UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – interpretation of lease – reserve fund – costs of proceedings – LVT misled by mistaken consensus – s.20C Landlord and Tenant Act 1985 – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN:

SUSSEX VILLAS LIMITED **Appellant**

and

(1) DR HUIMIN WAN
(2) NEIL RAINE HARRISON **Respondents**

Re: Ground Floor Flat
103B Preston Drove,
Brighton,
East Sussex BN1 6LD

Before Martin Rodger QC, Deputy President
Sitting at 45 Bedford Square, London WC1B 3AS
on
22 January 2014

Simon Sinnatt instructed by Dean Wilson LLP for the appellant
Justin Bates instructed by the Bar Pro Bono Unit for the first respondent
Mr Harrison, the second respondent, in person

Decision

Introduction

1. This appeal concerns the proper interpretation of a poorly drafted service charge clause in the lease of the Ground Floor Flat ("the Flat") at 103 Preston Drove, Brighton, East Sussex, BN1 6LD ("the Building"). The appeal is against a decision of the leasehold valuation tribunal for the Southern Rent Assessment Panel ("the LVT") given on 25 October 2012 in which the LVT concluded that the appellant is not entitled to recover from the respondents a contribution to the anticipated cost of major works to the Building which were expected to cost £24,500.

2. The appeal is brought with the permission of the Tribunal (Sir Keith Lindblom, President) given on 28 May 2013 and has been dealt with by way of review.

The Lease

3. The lease of the Flat was granted on 10 July 1989 for a term of 99 years from 1987. At all material times the appellant was the landlord and the respondents were jointly the tenants of the Flat under that lease. Since the decision of the LVT the first respondent and the tenant of another of the flats in the Building have acquired the freehold interest.

4. The lease reserves a ground rent payable by the tenant and, as an additional rent, a sum referred to in clause 1 as "the Annual Maintenance Provision" which is described in greater detail in the Sixth Schedule.

5. The Sixth Schedule is in two parts. Paragraph 1 in Part 1 is a covenant by the tenant to pay a third share of the Annual Maintenance Provision. That payment is comprised of two elements: first, a fixed sum of £50 per annum (referred to as "the Maintenance Provision") which is payable by two instalments of £25 each in advance on the 25 December and 24 June in each year; and secondly "the balance (if any) of the Annual Maintenance Provision" which is payable within one month of the receipt by the tenant of a certificate referred to in paragraph 3 of Part 2 of the Schedule.

6. By paragraph 2 of Part 1 of the Schedule the landlord covenants to provide certain services including keeping the interior walls and main structure and other structural parts of the Building in good and substantial repair and condition.

7. Part 2 of the Schedule contains the contentious provisions. They are fairly indigestible and, perhaps for that reason, both the LVT in its decision and the parties in their written submissions concentrated almost exclusively on one part of the Schedule, paragraph 2(b). Nonetheless, as with any exercise in contractual interpretation, it is important to read the relevant provisions as a whole. They comprise the following:

"Part 2

Computation of the Annual Maintenance Provision

1. The Annual Maintenance Provision in respect of any year (year for the purpose of these presents being the twelve month period commencing on 25 December) shall be computed as soon as practicable after the beginning of January in the succeeding such year and shall be computed in accordance with paragraph 2 hereunder.

2. Such Annual Maintenance Provisions shall consist of:

   (a) the aggregate expenditure estimated to be incurred by the Managing Agents or the Landlord in such year for the purposes mentioned in Part 1 of this Schedule as reduced by (i) any unexpired reserve already made pursuant to sub-paragraph (1) of Part 1 of this Schedule in respect of any such expenditure and (ii) any excess of the corresponding estimate in relation to the immediately preceding year over the expenditure actually incurred in that year together with:

   (b) an appropriate amount in the reserve for or towards those of the matters mentioned in Part 1 of this Schedule as are likely to give rise to expenditure by the Managing Agents or the Landlord after such calendar year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year during such unexpired term including (without prejudice to the generality of the foregoing) such matters as the painting of the exterior of the building, the repair of the structure thereof, the repair of drains and the overhaul renewal or modernisation of any plant or machinery and the replacements of carpets and fittings in the building (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the aggregate amount included in the Annual Maintenance Provision for such matters as aforesaid (pursuant to sub-paragraph (a) hereof and to this sub-paragraph shall not unduly fluctuate from year to year) and;

   (c) a sum equal to any Maintenance Provision (or part thereof) payable in respect of any flat in the building in respect of any preceding calendar year which shall not have been paid at the date on which the computation is made.

   PROVIDED ALSO THAT:

   (i) no sum shall be included pursuant to sub-paragraph (c) hereof unless the Landlord or Managing Agents have taken all reasonable steps to recover such sum from the person liable to pay the same and;

   (ii) that all sums which have been included pursuant to such sub-paragraph (c) but are thereafter recovered by the Landlord or Managing Agents (otherwise than by virtue of such sub-paragraph) shall be deducted in computing the Annual Maintenance Provision for the calendar year next after such recovery.

3. A certificate signed by the Managing Agents or the Landlord's Accountant purporting to show the amount of the Annual Maintenance Provision for any calendar year shall be conclusive of such amount and in giving such certificate the Managing Agents or such

Accountant shall be deemed to be acting as an expert properly employed by the Landlord for that purpose."

The Facts

8. The following facts were found by the LVT:

(a) The Building is a mid-terrace Victorian villa on three floors which has been converted to provide three self-contained flats. At the rear there is a three-storey extension, the flat roof of which is in poor condition and has reached the end of its life.

(b) The appellant had failed to carry out cyclical maintenance to the Building and, as a result, its condition had deteriorated to the point where substantial expenditure was now required.

(c) Until 2010 the appellant had managed the Building itself, but in that year it appointed managing agents who commissioned a detailed condition survey which was followed by a comprehensive schedule of necessary remedial work.

(d) The appellant had not built up a reserve fund, and in particular had demanded no contribution to a reserve in 2006, 2007 or 2008. In 2009 a total contribution of approximately £4,000 was demanded from the three tenants as a contribution to a reserve fund (in fact the total contribution demanded and paid by the tenants in the Building in 2009 was £4,287.41).

(e) In June 2010 the appellant's managing agents commenced the statutory consultation procedure in respect of a major programme of external and internal repairs including re-building the flat roof over the rear extension, repairs to the front roof, rendering to the west flank wall and external redecoration.

(f) The agents then put the proposed works out to tender and obtained three estimates, the lowest of which was just under £24,500.

(g) On 17 February 2011 the annual service charge accounts for the year ending 25 December 2010 were drawn up and certified by the appellant's accountants. Those accounts included the sum of £24,500, described as "reserve".

(h) In May 2011 the second stage of the statutory consultation was commenced.

(i) The managing agents gave the respondents notice of the Annual Maintenance Provision for 2010 by letter dated 16 February 2011 and demanded their one third contribution towards the total sum. This included one third of the £24,500 reserve shown in the 2010 accounts, a sum which the LVT described as an "enormous financial burden".

(j) Proceedings for the recovery of the respondents contribution towards the 2010 Annual Maintenance Provision were commenced by the appellant in the Brighton County Court and later transferred to the LVT for a determination under s.27A Landlord and Tenant

Act 1985 ("the 1985 Act") of the sum payable by the respondents under the terms of their lease and whether it was reasonable.

The LVT's Decision

9. The appellant and Dr Wan were each represented before the LVT by counsel (although neither Mr Sinnatt nor Mr Bates was instructed at that stage). The LVT recorded in paragraph 11 of its decision, referring to paragraph 2(a) of Part 2 of the Sixth Schedule that:

> "[paragraph 2(a)] covers actual expenditure and at the hearing the parties were in agreement that this clause enables the Landlord to recover actual expenditure at the end of each accounting period an allowance being made for payments made on account."

10. The LVT's decision then focussed, as both parties had done, on paragraph 2(b). It considered that paragraph 2(b) contained two shortcomings which it considered were disadvantageous to the appellant as landlord. The first was that the lease limited the amount of the advanced service charge that the landlord could collect for estimated routine expenditure in any year to just £50. The second deficiency was that paragraph 2(b) limited the Annual Maintenance Provision by requiring that it "shall not unduly fluctuate from year to year."

11. Having inspected the Building and considered the parties' arguments, the LVT concluded that it was not sensible or practical to phase the programme of works over more than one year as the respondents had suggested. The only reasonable approach to the works was that they should be carried out as a single project, as proposed by the appellant. The LVT also considered the work itself and the estimated cost of each item and concluded at paragraph 40 of its decision that the works were the appellant's responsibility under the lease and that the estimated costs were reasonable (which, in context, I take to mean reasonable as a payment to be made in advance). This was an important conclusion because, as the LVT had reminded itself, s. 19(2) of the 1985 Act limits the sum which may be collected in advance of relevant expenditure being incurred to no greater amount than is reasonable.

12. The LVT then decided, at paragraph 44, that the appellant was at fault for failing to carry out cyclical maintenance and for failing to build up a reserve fund over a period of years, with the result that the tenants were now faced with "an enormous financial burden that should and could have been ameliorated with reasonable planning." The reserve fund demanded in 2010 was high "primary because of the appellant's failure to properly undertake its repairing obligations in a planned way."

13. The critical part of the LVT's reasoning came at paragraph 47, where it considered the effect of paragraph 2(b) of Part 2 of the Sixth Schedule and said this:

> "The tribunal interprets this clause as enabling the applicant to build up a reserve fund subject to a limitation that the amount of the Annual Maintenance Provision must not unduly fluctuate so far as is reasonably foreseeable from year to year. On the facts of this case the demand has led to a very considerable fluctuation which could have been foreseen and in the judgment of

the Tribunal it cannot as a consequence now be recovered under this clause as it will breach the limitation referred to above. Instead the costs of the Works would be recoverable pursuant to the Sixth Schedule Part 2, paragraph 2(a) which deals with actual rather than anticipated expenditure."

14. The LVT went on to accede to an application by the respondents under section 20C of the 1985 Act for an order prohibiting the appellant from adding the costs of the proceedings to the service charge payable by the respondents. The LVT described the respondents as having been "entirely justified in defending this application" and was critical of the "heavy handed" approach taken by the appellant's solicitors in correspondence. Bearing in mind the outcome and the conduct of the parties the LVT considered that it would not be just and equitable for the respondents to have to contribute towards the appellant's costs of the proceedings.

The appeal

15. The appellants sought and obtained permission to appeal on two grounds:

(1) That the LVT had misinterpreted paragraph 2(b) of Part 2 of the Sixth Schedule to the lease; and

(2) That the LVT had exercised its discretion incorrectly in making an order under section 20C of the 1985 Act.

Issue 1: the interpretation of the Sixth Schedule

16. At the commencement of the hearing I expressed the preliminary view that the consensus between the parties over the effect of paragraph 2(a) of Part 1 of the Sixth Schedule was fundamentally mistaken. That consensus was reflected in the LVT's decision and in the appellant's skeleton argument for the appeal; Mr Bates, acting *pro bono* for Dr Wan, arrived late on the scene and inherited a consensus to his client's advantage, in which he therefore quite properly acquiesced (despite, I am sure, knowing better). It appeared to me that the LVT had been led astray by the agreement recorded in paragraph 11 of its decision that paragraph 2(a) "covers actual expenditure" and enables the landlord to recover at the end of each accounting period the expenditure it had actually incurred in that period, after making an allowance for payments on account.

17. Part 2 of the Schedule is opaquely drafted but it seems to me to be capable of only one coherent interpretation. That interpretation, which Mr Sinnatt adopted, was as follows.

18. Paragraph 1 of Part 1 of the Schedule describes how the Annual Maintenance Provisions expended by the Landlord are to be recouped by means of three payments. The first and second of those payments are the instalments of £25 each which together represent the "Maintenance Provision" referred to in paragraph 1(a). The third payment is provided for by paragraph 1(b); it comprises "the balance (if any) of the Annual Maintenance Provision" and is payable within one

month of the receipt by the tenant of the certificate referred to in paragraph 3 of Part 2 of the Schedule. The balance referred to in paragraph 1(b) therefore represents the difference between the sum of £50 and the total Annual Maintenance Provision in any one year.

19. Paragraph 2 then explains how the Annual Maintenance Provision is to be "computed". It is to consist of a number of distinct elements. The first of those elements, paragraph 2(a), is the aggregate of the expenditure "estimated to be incurred … in such year for the purposes mentioned in Part 1 of this Schedule." But to which year are the words "such year" intended to refer?

20. It was submitted by Mr Bates that the reference to "such year" in paragraph 2(a) ought to be taken to refer to the same year as is indicated by the words "such year" in paragraph 1, and to be a reference back to the full year which has already elapsed. I reject that submission. The year referred to in paragraph 2(a) as "such year" is clearly the prospective year beginning on 25 December and containing the January referred to in paragraph 1, rather than the historical year in respect of which the Annual Maintenance Provision is to be ascertained. By way of example, using the facts of this case, the task is to compute the Annual Maintenance Provision in respect of the year ending 24 December 2010. That sum is to be computed as soon as practicable after the beginning of January in the year immediately succeeding the year ending 24 December 2010, i.e. in January 2011. The reference in paragraph 2(a) to "such year" is, in my judgment, a reference in that example to the year 2011. Were that not the case the reference to "expenditure *estimated to be incurred* … in such year" would make no sense: the whole year would already have elapsed when the computation was undertaken and no expenditure would remain "to be incurred" or would require to be "estimated".

21. Mr Bates submitted that the words "estimated to be incurred" in paragraph 2(a) should be interpreted as meaning "estimated to have been incurred". The justification for that submission was that, otherwise, the expression "such year" used in paragraph 1 and again in paragraph 2(a) would mean different years, which is unlikely to have been the draftsman's intention. I agree with Mr Bates that the drafting is sloppy, but I do not think the cure lies in reading words in to reverse the natural sense of the words already used. The paragraph makes good sense if the exercise being undertaken in January is the compilation of an estimate of expenditure to be incurred during the remainder of the that year; it lacks all sense if the estimate is of expenditure already disbursed in a year already complete.

22. I am therefore satisfied that paragraph 2(a) is not a provision designed to enable the landlord to recover actual expenditure which has already been incurred (as the parties agreed before the LVT and it accepted) but rather is a provision designed to enable the landlord to recover, in a conventional manner, estimated expenditure which had not yet been incurred.

23. Having, as soon as practicable after the beginning of January in any year, estimated the expenditure to be incurred in that year, the resulting total is then to be reduced by two amounts. The first, is described in paragraph 2(a)(i) as "any unexpired reserve already made pursuant to sub-paragraph (1) and Part 1 of this Schedule in respect of any such expenditure." This is a puzzling description. The reference to "any unexpired reserve" is obviously intended to apply to an unexpended reserve, but it is not clear why any such reserve should be described as having been

made pursuant to sub-paragraph (1) and Part 1 of the Schedule. The provision for making reserves is in paragraph 2(b). It seems to me likely that the draftsman intended to refer to so much of the balance of the Annual Maintenance Provision in previous years (referred to in paragraph 1(b) of Part 1, which I take to be meant by the words "sub-paragraph (1) and Part 1") as had been accumulated as a reserve. Where the expenditure estimated to be incurred in the current year includes expenditure on any of the non-recurring items for which the reserve was collected, the part of the reserve attributable to the relevant item is to be set against the estimated expenditure when computing the Annual Maintenance Provision. That reading is strengthened by the second allowance or reduction which is required to be made in paragraph 2(a)(ii), namely any excess of the estimate made in the preceding year over the expenditure actually incurred in that year. That excess cannot include the contribution to the reserve in the immediately preceding year (otherwise there would no point in the accumulation).

24. The second component of the Annual Maintenance Provision is provided for by paragraph 2(b). It seems to me that the LVT was quite right in its approach to paragraph 2(b) in identifying it as a provision for the accumulation of a reserve fund to go towards major items of work, rather than as a source of current expenditure; but nor is it intended to cover routine expenditure, and the treatment of it as covering a year end balancing payment is quite contrary to its terms. The words in parentheses at the end of paragraph 2(b) also seem to me to be clear. "The said amount" being referred to is the amount being transferred to the reserve in any given year. It is to be computed in such a way as to ensure as far as reasonably foreseeable that the aggregate Annual Maintenance Provision pursuant to paragraphs (a) and (b) does not fluctuate unduly from year to year.

25. Mr Bates submitted that the words in parentheses at the end of paragraph 2(b) had a different effect, and imposed a limit on the amount which could be charged to the reserve in any year and that it was that charge which was not permitted to fluctuate unduly. Since, as the LVT found, the sum charged to the reserve for the year ending December 2010 was almost six times the amount which had been charged in 2009, this was a clear case of undue fluctuation. I do not accept that argument. It seems to me clear that the figure which is not allowed to fluctuate is the "aggregate amount" included in the Annual Maintenance Provision "pursuant to" sub-paragraphs 2(a) and (b). The mechanism intended to avoid that fluctuation is the limit imposed by paragraph 2(b) on the amount of the annual contribution to the reserve, but that mechanism does not operate to limit the estimate of expenditure to be made under paragraph 2(a). There is no provision in the Sixth Schedule for any sum to be transferred out of the reserve to enable the aggregate of 2(a) and 2(b) to be maintained at a steady figure and to avoid fluctuations, so in any year when it is estimated that the expenditure will be significantly greater than in a previous year the potential will exist for fluctuation. Fluctuation of the aggregate sum may be tempered by a moderation, or a reduction to zero, in the amount collected as a reserve under paragraph 2(b) but the limiting words in paragraph 2(b) have no effect on the component of the Annual Maintenance Provision represented by paragraph 2(a).

26. The final component of the Annual Maintenance Provision is that referred to in paragraph 2(c). This unusual provision enables the landlord to add to the Annual Maintenance Provision a sum equal to "any Maintenance Provision (or part thereof)" payable in respect of any flat in the building in any preceding year which has not actually be paid provided the landlord has taken reasonable steps to recover it from the person liable to pay it. Collectively the tenants are required to bear the expense of default by any one of their number in paying the Maintenance Provision. It is important to note that

the sum which may be recouped under paragraph 2(c) is the "Maintenance Provision", i.e. the fixed £50 a year contribution referred to in paragraph 1(a) of Part 1 of the Sixth Schedule, and not the whole of the Annual Maintenance Provision provided for in Part 2.

27. The Annual Maintenance Provision is to be certified by the managing agents or the landlord's accountants under paragraph 3 and, once it has been certified and a copy of the certificate served on the tenant, paragraph 1(b) of the Sixth Schedule requires that sum (less so much of the £50 Maintenance Provision as had already been paid) to be paid within one month.

28. This interpretation of the Sixth Schedule seems to me to be coherent and logical. It gives proper effect to paragraph 2(a) as entitling the landlord to collect in advance a contribution towards anticipated expenditure in the relevant year and avoids a situation where the landlord is required to forward fund any work for which provision has not been made in the reserve. It was submitted by Mr Bates that the reading of the Schedule adopted by the LVT was advantageous to the tenant, but I would regard a clause to that effect, as, at best, a mixed blessing. It is true that the tenant would not be troubled to fund expenditure before it had actually been incurred and would therefore enjoy a cash-flow benefit, but experience suggests that the practical impact of such a clause is to act as an incentive to a landlord to put off incurring necessary expenditure leading to neglect and unmanageably large bills at a later date. Whether advantageous or disadvantageous to the tenant it does not seem to me that the construction urged upon the LVT by the parties was correct.

29. What then is the effect of this alternative construction of the Sixth Schedule? On 15 February 2011 the Landlord's Accountants certified the expenditure for the year ending 2010 and included in it the "reserve" sum of £24,500. Although described as a reserve that figure represented expenditure which the Landlord intended to incur in 2011 (although it was eventually prevented from doing so by the failure of the respondents and the other tenants in the Building to pay). On 16 February the Landlord's managing agent sent a demand for £9,453.17 to each of the tenants, including the respondents. That total included £8,166.66 representing the tenant's one third share of the reserve. The Annual Maintenance Provision for 2010, payable within one month of 16 February 2011, was therefore the aggregate sum of £9,453.17. It does not seem to me to matter that part of that sum was shown as being represented by a "reserve" despite the fact that it was intended for expenditure in the current year. The documents served on the respondents sufficiently identified the purpose for which the sums were demanded, although they were misattributed having regard to the Sixth Schedule.

30. Two features of the sum of £24,500 are important. The first is that it was in respect of expenditure which had not yet been incurred, while the second is that the proposed expenditure was on work in respect of which a reserve had already started to be built up in 2009.

31. For the first of those reasons the charge fell within the scope of s.19(2) of the 1985 Act and was subject to the limitation that no greater advance sum than was reasonable was payable. The LVT decided that £24,500 was a reasonable estimate of the cost of the works and it was not necessary for it to go on to consider whether the full sum represented the amount which it was reasonable to expect the tenants to pay in advance of the expenditure actually being incurred. Given

the need for urgent work which the LVT found it seems to me that it would have been reasonable for the landlord to have in hand the full £24,500 in the expectation that it would be expended quickly.

32. For the second reason it is necessary, however, to give credit against the demand for £24,500 to reflect the sum of £4,287.41 collected as a contribution to the reserve in the Annual Maintenance Provision for the year ending 24 December 2009. In the certificate for that year the reserve sum was specifically attributed to "works to rear" and I am satisfied from the content of a letter dated 16 July 2009 from the appellant to the respondents in which the 2009 works were described, that those works were all included in the works described in the schedule put out to tender in 2010 which produced the estimate of £24,500.

33. Paragraph 2(a) (i) of Part 2 of the Sixth Schedule requires credit to be given for the "unexpired reserve already made" and it seems to me clear from the documents before me (and from the findings of the LVT) that for 2010 the unexpired reserve comprised the sum demanded in 2009. Had credit been given for this sum in the certificate dated 15 February 2011 (as it ought to have been) the total recoverable expenditure would have been reduced and the sum referable to the major works would have become £20,212.59 of which the respondents' one third contribution would have been £6,737.53. The total sum which should therefore have been included in the demand of 16 February 2011 was one third of £24,072.12 (the certified total of £28,359.53 minus the sum of £4,287.41 in reserve) namely £8,024.04.

34. Although this matter comes before the Tribunal as a review, rather than a rehearing, I have sufficient material in the facts found by the LVT and the supporting documents to enable me to conclude that the respondent's liability for the service charges for the year ending 24 December 2010 is the sum of £8,024.04.

Issue 2: the section 20C application

35. The principal basis on which the LVT determined that it was just equitable that the respondents should not be liable to contribute towards the costs incurred in the proceedings before it was that they had been very substantially successful in resisting the appellant's claim. I am satisfied that, under the misleading influence of the parties' consensus on the effect of paragraph 2(a), the LVT came to the wrong conclusion. It necessarily follows, therefore that its decision under section 20C was made on a false premise and must be set aside.

36. It remains for me to re-determine the application under section 20C (no purpose would be served by remitting it to the LVT). In doing so I bear in mind that the outcome of the proceedings before the LVT ought to have been a determination in favour of the appellants, that they were entitled to recover much the greater part of the sum claimed (although not all of it after credit was given for the payment already made in 2009). Prima facie the lease allows the costs incurred in obtaining that decision to be recouped through the Annual Maintenance Provision from the tenants of all three flats in the Building. I take into account also the fact that the respondents raised a number of other issues in answer to the appellant's claim which they dropped before the case reached its final hearing. On the other hand, and as Mr Harrison has emphasised in written material submitted to the

Tribunal, the LVT was critical of the heavy handed approach adopted by the appellant's solicitors and, as I have found, the full amount demanded was not in fact due.

37. I think it is right also that I have regard to the limitation on service charges imposed by section 19(1) of the 1985 Act, and on the inevitable outcome of any attempt by the appellant to recover its expenditure through the service charge. Where costs are reasonably incurred in procuring legal services which are provided to a reasonable standard, a landlord can expect to recover those costs through an appropriately worded service charge clause. Where, as here, the legal services provided caused the landlord's case to be presented on an entirely false basis, it is impossible to regard those services as having been provided to a reasonable standard.

38. It would be open to me to refuse to make an order under section 20C and to leave the respondents to challenge any costs added to the service charge in respect of the proceedings before the LVT on the grounds that they had not been incurred in the provision of services to a reasonable standard. Since it seems to me manifest that that is the case, I prefer to adopt a less cumbersome and more economical approach. I am satisfied that it would not be just and equitable in the circumstances for the appellant to be entitled to add the costs of its solicitors and counsel in connection with the proceedings before the LVT to the service charge payable by the respondents. I therefore propose to make an order under section 20C. The sole beneficiaries of that order will be the respondents as no application has been made by or on behalf of the tenants of the other flats in the Building. The appellant will therefore not be deprived of the opportunity of collecting some of its costs (subject to any application which may be made by the tenants of other flats).

39. Mr Bates also requested an order under section 20C in respect of the costs of the appeal. As the appellant is no longer the landlord, and as the relevant provision of the lease (paragraph 2(iv) of Part 1 of the Sixth Schedule) extends only to legal costs incurred by managing agents or by the landlord, it is not clear to me that there is any basis on which the appellant's costs could now be recouped through the service charge in any event. Nonetheless I am not aware of the terms on which the freehold of the Building was transferred and as an application has been made I ought to deal with it on the assumption that, otherwise, the appellant would be entitled to recover its costs.

40. On that assumption it does not seem to me to be just and equitable that the respondents should be required to contribute to the costs incurred by the appellant in correcting an erroneous decision of the LVT which was attributable in very large measure to the mistaken interpretation put on the lease by the appellant's own advisers (I have not forgotten that the same interpretation was accepted by the respondents' counsel). Had the appellant argued its case properly before the LVT the likelihood is that an appeal would never have been necessary. In those circumstances, to guard against the possibility that the appellant may have some residual entitlement to recoup its costs through the service charge I additionally make an order under section 20C of the Landlord and Tenant Act 1985 that no part of the costs incurred in connection with this appeal may be added to any service charge payable by either of the respondents.

Martin Rodger QC, Deputy President

28 January 2014