FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOAH/LSC/2021/0390**
Property	**:**	**55 Penge Road, London SE25 4EJ**
Applicants	**:**	**Ms Nordica Thomas ("First Applicant"), Kingwood Property Developments Ltd ("Second Applicant") and Ms Fadila Atif ("Third Applicant")**
Representative	**:**	**Ms Lorna Morgan of Harmens representing First Applicant and Second Applicant only**
Respondent	**:**	**Assethold Limited**
Representative	**:**	**Mr Richard Granby of Counsel, instructed by Scott Cohen solicitors**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Mrs A Flynn MRICS** **Mr O Miller BSc**
Date of hearing	**:**	**22 November 2022**
Date of Decision	**:**	**22 December 2022**

DECISION

Description of hearing

This has been a face-to-face hearing. The decision made is set out below under the heading "Decision of the tribunal".

Decision of the tribunal

The disputed service charges to which these applications relate, namely the actual service charges for the years 2016/17 to 2020/21 inclusive and the budgeted service charges for the year 2021/22, are all fully payable, albeit that the second six-monthly payment for 2021/22 is not due until 25 December 2022 (as is accepted by the Respondent).

NOTE 1: *The Applicants should note that because the figure for 2021/22 is a budgeted figure it will be subject to a balancing adjustment in due course once the actual cost of services is known.*

NOTE 2: *The parties' attention is drawn to paragraphs 81 to 85 below which contain further directions in relation to the existing 'wasted costs' order and in relation to any other cost applications that the parties have made or wish to make.*

Introduction

1. The Applicants seek a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the reasonableness and payability of certain service charges.

2. The Property is a converted terraced house currently comprising 6 flats, although a seventh lease has been granted in respect of a flat which is yet to be constructed (Flat F). Ms Nordica Thomas ("**the First Applicant**") is the leaseholder of Flat C of the Property (known as 55C), Kingwood Property Developments Ltd ("**the Second Applicant**") is the leaseholder of Flat D (known as 55D) and Ms Fadila Atif ("**the Third Applicant**") is the leaseholder of Flats A and B (known respectively as 55A and 55B). The Respondent is the freehold owner of the Property and is the Applicants' landlord.

3. The First Applicant and Second Applicant were represented by Ms Lorna Morgan of Harmens, a non-practising solicitor, whilst the Third Applicant was representing herself having previously also been represented by Ms Morgan. The Respondent was represented by Mr Richard Granby of Counsel, instructed by Scott Cohen solicitors.

4. The hearing bundle contains a copy of the lease of 55C, and it is common ground between the parties that the other leases are in the same form as that for 55C for all purposes relevant to these proceedings.

5. The Applicants dispute the payability of the whole of the service charges for the years 2016/17 to 2021/22 inclusive. The service charges demanded by the Respondent from each of the Applicants is the proportion payable by the relevant Applicant under their lease (as varied, where applicable), of the following total sums for each year:-

2016/17	£15,460.53
2017/18	£5,071.85
2018/19	£8,233.44
2019/20	£26,162.55
2020/21	£9,748.50
2021/22	£10,984.43 (budgeted sum).

Procedural background

6. This case was originally due to be heard on 26 May 2022. However, the panel due to hear the case ("**the Original Panel**") was provided with voluminous documents at the last minute and was also informed that there were other documents which it had not yet seen. In addition, Ms Morgan (the representative for the First Applicant and the Second Applicant) attended the hearing some 45 minutes late and then sought to raise preliminary issues as set out in a document that she had lodged the day before. This was the first involvement of Ms Morgan and of the First Applicant and Second Applicant in these proceedings.

7. The Original Panel took the view that it was impossible for it to consider the late submissions without more time. Furthermore, the Original Panel considered that the Applicants had not grasped the tribunal's previous directions and were instead seeking simply to categorise each item in dispute as being fraudulent. Those allegations of fraud were not confined to the Respondent but seemed to include Tribunal Judges and County Court Judges.

8. The Original Panel noted that of particular concern to the Applicants was the manner in which the Respondent was said to have acquired the freehold in 2017. In addition, it was said that because the leases in aggregate potentially allowed for the recovery of more than 100% of the service charges, an issue which had been dealt with by this tribunal earlier this year (but not to the Third Applicant's satisfaction), the Respondent was wrongly holding money belonging to the Applicants.

9. The Original Panel advised the Applicants that it would need to adjourn the proceedings in order to achieve some semblance of structure, with the main reasons for its inability to deal with the case on the day being the inability of the Third Applicant to grasp what was required of her and in particular the non-involvement of Ms Morgan on behalf of the First Applicant and the Second Applicant until the very last moment. Ms Morgan accepted at that adjourned hearing that she was at fault. Indeed, when the Original Panel indicated that there would need to be costs orders made under the provisions of Rule 13 of the Tribunal Procedure (First-tier tribunal) (Property Chamber) Rules 2013 ("**Rule 13**") she said that she should bear the relevant costs by way of a 'wasted costs' order.

10. The Original Panel then proceeded to make a wasted costs order against Ms Morgan under the provisions of section 29(4) Tribunals, Courts and Enforcement Act 2007, as provided for in Rule 13. She told the Original Panel that she was a solicitor and represented the First Applicant and the Second Applicant and accepted that she was at fault for not engaging with the proceedings to date. The Original Panel ordered that she pay the wasted costs of the adjourned hearing, to include Counsel's fees, which the Original Panel was advised were £2,750 plus VAT. The Original Panel declined to make an award of that amount immediately, noting that under the provisions of Rule 13(9) it could order payment on account. It ordered that Ms Morgan pay the sum of £1,000 in 28 days, with the balance to be be reviewed at the conclusion of the case.

11. The Original Panel went on to point out to the Applicants what was expected of them. The directions previously given had made it quite clear what steps they should take, but they had failed to take those steps. The First Applicant and the Second Applicant needed to be in a position to support the case that they had set out in the application. As regards the Third Applicant, she could not rely on a video and allegations of fraud. She needed to complete the Scott Schedule provided, highlighting those expenses that she was challenging, saying why, and giving alternative costs. The Original Panel also made it clear that it would not revisit decisions made by this tribunal in earlier cases or matters which have already been determined in the County Court.

12. As part of its further directions when adjourning the case, the Original Panel directed the Respondent to disclose to the Applicants by 10 June (later changed to 24 June) 2022 relevant correspondence concerning its acquisition of the freehold of the Property, including copies of any notices sent or received under the Landlord and Tenant Act 1987, or a full explanation as to why they were not available.

13. It is also worth highlighting that there have been numerous complaints by the parties about each other's conduct in relation to case management issues. The case management issues have involved an

exceptional amount of the tribunal's time, and the tribunal's response to the various complaints is a matter of record.

Applicants' case

14. In addition to the application itself, the First Applicant and the Second Applicant have submitted a written skeleton argument and have also provided some written supporting documentation. The Third Applicant has provided a written statement containing her submissions and she too has also provided some written supporting documentation.

15. We will begin with the First Applicant and Second Applicant's written skeleton argument which the Third Applicant also effectively adopted at the hearing and which constitutes the main thrust of the Applicants' case. In that skeleton argument it is submitted that the Respondent is unable to claim payment of the service charges for the years 2016/17 to 2021/22 inclusive because the claim is based on its own dishonesty to a degree which precludes the tribunal from assisting the Respondent. In relation to this point the First Applicant and the Second Applicant rely on the doctrine of *ex turpi causa* and on the decisions of the Supreme Court in *Patel v Mirza [2016] UKSC 42*, *Stoffel & Co v Grondona [2018] UKSC 0187* and *Takhar v Gracefield Developments Limited and others [2017] UKSC 0072*.

16. The skeleton argument states that the Respondent has denied the tenants their statutory right to acquire the freehold interest in the Property at the price paid by the Respondent. Specifically, the Respondent deliberately misled the tribunal by telling it that the relevant notices under section 5 of the Landlord and Tenant Act 1987 ("**the 1987 Act**") and section 3A of the 1985 Act had been served. The argument continues that the Respondent then *"persistently abused its right as landlord by prematurely demanding payment of service charges, receiving 125% of the service charge and not crediting the excess service charges pro rata to the tenants who had overpaid them"*. The skeleton argument also refers to the Respondent *"claiming service charge contributions from the tenants for works which were not carried out and/or which were unnecessary and/or which were unreasonable"*.

17. In support of the position of the First Applicant and the Second Applicant the skeleton argument provides a chronology of certain events relating to the purchase of the Property by the Respondent and the answers to enquiries relating thereto. The skeleton argument also contains a summary of what are stated to be the Respondent's actual expenses between 2016 and 2020, a completion statement for the purchase of 55C Penge Road as at 24 March 2016, a summary of what are stated to be the service charge and ground rent payments for 55D Penge Road between 20 February 2017 and 9 January 2018, other

payment summaries in respect of 55C and 55D, and some copy correspondence.

18. The abovementioned documents and items of correspondence are not specifically referred to in the skeleton argument itself, although the skeleton argument does refer to a tribunal direction dated 30 May 2022 directing that *"by 10 June 2022 the Respondents are to disclose to the Applicants relevant correspondence concerning the acquisition of the freehold of the subject property, including copies of any notices sent or received under the Landlord and Tenant Act 1987, or a full explanation as to why they are not available"*. It is also stated that the notes to the directions at paragraph (c) read: *"if the Respondent fails to comply with these directions the Tribunal may bar them from taking any part in all or part of these proceedings and may determine all issues against it pursuant to Rules 9(7) and (8) of the 2013 Rules"*.

19. The First Applicant and the Second Applicant have also provided a large separate bundle of supporting documents and copy correspondence, but they have not provided a written statement of case. Their only written arguments are therefore contained in the skeleton argument itself, and the skeleton argument does not explain which of the documents and correspondence either support the arguments contained in the skeleton argument or support some other argument not articulated in the skeleton argument.

20. The Third Applicant, on the other hand, has provided a written statement of case. She states that the Respondent has no right to demand any service charges as it has breached her lease and has failed to carry out any work in the building which she states is now in a very bad condition. She has provided copy photographs of the building. She also states that the Respondent has breached the lease and committed a criminal offence by charging her 50% of the whole service charge. Furthermore, she states that the Respondent has 'scammed' her bank *"by taking £24,000 in both mortgages"* and has provided copy bank statements. She adds that the Respondent cannot take payments from her bank account without carrying out their duties and obligations under section 35 of the 1987 Act.

21. The Third Applicant states that the Respondent *"has failed to give any notice to join the freehold towards the leaseholders"* and also makes reference to rights and obligations under section 35(2) and section 35(D) of the 1987 Act (presumably meaning section 35(2)(d)), section 20C of the 1985 Act and section 38(10) of the 1987 Act.

22. The Third Applicant also refers to, and expresses her dissatisfaction at, previous county court decisions in disputes between her and the Respondent and a previous tribunal decision also relating to service charges.

23. In addition, the Third Applicant has provided a 'Scott Schedule' in which her stated reasons for disputing the whole of the service charges are *"Landlord has breached the lease and law and has committed criminals' offence"* and *"Landlord has no right to claim the service charges under the lease"*.

Respondent's case

24. In written submissions, the Respondent states that the leases provide for the service charge to be paid by the leaseholders in the following proportions:-

Ground Floor Flat	12.5%
Flat A	25%
Flat B	25%
Flat C	25%
Flat D	12.5%
Flat E	25%
Flat F	16.67%.

25. As Flat F is yet to be built no service charge demands have yet been issued to it.

26. The Applicants previously applied to the tribunal for a variation of their leases, as the percentages added up in aggregate to more than 100%. The application was struck out against Flats C and D for default in compliance with the tribunal's directions. In relation to Flats A and B, the tribunal determined that the proportion should be changed from 50% (in aggregate) to "a fair and reasonable proportion". The leaseholder of Flats A and B, the Third Applicant in this case, applied for permission to appeal that decision but permission was refused.

27. The Respondent contends that the disputed service charges are reasonable. It states that the leases contain the relevant provisions obliging the Respondent to provide services and to carry out works and obliging the Applicants to contribute towards the cost of those services and works, and it has provided a summary of the relevant lease clauses.

28. In its written skeleton argument, the Respondent notes that the First Applicant and the Second Applicant have not filed statements of case. Whilst the Third Applicant has done so, the Respondent contends that

her statement of case has only a limited relationship with the actual application before the tribunal.

29. The Respondent goes on to state that the substance of the Applicants' applications appears to be an allegation that the Respondent and/or its predecessor in title failed to comply with the notice requirements of section 3A of the 1985 Act and section 5 of the 1987 Act relating to the Right of First Refusal on disposal/acquisition of the freehold. The Respondent understands the Applicants to be contending that as a result of such alleged failure the Respondent is not entitled to demand service charges. The Respondent does not dispute the contention that section 3A notices and section 5 notices were required to be served.

30. The Respondent emailed the tribunal on 5 August 2022 stating that it did not have any section 5 notices whilst providing copies of section 3 notices served on leaseholders. The Respondent accepts that it has not produced any direct evidence that its predecessor in title served notice under section 5 of the 1987 Act or that it served notice under section 3A of the 1985 Act, but it puts this down to poor communication from solicitors.

31. The Respondent's skeleton argument anticipates what the Respondent was expecting the First Applicant's and Second Applicant's representative to argue at the hearing. It notes that Part I of the 1987 Act creates a statutory scheme whereby if a landlord disposing of property does not serve notice under section 5 (giving notice of the sale particulars and of the right of first refusal) there is a mechanism under which a qualifying majority of leaseholders can acquire the freehold from the purchaser on the same terms as those on which the purchaser acquired the freehold from its predecessor in title. The time for exercise of that right runs from the date of service of the section 5 notice or, if it not served, from the date of service of the notice required to be served by an incoming landlord under section 3/3A of the 1985 Act. However, the Respondent contends that this does not impugn or limit the new registered proprietor's title or its rights or obligations under the leases to which it holds the reversion following acquisition of the freehold interest, and a failure to serve a section 5 notice does not prevent the passing of good title to the purchaser of the freehold interest.

32. The Respondent also states that it complied with section 3 (copy section notices in the hearing bundle) and that it 'appears' that section 5 was complied with by its predecessor in title. In support of this contention, it has provided a copy of an email dated 10 October 2016 from a Peter Long to a Stephen Clancy stating as follows (under the heading 'Penge'): *"The section 5 notices were served and expired on the 6 October. Please advise that we can complete on the next day or two"*.

33. On the basis of previous comments made on behalf of the Applicants, possibly at the hearing before the Original Panel on 26 May 2022, the Respondent states that the Applicants appear to rely on the doctrine of *ex turpi causa* as expressed by the Supreme Court in *Patel v Mirza [2016] UKSC 42*, and indeed that case is referred to in the First Applicant's and Second Applicant's skeleton argument provided after the Respondent's skeleton argument was provided. The doctrine essentially covers the circumstances in which the courts should refuse to assist a party whose claim is based on an illegal or immoral act.

34. The Respondent submits that the Applicants' reliance on the doctrine of *ex turpi causa* in this case is misplaced. First, nothing about the leases themselves – the contracts which are before the tribunal – is unlawful. Secondly, the Land Registry's title register is conclusive as to ownership. Thirdly, it is not illegal or contrary to public policy to enter into a contract for the sale of land where the other party has not served a section 5 notice. Fourthly, a landlord who has not served a section 3A notice places itself at risk of the leaseholders exercising the right of first refusal more than 6 months later or at risk of committing a criminal offence, but there are no other statutory consequences. Furthermore, the Supreme Court in *Patel v Mirza* did not accept that there was a general principle that contracts or arrangements involving illegality will not be enforced. Instead, it concluded that the question of whether a court will grant or refuse relief in any case is a fact-specific and context-specific decision.

35. The Respondent also notes another argument raised by Ms Morgan at the hearing on 26 May 2022, but not in written submissions, namely that the leases require that any payments received by the landlord that in aggregate exceed 100% of the service charge expenditure must be held to the credit of the leaseholders. The Respondent does not accept that payments have exceeded 100%, presumably because of the arrears as payments did at least have the **potential** to exceed 100% as the aggregate percentages equalled 125% prior to the decision on the application for lease variation. In any event, the Respondent states that the leases merely refer to the relevant leaseholder being *"credited in the books of the Managing Agents or if none the Lessor"* if the on-account payment exceeds the amount underpaid by that leaseholder. The Respondent submits that this simply means that if the leaseholder overpays their own contribution as defined by their own lease they are entitled to a credit for the following year and that this should not be construed as a 'backdoor' way of altering the agreed apportionments.

Mr Gurvits' witness evidence

36. Mr Ronni Gurvits of Eagerstates Limited, the Respondent's managing agents, has given a witness statement and was available at the hearing to be cross-examined on that witness evidence.

37. In his witness statement Mr Gurvits states that there were problems with the management of the Property from the outset. When the Respondent purchased the Property it was apparent that the Property was in need of various services and works to bring it up to a reasonable standard. The Respondent therefore proceeded to undertake certain items of repair and maintenance and issued service charge demands. Copy invoices and demands are contained within the hearing bundle.

38. He states that from the outset service charge payments were withheld by all but one of the leaseholders, and as at 29 April 2022 there were service charge arrears of more than £70,000. Due to the arrears position, the Respondent has been obliged to prioritise when deciding what works to carry out. Mr Gurvits has provided a brief summary of the services and repairs that have been undertaken and of the steps taken to pursue arrears.

39. With regard to the issues raised in connection with the purchase of the Property, Mr Gurvits states that he believes that the previous owner's solicitors served section 5 notices and that these expired on 6 October 2016. At the hearing he was cross-examined by Ms Morgan and he confirmed that he knew the section 5 notice to be an important document. Ms Morgan asked him why, in that case, he had not queried its non-production. He replied that he had been told by the solicitor that it existed.

Oral submissions at hearing

Ms Morgan's submissions for First Applicant and Second Applicant

40. Ms Morgan said that it was accepted that the landlord could recover 125% of the cost of services if this was the aggregate percentage payable under the leases. However, she added that under clause 5(h) of each lease the landlord is required to keep proper books of account and credit each amount paid to the relevant leaseholder's account.

41. Ms Morgan then went on to state that in a previous case between the Second Applicant and the Respondent – *Kingswood Property Developments Limited v Assethold Limited [2019] UKUT 383 (LC)* – the Upper Tribunal held that the Respondent had levied service charges 6 months earlier than it should have done and therefore that its demands were premature.

42. With regard to the section 3A and section 5 notices, there was no proper evidence that these had been served.

43. With regard to the arrears of service charge, as at 26 July 2017 the First Applicant's service charge account was £633.10 in arrears but the Respondent demanded payment of £4,406.52.

44. In relation to the decision of the Supreme Court in *Patel v Mirza*, Ms Morgan referred the tribunal to paragraph 102, section B, submitting that this section is authority for the proposition that the courts will not enforce rights arising out of an act which is anti-social. She also cited paragraph 99 of that decision as stating that a person should not profit from their wrongdoing and that the law should be coherent and not condone illegality. She added that *Patel v Mirza* dealt with the common law, not statute, and looked at the principles that should be followed.

45. Ms Morgan then referred to the decision of the Supreme Court in *Stoffel & Co v Grondona*, stating that according to paragraph 44 of that decision one branch of the law should not permit a person to profit from something regarded as illegal by another branch of the law. In relation to the decision of the Supreme Court in *Takhar v Gracefield Developments Limited*, Ms Morgan said that it showed that a person cannot hide behind fraud. It was also authority for the proposition that if fraud and finality conflict then finality has to give way, i.e. the benefit of achieving finality in a case will be outweighed by the need to deal with fraud.

Third Applicant's submissions

46. The Third Applicant said that her case was broadly similar to that of the First Applicant and the Second Applicant. In addition, though, she said that the Respondent had unlawfully taken £8,000 and then £15,000 from her, and she also objected to the forfeiture proceedings taken out by the Respondent against her in the county court.

47. She added that the Respondent has not carried out any work to the Property, or at least that when it does so the work is done in a 'cowboy' manner. Furthermore, the Respondent does not answer when she tries to make contact.

Mr Granby's submissions for Respondent

48. Mr Granby said that the First Applicant and the Second Applicant had not filed any evidence or statement of case. Their application also bore no relationship to how their representative was now seeking to put their case. As for the Third Applicant's statement of case, it covered various issues but did not do so very well. All Applicants appeared to have ignored the warning contained in the directions issued by the Original Panel (see paragraph 11 above).

49. As regards the section 3A notice, Mr Granby submitted that even if it was not served there was nothing in either statute or the textbook 'Woodfall' to indicate that this would or should have any effect on the Respondent's right to claim service charges.

50. The Respondent was only seeking to enforce its contractual rights, and surely it could not be the case that the Respondent is unable to claim service charges but remains obliged to keep the Property in good repair. In his submission, the Applicants have whatever rights statute gives them, for example by following the process set out in sections 11 and 12 of the 1987 Act.

51. Mr Granby did not accept that *Takhar v Gracefield Developments Limited* was relevant to our case. As regards *Kingswood Property Developments Limited v Assethold Limited*, this related only to interim service charges and was therefore not relevant to actual service charges (i.e. service charges calculated at the end of an accounting year based on actual costs). As regards the suggestion that the Respondent had dishonestly made early demands, there was no evidence of this and no proper statement of case (or any statement of case at all in relation to the First Applicant and the Second Applicant) for the Respondent to answer. Furthermore, the most that the Respondent would achieve through this sort of alleged dishonesty would be merely to receive the same amount 6 months early.

52. Regarding the keeping of accounts under clause 4(c)(iii) of the leases, the Applicants' point was misconceived because the leaseholder is obliged to pay the relevant proportion of the service charge as set out in its lease, and in any event there was no evidence that the Respondent had received more than 100% of expenditure because there were significant arrears.

Tribunal's analysis

53. The Applicants' main argument seems to be based on the doctrine of *ex turpi causa* and on the decisions of the Supreme Court relied on by them or at least relied upon by the First Applicant and the Second Applicant. In essence, they state that the Respondent was required to serve a notice on qualifying tenants under section 3A of the 1985 Act and that a notice was also required to be served on qualifying tenants under section 5 of the 1987 Act but that neither notice was served. The argument is that the Respondent failed to serve or procure the service of the relevant notices and that it should not be able to benefit from the failure to do so by being able to charge service charges to leaseholders, especially if such failure constituted a criminal offence.

54. Under section 3A(3) of the 1985 Act *"A person who is required to give notice under this section and who fails, without reasonable excuse, to do so within the time allowed for giving notice under section 3(1) commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale"*. Under section 10A(1) of the 1987 Act *"A landlord commits an offence if, without reasonable excuse, he makes a relevant disposal affecting premises to which this Part applies – (a) without having first complied with the requirements of*

section 5 as regards the service of notices on the qualifying tenants of flats contained in the premises, or (b) in contravention of any prohibition or restriction imposed by sections 6 to 10" and under section 10A(2) *"A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale"*. Neither party has addressed us on the question of whether section 5 of the 1987 Act applies to the Respondent or just to its predecessor in title, but clearly at the very least section 3A of the 1985 Act applies to the Respondent in the sense that any contravention of that section will have been a contravention by the Respondent, and this point has not been disputed by the Respondent.

55. Section 3A(3) states that a failure to give notice within the time allowed by a person required to do so will only constitute an offence if there is no reasonable excuse. However, the Respondent's position is not that it failed to give notice and had a reasonable excuse for that failure; rather, its position is that it believes that it did give notice, and therefore no 'reasonable excuse' defence is being offered.

56. The Respondent concedes that it has no direct evidence that section 3A or section 5 notices were ever served. It took a long time for the Respondent to reply meaningfully to the question of whether the notices had been served, and all that Mr Gurvits was eventually able to do was to state that he believed that the previous owner's solicitors had served section 5 notices. The only documentary evidence offered by the Respondent is an email from a Peter Long to a Stephen Clancy stating (under the heading 'Penge'): *"The section 5 notices were served and expired on the 6 October. Please advise that we can complete on the next day or two"*. It is unclear who Mr Long and Mr Clancy are, no copy notices have been provided, and altogether this hardly constitutes compelling evidence that section 5 notices were actually provided in connection with this particular disposal and that the notices were compliant with section 5 and were properly served. There is also no evidence before us that section 3A notices were served.

57. Based on the somewhat threadbare evidence before us, our factual findings are that:-

(a) beyond reasonable doubt, the Respondent as the new landlord failed without reasonable excuse to give notice to qualifying tenants under section 3A of the 1985 Act within the time limit allowed under section 3(1); and

(b) on the balance of probabilities, the landlord failed without reasonable excuse to serve notice on qualifying tenants under section 5 of the 1987 Act having made a relevant disposal affecting premises to which Part I of the 1987 Act applies.

58. As regards the consequences of the above factual findings, we will now consider the cases cited by the representative of the First Applicant and the Second Applicant. *Patel v Mirza* concerned a situation in which the claimant paid a large sum of money to the defendant under an agreement whereby the defendant would bet on the movement of shares using inside information. This was an illegal agreement. In practice the agreement could not be carried out because the inside information was not forthcoming. The claimant brought a claim for the repayment of the money, and the judge at first instance dismissed the claim as being barred by illegality. The Court of Appeal allowed the claimant's appeal and the Supreme Court upheld the decision of the Court of Appeal, i.e. that the money was recoverable. The Supreme Court noted that there was a common law doctrine of illegality as a defence to a civil claim and said that there were two broad policy reasons for it, namely (i) that a person should not be allowed to profit from that person's own wrongdoing and (ii) the law should be coherent and not self-defeating. However, it went on to state that the rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he/she has to rely on his/her own illegal conduct to establish the claim does not satisfy the requirements of coherence and integrity of the legal system and should no longer be followed.

59. Lord Toulson (with whom Baroness Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed) said [at paragraph 120] that *"the essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear ...). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate"*.

60. On the issue of proportionality, Lord Toulson cautioned against attempting to lay down a prescriptive or definitive list of relevant factors, but he observed [at paragraph 107] that potentially relevant factors included the seriousness of the conduct, its centrality to the contract whether it was intentional and whether there was a marked disparity in the parties' respective conduct. He then went on to state

[paragraph 108] that the integrity and harmony of the law require a degree of flexibility in approaching this matter, adding that punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. Whilst the public interest requires that the civil courts should not undermine the effectiveness of the criminal law, nor should they impose what would amount to an additional penalty disproportionate to the nature and seriousness of any wrongdoing.

61. Lord Toulson also went on to state [paragraph 110] that *"unless a statute provides otherwise (expressly or by necessary implication), property can pass under a transaction which is illegal as a contract ... . There may be circumstances in which a court will refuse to lend its assistance to an owner to enforce his title as, for example, where to do so would be to assist the claimant in a drug trafficking operation, but the outcome should not depend on a procedural question"*.

62. In *Stoffel & Co v Grondona* the Supreme Court again considered the defence of illegality. In that case the question was whether a firm of solicitors could escape liability for their negligent failure to register documents effecting a property transfer because the transfer formed part of an illegal mortgage fraud. The decision in *Stoffel & Co v Grondona* is essentially an application of the principles set out in *Patel v Mirza*. The representative of the First Applicant and the Second Applicant has quoted paragraph 44 of the decision in *Stoffel & Co v Grondona* but has not properly articulated why it assists the Applicants. The contents of that paragraph merely reflect one aspect of a complex balancing exercise for the relevant court or tribunal and do not by themselves prove that the Respondent in this case should be prevented from recovering any service charges.

63. The facts of *Takhar v Gracefield Developments Limited* are quite complicated and the details are not relevant to our case. Focusing on the specific submission made by Ms Morgan, she makes a general point that if fraud and finality conflict then finality has to give way, which appears to be a reference to an extract from a decision by the Ontario Superior Court of Justice in the case of *Canada v Granitile Inc* which has been quoted by Lord Kerr in *Takhar*. Ms Morgan does not go on to develop her point in any way which engages with the combination of factors set out in *Patel v Mirza*, but in any event her point appears to assume that fraud has been proved in the present case. However, even though our factual finding is that notices were not served, there is no evidence whatsoever before us that the Respondent acted fraudulently, i.e. that its failure to serve notices was deliberate and fraudulent. Ms Morgan also refers in a general sense to paragraphs 59 to 67 of the decision in *Takhar*, these being the opening paragraphs of Lord Sumption's judgment, but she does not articulate exactly which aspects of these paragraphs she relies on, what they signify or how to apply them to the facts of our case, and it is not for the tribunal to attempt to construct her case for her.

64. The First Applicant and the Second Applicant have also made a point about the decision of the Upper Tribunal in *Kingswood Property Developments Limited v Assethold Limited*, which concerned the question of whether a particular service charge under the Second Applicant's lease fell due on 25 December 2017 or 24 June 2018. However, whilst that case has a potential factual relevance because it involved this Property and two of the same parties as in the present case, we fail to see its relevance to the question of whether at the date of the present applications the service charges for the years 2016/17 to 2020/21 inclusive are payable. It is relevant to the dates of payment of the estimated service charge for 2021/22, but there is no current dispute on this point as the Respondent has confirmed that it is accepted that the second payment is not due until 25 December 2022.

65. We therefore return to *Patel v Mirza*. It requires us to consider the underlying purpose of the prohibition which has been transgressed, any other relevant public policy, and proportionality. One point worth highlighting is that *Patel v Mirza* concerned an illegal contract, but in the present case there is no illegal contract as such. There is no evidence before us that the freehold transfer itself was an illegal transfer or arose out of an illegal contract and neither is there any evidence that any of the leases are illegal contracts. Instead, the issue is the failure to serve certain notices required under the relevant statutory provisions to alert qualifying tenants to their rights.

66. Secondly, this is not a case in which the failure to serve those notices would be free of consequences if no sanction were to be applied by this tribunal. A breach of section 3A of the 1985 Act and a breach of section 5 of the 1987 Act are both criminal offences, and the sanction is set out in the relevant statute itself. Furthermore, section 11 of the 1987 Act sets out certain other consequences of a failure to serve a section 5 notice which are designed to afford some protection to qualifying tenants.

67. Thirdly, there is no evidence before us that this is a case of fraud. Whilst our factual finding is that notices were not served, and whilst we accept that it is sometimes difficult for a party to prove the state of mind of another party in the absence of any admission or documentary evidence, the fact remains that the Applicants have not demonstrated fraud or an intention to commit a criminal act. This is significant because in the case of *Patel v Mirza* it was clear to the claimant that the contract under consideration was an illegal one with a criminal purpose, and yet the Supreme Court still found in the claimant's favour.

68. Fourthly, what the Applicants are seeking is a determination that no service charges whatsoever are payable for any of the years 2016/17 to 2021/22 inclusive, and by extension they would presumably argue that no service charges should be payable in the future for so long as the Respondent is the freeholder. This, in our view, would not only be

wholly disproportionate but would also lead to the incongruous result that the Respondent would remain liable under the lease repairing covenants and the other landlord's covenants to spend money on maintaining the Property and providing various services but would not be able to recover the cost of any of that maintenance or those services. *Patel v Mirza* and other relevant cases essentially look at whether and in what circumstances a person can **profit** from illegality, but this is not – in principle – a case about profit. The Respondent has obligations under the leases and there are statutory provisions limiting the amount that the Respondent can charge, so that no more than is reasonable may be charged. There are also other statutory protections for leaseholders in relation to service charges. The statutory regime therefore envisages that a landlord will spend a reasonable amount in complying with its obligations and will recover that reasonable amount from leaseholders. The system therefore assumes reasonable reimbursement of actual costs incurred, not that the landlord will make a profit.

69. In *Patel v Mirza*, Lord Toulson specifically makes the point that punishment is a matter for the criminal courts, and we do not consider that it is the role of a civil tribunal to impose what would be a draconian punishment on the Respondent on the facts of this case in circumstances where statute already imposes specific sanctions.

70. As regards the specific passage in *Patel v Mirza* quoted by Ms Morgan, this is not in fact a statement made by the Supreme Court itself. Instead, it is a quote from a view expressed by Diplock LJ in the Court of Appeal decision in *Hardy v Motor Insurers' Bureau* and does not form part of the rationale for the Supreme Court's decision in *Patel v Mirza*.

71. Returning to the three-stage test in *Patel v Mirza*, the present case does not concern a prohibition as such, but the underlying purpose of the requirement to serve notices is to protect the rights of qualifying tenants. Those rights are already protected by the relevant statutory provisions, including the criminal sanctions set out therein. The Applicants have not come up with any coherent arguments regarding public policy. And, for the reasons set out above, it would be wholly disproportionate to determine that no service charges are payable in respect of any of the years in dispute.

72. The Third Applicant has raised concerns regarding the condition of Property and has provided photographic evidence. She has also made other allegations about the Respondent taking money out of her account. Ms Morgan has also made other points, which are referred to below. The difficulty, though, is that neither the Third Applicant nor the other Applicants have heeded the warning of the Original Panel as to how they needed to prepare their case.

73. As noted above, this matter was due to be heard on 26 May 2022. The Original Panel took the view that it could not proceed with the hearing as a final hearing, and it adjourned the hearing. The main reasons given by the Original Panel for the need to adjourn were the inability of the Third Applicant to grasp what was required of her but mainly the non-involvement of Ms Morgan on behalf of the First Applicant and the Second Applicant until the last moment which itself led to a wasted costs order being made against her.

74. At the attempted hearing on 26 May 2022 the Applicants were explicitly advised by the Original Panel in writing (and presumably orally) what they needed to do in order to present their case properly, even though this was already clear from the original directions. However, despite the censure from the Original Panel and the wasted costs order and the clear and explicit advice given by them, the Applicants have seemingly chosen to ignore that advice. The First Applicant and the Second Applicant have provided no statement of case and have not completed any Scott Schedule. Their skeleton argument, provided at the last moment, bears very little relationship to their application which on its face looks like a standard challenge to particular service charges but without any detail that might alert the reader to the basis or bases of the challenge. Points were also raised at the hearing for the first time. The skeleton argument itself was in parts not very clear, and the separate bundles of copy documents contained nothing to explain what relationship those documents had to the points that were in issue. This would be deeply unsatisfactory even if the First Applicant and the Second Applicant were litigants in person, but remarkably the First Applicant and the Second Applicant were represented by a solicitor, albeit a non-practising one.

75. As for the Third Applicant, she at least has provided a statement of case and she is also now a litigant in person, having sacked Ms Morgan as her representative. However, her statement of case is unfortunately very poorly argued and relies too much on unsubstantiated allegations of fraud and illegality – including against judges involved with this case or other proceedings between the parties – and on selective quotations from statutory provisions which do not support the points she wishes to make. By way of illustration, section 38(10) of the 1987 Act does indeed refer to a scenario in which a party can be required to pay compensation to another party for loss or disadvantage that they are likely to suffer, but this is only in the context of an application for a lease variation. Whilst there was a previous application for lease variation, as noted above, the present case relates to the reasonableness of the service charges themselves which is an entirely separate application not subject to clause 38(10) of the 1987 Act.

76. The Third Applicant does provide some evidence of disrepair by way of copy photographs. However, she has still not put together a proper case. She is silent on the question of which charges in each year are considered not to be payable and why. She appears to argue that

nothing is payable, but why for example would disrepair mean that the electricity does not need to be paid? Even in relation to the repair and maintenance charges, we can understand obviously why she does not want to pay for work that has not been done, but why should she not pay for any work that **has** been done? As regards her other objections, she has made assertions about money being taken but has offered no evidence to show that the service charges in question are not fully payable.

77. As regards the point made by Ms Morgan about clause 5(h) of the leases, we do not accept this point. Under clause 5(h)(iii) all sums paid by the tenant must be credited to the tenant in the landlord's or managing agents' books and paid in trust for the tenant until applied towards the tenant's contribution towards the service charge payable in accordance with clause 4(c) which itself sets out the percentage of the costs incurred by the landlord which is payable by the tenant. There is no evidence before us that the Respondent has done anything which constitutes a breach of clause 5(h) of the leases. We also agree with the point made by Mr Granby referred to in paragraph 35 above. Ms Morgan's argument appears to be linked to the Respondent having had a contractual right to claim 125% of the cost of services prior to the application for lease variation, although at the hearing she accepted that the Respondent had been entitled to claim the full amount. In any event, it is worth reiterating that the leaseholders' remedy where the service charges in aggregate exceed 100% of the costs is to apply for a lease variation under section 35 or section 37 of the 1987 Act but that this is not the application currently before the tribunal. This point also applies to the Third Applicant's complaint that she was contractually obliged to pay 50% of the total service charge.

78. As for the allegation that at one point the Second Applicant was invoiced for more than the amount of the then arrears, Ms Morgan has not provided any proper supporting evidence, just a copy of a demand, but in any event any dispute as to what has been paid – rather than what is payable – is a matter for the county court if it cannot be resolved between the parties.

79. We feel that we should also add the following observation. It is conceivable that the Applicants might have had a case for the reduction of the service charges, perhaps in connection with disrepair or management issues or perhaps in relation to other issues, but there is no realistic chance of the tribunal finding in their favour in the absence of a properly argued case. The Applicants would greatly have benefited from obtaining good legal advice at the outset. Whilst we appreciate that legal advice can be expensive, there are sources of free and low-cost advice available, and the Applicants needed someone to look properly at the evidence and then either (a) to help them to put together a proper case or (b) to advise them that their case was too weak to proceed, depending on the view taken by that adviser.

80. In conclusion, in the absence of any of the Applicants' arguments succeeding the service charges are payable in full.

Cost applications

81. As noted above, a wasted costs order has already been made against Ms Morgan (see paragraphs 9 and 10), with Ms Morgan having been ordered to pay the sum of £1,000 within 28 days from the date of the order and the balance to be reviewed at the conclusion of the case.

82. In addition, the Applicants have expressed a wish to apply for a cost order under section 20C of the 1985 Act ("**Section 20C**") and to apply for a cost order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**"). Also, the Respondent has expressed a wish to apply for a cost order under paragraph 13(1) of the Tribunal Rules ("**Rule 13(1)**"). It is possible that the parties also wish to make other cost applications, although we would emphasise, in the light of the manner in which this case has been conducted to date, that the tribunal can only consider cost applications that fall within its jurisdiction.

83. Specifically in relation to the balance potentially payable in connection with the wasted costs order, any submissions that the Respondent wishes to make must be sent by email to the tribunal, with a copy to Ms Morgan, by **5pm on 12 January 2023** (a period which is longer than would otherwise be allowed due to the Christmas break). Any response that Ms Morgan wishes to make (or any statement in the absence of any submissions by the Respondent) must be sent by email to the tribunal, with a copy to the Respondent, by **5pm on 26 January 2023**.

84. Any other cost applications **by any party** must be sent by email to the tribunal, with a copy to the other parties, by **5pm on 12 January 2023** (again to allow for the Christmas break). In relation to any Section 20C or Paragraph 5A applications, the relevant Applicant or Applicants must explain the reasons why they consider these orders should be made. In relation to any **other** cost applications, including under Rule 13(1), the person(s) applying for the cost order must (a) explain the statutory/legal basis on which the costs are claimed, (b) provide details of the amount of the costs claimed plus a proper breakdown and (c) provide a detailed explanation, including any relevant legal authority, as to why a cost order should be made in the amount claimed or at all.

85. Any written submissions by any party **objecting** to any cost application made by another party must be sent by email to the tribunal, with a copy to the other parties, by **5pm on 26 January 2023**.

Name: Judge P Korn **Date:** 22 December 2022

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

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

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 3

(1) If the interest of the landlord under a tenancy of premises which consist of or include a dwelling is assigned, the new landlord shall give notice in writing of the assignment ...

Section 3A

(1) Where a new landlord is required by section 3(1) to give notice to a tenant of an assignment to him, then if -

(a) the tenant is a qualifying tenant within the meaning of Part I of the Landlord and Tenant Act 1987 (tenants' right of first refusal), and
(b) the assignment was a relevant disposal within the meaning of that Part affecting premises to which at the time of the disposal that Part applied,

the landlord shall give also notice in writing to the tenant ...

(3) A person who is required to give notice under this section and who fails, without reasonable excuse, to do so within the time allowed for giving notice under section 3(1) commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale.

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
(a) "costs" includes overheads, and

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

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling … is void in so far as it purports to provide for a determination – (a) in a particular manner, or (b) on particular evidence.

Landlord and Tenant Act 1987

Section 5

(1) Where the landlord proposes to make a relevant disposal affecting premises to which this Part applies, he shall service a notice under this section … on the qualifying tenants of the flats contained in the premises …

Section 10A

(1) A landlord commits an offence if, without reasonable excuse, he makes a relevant disposal affecting premises to which this Part applies … without having first complied with the requirements of section 5 …

(2) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 ob the standard scale.