was being overcharged for water for three reasons. First, he was paying 1/42 of the cost which was unreasonable. As the Flat is only a one bedroom flat and there are other flats with two and three bedrooms these will consume more water and a fairer apportionment would be based on the number of bedrooms. In support of this submission he relied upon the *Hayes Point* LVT decision which reached that conclusion, see paragraphs 189 to 191.

85. Second, Mr Roberts submitted that the bills relating to Dray Court were much higher than the other blocks and he was concerned there may be a leak or connection to commercial property. Third, he submitted that the Landlord had incorrectly added up the invoices for water by including sums brought forward from previous invoices so there was double counting.

86. Mr Bradshaw relied upon the same submissions he made in relation to electricity charges. The LVT had heard the evidence and inspected the Development. There were no grounds for the Tribunal to interfere with its judgment on the facts. In addition, although he could not point to any evidence to this effect, he submitted that the reason the Dray Court water bills were higher was because they included the water supplied to Malt House.

87. Although there is no reference in the LVT decision to Mr Roberts' argument that 1/42 of the costs was not reasonable, Mr Bradshaw informed the Tribunal that the LVT had considered that as a preliminary issue orally at the beginning of the hearing and decided that it was bound by the terms of the Lease to apply 1/42.

88. As to this issue, neither party referred me to the decision of the Court of Appeal in *Sheffield City Council v Oliver* [2017] EWCA Civ 225 or the Upper Tribunal cases which were referred to therein at paragraphs 28 to 29. Section 27A(6) of the 1985 Act provides that:

> "An agreement by the tenant of a dwelling… is void so far as it purports to provide for a determination –
>
> (a) in a particular manner, or
> (b) on particular evidence
>
> of any question which may be the subject of an application under subsection (1) or (3)."

The Court of Appeal approved two decisions of the Tribunal which decided that the effect of this provision is to render void a clause which states that the landlord's surveyor or other person shall decide the amount of the service charge, see *Windermere Marina Village Limited v Wild* [2014] UKUT 0163 (LC) and *Gater v Wellington Real Estate Limited* [2014] UKUT 0561 (LC), both decisions of the Deputy President (Martin Rodger QC). In *Oliver* the service charge was defined as "a fair proportion to be determined by the City Treasurer" of the allowable costs and expenses. The provision for determination by the City Treasurer was void and the court determined what was a fair proportion of the costs in dispute in that case, see paragraphs 53 to 56.

89. In all of those three cases the service charge provision contained only one formula for determining the service charge namely "a fair proportion" whereas in the present case the definition of the 'Service Charge Proportion' in paragraph 1 of Part 3 in the Eighth Schedule to the Lease is "one forty-second (1/42) or such other fair and reasonable proportion to be determined by the Landlord's surveyor whose decision (save in the case of manifest error) shall be decisive" (emphasis added). In my judgment, the effect of s.27A(6) cannot be to render void the whole of the second part of the definition. The prohibition is designed to avoid ousting the jurisdiction of the First Tier Tribunal (or Leasehold Valuation Tribunal) but it does not oust "a matter which has been agreed or admitted by the tenant", see s.27A(4)(a). The matter which the tenant has agreed is to pay (in the other cases) a fair proportion or (in this case) 1/42 or a fair and reasonable proportion.

90. However, in my view that does not entitle the Tenant in this case to argue that every cost should be apportioned on a fair and reasonable basis. To do so would defeat the purpose of specifying any fixed proportion. A proper approach to the definition of Service Charge Proportion in this case is to treat the agreement to pay 1/42 as the starting point. The fact that the specified alternative is a 'fair and reasonable proportion' suggests that the parties agreed that, in general, 1/42 would be a fair and reasonable proportion. Where a cost is one which was anticipated at the start of the lease and is a regularly recurring cost such as the cost of electricity and water, in my judgment the parties can be taken to have agreed that 1/42 would normally be expected to be a fair and reasonable proportion. In the context of the Tenant's complaint that his flat is only a one bedroom flat whereas other flats are two and three bedroom flats which likely consume more water, this would have been known when the lease was granted but the parties nevertheless agreed that 1/42 would be a reasonable apportionment. In my judgment, there would need to be some good reason why that is not a fair and reasonable proportion in those circumstances, for example, an unexpected change like a subsequent sub-division of flats. A determination as to reasonableness pursuant to s.19 of the 1985 Act has to be undertaken in the context of the terms of the Lease. Thus, the LVT would be entitled to conclude that 1/42 of the cost should be paid but should have addressed its mind to this issue rather than simply concluding that they were bound to order 1/42 be paid.

91. In my view, the remaining issues relating to water costs are also subsumed in the arguments relating to the Coopers Court decision in the same way as electricity costs. In that case the LVT arrived at its figures for service charge after conducting its own reconciliation and a "thorough analysis" of all the Landlord's invoices, paragraph 55. These included invoices relating to water, see paragraph 58. One of the points it made was that the Landlord had omitted some water invoices when calculating the service charge, a point Mr Roberts made as well, the implication being that the Coopers court LVT took those additional water invoices into account. It is therefore clear that they carefully considered the water invoices against the service charge demanded. There is no evidence of any leak at Dray Court such as would account for the difference in water bills, indeed the Tenant's own analysis of the water bills shows no bills for Malt House lending weight to the assertion that the supply to that block is included in

the bill for Dray Court. As I have already stated, the LVT in this case provided no reasons for adopting different general service charge figures from those in the Coopers Court decision and the LVT will have to reconsider the issue relating to water charges in the light of the service charge figures determined in the decision in Coopers Court. If the LVT is going to depart from the Coopers Court decision figures, it must give proper reasons.

92. When this case is remitted to the LVT it will be open to the Tenant to argue that the service charges for 2014 and 2015, which were not considered in the Coopers Court decision, should be reduced to reflect the true cost in the water invoices. Neither the Landlord nor the Tenant's analyses of the 2014 and 2015 water bills appeared to me to be correct but that will be a matter for the LVT to determine.

93. The LVT will also have to decide whether 1/42 of the water charges should be paid or, having regard to the guidance given in paragraph 90 above, a different proportion would be fair and reasonable in all the circumstances. In this appeal the Tenant has not challenged any of the other charges on the grounds they should be apportioned in some other way rather than 1/42 and he is not entitled to do so in respect of any other service charge costs which are remitted to the LVT for reconsideration.

94. In post hearing correspondence the Tenant argued that he did challenge the service charges on the grounds that they should be apportioned other than by 1/42. This is true of his appeal to the LVT but the only grounds on which he was permitted to appeal to the Tribunal are those summarised in paragraph 4 above. Paragraph 10 of the order dated 23 January 2017 granting permission states "Whether any of the determinations in paragraph 35 of the draft grounds of appeal is appropriate will only be capable of ascertainment once the appeal has been determined, and can be dealt with as appropriate as consequential matters." The Tenant relies upon paragraph 35(d) of the draft grounds of appeal as raising this issue. However, paragraph 35(d) states that "A determination was made under this heading and has been appealed for the reasons stated above." The order granting permission is quite specific as to which of the "reasons stated above", i.e. paragraphs 1 to 34, have been granted permission to appeal. This is not one of them nor is it mentioned in the earlier paragraphs (save in relation to water charges). In my judgment paragraph 35(d) is not sufficiently clear to justify treating the order granting permission to appeal to the Tribunal as granting the Tenant permission to re-open the question of whether the apportionment should be 1/42 in respect of the balance of the service charges, other than water.

(7) 'Surplus'

95. Mr Roberts argued that it was wrong for the Landlord to continue to accumulate a surplus each year without adjusting the service charges at the end of each year and crediting the tenants with the surplus as envisaged by the Lease. As a result the tenants are being overcharged. Insofar as there is a debt owed by tenants for unpaid service charges it should be recovered, not funded by charging a higher service charge. He illustrated his submission by reference to the Service Charge Statement of Account for 2012 which showed expenditure totalled £60,646. Divided by 1/42 that figure should give rise to a service charge of £1,444 not the £1,656 charged. He submitted service charges should be reasonable and based on actual expenditure not a 'guesstimate.'

96. Mr Bradshaw submitted that it was necessary for the Landlord to levy the quantum of service charges that it did in order to meet the costs of maintenance and to pay utility bills. The Managing Director of the managing agent, Mr John Socha, had given detailed evidence to the LVT about the

Landlord's accounting processes. He had explained that the actual expenditure was constrained by the underpayment of service charges which had been endemic under the previous manager but which was slowly now being brought under control. This was demonstrated by the 2015 Service Charge Statement of Account which showed the amount of service charges owed by tenants was reducing. The Landlord could not spend money it did not have and was obliged to meet its obligations to pay for utilities and carry out essential maintenance. The LVT accepted that in reality there was no 'surplus' that could be credited, it was a debt owed to the Landlord by tenants who had failed to pay service charges. It did not lie in Mr Roberts' mouth to complain about this as he had paid no service charges at all in the period 2009 to 2015 the subject of the LVT proceedings.

97. For the purpose of considering these submissions I put on one side the Reserve Funds shown in the Service Charge Statements of Account which I have already dealt with and concentrate on the balance of the 'surplus' shown in them.

98. The definition of 'the Service Charge' in the Lease is contained in paragraph 2 of Part 3 in the Eighth Schedule. It is 'the Service Charge Proportion [i.e. 1/42 or a fair and reasonable proportion] of the Expenditure paid or incurred in that Service Charge Period.' 'Expenditure is defined in paragraph 1 as 'the aggregate of the costs, expenses and amounts mentioned in Part 2'. Part 2 contains a standard list of services that one would expect a landlord to provide to the Development. Just as the list in Part 2 does not include establishing a reserve fund, neither does it include establishing a surplus to subsidise the non-payment by some tenants of service charges.

99. Further, the scheme of the service charge machinery envisages payments on account, referred to as Interim Payments, based on estimated expenditure and then adjustment at the end of the Service Charge Period. Paragraph 4 provides that the landlord may at any time notify the Tenant of a "reasonable estimate of the Expenditure and of the Service Charge for a Service Charge Period and may from time to time revise that estimate". Paragraph 5 provides that the Tenant will pay the "estimated Service Charge". Paragraph 8 imposes an obligation on the landlord to supply a Service Charge Statement as soon as practical after the end of each Service Charge Period. Then paragraphs 9 and 10 make provision for the adjustment. Under paragraph 9, if the Service Charge exceeds the interim payments the Tenant "<u>will pay</u> the difference" to the Landlord (emphasis added). Under paragraph 10, if the Service Charge is less than the Interim Payments "the overpayment <u>will be credited</u> to the Tenant against the next payment of Service Charge" (emphasis added).

100. Thus, both the on-account payments of service charge and any adjustment at the end of the year have to be based on an estimate of the cost of supplying the services set out in Part 2 and then the actual costs. No provision is made for the service charge (whether estimated or actual) to include any cushion to reflect the fact that some tenants are not paying. At the hearing I enquired why the Landlord had not financed the shortfall through borrowing and recovering the interest from the tenants as part of the service charge. Mr Bradshaw said it could not do so. However, paragraph 11.2 of Part 2 in the Eighth Schedule clearly states that one of the costs which may be included in the Expenditure is "Interest, commission, fees and charges in respect of any money borrowed to finance any services, items or functions referred to in this Schedule." Borrowing to cover the deficit caused as a result of non-payment by tenants would be covered by such a provision, see e.g. *Skilleter v Charles* [1992] 1 EGLR 73, CA.

101. To return to the issue which arises in this appeal, the question is whether the LVT's decision that the on-account services charges demanded were reasonable is lawful. In my judgment it was not. As I have already said in the context of the Service Charge Proportion, reasonableness has to be considered in the context of the contractual rights and obligations of the Lease. It cannot be reasonable for the Landlord to charge on-account service charges for the purpose of providing a surplus to cover the costs of tenants who are in arrears of service charges because the Lease does not authorise the recovery of a service charge for this purpose. True it is that each year an Estate Budget is provided which purports to estimate expenditure on items legitimately included in Part 2 of the Eighth Schedule and this forms the basis of the on-account demands for service charge. The Estate Budget does not include an item which expressly provides for a surplus. However, the reality is that the Landlord has deliberately continued to claim on-account service charges based on an Estate Budget the purpose of which is to ensure that there is not a shortfall in cash to pay for maintenance of the Development and which therefore charges the tenants more than the actual cost of providing the services.

102. That does not mean that the Tenant does not owe a substantial sum in service charges. The appropriate course is for the Landlord to retrospectively prepare service charge accounts which comply with the terms of the lease and identify for each tenant an appropriate credit which is carried forward and which will reduce over time until it is virtually nil, when all service charge payments are up to date. If any further shortfall is anticipated as a result of non-payment by tenants it may be financed through borrowing as the Lease envisages and the service charges will have to bear the cost of any interest payable on such borrowing. Such accounts should be prepared before the hearing of this remitted case at the LVT so that the LVT may consider the reasonableness of the service charges demanded in a proper context. Although the demands are all for on-account payments, given that they relate to historic figures the actual costs are now available in the accounts and may be used.

103. For completeness I should add that in my view this does not give rise to any issues relating to s.20B of the 1985 Act. The fact that the on-account demands for service charges have been excessive because they exceed the likely expenditure does not mean they are invalid demands. If that were the case any service charge demand which was found at a later date to include a sum that should not have been included would be invalid and not comply with s.20B(1). In fact, in the *Shulem* case, Morgan J envisaged that in order to comply with s.20B(1), it would be open to a landlord to err on the side of caution and include a figure which will enable it to comfortably recover all the anticipated costs, see paragraph 58. Therefore the service charge demands the subject of these proceedings remain demands which satisfy s.20B(1). In any event, I have also held that the Service Charge Statements of Account also satisfy s.20B(2).

Section 20C

104. After reaching a decision on the issues remitted to it, the LVT will have to reconsider whether to make an order under s.20C of the 1985 Act that all or any part of the costs of the LVT proceedings should not be regarded as relevant costs to be taken into account when determining the amount of service charges.

105. I will consider any submissions the parties wish to make as to whether I should make an order under s.20C in respect of the costs of this appeal and whether I should make any other order for costs. This decision is final on all matters other than those two issues (an order under s.20C and the costs of

the reference). The parties may now make submissions on such costs and a letter giving directions for the exchange and service of submissions accompanies this decision

Dated 29 December 2017

Her Honour Judge Alice Robinson

Costs addendum

106. Both parties made written submissions as to costs. In his submissions dated 22 January 2018, Mr Roberts made an application for an order pursuant to s.20C of the 1985 Act in relation to the costs of the appeal and the LVT proceedings on a number of grounds. At the outset I note that, as pointed out by the Landlord in its' submissions dated 5 February 2018, in paragraph 104 of my decision I made it clear that the LVT will have to consider whether to make a s.20C order in respect of the LVT proceedings when it has re-determined those matters which were remitted to it. In particular, the relevance of the offer to settle referred to by Mr Roberts in his submissions can only be determined when the final amount of services charges owed has been determined. Therefore, at this stage I will only deal with the application for an order pursuant to s.20C insofar as it relates to the costs of the appeal.

107. As to this, Mr Roberts submitted that he had won 5 of the 7 points on which permission to appeal had been granted which he described as the 'meat' of the appeal. Accordingly, it would be fair and reasonable to make an order under s.20C.

108. As to the costs of the appeal, Mr Roberts submitted that the Landlord had behaved "unreasonably" for the purposes of rule 10(3) of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 ("the 2010 Rules") in resisting the appeal for a number of reasons: the Tenant's appeal had succeeded to a significant extent, part way through the hearing the Landlord had conceded that the figures determined by the LVT in the Coopers Court decision were correct, the Landlord had strongly resisted matters which were judged to be unlawful and the Landlord had unnecessarily insisted on a huge bundle which had been very expensive to produce.

109. The submissions on behalf of the Landlord are that, having regard to the principles which apply to s.20C summarised in *Bretby Hall Management Company Ltd v Pratt* [2017] UKUT 70 (LC) at paragraph 46, both parties had succeeded to a significant extent in the appeal. The Landlord did not act unreasonably in opposing the appeal and any order under s.20C should be proportionate and in any event for not more than 50% of the costs of the appeal. As to an order for costs, it is submitted that the appeal was hard fought on both sides but neither side behaved unreasonably. The concession made in relation to ground rent was at an early stage and the decision does not suggest any culpability on the part of the landlord generally. No order for costs should be made.

110. I start by considering whether an order for costs should be made in the appeal. The combined effect of rule 10(2) and 10(3)(b) of the 2010 Rules, as amended, is that an order for the costs of this appeal may only be made

> "if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings."

111. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290(LC) the Tribunal (Martin Rodger QC, Deputy President and Siobhan McGrath, Chamber President, First-tier Tribunal (Property Chamber)) rejected a submission that the word unreasonable in this context should be given a wide interpretation and said:

> "An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level." (paragraph 24)

112. In my judgment, it is necessary to consider the points on which parties succeeded and failed in the appeal. The ground rent issue was conceded at an early stage by the Landlord who has not acted unreasonably in this respect, although, for the same reason, it was undoubtedly proper for the Tenant to appeal on this ground.

113. The Tenant was wholly unsuccessful on both the second and third issues relating to the validity of service charge demands and compliance with s.20B of the 1985 Act. Any previous non-compliance had been remedied well before the appeal. However, in order to deal with these issues it was necessary to look carefully at a multitude of service charge demands, their compliance with legislation and the application of a number of Court of Appeal decisions to the particular circumstances of the case. In my judgment neither party acted unreasonably in this respect. I take into account that part of the difficulties which arose relating to compliance with s.20B of the 1985 Act stemmed from fact that the Landlord had not complied with the Lease by failing to serve any balancing statements. This, coupled with the fact that estimated service charges were based on the same figure each year, obscured the actual amount spent on service charges and the amount needed to finance non-payment of services charges by some tenants. For this reason, the Tenant wholly succeeded on the last issue relating to the 'surplus'.

114. As far as the remaining issues are concerned, these largely (though not wholly) turned on the effect of the Coopers Court decision. As to this, the Landlord conceded during the course of the appeal hearing that the LVT had failed to have regard to important findings in that decision. The fact that this was an error on the part of the LVT does not mean that the Landlord could not have conceded this at an earlier stage. Nevertheless, the Tenant raised a number of complaints about electricity and water charges which would have necessitated examination of these in the appeal in any event and in my view it would be going too far to say that it was unreasonable for the purposes of rule 10(3)(b) of the 2010 Rules for the Landlord not to have conceded this issue earlier. Further, although I held that the LVT adopted the wrong approach towards the calculation of the Service Charge Proportion in relation to water charges, I also rejected Mr Roberts submissions about this.

115. Whether looked at in the round or in relation to individual points won or lost, I do not consider that the Landlord has behaved unreasonably in defending or conducting the proceedings such that an order for the costs of the appeal should be made.

116. As far as the costs of the bundles are concerned, Mr Roberts took a great many detailed points about the individual charges and service charge demands and it was necessary for the Tribunal to look at quite a lot of the documents. I do not consider the Landlord behaved unreasonably in this respect either.

117. However, the appeal has succeeded in the sense that a number of issues have been remitted to the LVT for redetermination. In those circumstances I consider it is appropriate to make an order pursuant to rule 10(14) of the 2010 Rules that the Landlord pay to the Tenant any fees which have had to be paid in the appeal.

118. I turn to consider the application for an order pursuant to s.20C of the 1985 Act. This provides, so far as relevant, as follows:

> "(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 leasehold valuation tribunal or the First-tier 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.
>
> …
>
> (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."

119. The principles which apply to an application for an order under s.20C(1) have been helpfully summarised by the Tribunal (HHJ Behrens) in *Bretby Hall Management Company Limited v Christopher Pratt* [2017] UKUT 70(LC) paragraph 46 as follows:

"1. The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.

2. The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.

3. Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.

4. The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.

5. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income."

120. No material costs have been incurred on issue (1) which was conceded at an early stage. In my judgment the Tenant has squarely failed in the challenges to the validity of the service charge demands (issues (2) and (3)), had mixed success on issues (4) to (6) and succeeded on issue (7). I have already held that neither party acted unreasonably in the conduct of the proceedings. However, I have also said that part of the difficulties which arose relating to compliance with s.20B of the 1985 Act (issue (3)) stemmed from fact that the Landlord had not complied with the Lease by failing to serve any balancing statements and this was also the reason for the Tenant's success on issue (7), the 'surplus'. In my judgment it would be unjust if the Tenant were required to contribute towards those costs of this appeal which were in large measure generated by the Landlord's failure to comply with the lease.

121. Recognising there is no mathematical precision about the figures and having regard to the points won and lost, I consider that the outcome which would most nearly accord with what is just and equitable in the circumstances is to make an order under s.20C in respect of one half of the Landlord's costs of the appeal.

122. I therefore order that

(1) The Landlord pay to the Tenant any fees which the Tenant has had to pay in this appeal, and

(2) one half of the Landlord's costs of this appeal 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.

Dated 19 March 2018

Her Honour Judge Alice Robinson