UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0221 (LC)
LT Case Number: LRX/120/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – scope of compromise agreed in correspondence – identity of landlord – validity of service charge demands – section 47, Landlord and Tenant Act 1987 – appeal allowed in part – application under section 20C – whether necessary to rule on scope of service charge clause – application refused

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE THE FIRST TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN

MRS TERHAS TEDLA

Appellant

and

CAMERET COURT RESIDENTS ASSOCIATION LIMITED

Respondent

Re: 32 Cameret Court,
Lorne Gardens,
London W11

Before: Martin Rodger QC, Deputy President
Sitting at: Royal Courts of Justice, Strand, London WC2A 2LL

5 May 2015

Justin Bates, instructed by Brethertons LLP, for the Appellant
Brynmor Adams, instructed by PDC Legal, for the Respondent

The following cases are referred to in this decision:

Ghany v Attorney General of Trinidad and Tobago [2015] UKPC 12

Pendra Loweth Management Limited v North [2015] UKUT 91(LC)

Introduction

1. Mrs Tedla, the appellant, is the long leaseholder of a flat at 32 Cameret Court, Lorne Gardens, London W11; Cameret Court Residents Association Limited, the respondent, a company controlled by the owners of flats at Cameret Court, is her landlord. In 2009 the parties reached an agreement compromising a dispute over the service charges payable by Mrs Tedla. This appeal concerns the scope of that compromise. The appeal also concerns the form of service charge demands relied on by the respondent and whether they have complied with the requirements of section 47, Landlord and Tenant Act 1987 ("the 1987 Act").

2. Cameret Court is a block of 36 one and two bedroom flats. The freehold interest is subject to a headlease of the whole block granted on 30 November 1979 for a term of 125 years. The headlease is vested in Cameret Court Ltd. Out of that headlease an occupational sub-lease of flat 32 was granted on 17 July 1985. It is for a term of 125 years (less 10 days) from 30 November 1979 so it will expire on 20 November 2104. Mrs Tedla acquired that sub-lease by assignment in 1988. Sub-leases of the remaining flats in the building were also granted on what I assume were substantially the same terms.

3. The respondent was a party to the occupational sub-leases of each of the flats in the building in its capacity as a management company responsible (together with the landlord) for the provision of services.

4. On 11 August 1986, which I assume was after sub-leases of all of the flats had been granted, an underlease of the whole building was granted to the respondent for a term expiring on 23 November 2104. That was a lease of the reversion to the occupational sub-leases, in that it was granted subject to those sub-leases. It is now common ground that, by reason of that underlease, the respondent became the appellant's immediate landlord. The freehold interest in Cameret Court is now vested in Addison & Holland Estates Ltd which is not party to these proceedings.

The proceedings

5. There have been numerous county court proceedings between the parties to this appeal. The earliest of which I am aware was a claim for unpaid service charges for the service charge year ending on 23 June 2010. Those proceedings were settled on 24 June 2011 by a consent order by which the appellant agreed to make a payment of £2,500. In March 2013 the respondent commenced a further claim for service charges and administration charges totalling £5,853.41 falling due on and after 25 December 2011. I am told that yet another claim is currently stayed awaiting the outcome of this appeal but no details are before the Tribunal.

6. On 15 May 2013 the appellant herself applied to the leasehold valuation tribunal for a determination under s. 27A, Landlord and Tenant Act 1925 of her liability to pay service charges in each year from her acquisition of her sub-lease in 1988 until 2010. The scope of that application was subsequently limited by agreement to cover only the years ending 31 December 2001 to 31

December 2010. It was further limited when it was pointed out that the appellant's liability for the period 24 June 2010 to 24 December 2011 had been the subject of a previous application under s. 27A, decided by the LVT on 13 December 2012. There was no appeal from that determination.

7. The respondent's claim for service charges payable from 25 December 2011 was transferred by the West London County Court to the First-tier Tribunal (Property Chamber) ("the F-tT") the (the successor of the LVT) on 29 October 2013 so that it could be heard together with the appellant's own s. 27A application.

8. This appeal is against the decision of the F-tT given on the transferred proceedings and the s. 27A application on 14 August 2014.

9. In its decision the F-tT identified two periods as being the subject of its consideration. The first was from 31 January 2001 until 24 June 2009, while the second it described as being from 24 June 2010 "to date". The period from 24 June 2009 to 24 December 2011 was not open to consideration because of the consent order of 24 June 2011 and the LVT's decision of 13 December 2012. Although the F-tT referred in paragraph 11 of its decision to the second period commencing on 24 June 2010 in fact it limited its consideration to the period after 25 December 2011.

10. The F-tT first considered an argument on the part of the respondent that a binding agreement had been reached in 2009 which settled the appellant's liability for service charges for the whole of the period up to 24 June 2009. The appellant's position was that there had either been no such agreement or that any settlement which had been achieved applied only to the period from 24 June 2007 to 24 June 2009, and not for any earlier period. She claimed in any event to be entitled to reimbursement of all of the service charges she had paid in the period from 31 January 2001 to at least 24 June 2007, and subject to the question of settlement to 24 June 2009 as well, on the grounds that the respondent had failed to comply with the statutory formalities for consultation, the provision of information, and the form of demands for service charges.

11. The contemporaneous evidence concerning the compromise relied on by the respondent before the F-tT was a single letter dated 30 July 2009 from its managing agents, Lewis & Tucker, to the appellant's solicitors, Allen Edwards & Co, which contained the following statement:

> "Further to your letter dated 16 July 2009, we are instructed to accept the sum of £3,662.05 in full and final settlement of your client's service charge, ground rent, interest and legal fees for the period 24 June 2007 to 24 June 2009."

12. The F-tT also received evidence in the form of a witness statement by Mr Ross, the chairman of the respondent's board of directors, in which he stated that the agreement reached with the appellant had been intended to cover all outstanding charges to the date of the letter and not simply for the period from June 2007 to June 2009. A witness statement from the appellant disputed that any agreement had been reached and suggested that her offer to make a payment of £3,662.05 had been subject to the provision of an up-to-date statement of account which had never been forthcoming so that the proposed agreement fell through.

13. The F-tT was left in a difficult position. The subjective evidence of what the parties had intended was inadmissible and, possibly for that reason, neither party took the opportunity to cross examine the makers of the witness statements. Understanding what had been agreed, or indeed whether any binding agreement had been achieved, was not easy because the F-tT had only a single letter in what had obviously been an exchange of correspondence. In paragraph 30 of its decision the F-tT nonetheless concluded that, on the balance of probabilities, a binding agreement had been reached in July 2009 and found as a fact, on the basis of Mr Ross' witness statement, that the agreement had covered all outstanding charges up to the date of the letter of 30 July 2009. On that basis it was satisfied that it was not open to the appellant to seek a determination from the F-tT of her liability to pay the service charges which she had in fact discharged between January 2001 and June 2009.

14. For the period from 25 December 2011 to the date of its decision the F-tT considered and rejected a number of challenges by the appellant to sums demanded by the respondent. The F-tT made no decision on an issue of legal costs which had been reserved to itself by the county court.

15. The appellant's overarching challenge to the service charges concerned compliance by the respondent with s. 47(1) of the 1987 Act. She pointed out that the demands for service charges delivered to her bore the name of the freeholder, Addison & Holland Estates Limited, and not that of Cameret Court Limited, the holder of the headlease which (at that stage) was understood to be the appellant's immediate landlord. The F-tT rejected that challenge and accepted the argument of the respondent that it was party to the appellant's lease in its capacity as manager and that the statutory requirement to include the name and address of the landlord in demands served by a landlord did not apply to it.

The appeal

16. The appellant sought and obtained permission to appeal from the Tribunal.

17. The first ground of appeal is that the F-tT erred in concluding that it had no jurisdiction to determine the service charges properly payable for the period 2001-2009 because Lewis & Tucker's letter of 30 July 2009 was expressly limited to the period from June 2007 to June 2009.

18. The second ground of appeal is that the F-tT's approach deprived s. 47 of the 1987 Act of any substantive meaning or effect in a case where services were delivered by a management company, rather than by a landlord.

Issue 1: The scope of the compromise

19. I have had a significant advantage over the F-tT in that, for the purpose of the appeal, the parties have produced all of the relevant correspondence leading up to the 2009 compromise. I mention only the most significant of those exchanges.

20. Between 2004 and 2007 the respondent's managing agents had been a firm called Wigmore who had taken over from Scotts. In June 2007 they were replaced by Lewis & Tucker, who experienced difficulty in obtaining full information and copies of relevant documents from Wigmore. When it assumed responsibility Lewis & Tucker understood that the only outstanding service charges payable by the appellant related to a levy of £2,597.40 to replace one of the boilers in the building which had broken down and for which no other provision had been made. The appellant did not agree that there were no other issues as she contended that Wigmore had failed to take into account payments which she had made and others made on her account by her mortgagee. Lewis & Tucker were in difficulty in dealing with those allegations and as early as 8 April 2008 they offered to exempt the appellant from liability to pay the boiler levy if she would discharge the charges which had accrued since it took over management in June 2007. No agreement was reached on that basis and eventually the respondent instructed solicitors, Michael Oppler & Co, who wrote to the appellant in November 2008 demanding payment of £9,722.90.

21. On 13 February 2009 the appellant's solicitor disputed the sum demanded and asserted that her true liability was £3,662.05. On 19 February the respondent's solicitors wrote an open letter rejecting that suggestion which they followed the next day with a without prejudice offer to accept just over £6,000 together with interest and costs but warning that if that was not agreed proceedings for forfeiture would be issued.

22. On 10 March 2009 the appellant's solicitors wrote three letters to the respondent's solicitors. The first set out the appellant's various defences to the service charge claim in some detail. It explained why she was not liable to pay the boiler levy and pointed out a number of defects in service charge demands addressed to her by Lewis & Tucker. In paragraph 6 of that letter a complaint was made that Wigmore had not complied with s. 47 of the 1987 Act and had not included a summary of the recipient's rights and obligations in the service charge demands. On that basis it was said that service charges which had been paid had not in fact been due and that consequential administration charges and interest on alleged arrears had not been payable. In short the appellant's solicitors threatened to challenge the charges paid by their client both before and after Lewis & Tucker took over responsibility in 2007.

23. The third of Alan Edwards & Co's letters of 10 March 2009 was headed without prejudice save as to costs began by referring to the open letter of the same date and reiterated their position that interest and legal costs previously paid in response to claims for by Lewis & Tucker's predecessors needed to be re-credited to the appellant's account. The letter went on to make the following proposal:

> "We are instructed by our client that she is ready to pay the sum of £3,662.02 which she submits is the amount she owes, further to the statement which we previously sent you and of which we enclose a further copy, by the end of March in full and final settlement of this claim."

24. Michael Oppler & Co acknowledged receipt of that letter but did not reply substantively. I was told that in view of the offer contained in the letter the respondent had decided that Lewis & Tucker

should handle the remaining negotiations. It was not until 4 June 2009 that Lewis & Tucker responded to the appellant's solicitors as follows:

> "We are under instruction to accept the figure put forward by your client as the amount outstanding to 23 June 2009. The sum proposed was £3,662.05. Please send a cheque in settlement to our offices by return of post."

25. Lewis & Tucker had interpreted the appellant's 10 March offer as covering all payments up to that date, and therefore as excluding the further half-year charges which would fall due on 24 June 2009. It is clear that the parties were in agreement on this point. Up-to-date statements which had been provided under cover of by the respondent's solicitor's letter of 19 February 2009 took the appellant's account up to 23 June 2009. In a letter to Lewis & Tucker on 24 February 2009 the appellant herself had asserted that all that remained unpaid was the service charge for December 2008 to June 2009 which she said amounted to £3,662.02.

26. It is also clear that by the exchange of Alan Edwards' letter of 10 March and Lewis & Tucker's response of 4 June 2009 the parties had reached a consensus. The appellant's offer was to pay £3,662.02 which was said to represent all that she owed and was made in full and final settlement, and the respondent's managing agents accepted the offer which she put forward as discharging the appellant's liability up to 23 June 2009. The settlement then achieved was clearly intended to resolve all outstanding issues between the parties covering the service charges demanded by Lewis & Tucker, Wigmores and its predecessor, Scotts. The correspondence included a positive assertion by the appellant that the amount she owed was £3,662.02 and made no reservation of her entitlement to recoup sums previously paid in interest, administration charges or legal costs.

27. Lewis & Tucker's letter of 4 June 2009 was not received by the appellant's solicitor and a further copy was sent on 6 July 2009. The appellant's solicitors do not appear to have appreciated that there had been a clear offer and acceptance and informed Lewis & Tucker that they would take their clients instructions. Having done so they replied on 16 July 2009 asking for confirmation that the proposed payment of £3,662.05 "would be in full and final settlement of all service charges, ground rent, interest and legal fees for the period June 2007 to 24 June 2009". That letter elicited a response on 30 July 2009 from Lewis & Tucker confirming that the payment was indeed intended to cover the period 24 June 2007 to 24 June 2009. They included what they described as an invoice "for the new balance on the account" and requested payment of that sum by return. The new balance was £1,662.05 which comprised the service charge in advance and the half-yearly sinking fund both due on 24 June 2009 covering the period to 24 December 2009. It is apparent, therefore, that Lewis & Tucker did not regard the payment of £3,662.05 as including the period from 24 June to 24 December 2009. Once again the parties were in agreement (although an additional 2 pence had been added to the agreed sum). On 8 October 2009 Lewis & Tucker chased for a response but received no substantive reply and only two payments totalling £1,500 expressed to be "towards our client's current service charge demand."

28. Both parties agreed that they had reached a settlement, but they did not agree on the period to which the settlement related. Mr Bates submitted on behalf of the appellant that settlement had been achieved only for the period 24 June 2007 to 24 June 2009 and that the F-tT had been wrong to

conclude that the agreement had resolved any disputes about charges claimed or paid before Lewis & Tucker's management commenced. I cannot accept that submission. Having read the correspondence as a whole it is quite apparent that the appellant's offer of 10 March 2009 was in full and final settlement of all of her liability for service charges, including her alleged entitlement to reimbursement of interest and legal fees paid in respect of demands by Wigmore and Scotts. The correspondence is entirely inconsistent with the appellant reserving any entitlement to recoup further sums, as she now wishes to do, in respect of the period before 24 June 2007.

29. It is true that the letter of 30 July 2009 shown to the F-tT referred expressly only to the period 24 June 2007 to 24 June 2009. By the time that letter was written Lewis & Tucker's was not suggesting that there were outstanding sums predating its management other than the disputed boiler levy which the respondent had agreed to waive. Even if I am wrong about the effect of the exchange of correspondence on 10 March and 4 June 2009 I am nonetheless satisfied that the F-tT was correct in its conclusion that it had no jurisdiction to consider service or administration charges predating 24 June 2007. By section 27A(4) of the 1985 Act no application may be made to the F-tT in respect of a service charge which has been agreed or admitted by the tenant. By section 27A(5) a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. Nonetheless, I am satisfied that in the circumstances of this case, by making the payments which she did before Lewis & Tucker took over management of the building, and by subsequently settling the charges due after it commenced its management without claiming a credit for sums previously paid, the appellant must be taken to have admitted her liability for those historic charges.

30. For these reasons I am satisfied that the appellant's liability for service charges predating 24 June 2007, but not including charges falling due on that date, was the subject of agreement in July 2009 and was not capable of being challenged by the appellant under section 27A of the 1985 Act. The appeal on the first issue is accordingly dismissed.

Issue 2: Section 47 of the Landlord and Tenant Act 1987

31. Once again the submissions and material placed before this Tribunal are very different from those on which the F-tT made its decision. Before the F-tT the parties were in agreement that Cameret Court Limited was the appellant's immediate landlord and that the respondent was party to the appellant's lease only in its capacity as management company. It was on that basis that the F-tT concluded that s. 47(1) did not require the respondent's name and address to be included in service charge demands, and that s. 47(2) imposed no sanction for the omission of that information.

32. The relevant parts of s.47 provide as follows:

> "47 Landlord's name and address to be contained in demands for rent etc.
>
> (1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—
>
> (a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—

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

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

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

…

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

33. The 1987 Act includes no equivalent of s. 30 of the Landlord and Tenant Act 1985 which provides that "landlord" includes any person who has a right to enforce payment of a service charge. On the contrary, s. 60(1) of the 1987 Act stipulates that for parts of the Act including Part VI (where s. 47 is to be found) "landlord" means the immediate landlord.

34. In its recent decision in *Pendra Loweth Management Limited v North* [2015] UKUT 91(LC) the Tribunal has held that s. 47 of the 1987 Act has no application to demands for payments of sums due parties to leases who are not landlords within the meaning of the definition in s. 60. In *Pendra Loweth* demands for service charges may be made by a management company were held to be valid notwithstanding the omission of the management company's name and address. Mr Bates did not accept that the Tribunal's conclusion on that issue was correct but he realistically limited his submissions on the point while reserving his position for any potential appeal. He suggested that "landlord" in the 1987 Act could not logically be taken to exclude a management company where the management company was responsible for the delivery of services and was entitled to receive service charges. Referring to the decision of the Privy Counsel in *Ghany v Attorney General of Trinidad and Tobago* [2015] UKPC 12 at [14]–[15] Mr Bates submitted that there was an error in the drafting of the 1987 Act which should be corrected by the Tribunal. I am quite satisfied that it is not open to me to find that it was Parliament's true intention that the scope of s. 47 should include demands by management companies and that only by inadvertence did it fail to make that clear; only then would it be permissible, as part of a process of interpretation, to read s. 47 as including such demands. In view of the extended definition given to "landlord" in s. 30 of the 1985 Act it seems to me quite impossible to suggest that Parliament had any such obvious purpose in mind when enacting the 1987 Act.

35. Mr Bates' remaining argument on s. 47 raised a new point not taken before the F-tT. He submitted that, by reason of the 1986 grant to the respondent of an underlease of the whole building

subject to the appellant's occupational sub-lease, the respondent had from that time become the appellant's landlord. He referred to Megarry & Wade's *Law of Real Property* at paragraph 17-134:

> "Thus if L grants a lease of Black Acre to T for 21 years in 1994, and then granted a lease of Black Acre to X for 30 years in 1995. X would become the reversioner upon T's lease and therefore T's landlord."

It followed, Mr Bates submitted, that s. 47(1) required that the respondent's name and address be included in any demand for service charges, that the demands issued by the respondents were demands within the meaning of s. 47(4) and that as admittedly they did not include the respondent's name and address, the sanction in s. 47(2) applied and the service charges payable for the period from 24 June 2007 were to be treated for all purposes as not being due.

36. For the respondent Mr Adams accepted that the respondent was the appellant's immediate landlord. Nonetheless he drew attention to the form of invoice which had been used by the respondent's new agent, John Mortimer Property Management Limited, since the appellant had first taken the s. 47 point. The invoices included three separate pieces of information, as follows:

> "Landlord and Tenant Act 1987, sections 47 and 48: Cameret Court Limited c/o Quastel Midgen, 74 Wigmore Street ….
>
> Address for service of notices (including notices in proceedings): c/o Quastel Midgen …
>
> Acting as agent for: Cameret Court Residents Association Limited, Cameret Court, Lorne Gardens, London W11."

It was said by Mr Adams that in this form the invoices complied with s. 47(1) because they contained the name and address of the respondent which is the landlord. I do not accept that submission. The invoice contains the names and addresses both of Cameret Court Limited and of the respondent (as well as of their agent). It would be entirely unclear to anyone unfamiliar with s. 47 whether either of those companies was being identified as the landlord. Indeed, a recipient of such a demand who was familiar with s. 47 would be led to believe by the information in the first line that Cameret Court Limited was the landlord, and not the respondent.

37. The statutory requirement is not simply that the name and address of the landlord must appear on any written demand. The tenant must be informed of the name and address of the landlord, hence the requirement that: "the demand must contain the following information". A demand which provides the name and address of two or more different companies without identifying which of them is the landlord does not, in my judgment, provide the required information. The tenant is not to be left to guess which of two or more parties is the landlord, but is to be informed of the landlord's identity.

38. It follows, therefore, that the sanction in s. 47(2) of the 1987 Act applies to the demands given by John Mortimer Property Management Limited since taking over from Lewis & Tucker. Mr Bates suggested that as a result it would be necessary for the respondent to serve further demands for all of the charges claimed from 27 June 2009 onwards. I do not think that is correct. The effect of s. 47(2) is suspensory only, in that any service charge or administration charge is treated as not being due

from the tenant to the landlord "at any time before the information is furnished by the landlord by notice given to the tenant". It is an irony that in this case that the information that the respondent is the appellant's landlord was given to the respondent by Mr Bates, the appellant's counsel. It may be that there has already been a sufficient communication between the respondent and the appellant to satisfy s. 47(2) but no such document has been relied on. If there has not been one, all that is now required to satisfy the statutory requirement is for a notice to be given to the appellant informing her that the respondent is her landlord and of its address. It may be that that step has already been taken. It is not necessary for all of the previous service charge demands to be re-issued. From the time at which such a notice has been given the service charges will be treated for all purposes as being due from the appellant to the respondent.

39. On the information before the Tribunal it follows that the service charges claimed in the 2013 county court proceedings as being due from 25 December 2011 have not been shown to have been due when those proceedings commenced, but will be due in full with effect from the date on which the necessary notice under s. 47(2) of the 1987 Act either was given or is given in future. No other challenge by the appellant to her liability to pay the sums demanded has succeeded. No schedule of the service charges claimed up to the date of the county court proceedings has been produced to me so I am unable to state the relevant figure.

40. For these reasons I allow the appellant's appeal against the decision of the F-tT that her liability to pay service charges to the respondent is unaffected by the need to comply with s. 47.

41. The parties requested the opportunity to make written submissions on an appropriate order under s. 20C Landlord and Tenant Act 1985 in relation to the treatment of the costs of this appeal (a decision of the F-tT on a similar application in relation to the proceedings before it is still awaited). I therefore invite the parties to make any such further submissions within 14 days of the date of this decision.

Martin Rodger QC
Deputy President
20 May 2015

Addendum: Section 20C, Landlord and Tenant Act 1985

42. The parties have now exchanged submissions on the outstanding application by the appellant for a determination under section 20C, Landlord and Tenant Act 1985 that no part of the costs of the appeal should be treated as relevant costs for the purpose of any service charge payable by her.

43. On the appellant's behalf, Mr Bates has submitted that before considering what order to make under section 20C, if any, it is first necessary for the Tribunal to be satisfied that there is a contractual right to include the costs of the proceedings in the service charge. The basis of that submission is that unless the lease permits the recovery of such costs as part of the service charge, there is no potential liability to which section 20C is capable of applying.

44. Mr Bates referred to the Tribunal's decision in *Daejan Properties Ltd v Griffin* [2014] UKUT 206 in support of the contention that a determination on the scope of the charging provisions in the lease was "ordinarily" a necessary pre-condition to the making of an order under section 20C. I am aware that a similar view has sometimes been taken by first-tier tribunals faced with applications under section 20C, resulting in additional argument and effort in considering an issue which is usually peripheral to the main subject matter of the dispute. Mr Bates' submission in this case provides the Tribunal with the opportunity to dispel any misconception over the effect of *Daejan v Griffin.*

45. In *Deajan v Griffin* the Tribunal was considering an appeal by a landlord against a section 20C order made by a leasehold valuation tribunal in favour of leaseholders who had succeeded in reducing the service charges claimed from them for work carried out after the parapet of their building collapsed into Cricklewood Lane. The Tribunal had already allowed the landlord's substantive appeal against the LVT's decision and had found the leaseholders liable to pay the full amount of the original service charge. In response to the landlord's section 20C appeal one tangential point taken on behalf of the leaseholders was that their leases included no provision under which the costs of the proceedings could be added to the service charge. The landlord invited the Tribunal not to determine that issue, but to assume that there was an entitlement to include costs of proceedings, leaving the scope of the charging provision to be determined by some other court or tribunal on some later occasion. The landlord's submission, which we recorded at paragraph [114], was essential that the Tribunal had no jurisdiction to make a determination on the scope of the charging provision:

> "Mr Peters contended that there were no grounds for the Tribunal to consider the appellant's contractual right to recover the costs it had incurred in these appeal proceedings via the service charge provisions in the various leases. No such service charge had yet been raised and the issues of construction of the individual leases had not been a matter for consideration by the LVT. In those circumstances it should not be considered to be within the scope of the appeal."

46. Both parties had already made extensive submissions in writing on the scope of the charging provisions, so the suggestion that a dispute which had already crystalised should be left over to be resolved in yet further proceedings was not an attractive one and we rejected it. Among the reasons we gave for addressing the meaning of the charging provision (which I take to be the basis of Mr Bates' submission) was the following, at paragraph [117]:

> "First, if the appellant has no contractual entitlement to recover the costs of proceedings through the service charge that would render the section 20C application, and the appeal on that issue, entirely redundant, and there would be no need for us to spend further time considering it …"

It was also the case that the flats in the building were held under a variety of different forms of lease and the Tribunal considered that it was relevant to have regard to the relative liability of different leaseholders in exercising the discretion under section 20C (see *Deajan* at paragraphs 118 and 139). That special feature is unlikely to be encountered in most cases where leases are usually in a common form.

47. It is one thing to say that if the costs of proceedings are not recoverable as a matter of contract there is no need to spend time considering section 20C, but it is quite a different thing to say that it is therefore necessary to consider the meaning of the lease before it is possible to make a determination under section 20C. Clearly it is not necessary to do so, although there may be circumstances in which it is appropriate. There were good reasons in *Daejan* for the Tribunal to begin its consideration of the section 20C appeal by looking at the terms of the various charging provisions, but we did not thereby intend to suggest that that should be the invariable starting point, or even that it would be a useful point of departure in most cases.

48. Nevertheless in this appeal the question of the scope of the charging provision in Ms Tedla's lease has been raised on her behalf by Mr Bates and, as it has been argued and can be dealt with shortly I intend to do so. The Fifth Schedule to the lease defines the expenses recoverable through the service charge and includes two items which are relied on by Mr Adams. Paragraph 4 covers:

> "The costs of enforcing or attempting to enforce against any of the Residents the performance or observation of any covenant stipulation or regulation contained or referred to in the underlease of any flat…"

Paragraph 14 extends to:

> "Any expenses costs and fees incurred by the Company under or in relation to or however arising out of… any proceedings or contemplated proceedings or dispute between any two or more of… the Company the Tenant… relating to the provisions of this Underlease."

49. Mr Bates submitted that paragraph 14 was not engaged by these proceedings as the dispute over the scope of the compromise of the appellant's service charge liability was not a dispute "relating to the provisions of" the underlease. I disagree. A dispute may fairly be said to relate to the provisions of a lease or underlease if it concerns the payability of charges sought to be levied under those provisions, whether or not the dispute concerns the meaning of the terms themselves. In any event, Mr Bates made no submission in relation to paragraph 4 of the Fifth Schedule, which clearly covers the respondent's claim transferred from the county court to recover the unpaid service charges.

50. It is then said by Mr Adams that as the appeal has been allowed by the Tribunal the appellant should have the benefit of an order under section 20C. I disagree. The success achieved by the appellant was pyrrhic. As a result of Mr Bates' attention to detail she was able, at the last minute, to identify and take advantage of an entirely new point of some technicality but ultimately of no lasting benefit. Mr Bates' rearguard action is unlikely to have delayed the respondent's entitlement to the charges for longer than it would take to send a single letter providing confirmation of the required information. In substance, however, the respondent has been the successful party and has completed the rout of the appellant's unattractive campaign to recoup all of the charges paid by her for services enjoyed since 1988.

51. Like her neighbours, the appellant agreed when she took the underlease of her flat that she would contribute to the cost incurred by the respondent in enforcing obligations, including her own. I do not consider that it would be unjust or inequitable in the circumstances of this appeal for her to be held to that bargain; in my judgment it would be unjust and inequitable for her neighbours to bear a disproportionate share of the expenses she has caused the respondent company, of which they are all members, to incur. I therefore refuse to make an order under section 20C in the appellants' favour in respect of the costs of the appeal to this Tribunal.

52. There is no application before the Tribunal for an order under section 20C in respect of the costs of the proceedings before the FtT. An application was made to that tribunal but it has not yet been considered pending the outcome of this appeal. Mr Bates has not asked me to make such an order on the appellant's behalf and in those circumstances I do not think it appropriate to accede to Mr Adams invitation to refuse to do so. If the appellant still wishes her application to be considered by the FtT she must revive it in that forum; unless and until she does, and is successful, she will be liable along with her neighbours for the cost of the proceedings in the FtT as well as those in this Tribunal.

Martin Rodger QC
Deputy President
2 October 2015