UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – section 27A Landlord and Tenant Act 1985 – construction of provisions of lease – landlord fails to establish specially designated trust fund as required by lease – whether landlord obliged to pay for repairs from reserve fund – tenants' appeal allowed – whether order under section 20C Landlord and Tenant Act 1985 should be made in respect of costs before Ft T and/or before UT

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

BETWEEN:

(1) CARIBAX LIMITED
(2) STARCLASS (HINDE HOUSE) NO. 2 LIMITED
(3) STARCLASS (HINDE HOUSE) LIMITED
(4) LONDON & NEW YORK LIMITED

Appellants

and

HINDE HOUSE MANAGEMENT COMPANY LIMITED
Respondent

Re: Hinde House,
11-14 Hinde Street & 16-18 Thayer Street
London W1U 3BD

Before: His Honour Judge Stuart Bridge
Sitting at: Royal Courts of Justice, Strand, London WC2B 2LL
on
6 May 2015

John Furber QC for the Appellants
Steven Woolf for the Respondent
No cases are referred to in this decision.

Introduction

1. This is a dispute about service charges. The appellants are each lessees of flats contained within Hinde House, the head lease of which is held by the respondent. The building has a total of 34 flats, and the appellants between them are long lessees of seven of those flats.

2. On 5 March 2014, a number of matters came before the Ft T for determination under section 27A of the Landlord and Tenant Act 1985. The Ft T gave its decision on 14 April 2014, following which the appellants sought permission to appeal. Limited permission was granted on 3 September 2014 on two issues only: (1) the use of a reserve fund provided for in the leases and referred to in the respondent's accounts; (2) the exercise of the jurisdiction under section 20C of the Landlord and Tenant Act 1985 to exclude the respondent's costs of all or part of the proceedings from the service charges payable by the appellants.

3. The principal issue on this appeal is therefore the use of the reserve fund, and it raises a matter of law in that its resolution depends upon the true construction of the lease.

4. There is a subsidiary issue, namely whether the respondent's costs in bringing the proceedings should be payable by the appellants pursuant to its obligations under the service charge. It is accepted by both parties that this issue only arises in the event of the principal issue being decided in favour of the appellants.

The terms of the leases

5. The issue being one of construction of the leases, I begin with the example lease that is provided by agreement of the parties.

6. In that lease, the Tenant covenants with the Landlord to observe and perform at all times the obligations and responsibilities set out in Part A of the Fifth Schedule. One of those covenants (at paragraph 2 of that Schedule), immediately following the covenant to pay the rents, is as follows:

> (a) To pay to the Landlord without any deduction by way of further and additional rent a Service Charge being that percentage specified in Paragraph 8 of the Particulars of the expense which the Landlord shall in relation to the Property reasonably and properly incur in each Landlord's Financial Year and which are authorised by the Eighth Schedule hereto (including the provision for future expenditure therein mentioned) the amount of such payment to be certified by the Landlord's independent qualified Accountants acting as experts and not as arbitrators by the quarter day immediately next following the expiry of each Landlord's Financial Year and to include the payment of an appropriate proportion of any substantial expenditure which has to be incurred during the

course of the Landlord's Financial Year and which was not anticipated at the time when the Landlord's estimate was made and FURTHER on the Twenty-fifth day of March and the Twenty-ninth of September in each Financial Year to pay on account of the Tenant's liability under this paragraph such amount as in the reasonable opinion of the Landlord fairly represents one half of the Service Charge for the current Landlord's Financial Year whichever shall be the greater PROVIDED THAT such payment first referred to in this paragraph (not being the on Account payments) shall be required to be made by the Tenant only after having received a copy of the Landlord's independent qualified Accountants' certificate hereinbefore referred to PROVIDED THAT immediately upon such certificate being given as aforesaid there shall be paid by the Tenant any deficiency between the amount paid by the Tenant on account and the Service Charge so certified

(b) The Service Charge shall include an amount (to be revised annually by the Landlord at its reasonable discretion) towards the estimated cost to the Landlord of complying with its covenants in Clause 3 hereof such amount to be ascertained after taking account of:

(a) the life expectancy of the plant, equipment and other items (of which the cost of replacement would form a substantial proportion of the Service Charge) and the estimated cost of replacing the same;

(b) the state of repair and condition of the Building and the estimated costs of carrying out repairs, renewals and maintenance of the Building in future accounting years; and

(c) the requirement for the future decoration of the outside of the Building as and when the Landlord may from time to time in its reasonable discretion consider necessary, which amount shall be transferred to a specially designated trust fund to be invested so as to satisfy the requirements of section 42(5) of the Landlord and Tenant Act 1987 (and any legislation which shall amend or replace the same)

PROVIDED THAT any expenditure on any such plant, equipment and other items in respect of the repairs, renewals and maintenance of the Building and decoration thereof during any accounting period shall first be met out of the specially designated trust fund to the extent of the amount standing to the credit of such trust fund.

7. The Landlord covenanted with the Tenant, in the usual form, to observe and perform the obligations set out in the Sixth Schedule. These include a covenant, expressed to be 'subject to the payment by the Tenant of the rents and the Service Charge herein mentioned' and to the Tenant's compliance with all other covenants agreements and obligations, 'to keep in good repair and decoration (and to renew reinstate and if reasonable improve as and when the Landlord may from time to time in its reasonable discretion consider necessary)' the structure of the property (as defined in the lease), the conduits (again as defined) and the Common Parts.

8. Clause 3 (referred to in the tenant's service charge as above) contains a covenant by the Landlord 'to keep clean and reasonably lighted the passages landings staircases and other parts of the Property enjoyed or used by the Tenant in common with others and to tend keep clean and tidy and generally to maintain any forecourt or garden used in connection with the Property and not included in the demise of any flat therein.'

9. In Part B of the same Schedule, at Clause 2, the Landlord covenanted:

> To hold the Service Charge and the Service Charge Fund upon trust to expend the same in subsequent years pursuant to the Eighth Schedule hereto.

10. The Eighth Schedule sets out in detail the costs and expenses charged upon the Service Charge and the Service Charge Fund. These include the costs incurred by the Landlord in complying with its covenants contained in Part A of the Sixth Schedule as well as a number of other items. At clause 11, there are included 'All legal and other proper costs incurred by the Landlord', both in 'the running and management of the property' and 'in making such applications representations and in taking such action' as the Landlord shall reasonably think necessary.

The Reserve Fund issue

11. The parties have provided an Agreed Statement pursuant to directions of the Upper Tribunal. They agree that there is no dispute relating to the facts arising in this appeal. They jointly formulate the principal issue as follows:

> Whether the Ft T was wrong in holding that, because the "Reserve Fund" was not held in a specially designated trust fund as required by the relevant leases, there was no obligation on the part of the Respondent to expend the money shown in the relevant accounts as held in the "Reserve Fund" towards the cost of repairs and maintenance in the relevant years. The Appellants contend that the Ft T was wrong and the Respondent contends that it was right in accepting a submission made on its behalf.

12. Reference is then made to the following extract from the decision of the Ft T which deals with this particular issue:

> '24. Mr Furber [counsel for the appellants] relied on the terms of paragraph 2(b) of the Fifth Schedule Part A which requires the landlord to transfer the reserve fund to a specially designated trust fund. There are two reserve funds identified in the accounts, though it was conceded for [the respondent] that neither was a specially designated trust fund. At the end of 2012 the reserve fund had stood at just over £133,000. Before the date of the adjourned hearing, all reserve fund moneys collected had been refunded to the leaseholders.
>
> '25. Mr Furber argued that service charge expenditure for the items of maintenance specified in paragraph 2(b) (broadly speaking, plant and equipment, building repairs and exterior decoration) was not payable as it had not been first

"met out of the specially designated trust fund to the extent of the amount standing to the credit of such trust fund". Mr Furber contended that the fact that it was not within the specially designated trust fund does not mean that it had not been available for the purpose for which it was intended.

'26. However, there was now no dispute that such a specially designated trust fund had never been established. Since no such fund existed, the tribunal agreed with Mr Woolf [counsel for the respondent] that Mr Furber's argument that the service charges should be met from that fund was without merit.

'27. The tribunal, in common with both counsel, observed there were issues of application with regard to the operation of the reserve fund- if the lease was interpreted as meaning that any expenditure on the specified items should first be met from the reserve fund in each year- since it would not act as a reserve fund year to year unless the contributions were sufficient to meet current year and a contribution to future expenditure. The interpretation of the provisions was not straightforward, however, and since the matter does not require a determination in these proceedings the tribunal has not reached one.'

13. These paragraphs, in particular the first three, summarise the dispute about the reserve fund which has been argued before me. Before I deal with those arguments, it is important that I set out those matters which are agreed:

(1) It is accepted that the respondent never established a 'specially designated trust fund' pursuant to section 42A of the Landlord and Tenant Act 1987. By section 42 of the same Act, sums paid by way of service charges to the landlord (or any other person to whom service charges are payable) are to be held by him on trust (either as a single fund, or as two or more separate funds) to defray costs incurred in connection with the matters for which the service charges were payable and, subject to that, on trust for the contributing tenants. By section 42A, the 'payee' (that is, in this case, the respondent, being the landlord) is required to hold any sums standing to the credit of any trust fund in a designated account at a relevant financial institution.

(2) It is accepted that the respondent, in failing to establish such a fund, was in breach of its obligation to do so under the lease.

(3) It is accepted (apparently for the first time, no such concession having been made in the Ft T) that the sums paid to the respondent by way of service charges must have been held by the respondent on trust.

(4) It is accepted that over the relevant period with which the dispute is concerned- that is calendar years 2010- 2012- a total of £48,203 was charged to the tenants of the block in respect of 'Repairs & Maintenance' and the 2013 accounts indicated an estimated sum to be levied for the same amounting to £30,000.

(5) It is accepted that over the same period sums were being transferred into a so-called 'Reserve Fund' and that by the end of 2012 that fund contained the sum of £133,491.

14. In light of these accepted facts, the submission of the appellants is straightforward and succinctly expressed in their skeleton argument. The appellants say that the conclusion of the Ft T is commercially nonsensical and wrong in law. The respondent was in breach of its own covenant in failing to establish a 'specially designated trust fund' and it cannot take advantage of its own wrong in contending that, there being no such fund, it is under no obligations relating to the use of the reserve fund. Although the machinery envisaged in the Fifth Schedule of the lease may have failed by virtue of the respondent's breach, the reserve fund is identifiable in the accounts and must therefore be used in accordance with the proviso to paragraph 5(b) so as to pay for the costs of the repairs (etc) during each accounting year as and when they fall due. Had the reserve fund been so used then the costs of the repairs in 2010-2012 would not have been payable by the lessees. Put another way, the sums collected by the respondent are held on trust to use it for the purposes specified in the proviso, that is, the purposes for which they were collected. The appellants conclude by submitting that the sums claimed by way of service charge for the years 2010-2012 should not have included sums for repair and maintenance (and likewise the expenditure anticipated on those items in the 2013 estimate), as those sums should have been met out of the reserve fund in accordance with the terms of the leases.

15. The respondent, as I have indicated, concedes that it failed to establish a specially designated trust fund and that in failing to do so it was in breach of covenant. It now accepts that the sums paid to it cannot be owned by the respondent beneficially and that they must be held pursuant to a trust. But it seeks to uphold the decision of the Ft T by asserting that, in the absence of a specially designated trust fund, it cannot have been under an obligation to meet the costs of repair (etc) first out of any other reserve fund that might be identifiable. To impose such an obligation on the landlord would be to require it to perform the impossible. The proviso cannot be read to apply to a fund which is not a specially designated trust fund.

16. The respondent seeks, in its skeleton argument, to offer the answer to the appellants' 'perceived concern':

> 'The Appellant need only to have threatened an action in breach of covenant against the Respondent for failing to set up the "specially designated trust fund". Had such a threat been made, the Respondent would either have done as required or ignored the request. If the request was ignored, proceedings could have been commenced which would have been undefendable.'

17. The answer to the principal issue in this appeal depends upon the construction of the service charge provisions contained in the leases concerned.

18. The appellants were liable, pursuant to paragraph (2) in the Fifth Schedule, to pay service charges to the respondent, the amounts payable being calculated on the basis

stipulated by the lease. The effect of paragraph 2(b)(c) in the same Schedule is that the respondent landlord was obliged to establish a 'specially designated trust fund' in which certain of the sums paid by the appellants were to be invested in compliance with section 42(5) of the Landlord and Tenant Act 1987. The proviso to paragraph 2 is quite specific in stipulating that 'any expenditure… in respect of the repairs, renewals and maintenance of the Building'… 'during any accounting period shall first be met out of the specially designated trust fund' insofar as there is sufficient credit in that trust fund to allow for such sums to be so met.

19. The sums paid by way of service charge by the appellants to the respondent would all, in my judgment, be held upon a trust whereby the respondent was obliged as trustee to use or invest those sums for the purposes stated in the lease. I cannot see how it would be otherwise, as the respondent concedes, quite rightly, that the parties never intended that the respondent would become beneficial owner of the sums paid by the appellants. But if the point needed to be made by reference to any of the provisions in the lease, there is paragraph B2 of the Sixth Schedule (see paragraph 9 above).

20. The lease obliges the respondent to establish a specially designated trust fund, and then requires it, assuming sufficient credit in that account, to meet any expenditure on repairs renewal and maintenance of the building out of that fund. The intended effect of that proviso was that the lessees could require that fund defray those costs on the basis their service charges would not be used to meet them until that fund had been exhausted.

21. In the circumstances of this case, there was always in existence a reserve fund, identified in the service charge accounts produced by the respondent, sufficient to meet the expenditure incurred. There was not, however, a specially designated trust fund because, in breach of its obligations under the lease, the respondent never established one.

22. The reserve fund, being made up of service charge payments by the appellants and other lessees, was itself held on trust, for the reasons explained above. The trust has no express terms, but as a matter of construction of the parties' intentions objectively ascertained from the terms of the lease, I am of the view that the trust must give effect to the provisions of the lease as far as that can be done. The respondent was therefore under a liability, as trustee of the sums paid by way of service charge, to deal with that fund and when repairs renewal and maintenance of buildings were carried out (as defined and described in the relevant terms of the lease) the respondent was obliged to defray those costs out of that fund. Applying the proviso to paragraph 2 above, those costs were to be paid first out of the reserve fund, and in the event of there being sufficient credit in the reserve fund to pay those costs, the respondent would have no legitimate recourse to the appellants for any further amount in respect of expenditure of that kind.

23. The respondent has contended that if it held the sums paid by way of service charge on trust (which it now concedes), and if it was obliged to hold those sums in accordance with the provisions of the lease (which I have decided is the case), it does not follow that it would be obliged immediately to pay over the contents of the reserve fund in the event

of any repairs renewal or maintenance being carried out. It has argued that the same amounts could have been demanded, and lawfully demanded, of the appellant, as were demanded. The respondent claims that it was pursuing a legitimate strategy in retaining sums in reserve in order to ensure that there was sufficient available capital in the event of a large amount being required to be raised at relatively short notice. This being the case, claimed the respondent, no 'adverse consequences' resulted from its admitted breach of covenant, and, more significantly, it could not be said that the amount it claimed as service charge could not be lawfully claimed.

24. The difficulty with these contentions is that no evidence was ever put before the tribunal concerning any 'strategy' that had been expressed, or applied, by the respondent in respect of the funds it was holding. Without evidence, there is no basis upon which a tribunal could say how the service charges being claimed had been calculated, and the respondent cannot seek to go behind or justify the amounts being claimed at this stage in the proceedings. In my judgment, the exercise the respondent is seeking to advocate has been accurately characterised by the appellants as 'irrelevant and speculative'.

25. I should add, by way of conclusion, that I find the respondent's argument extremely unattractive. I agree with the appellants that it amounts to an attempt to take advantage of its own wrong. I do not see why, following the respondent's frank admission of one breach of covenant, it should be allowed to assert immunity from further breaches which flow naturally and inexorably from the first.

26. For all these reasons, I am of the view that the appeal on the reserve fund issue must be allowed. The Ft T was wrong in determining that there was no obligation on the respondent's part to expend the sums of money shown in the relevant accounts towards the costs of repair renewal and maintenance.

The costs issue: section 20C Landlord and Tenant Act 1985

27. The parties' Agreed Statement clearly sets out this issue as follows:

> If the Appellants are successful on the issue described above then they ask the Tribunal to review the decision of the Ft T declining to make an order relating to costs pursuant to section 20C of the Landlord and Tenant Act 1985, save in respect of an abortive hearing on 15 November 2013 (see paragraphs 41-44 of the decision of the Ft T). The Appellants contend that success on the issue described above, together with their success on other issues before the Ft T, justify and require the making of an order under section 20C, ensuring that they do not have to contribute to the Respondent's costs of these proceedings through the service charge. The Respondent contends that, even if the Appellants are successful on the issue described above, the order made by the Ft T relating to section 20C should stand, having regard to the decisions on all the issues before the Ft T and the consequences of a decision in the Appellants' favour relating to the "Reserve Fund".

28. In order to explain and to examine this issue more fully, a brief history of the proceedings is necessary.

29. On 15 July 2013, the respondent made application to the Ft T for a determination of liability to pay (and reasonableness of) service charges pursuant to section 27A of the Landlord and Tenant Act 1985. The determination sought was in relation to years 2010 to 2012 inclusive in the past as well as 2013, the current year. In relation to each year, when asked for a description of the questions to be determined, the respondent stated [sic]:

> 'Are the cost incurred for [the relevant year] reasonable?'

30. The respondent commented, where invited to do so, that no service charge payments had been made since September 2012. This is accepted by the appellants: they were refusing to pay by way of protest at the lack of information provided by the respondent.

31. On 13 August 2013, there was a hearing before the Ft T. The Ft T commented that the appellants had not given a clear explanation as to why service charges were being withheld, although the record of the decision does refer to the appellants' representative stating that the main problem was indeed a lack of financial information which had been requested for some time. The Ft T made directions that (inter alia) the respondent should supply the appellants with copy certified service charge accounts for 2010-2012, an itemised service charge budget for 2013 and a schedule setting out the amount standing to the credit of the reserve fund as at the date of the hearing as well as sums paid out of that fund with appropriate details. The hearing of the application was listed for 14 November, an inspection of the property to be conducted that morning prior to the hearing, with provision being made for the hearing to continue into the next day should it be necessary to do so.

32. On 14 November 2013, problems arose, as is evident from the Ft T record of that hearing, headed 'Directions' dated 25 November 2013.

33. First, the 2012 accounts provided by the respondent in response to the directions made at the August hearing contained an entry entitled 'Contentious Items' in the sum of £93,415.00. These were explained by the respondent's representative as comprising a number of items of loss and/or expenditure for which it considered the freeholder to be liable but which it would seek to recover through the service charge if recovery from the freeholder proved impossible. ("It should be noted that the appellants and the freeholder are associated companies"). The Ft T, having heard representations, held that it had no jurisdiction, under the application that had been made, in respect of the Contentious Items.

34. Secondly, the application sought the tribunal's determination only as to the reasonableness of the service charges claimed. The directions made at the August hearing had recognised the issue for determination by the tribunal which, pursuant to section 27A of the 1985 Act, was whether service charges were payable, reasonableness

being one element only of such an application. However, the appellants had not given details of the items disputed (as the directions had required them to do) but had instead responded largely with a list of queries. As a result, the issues in dispute had not been clearly identified or sufficiently well defined in advance of the hearing.

35. The Ft T accordingly decided, with the parties' consent, to adjourn the hearing to 5 and 6 March 2014, without hearing evidence, and made further directions. The hearing took place on 5 March, only one day being found necessary, and on 16 April 2014, the Ft T made its decision. It recorded as follows:

> I. The costs of common parts cleaning have been agreed.
>
> II. Service charges as determined below for repairs and maintenance, professional fees and administration expenses, and all other service charges demanded, are reasonable and will be payable upon service of correct certification pursuant to the Fifth schedule of the lease.
>
> III. The [Respondent] shall pay to the [Appellants] £1,500 in costs within 28 days.
>
> IV. An order under s.20C of the [Landlord and Tenant Act 1985] is made in respect of the [Respondent's] costs of attendance at the hearing on 14 and 15 November 2013 only.

36. The decision of the Ft T needs to be examined in a little more detail. The Ft T, in arriving at the decision, allowed certain items claimed by the respondent and disallowed others.

> (1) The appellants disputed that service charges were payable on a number of grounds: the lack of written evidence in support of the respondent's case; the lack of proper certification of the actual amounts alleged to be due from each lessee; the failure of the landlord to form a reasonable opinion as to the appropriate estimates; the invalidity of demands which were not made twice yearly. The Ft T considered these arguments, and with one exception rejected them, finding that all of the respondent's demands for estimated service charges were payable. However, it did accept that certification was necessary before the actual amounts determined would become payable.
>
> (2) The Ft T rejected an argument on behalf of the appellants based on section 20B of the 1985 Act to the effect that the respondent's claim to service charge for the year 2011 had become time-barred.
>
> (3) The Ft T rejected the appellants' contentions regarding the failure of the respondent to resort to the reserve fund for repairs renewal and maintenance. This was the subject of the appeal to this Tribunal, and the issue has now been resolved in favour of the appellants.
>
> (4) The Ft T found that the respondent had made an excessive demand for maintenance and repairs, failing to account for items which had been met by

claims on the buildings insurance, and reduced the amount payable from £49,773 to £39,595.04.

(5) The Ft T found that the respondent had claimed, as administrative expenses of the company (a sum reduced by concession of the respondent to £5,875), expenses associated with setting up and running the company which were not expenditure on the management of the building, and disallowed the sum claimed.

(6) The Ft T found that the respondent had claimed for legal costs (£5,915) without being able to produce documentary evidence establishing that they had in fact been incurred, and as a result determined that the sums were not payable.

37. Having considered the substance of the claims, the Ft T then turned to the application being made by the appellants under section 20C.

38. The relevant passage of the decision of the Ft T reads as follows:

> '41. The parties' statements of case in purported compliance with the directions of 13 August 2013 were actually in the nature of an exchange of questions and answers which did not serve to identify the issues in dispute. Before the instruction of Mr Furber, neither [Respondent] nor [Appellants] appeared to have appreciated that the issues were obscure, and the difficulty which the tribunal would have in identifying them. That difficulty quickly became apparent upon the commencement of the November hearing. It is simplistic to suggest that the fault in this lay with the [Respondent]- the tribunal is of the view that it was equally shared.
>
> '42. The tribunal was able to conduct the inspection on the first day of the November hearing, and the remainder of that day was useful on any analysis. Had the [Respondent] not sought to include the Contentious Items in the application, the tribunal takes the view that the second day could have been avoided. The tribunal would consider it appropriate to make an order that the [Respondent] reimburse the [Appellants'] costs in attending the second day of the November hearing, and their costs in preparing bundles and argument in response to the unreasonable attempt to bring the contentious items within the application. Insofar as misconceived submissions were made on these items by the [Respondent], the [Appellants] should be reimbursed for their cost in having to address the issues raised. However, in the absence of evidence as to costs, the tribunal has determined that an overall figure of £1,500 is appropriate and makes an order in this amount, payable by the [Respondent] to the [Appellants] within 28 days.
>
> '43. The tribunal declines to make any award of costs in respect of the [Appellants'] response to any other aspect of the [Respondent]'s case, both having been culpable in poorly preparing for the first hearing, meaning an adjournment was inevitable.
>
> '44. The [Respondent] has largely been successful in these proceedings (but for discrete service charge items and the fact that the certificates must now be

served). The [Appellants] have obstinately failed to pay any service charges for a substantial period of time, and without good justification. The challenges raised to the service charges were largely unmeritorious. In all of the circumstances, the tribunal determines that the [Respondent] should be prevented from recovering its costs of attendance only at the abortive November hearing from being recovered as a service charge, and makes an order under section 20C of the Act to that effect.'

39. The Ft T, in determining that the respondent should pay £1,500 in costs to the appellants, was penalising the respondent for its conduct in relation to the November hearing. Consistent with that approach, it made an order that the respondent should not be entitled to recover its own costs of attending that hearing from the appellants by way of service charge.

40. I am now asked to review the decision made on the section 20C application of the appellants in light of the reversal on appeal of the Ft T determination with respect to the reserve fund. It is accepted that I should not review the individual items at (1) to (6) above but consider the effect of the result on the substantive appeal on the overall position of the parties. It is also accepted that in conducting this exercise, this Tribunal has the same discretionary powers as the Ft T.

41. Section 20C of the 1985 Act provides, so far as is relevant to this case:

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

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

(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.

42. It is clear that the Tribunal has a wide-ranging discretion in determining whether an order should be made, and if so what the extent of that order ('all or any of the costs incurred or to be incurred') should be.

43. Counsel for the appellants has submitted that the effect of my decision on the substantive issue of the reserve fund is such that it should result in a reversal of the Ft T decision on the section 20C application. In doing so, the appellants have directed me to two particular considerations.

44. First, the financial consequences of the decision have been significantly affected by the appeal result. At first instance, the appellants had some success, but it had relatively limited impact financially: the sum total of service charges disallowed by the Ft T (see at (4), (5) and (6) of paragraph 36 above) being £20,968.96. As a result of the appeal, further sums of £48,203 (repairs and maintenance claims for 2010-2012) and £30,000 (estimate for 2013) have been disallowed by this Tribunal. These figures are the total sums claimed due from all the lessees in the building, and the sum claimed from the seven lessees involved in these proceedings would represent, it is accepted by the respondent, approximately 25 per cent of these figures. Nevertheless, the appellants contend, that means that the effect of success on appeal is for the seven lessees to save themselves a sum of approximately £19,550 over and above the sum of approximately £5,242 they had already saved in the Ft T.

45. Secondly, the appeal result has significant implications in assessing the parties' conduct in the course of the proceedings. It is no longer accurate to say, as the Ft T did, that the respondent has 'largely been successful'. Moreover, the view of the Ft T that the appellants' failure to pay was 'obstinate' and 'without justification', and that their challenges were 'largely unmeritorious', is now difficult to support. The appellants contend that had the Ft T determined, as I have decided they should have done, that the respondent was wrong not to use the sums contained in the reserve fund to pay for the necessary repairs and maintenance, the degree of mismanagement thereby disclosed in their operation of the service charge machinery should have led to a section 20C order in the appellants' favour.

46. Counsel for the appellant has also pointed out (although it should be noted that these were matters known to the Ft T when it made its order on 16 April 2014) that the respondent did not provide the appellants with the financial information it was seeking until the application was commenced, service charge accounts not having been provided until directions were made by the Ft T in August 2013 and that the respondent added to the confusion by seeking to claim items as service charges (the so-called 'Contentious Items') which it had no entitlement to claim.

47. Counsel for the respondent has urged caution, asking me to resist from disturbing a decision of the Ft T made after due consideration of the parties' respective approaches to the dispute. The effect on the finances of the building, and on the ability of the respondent properly to manage them, of the appellants' failure to pay their service charges was significant. It is noteworthy that the appellants were refusing to pay anything and that they were taking a number of technical objections which were rightly described by the Ft T as unmeritorious. The Ft T clearly held that the application of the respondent for a determination under section 27A of the 1985 Act was entirely justifiable in the circumstances.

48. I accept that the Ft T was able properly to assess the allegations being made by the appellants about the respondent's failure to furnish them with financial information and the respondent's inflation of their claim by including the 'Contentious Items'. I do not consider that I should, in the context of this appeal, revisit that particular aspect of the decision. That said, I consider that the arguments of counsel for the appellants in relation to the significance of the result in this appeal on the overall outcome are unanswerable. When I weigh the relative success of the parties, as well as the implications of the result in assessing the parties' conduct throughout these proceedings, I take the view that it would be wholly inappropriate for the appellants to be expected to fund the respondent's application out of their service charges.

49. It follows that the order that I consider to be just and equitable in the circumstances is that all the costs incurred by the respondent in taking these proceedings before the Ft T should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the appellants, that is the four lessees who are parties to the current application. That is the order I make, and in doing so, and in order to do so, I allow the appeal from the decision of the Ft T not to make a section 20C order.

Costs of the appeal: a further section 20C application

50. I asked counsel for the appellants whether he was applying for a section 20C order in relation to the proceedings before this Tribunal as he is entitled to do pursuant to section 20C(2)(c) above. No written application having been made, he made an oral application for such an order. Counsel for the respondent invited me not to make any such order, indicating that he would like to have the opportunity to make representations in due course concerning the costs of this appeal, and asked that I adjourn consideration of the appellants' application.

51. The appellants have been wholly successful in this appeal. I have found in their favour on both grounds they have advanced. I consider that, in those circumstances, it would normally be just and equitable to make a section 20C order in favour of the appellants (to the effect that the costs of the respondent in opposing this appeal should not be regarded as relevant costs). However, I accept that the respondent should have the opportunity to make representations if it sees fit.

52. I therefore adjourn consideration of the section 20C application with regard to the costs of the appeal for a period of 28 days. I direct that the respondent should make any written representations on this matter within that period, providing them to the Tribunal and to the appellants. If no written representations are forthcoming, I shall make the section 20C order as sought by the appellants. If written representations are made, the appellants shall be entitled to respond in writing, to the Tribunal and to the respondent, within a further period of 28 days. I shall then consider, in the light of those written representations, whether to make an order under section 20C.

Dated: 4 June 2015

His Honour Judge Stuart Bridge

ADDENDUM

53. As there has been no submission in response to the directions made in paragraph 52 of my Decision of 4 June 2015, I now direct as follows:

    I find in favour of the appellants, under section 20C of the Landlord and Tenant Act 1985, the costs incurred by the respondent in connection with these proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the appellants, that is the four lessees who are parties to the appeal.

Dated: 20 August 2015

His Honour Judge Stuart Bridge