FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2023/0074**
Property	:	**Flat 1, 12 Walpole Street, SW3 4QP**
Applicant	:	**12 Walpole Street Freehold Limited**
Representative	:	**Mr D Jones of counsel**
Respondent	:	**Reena Dennhardt**
Representative	:	**In person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Tribunal Judge Prof R Percival** **Mr J Naylor MRICS FIRPM**
Date and venue of Hearing	:	**21 July 2023** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**31 August 2023**

DECISION

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The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Applicant in respect of the service charge years from December 2019.

2. Proceedings were originally issued in the County Court on 15 July 2022. A Defence and Counterclaim was filed on 16 August 2022. The claim was transferred to this Tribunal by order of a District Judge on 7 February 2023 (DDJ Brafield).

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

The property

4. The property is the basement flat at number 12 Walpole Street, a period terraced house converted into flats.

The lease

5. The original lease was made in 1990. In 2017, by surrender and regrant, the term was extended, and a small number of other changes were made, none relevant to this application. Otherwise the covenants in the original lease were incorporated unchanged.

6. Provision for the service charge is made in clause 1(2), by which the lessee covenants:

   > "(a) To pay to the Lessor in addition to the rent hereby reserved the sum of one hundred pounds per annum (hereinafter called the 'basic maintenance charge') or such additional sum as hereinafter provided as a contribution towards the expenditure incurred by the Lessor in carrying out his obligations under Clause 2(1)(iii) and (iv) and Clause 3 hereof
   >
   > (b) The basic maintenance charge shall be paid to the Lessor by two equal half yearly instalments in advance on the twenty fifth day of December and the twenty fourth day of June together with the rent hereinbefore reserved and so that in case of default the same shall be recoverable from the Lessee as rent in arrear.
   >
   > (c) If the expenditure incurred by the Lessor in any accounting period of twelve months in carrying out his obligations under

> Clause 2 (iii) and (iv) and Clause 3 hereof (hereinafter called 'the annual cost') exceeds the aggregate amount payable (or deemed to be payable) by the Lessees of all the flats in the Building in the accounting period in question (hereinafter called 'the annual contribution') together with any unexpended surplus as hereinafter mentioned and a certificate of the Accountant of the Lessor of the amount by which the annual cost exceeds the aggregate of the annual contribution and any such unexpended surplus be served upon the Lessee by the Lessor or his agent then the Lessee shall pay to the Lessor within fourteen days of the service thereof one-fifth (hereinafter called 'the excess contribution') of the amount of such excess shown therein such sum to be recoverable from the Lessee in case of default as if the same were rent in arrear
>
> (d) If in any such accounting period as aforesaid the annual cost is less than the annual contribution the difference (being the unexpended surplus) shall be accumulated by the Lessor and shall be applied towards the annual cost in the next succeeding or future accounting period or periods as aforesaid
>
> (e) The Lessor shall be entitled to review in every fifth year of the term hereby created the amount of the basic maintenance charge if in the year immediately preceding such review the annual cost exceeds the then existing basic maintenance charge"

7. The reference to the lessor's obligations suffers from inaccurate numbering. The relevant obligations are in clause 2 (which proceeds with single value sub-clauses with Arabic numerals in brackets). The lessor, by clause 2(1), covenants to insure the building; by clause 2(3) to keep the un-demised structure and conduits in good and substantial order; by clause 2(4) to decorate the exterior and common parts on a four-year cycle; by clause 2(5) to clean the entrance hall; and by clause 2(6) to maintain "the electric porter system". Clause 2(7) is a sweeping-up clause expressed in general terms (see below). Clause 3 is the re-entry clause.

8. It was clear to the Tribunal that the description of the applicable obligations on the lessor for the purposes of the service charge are the product of a pure typographical or copying error. The Respondent did not suggest that the lessor's expenditure on insurance or cleaning the entrance hall were not referable to the service charge. At the hearing, both parties agreed that the lease should be construed as imposing the service charge obligation in respect of the lessor's expenditure under clause 2(1) to (7).

9. The terms of clause 2(7) are as follows:

> "Without prejudice to the generality of the foregoing to do or cause to be done all such works installations acts matters and things as may in the Lessors reasonable discretion be necessary or advisable for the proper maintenance safety amenity and administration of the Flat and of the Building including (but without prejudice to the generality of the foregoing) the appointment of managing or other agents or professional advisers and the payment of their proper fees."

10. Clause 1(19) is one of the family of section 146, Law of Property Act 1925 notice clauses. The lessee covenants

> "To pay all costs charges and expenses (including professional fees) incurred by the Lessor in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 or any statutory re-enactment or modification thereof notwithstanding that forfeiture is avoided otherwise than by relief granted by the court"

11. By clause 4, the parties agree and declare

> "that any demand for payment or notice required to be made upon or given to the Lessee shall be well and sufficiently made given or sent as the case may be if sent by the Lessor or his agent for the time being through the post by Recorded Delivery addressed to the Lessee at the Flat or if left for him there and that any Notice required to be given to the Lessor shall be well and sufficiently given to him if sent by the Lessee through the post by Recorded Delivery addressed to the Lessor at his aforementioned address or being a company to the registered office or sent as aforesaid addressed to any agent from time to time authorised by the Lessor to receive the same at the usual or last-known place of business of such agent."

The issues and the hearing

12. Mr Jones of counsel represented the Applicant. Ms Dennhardt represented herself. We heard evidence from Mr Tejada, the current property manager employed by the managing agents, HML PM Ltd, responsible for the property, and from Ms Dennhardt.

13. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the lease made provision for the accumulation of a reserve fund;

    (ii) Whether the relevant service charge demands were served on the Respondent.

(iii) Whether the Respondent's counterclaim in the County Court should be set-off against the Applicant's claim.

(iv) Whether an order under section 20C of the 1985 Act, or under paragraph 5A of schedule 11 to the 2002 Act, should be made.

(v) The Tribunal identified as a further issue whether the lease made provision for late payment charges and charges in relation to debt collection.

The reserve fund issue

14. The Applicant's case was that the lease provided for the collection of a reserve fund. It was an unusual feature of the case that the original statement of claim was based on a lease of a quite different property, apparently also managed by the HML. The extract from that lease provided in the statement of claim does, indeed, appear to make provision for a reserve fund. The correct leases were before the Tribunal.

15. Mr Jones submitted that clause 1(2)(d) of the lease authorised the collection of a reserve fund. The service charge (the "maintenance charge") was broadly defined, and clause 1(2)(d) allowed the collection and maintenance of funds over more than one year ("... shall be applied towards the annual cost in the next succeeding or future accounting period or periods ...").

16. The Respondent told us that the previous managing agent had not charged a reserve fund.

17. We conclude that this sub-clause does not provide a power for the lessor to accumulate a reserve fund, in the ordinary sense. Rather, it is part of the reconciliation process required in the context of a service charge demanded in advance. Sub-clause 1(2)(c) makes provision for an additional demand if actual expenditure exceeds the sum collected in advance. Sub-clause 1(2)(d) makes corresponding provision where the actual expenditure is less than the amount collected. It provides that in that event, the excess may be applied to a future year or years (thereby reducing the amount of the advance charge that would need to be collected in the future). Rather than merely crediting the lessee with the excess, it allows the lessor to accumulate a fund, and one that may be applied in future years. However, there is nothing in clause 1(2)(d) or anywhere else in the lease that allows the lessor to demand a service charge *for the purpose of* accumulating such a fund.

18. *Decision*: Where the lessor has purported to demand a contribution to the reserve fund, that element of the service charge is not payable under the lease.

The service issue

19. The lease provides for notices to be served by registered mail at the property address. It was not disputed that service had never been made in that way. Both parties accepted that there had been an informal agreement to depart from this form of service, and that service of the service charge demands could be made by ordinary post, to an address provided by the Applicant. The Applicant's case was that the agreement extended to email service from December 2021. The Respondent denied that she had agreed to email service.

20. As to service by email, the Respondent denied that she had ever been asked, or agreed, to service by email. She pointed to the fact that the email address given in the Applicant's statement of case made following transfer to the Tribunal, is misspelled.

21. In his evidence, Mr Tejada said that he did not have personal knowledge of the agreement to serve by email, but that it must have been made was evident from the fact that HML's records included provision for service by email. No documentary evidence of this record was produced.

22. Mr Jones submitted that it was more likely that the misspelling of the email address was an error made by the person drafting the statement of case, rather than an accurate transcript of an inaccurate record as held by HML. In support of this submission, he noted that there had been significant email correspondence between the parties, examples of which were included in the bundle, and in which the Respondent's email address had been used.

23. We agree with Mr Jones submission that it is most likely that the spelling error occurred in the statement of case, given the general email correspondence. However, all that demonstrates is that HML had the Respondent's email address and that there was a practice of using it for general correspondence, not that she had agreed that it could be used for service.

24. The only basis upon which the Applicant sought to assert that the agreement had encompassed service by email was that the Respondent had sent demands and reminders to pay the service charge by email. It was not possible, he said, for demands or reminders to be sent by email unless a tenant consented to service in that manner. We asked Mr Tejada how HML's automated system worked, such that it was only possible to do so if a tenant consented. He could only tell us that the team responsible for the automated system required that the property manager asking that email be used confirmed consent.

25. The only witness who could give direct evidence of the agreement is the Respondent. The force of the Applicant's case is that she is lying when

she says that email service was not part of that agreement. It is not, indeed, clear to us that demands, as opposed to other documents, were sent by email in any event. But we do not think that the evidence of Mr Tejada is sufficient for us to conclude that the Respondent is lying on the basis of an implication of consent to service arising from the requirement of one team within HML for an indication by another HML employee of consent before service by email would be effected. We have no evidence or material from the property manager responsible for the indication of consent, nor, indeed, of the practices of the relevant team at HML at that time. There may simply have been an error. We do not consider that the evidence in favour of an implied agreement is sufficient to justify us in accepting an accusation of dishonesty against the Respondent. We find that there was no agreement for service by email.

26. The question therefore is whether service by post was effected, and if so, when.

27. The Applicant's statement of case asserts after December 2021, demands were sent only by email (with the exception of that sent on 13 January 2023). Before that, demands were sent to Flat 12a, 4 Culford Gardens, London SW3 2ST. Finally, on 13 January 2023, a demand was sent, by special delivery, to Finkenhofstrasse 24, Frankfurt, Germany 60322.

28. The documents provided in the bundle were demands bearing a postal address, in respect of the period from December 2019 to June 2023, dated from 19 December 2019 to 29 December 2022. Those relating to the periods from December 2019 to December 2021 bear the address of Flat 12a. Those that follow bear the Frankfurt address. Reminder letters follow the same pattern, carrying the Flat 12a address until 14 July 2022, which carries the Frankfurt address. The final exhibited demand is that dated 12 January 2023, which provides a table of "previously charged items" covering the period from June 2019 to June 2023.

29. As we understand the Applicant's case, the demands covering the period after December 2021 were only sent by email, and therefore, since we have found that agreement between the parties did not include service by email, they were not served.

30. Ms Dennhardt's evidence was that she had not received any of the demands or reminders. Since 1994, demands had been sent to her mother's address, which was Flat 3, Culford Gardens, not Flat 12a. There is no Flat 12a at that address. Her mother's surname is not the same as hers. In his submissions, Mr Jones argued that we should infer that Ms Dennhardt would have had actual notice of demands sent to Culford Gardens, as he had established in cross-examination that there was a common letter box, so the letters would have found their way to Ms Dennhardt's mother.

31. In the first place, it is our understanding that the Applicant's case that these demands, despite including on their face the postal address and no reference to service by email, had in fact only been served by email. Secondly, we do not think we can infer that a mis-addressed letter to an address with several flats would have come into the hands of a person to whom it was not addressed as a matter of course. The argument for such an inference is weak in any event, and is certainly not, we conclude, sufficient to establish that Ms Dennhardt is lying to us when she says she did not receive these demands via her mother.

32. In her witness statement, Ms Dennhardt said that she did not know why she had not received letters sent earlier to Frankfurt, but speculated that insufficient postage was paid. But on the Applicant's evidence, those demands (save the last) were only sent by email.

33. As to the final demand sent to the Frankfurt address, Ms Dennhardt's evidence was that, by that time, she had moved from Frankfurt to her current address, in Berlin. She produced an email dated 13 June 2022 informing HML of her new address. We accept that HML were aware, or should have been, of Ms Dennhardt's change of address.

34. The result is that the first time that the Respondent received in proper form the demands was when she received the Applicant's statement of case, as provided for in the directions. That appears to have been on 24 May 2023.

35. The consequences of this depend on the application of Section 20B of the 1985 Act. The terms of that section are set out in the appendix to this Decision.

36. In this case, it is, as we understand it, accepted by the Respondent that the receipt of the bundle amounted to valid service of the documents contained therein.

37. There have been a number of cases on the application or otherwise of section 20B to advance service charges. In *Skelton v DBS Homes (Kings Hill) Ltd* [2017] EWCA Civ 1139, [2018] 1 W.L.R. 362, Arden LJ (as she then was) said this, addressing *Gilje v Charlegrove Securities Ltd* [2003] EWHC 1284 (Ch), [2004] L. & T.R. 3:

> "17. In my judgement, 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 the Gilje case [2004] 1 All ER 91 . In the *Gilje* case 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 *367 "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 *Brent London Borough Council v Shulem B Association Ltd* [2011] 1 WLR 3014 , para 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.

38. Thus, although in the circumstances set out in *Gilje*, section 20B did not apply, it does apply to a demand for on-account service charges which is only validly served after the relevant costs have been incurred.

39. Mr Jones submitted that the reminder letters (at least) constituted notices under section 20B(2) of the 1985 Act, thus suspending the rule in section 20B(1). We do not accept this argument. First, the precondition to the operation of the subsection is that a tenant will "subsequently" be required to contribute to costs. In this case, previous demands had, in each case, already been attempted to have been served, albeit unsuccessfully. Secondly, where a lease makes provision for service in a particular way, a section 20B(2) notice counts as a "notice under the lease", and the specified means of service applies to it: *Southwark London Borough Council v Akhtar* [2017] UKUT 150 (LC) . The same must apply to the informally agreed replacement of the lease conditions for service, and thus our conclusions in respect of the service charge demands apply to the same extent to service of the reminder letters (qua section 20B(2) notices).

40. We consider that the consequence are, first, that the advance service charge demanded in respect of the period from December 2022 to June 2023 (£983) is properly demanded by the bundle demand, and is payable by the Respondent. Secondly, the demand will be effective in respect of any costs not actually incurred (that is, ordinarily, invoiced for) before 24 November 2021. Unfortunately, the information

provided to the Tribunal is not such as to allow us to calculate what that figure is. But the information must be available to the Applicant.

41. We therefore invite the parties to attempt to come to an agreement as to which costs fall after that date (ie, where invoiced after that date), and are therefore payable. If the parties cannot agree, one or both may request a review of this decision under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 55/Tribunals, Courts and Enforcement Act 2007, section 9(1)(a), providing the Tribunal with relevant material (particularly the invoices referable to the service charge). Such an application must be made within 28 days of the date of this decision. The deadline for appealing to the Upper Tribunal (see below) is consequentially extended.

42. *Decision*: The contested service charge demands were only properly served when the Applicant's case was received by the Respondent. In consequence, only service charges referable to relevant costs incurred after 24 November 2021 are payable. The quantification of the consequences of this finding should be pursued as proposed in paragraph 41 above.

The counter-claim

43. The Respondent's case was that, until February 2018, the communal lighting for the property (that is, the communal areas servicing the other flats, but not flat 1) was connected to the Respondent's fuse box, and therefore the bill was charged to her. The lighting consisted of two light bulbs. The Applicant did not accept that this was the case. After that date, on the Respondent's case, this was changed, but an exterior light in the vicinity of the Respondent's back door remained connected to the fuse box. The Applicant accepted that that light was paid for by Ms Dennhardt. Mr Jones (in our view correctly) did not argue that paying for the exterior light was the Respondent's responsibility, rather than that of the lessor.

44. In the County Court, the Respondent made a counter-claim for the electricity charges properly the responsibility of the lessor that she had paid in the previous six years in the sum of £5,260. In evidence, the Respondent said that this was, in effect, her opening shot in what she expected to be a negotiation with the Applicant.

45. The Applicant accepted that some payment to the Respondent was due, but it was less than that claimed. The Applicant could not, however, provide an alternative figure.

46. The Respondent effectively asked the Tribunal to treat the counter claim as an equitable set off. The Tribunal does have a discretionary power to consider set-off when considering an application under section 27A. The starting point for this jurisdiction is usually

considered to be *Continental Properties v White* [2007] L&TR 4, in which (in a case involving the costs of remedying a fault which could have been remedied more cheaply had the landlord not breached its repairing covenant) Judge Rich said

> "[i]t is submitted that the determination of such claims for damages was outside the jurisdiction of the LVT. I accept that the LVT has jurisdiction to determine claims for damages for breach of covenant only insofar as they constitute a defence to a service charge in respect of which the LVT's jurisdiction under section 27A has been invoked. I see no reason of principle why such jurisdiction does not extend to determining even a claim for loss of amenity or loss of health arising from a breach of a repairing covenant …"

47. It is clear, however, that in deciding whether or not to allow such a set off the Tribunal is exercising a discretion. We decline to do so in this case. The practice of the Tribunal in general has been only to allow set-off where the quantum of the set-off was readily ascertainable; and the set-off is less than the landlord's claim. Neither of those is clearly the case here.

48. It should be noted that this is a decision not to decide whether to allow a set-off. It is not, therefore, a decision preventing the matter being litigated elsewhere.

49. *Decision*: We decline to consider the set-off argued by the Respondent.

The administration charges/late payment etc fees issue

50. The payment demands issued by the Applicant included a number of charges for late payment, management fees in respect of arrears and debt collection fees, in addition to service charge demands. The Tribunal was concerned as to whether the lease allowed for such charges, although the point had not been raised by the Respondent. In order to allow the parties – particularly the Applicant – the opportunity to consider the question, we directed that the parties could, if they wished, make written representations on the issue within 14 days of the hearing. Both parties did so.

51. Given our findings in respect of the service issue above, the significance of the issue may be reduced or extinguished, insofar as we have determined that some of the service charges are not payable. Nonetheless, it is appropriate for us to make a finding.

52. The Applicant's written submissions appear to us to include, or indeed concentrate on, the issue as to whether legal costs may be charged as an administration fee. As we said during the hearing, any of the costs of initiating proceedings in the county court fall to be determined by that

court, not us. As far as we can determine, all of the legal costs identified in the payment schedules fall into this category.

53. The Respondent's written submissions also appeared to concentrate on legal costs, asserting that there is no provision for them to be claimed in the service charge. The submission otherwise engages with other matters, not relevant to the issue we identified. We note that the written submissions appear to resile from the Respondent's clearly articulated agreement at the hearing in respect of the numbering of the lessor's obligations to which the service charge relates. It is too late for the Respondent to do so. If they had taken that approach in the hearing, we would have made a ruling that the lease should be interpreted as, in fact, the parties agreed at that time it should be interpreted.

54. The Applicant nonetheless identified three clauses in the lease that Mr Jones considered relevant.

55. The first was clause 1(3), which reads in its entirety

> "The lessee will from time to time and at *all* times during the term pay and discharge all rates taxes duties *charges* assessments impositions and outgoings *whatsoever (*whether imposed by statute or otherwise and whether of a national Parliamentary parochial or local character and whether of the nature of capital or revenue *and even though of a wholly novel character) which may or at any time during the term be assessed charged imposed upon or payable in respect of the Flat or any part thereof by the owner or occupier thereof*"

56. In his submission characterising this as a "broad enough to encompass administrative charges which are payable in respect of non-payment of rent or which relate to the management of the property", Mr Jones quoted the parts in italics above.

57. This is clearly a (very common) provision aimed at imposing on the lessee costs imposed by a third party ("of a national Parliamentary parochial or local character"), not costs to be imposed on the lessee by the lessor. It does not justify administration charges for late payment or debt collection.

58. The second was clause 1(18), which requires the lessee to observe regulations made by the lessor, and in particular to observe the regulations specified in the schedule to the lease. The scheduled regulations concern such matters as providing curtains, not keeping pets, not dancing, or causing a nuisance. There was no evidence of the lessor as having made, and publicised to the lessees, any additional regulations.

59. Nonetheless, the Applicant submits that the lessor's agent's processes for dealing with non-payment of service charge, which include charging fees for late payment, are such regulations, which therefore cover these administration charges.

60. We do not agree. The nature of the content of the regulations anticipated by the clause is shown by the scheduled regulations. As to form, such regulations must obviously be published to the lessees, so they know what they must do, or not do. Neither the content nor form of the agent's internal processes conform. And a regulation-making power in these terms cannot impose an administration charge, at least without very clear words.

61. The final provision that the Applicant refers to is clause 1(19), which is quoted above at paragraph 10. While this is a form of clause which *may* allow a lessor to pass on legal costs to a lessee (whether different formulations of this family of clauses do so, and in what circumstances, is discussed extensively in *Tower Hamlets v Khan* [2022] EWCA Civ 831, [2022] L. & T.R. 30), as we noted above, the legal costs before us related only to those relating to the county court proceedings, so are not a matter for us.

62. *Decision*: No provision of the lease allows for charging an administration fee for late payment or debt collection.

Applications for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

63. The Applicant applied for orders under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge; and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

64. We consider these applications on the basis that the leases does provide for such costs to be passed on either in the service charge or as administration charges, without deciding whether that is the case or not. Whether the lease does, in fact, make such provision is, accordingly, an open question should the matter be litigated in the future.

65. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (Tenants of Langford Court v Doren Ltd (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C

66. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course.

67. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC); [2014] 1 EGLR 111.

68. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

69. In this case, both parties have had some success, but the Respondent has, overall, had greater success than the Applicant. If all of the Applicant's costs could be recovered as an administration charge, or in the service charge, it would amount to just the sort of recovery "through the back door [of] what has been refused by the front" referred to in the context of making a section 20C order in *Iperion Investments v Broadwalk House Residents Ltd* (1995) 27 H.L.R. 196, 203 (quoting *Holding and Management Ltd. v Property Holding and Investment Trust Plc. and Others* [1989] 1 WLR 1313, 1324).

70. Having said that, it would not be just and equitable to make an order completely excluding the Applicant's contractual costs. We therefore make a 75% order in respect of both powers.

71. *Decision*: The Tribunal orders

(1) under section 20C of the 1985 Act that 75% of the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicant; and

(2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicant to pay litigation costs as defined in that paragraph be extinguished to the extent of 75%.

Rights of appeal

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

73. The application for permission to appeal must arrive at the office either:

(1) within 28 days after the Tribunal sends written reasons for the decision to the person making the application, if the party seeking

permission to appeal does not wish to undertake the procedure set out in paragraph 41 above; or

(2) within 28 days of either an agreement with the other party under the procedure set out in paragraph 41, or of a review by the Tribunal under that procedure.

74. If the application is not made within the time limits set out above, the application must include a request for an extension of time and the reason for not complying with the time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

75. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

The next steps

76. Subject to the procedure set out in paragraph 41 above, or an application for permission to appeal, this matter should now be returned to the County Court.

Name: Tribunal Judge Richard Percival **Date:** 31 August 2023

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

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

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

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

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

and the amount payable shall be limited accordingly.

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

Section 27A

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

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

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

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

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

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

Section 20

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

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

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

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

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

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

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

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

Section 20B

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

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

Section 20C

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

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

(2) The application shall be made—

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

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

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

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

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

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

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

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

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

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

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).