UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0586 (LC)
UTLC Case Number: LRX/84/2012 and LRX/88/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charges - costs of legal proceedings – whether recoverable under indemnity covenant – whether within s.11, Commonhold and Leasehold Reform Act 2002 – whether affected by paragraph 10(4) of Schedule 12 to Commonhold and Leasehold Reform Act 2002 – adequacy of leasehold valuation tribunal's reasons -

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

BETWEEN

(1) ALEXANDER CHRISTOFOROU
(2) DIOGENIS & COSTAS DIOGENOUS

Appellants

and

STANDARD APARTMENTS LIMITED

Respondent

Re: Flats 3 and 10 Standard Apartments,
Crescent Road,
London N8 8AW

Before: Martin Rodger QC, Deputy President

Sitting at 43-45 Bedford Square,
London WC1B 3DN
on 14 November 2013

Paul Letman, instructed by YVA Solicitors for the Appellants
Carl Fain, instructed by Harbottle & Lewis, solicitors, for the Respondent

© CROWN COPYRIGHT 2013

The following cases are referred to in this decision:

Canary Riverside Pte Ltd v Schilling LRX/65/2005

Galloo Ltd v Bright Grahame Murray [1994] 1 WLR 136

Lownds v The Home Office [2002] 1 WLR 2450

Staghold Ltd v Takeda [2005] 3 EGLR 45

DECISION

Introduction

1. This appeal is against a decision of a leasehold valuation tribunal for the London Rent Assessment Panel ("the LVT") given on 19 March 2012 in an application relating to the costs of previous proceedings brought by the respondent, Standard Apartments Limited, the owner of the freehold interest in Standard Apartments, Crescent Road, London N8 ("the Building"), against the appellants, the leaseholders of two of the sixteen flats in the Building, Mr Christoforou of flat 3 and Messrs Diogenis & Costas Diogenous of flat 10.

2. The LVT decided that the respondent was entitled to recover the sum of £6,944.37 from each of the appellants under covenants in their respective leases which permitted the recovery of costs and expenses arising directly or indirectly out of any omission or breach or non-observance by them of any other covenant. That sum represented each appellant's equal share of the costs incurred by the respondent in proceedings before a differently constituted leasehold valuation tribunal in 2009 when the appellants' liability to pay a service charge had been determined.

3. The appellants subsequently obtained the permission of the LVT to appeal to the Tribunal on one ground. On 25 July 2012 the Tribunal (George Bartlett QC, President) granted the appellant's permission to appeal on two additional grounds.

4. The single ground on which the LVT granted permission to appeal was whether it had erred in law in concluding that the landlord's costs of the proceedings before the earlier leasehold valuation tribunal were the result of a breach or non-observance by the appellants of terms of their leases and were therefore recoverable as an administration charge within the meaning of paragraph 1(1) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

5. The two additional grounds for which permission was given by the Tribunal raised the following issues:

(a) whether the LVT failed to address the appellants' challenge to the amount of costs claimed, where the sums were in respect of solicitor's charges calculated on a timed unit cost; and

(b) whether the LVT ought to have made an overall assessment of the reasonableness of the costs claimed so as to reduce the same substantially and whether it failed to have regard to the disproportionate level of the costs compared to the amounts in dispute in the section 27A application which had formed the subject of the earlier leasehold valuation tribunal proceedings.

6. In paragraph 77 of its decision the LVT had recorded that "there was no attack on the time taken, the range of tasks and the hourly rates applied" and when granting

permission to appeal by way of review on these additional grounds the Tribunal said this:

> "The contentions at paragraphs [5(a) and (b) above] seem to me to run counter to what is said in paragraph 78 of the decision. Since, however, the LVT did not address them in its decision on the application for permission, I am granting permission, but the contentions will only be arguable if the appellants establish that they did challenge the amounts claimed and submit to the LVT that there were disproportionate."

It seems to me likely that the reference to paragraph 78 of the decision was in fact intended as a reference to paragraph 77.

7. In the course of argument a further issue resurfaced, and Mr Letman was encouraged by me to seek permission to raise it as an additional ground of appeal. He had argued before the LVT that the respondent was precluded by paragraph 10(4) of Schedule 12 to the 2002 Act from recovering any of the sums which it claimed in respect of the costs of the 2009 proceedings. The LVT had not accepted that argument and Mr Letman had not sought to raise it again in on appeal. However, shortly before this appeal I had heard another appeal in which none of the parties was professionally represented and in which the same point was taken. I was therefore interested in the argument which had been presented to the LVT and I am very grateful to both Mr Letman and Mr Fain for their considerable assistance in enabling me to consider it as an additional point in this case.

The facts

8. Each of the appellants occupies a flat in the Building under the terms of a standard form of lease which requires the respondent to provide services and the appellants to contribute towards the cost of those services by means of a service charge. The service charge is expressly reserved as rent and at clause 3.1 of the lease each appellant covenanted to pay the rent on the due date and not to exercise any right or claim to withhold the rent.

9. The appellants, and the leaseholders of one other flat, failed to pay any of the service charges demanded of them by the respondent for the years 2006 and 2007 and refused to pay an estimated service charge for the year ended 2008. The respondent engaged solicitors in December 2006 and incurred expense in seeking to recover the service charges. Eventually the respondents made an application to the leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for it to determine the appellants' liability for the disputed years.

10. The service charges claimed in each year seem to have been in the order of £1,100 to £1,500 per flat. The sum under consideration in the section 27A application is therefore unlikely to have exceeded about £15,000 in total. Not all of the service charges were disputed, although none of the appellants paid or offered to pay any part of the outstanding sum while the application continued.

11. On 26 March 2009 the leasehold valuation tribunal issued a decision in which it found that, with the exception of a modest reduction of £50 per flat in the annual management charge, and subject to some other reductions which had been conceded, the service charges claimed by the respondent were reasonable.

12. The respondent incurred costs in connection with the 2009 proceedings, and it incurred further costs in seeking to recover the service charges which the tribunal found was payable by the appellants. The respondent eventually obtained judgments against the appellants in the county court and received payment in 2011. In total the appellant incurred costs of £20,833.11 in connection with the 2009 proceedings.

13. By clause 3.22 of their leases the appellants covenanted as follows:

> "To be responsible for and to keep the Landlord fully indemnified against all damage, damages, losses, costs, expenses, actions, demands, proceedings, claims and liabilities made against or suffered or incurred by the Landlord arising directly or indirectly out of –
>
> > 3.22.1 Any act, omission or negligence of the Tenant or any persons at the Premises expressly or impliedly with the Tenant's authority or
> >
> > 3.22.2 Any breach or non-observance by the Tenant of the covenants conditions or other provisions of this lease or any of the matters to which this demise is subject."

14. After the disputed services charges had been paid the respondent turned its attention to the costs which it had incurred. It claimed entitlement to recoup those costs from the appellants under clause 3.22 of their leases. The appellants resisted that claim and the respondent therefore commenced these proceedings pursuant to paragraph 5 of Schedule 11 of the 2002 Act to obtain a determination of the appellants' liability from the LVT.

Relevant Statutory Provisions

15. Schedule 11 of the 2002 Act is concerned with "administration charges", and "variable administration charges", expressions which are defined by paragraph 1 (so far as is relevant) as follows:

> "1.-(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –
>
> (a) (b) ….
>
> (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

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

(2) ….

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither –

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease."

16. By paragraph 2 of Schedule 11 a variable administration charge is payable only to the extent that the amount of the charge is reasonable. Paragraph 5 provides for applications to be made to a leasehold valuation tribunal for a determination whether an administration charge is payable, and if so, by and to whom, when, and in what amount and manner.

17. Schedule 12 of the 2002 Act was concerned with the procedure of the leasehold valuation tribunal; it therefore ceased to apply in England (though not in Wales) when the leasehold valuation tribunal was abolished and replaced by the First-tier Tribunal (Property Chamber). Paragraph 10 is concerned with costs and provides:

"10.-(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where –

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) in has, in the opinion of the leasehold valuation tribunal, acted frivolously. vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph should not exceed –

(a) £500 or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph."

18. Section 20C and 27A of the 1985 Act are also relevant to the issues in this appeal.

19. Section 20C enables a tenant to make an application for an order that costs incurred, or to be incurred, by a landlord in connection with proceedings before a court

or 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 tenant or any other person specified in the application. Section 20C(3) enables the court or tribunal to which such an application is made to make such order on the application as it considers just and equitable in the circumstances.

20. Section 27A(1) of the 1985 Act conferred jurisdiction on the leasehold valuation tribunal to determine whether a service charge was payable. An application for such a determination could be made whether or not any payment had been made (section 27A(2)). The LVT could also prospectively determine whether, if costs were incurred for services, a service charge would be payable in respect of them (section 27A(3)).

The LVT's decision

21. The LVT received extensive legal argument from counsel. It concluded that the appellants' failure to pay the service charge was a breach of their leases notwithstanding the fact that there was a genuine dispute concerning the respondent's entitlement to some of the sums claimed. It was satisfied that the charges were within the scope of clause 3.22.2 of the lease (paragraph 74) and that they were a variable administration charge within the ambit of Schedule 11 of the 2002 Act (paragraph 67). In the LVT's view the costs of the 2009 hearing had resulted from the non-payment of the service charges (paragraph 76) and were payable by the appellants. Finally, the LVT was satisfied that the approach taken by the respondent to the apportionment of the costs on an equal basis to each of the leaseholders who had been a party to the 2009 proceedings was reasonable, proportionate and fair.

Issue 1: Were the costs recoverable under the lease?

Submissions

22. The appellants' first ground of appeal challenged the LVT's conclusion that the disputed costs were administration charges within Schedule 11 of the 2002 Act, but both counsel agreed that a necessary prior question was whether the charges fell within the scope of clause 3.22.2 of the leases. If they did not, no issue about their reasonableness or payability would arise for determination.

23. Mr Letman's primary submission on behalf of the appellants was that the costs incurred by the respondent in connection with the 2009 proceedings did not fall within either clause 3.22.2 of the leases or within paragraph 1 of Schedule 11 to the 2002 Act. He contended that for there to be a liability to pay under clause 3.2.2 there must have been a causal relationship between the relevant breach of covenant or omission to pay and the incurring by the respondent of the costs. The same causal relationship was necessary for a charge to be an administration charge within paragraph 1(1) of Schedule 11. Both clause 3.22.2 and paragraph 1(1) required that the relevant costs should have arisen directly or indirectly out of a breach of covenant by the tenant. In either case, he submitted, there must be causal connection between the costs which had been occurred and the non-payment or breach relied on.

24. Mr Letman then submitted that in this case that necessary causal relationship was absent. That was because the LVT had a free-standing jurisdiction under section 27A to determine the amount of a service charge and that jurisdiction was independent of any non-payment or breach of covenant. Indeed, the LVT's jurisdiction existed even where a tenant had already paid the disputed service charge and was not in breach. The jurisdiction also existed under section 27A(3) before any relevant cost had been incurred or service charges claimed. These illustrations of the breadth of the LVT's jurisdiction ought to lead to the conclusion that proceedings under section 27A could never properly be treated as having been caused by a tenant's non-payment or breach of covenant.

25. Mr Letman accepted that breaches of covenant had taken place, but he suggested that these were the background or occasion of the proceedings before the LVT, but not a legally relevant cause of the costs incurred in those proceedings. He referred to *Galloo Ltd v Bright Grahame Murray* [1994] 1WLR 136 in which the Court of Appeal held that a breach of contract would sound in damages only if it were the dominant or effective cause of a claimant's loss and not if it had merely given rise to the opportunity for the loss to be sustained. In determining whether a breach of duty (in contract or in tort in situations analogous to breach of contract) was the cause of a loss or merely its occasion, the Court of Appeal indicated that a common-sense approach should be applied to the facts of the case. Mr Letman submitted that if a common-sense approach was applied to the costs incurred in connection with the 2009 proceedings, it could not be said that they costs had been caused by a breach of covenant on the part of the appellants.

26. As part of Mr Letman's case concerning the scope of administration charges he submitted that the legislature had intended that costs incurred in proceedings before the leasehold valuation tribunal should be payable only in the limited circumstances described in Schedule 12 of the 2002 Act (broadly, on grounds of unreasonable behaviour) and otherwise should be payable only by way of service charge subject to the power under section 20C of the 1985 Act to disallow such costs.

27. Mr Fain, on behalf of the respondents, contended that the disputed costs clearly fell within the scope of clause 3.22.2. of the appellants' leases. Under that provision the appellants were liable to indemnify the landlord against all costs, expenses, proceedings and liabilities suffered or incurred directly or indirectly out of any breach or non-observance by the tenant of the covenants or provisions of the lease. The language indicated conclusively that one purpose of the clause was to enable the respondent to recover costs of whatever nature arising from proceedings or disputes over the performance of the appellant's obligations. There was, he submitted, an inevitable and direct causal connection between the appellants' breaches of covenant in failing to pay the service charges, and the 2009 proceedings in which their liability had been established. The respondent's sole purpose in making its application under section 27A in 2009 was as a step towards compelling the appellants to make the disputed payment.

Discussion

28. The starting point in determining whether the disputed costs are recoverable must be to consider whether they fall within the appellants' contractual obligation under clause 3.22.2. If they do, the respondent will have a contractual right of recovery which it may enforce either by commencing proceedings in the county court or, if the costs are also an administration charge, by first seeking a determination from the leasehold valuation tribunal under Schedule 11 of the 2002 Act.

29. In my judgment the disputed costs fall clearly within clause 3.22.2 of the lease as costs incurred in proceedings which arose directly out of a breach or non-observance by the appellants of the covenants in their leases. It is important to consider the specific circumstances in which these costs were incurred and I reject Mr Letman's invitation to view the recoverability of costs as an issue of principle which depends on the scope of section 27A. Whatever may be the circumstances of other cases, these costs were incurred, as the respondent submits, because the appellants were refusing to pay the service charge and in order to put the respondents in a position to commence proceedings for its recovery. It is true that the application under section 27A did not result in a judgment for the disputed sum, but rather in a determination of the amount payable, but that does not seem to me to detract from the fact that the costs arose directly as a result of the appellants' breaches. There may be other cases in which costs incurred in proceedings under section 27A could not be recovered under a clause drafted in the terms of clause 3.22.2 (for example because the disputed service charge has been paid, or has not yet become due) but those cases would have to be considered on their own facts.

30. As for the secondary question of whether the charges were properly regarded as administration charges, once again I think clearly they were. Mr Letman argued that to include the costs of proceedings under section 27A within the scope of administration charges would "drive a coach and horses through the statutory regime" and "undermine the no costs environment of the LVT in relation to service charge determinations". Mr Letman's argument on this aspect of the appeal was essentially for the sake of consistency with his argument concerning clause 3.22.2, but were it to be accepted it would have serious consequences for the scope of the statutory control of administration charges. It would restrict the scope of paragraph 1(1)(c) and (d) of Schedule 11 to a very narrow category of charges, possibly only to obligations to pay interest on late payments under a lease or penalty charges payable in the event of a breach.

31. As its heading suggests, Part 1 of Schedule 11 is concerned with the "reasonableness of administration charges" and creates a regime, substantially for the benefit of residential tenants, limiting variable sums which may be recovered from them by their landlords. There is no reason in those circumstances to give the definition of administration charge in paragraph 1(1) a narrow meaning so as to exclude from its scope the costs of proceedings under section 27A which a tenant may have covenanted to reimburse.

32. In my judgment paragraph 1(1) is wide enough to encompass costs payable by a tenant under commonplace tenant covenants to indemnify a landlord against costs of proceedings or costs incurred as a result of a breach of covenant. It would include costs incurred in the preparation of section 146 notices or schedules of dilapidations which are routinely the subject of indemnity covenants in residential leases. I cannot accept Mr Letman's argument that Schedule 11 does not apply to that type of recovery provision.

33. I am therefore satisfied that the LVT was right to hold both that the costs of the 2009 proceedings were within clause 3.22.2 and that they were administration charges to which the statutory restriction in paragraph 2 of Schedule 11 to the 2002 Act applies. It was the latter determination which gave the LVT jurisdiction to consider whether the sums claimed were reasonable and it is to the LVT's treatment of that issue that the appellant's second ground of appeal is directed.

Issue 2: the appellants' challenge to solicitor's charges calculated on a timed unit basis

34. Mr Letman contended that the LVT failed to address an argument which he had advanced on behalf of the appellants to the effect that the mode of charging adopted by the respondent's solicitors, by recording activity in units of not less than six minutes, inevitably resulted in an inflated bill. In paragraph 77 of its decision the LVT said that "there was no attack on the time taken, the range of tasks and hourly rates applied"; the single issue on quantum concerned the apportionment of the total costs equally amongst the appellants. Nonetheless it was common ground between counsel before me that there had been some discussion of the practice of recording time in six minute units. It had been suggested by one of the members of the LVT that this was an inappropriate approach to billing and resulted in a solicitor always charging for more time than he had in fact spent on the relevant task.

35. Without the benefit of a transcript or clear note of the proceedings, and neither party having asked the LVT for its own note of the argument, it is very difficult to know precisely how this aspect of the argument developed. Based on what I have been told, it seems most likely that the point arose out of the comment by a member of the Tribunal, which was then picked up by Mr Letman and weaved with characteristic resourcefulness into his general argument that the amount of the costs claimed was manifestly excessive.

36. There is no duty on any court or tribunal to deal with each and every point made to it in the course of argument. The task of a tribunal judge is to explain clearly why the successful party has won and the unsuccessful party has lost and to deal with the substantial points which are determinative of the parties' rights and on which the argument has focussed. The First-tier Tribunal is entitled to adopt a proportionate approach to its decisions, giving greatest attention to points which matter most and limited or no attention to those which matter less, or not at all. Were it otherwise, decisions would become impossibly unwieldy.

37. I am satisfied that in this case Mr Letman's six-minute billing argument was not one which the LVT was obliged to address directly in its decision. I say that for three reasons. First, as Mr Fain pointed out, there was nothing unusual in the approach to billing adopted by the respondent's solicitors. Secondly, this point appears to have arisen from a comment from the bench rather than being presented in the forefront of the appellants' case. Finally and most significantly, even if the LVT had accepted Mr Letman's invitation to trim the bill of costs because it had been recorded in six minute units, that would not have made any difference to the eventual outcome. The respondent's solicitors had recorded the time which they had spent over almost three years in connection with the proceedings. The time sheets before the LVT showed that, had all of that time been charged for, that part of the bill would have exceeded £28,000 plus VAT. The respondent's solicitors claimed only £14,000 plus VAT in respect of their time and did not bill their client for anything like as much as they had recorded. By Mr Letman's calculation, if the time taken for each activity is reduced by three minutes to reflect the average impact of recording those activities in units of six minutes, the total time cost would be adjusted by £1500. An adjustment of that magnitude would already have been swallowed up by the reduction which the respondent's solicitors volunteered when billing their own client. For these reasons it seems to me that, even if the LVT had felt it necessary to address Mr Letman's six minute point in detail, it would have made no difference to its conclusion that the costs claimed were reasonable.

Issue 3 - the LVT's treatment of the proportionality of the costs claimed

38. The second limb of the appellant's challenge to the adequacy of the LVT's decision concerns its alleged failure to deal with an argument based on the proportionality of the costs claimed in respect of the 2009 proceedings. Mr Letman submitted that a bill of £21,000 (including VAT) in connection with LVT proceedings in which only a few items were in dispute was entirely disproportionate. On that basis the LVT ought to have been found that the costs were unreasonable and ought, he said, to have reduced the bill by half. That submission had been made to the LVT which recorded in paragraph 47 of its decision that "Mr Letman also argued that the costs were disproportionate in that they were considerably higher than the outstanding service charges." The LVT did not then return to consider proportionality in paragraphs 77 to 80 of its decision when it came to consider the reasonableness of the charges.

39. On behalf of the respondents Mr Fain acknowledged that the LVT had not addressed the issue of proportionality head on. The main challenge presented by the appellants was the issue of apportionment of the total bill of costs equally amongst the three appellants. There is no appeal against the LVT's decision that that was a perfectly reasonable approach. Nonetheless, the LVT did say in paragraph 77 that they had carefully examined the schedules of costs provided and they concluded in paragraph 80 that they were satisfied that the administration costs were reasonable in amount.

40. I do not accept Mr Letman's submission that the LVT failed sufficiently to deal with his argument on proportionality. Having looked in detail at the Schedule of costs, it clearly had in mind the work which had been required and it was aware of the issues which had been determined by the Tribunal in 2009. It obviously had the question in mind as it recorded Mr Letman's argument in paragraph 47. In my judgment the LVT's overall assessment that the administration charges were reasonable must reflect a conclusion that the charges were reasonable in the context of this particular dispute involving sums of money of the scale which had been in issue in 2009. While more might have been said, no more was necessary.

41. Even if my conclusion involves taking a benevolent view of the LVT's decision, and even if I were to approach the issue of proportionality afresh, I am by no means satisfied that any reduction in the costs would be justified. As Mr Fain pointed out, although at the original hearing in 2009 the appellants had concentrated their criticism on a limited number of service charge items in the three years in question, that refinement of the dispute was achieved only shortly before the hearing took place, and only after the respondent had given disclosure of extensive accounting material justifying all of these service charges for the whole period in issue. I also think there is force in Mr Fain's observation that, although only three leaseholders challenged the service charges in the 2009 proceedings, had those proceedings gone badly for the respondents it is very likely that other leaseholders would have sought reimbursement of service charges which they had already paid or would have claimed a credit against their future liability. The practical consequences of the issues determined by the tribunal in 2009 were therefore rather greater than the relatively modest sums which the respondents were eventually able to recover from the appellants. Looked at in that way, and bearing in mind that the sums claimed related to the involvement of the respondent's solicitors over a period of almost three years in their attempts to recover the disputed service charges, it does not seem to me that costs in the order of £21,000 were disproportionate.

42. Finally on this aspect of the case I would note Mr Fain's argument that an inquiry under paragraph 2 of Schedule 11 to the 2002 Act as to the reasonableness of an administration charge does not require or permit any consideration of proportionality.

43. Paragraph 2 limits the sum payable as a variable administration charge to that which is reasonable. Mr Fain submitted that all that is required in a case such as this is to consider what work was done and whether the charge made for it was a reasonable charge for that work. To put it another way, paragraph 2 is concerned with whether the amount was reasonable, not with whether it was reasonable to incur that amount. In support of that proposition Mr Fain referred to *Lownds v The Home Office* [2002] 1 WLR 2450, the well known decision of the Court of Appeal dealing with the concept of proportionality under the Civil Procedure Rules. It was perfectly possible, Mr Fain submitted, for costs to be reasonable but not to be proportionate, and paragraph 2 of Schedule 11 was concerned only with reasonableness.

44. I very much doubt whether that analysis occurred to the LVT, or if it had done, that the LVT would have been attracted to it. In any context not overshadowed by the approach to litigation costs which developed before the introduction of the Civil Procedure Rules, the suggestion that proportionality had nothing to do with reasonableness would seem unreal or counterintuitive. The LVT routinely has to consider whether the costs of professional or other services are reasonable or have been reasonably incurred, and routinely it does so by examining closely the work undertaken, the result achieved, and the magnitude and importance of the object to which the work was directed. Those considerations are all relevant to an assessment of the reasonableness of professional costs and I do not think that paragraph 2 of Schedule 11 to the 2002 Act requires a different approach to the reasonableness of administration charges.

Issue 4: the relevance of paragraph 10(4) of Schedule 12 to the 2002 Act

45. Before the LVT Mr Letman had argued that the respondents were precluded by paragraph 10(4) of Schedule 12 to the 2002 Act from recovering any of the sums which they claimed in respect of the costs of the 2009 proceedings.

46. Paragraph 10(4) provides that:

> "A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provisions made by any enactment other than this paragraph."

47. The LVT did not accept Mr Letman's submission and, as I have explained in paragraph 7 above, the appellants did not revive the point in either of their applications for permission to appeal. For the opportunistic reasons which I have already acknowledged, and because it seemed to me in the course of the argument over the scope of Schedule 11 to the 2002 Act that it may be relevant also to consider the effect of paragraph 10(4) of Schedule 12, I raised the point in the course of submissions. Mr Letman's argument that to include the costs of proceedings before the LVT within the scope of administration charges would "drive a coach and horses through the statutory

regime" and "undermine the no costs environment of the LVT in relation to service charge determinations" seemed to me to require some thought to be given to the true scope of the "no cost environment" in which such proceedings are conducted. As a result of exchanges going to that issue, and at my invitation, Mr Letman applied for permission to add a further ground of appeal, raising once again the issue which he had argued before the LVT.

48. The additional ground of appeal was expressed in the following terms:

> "Whether the LVT erred in law in deciding that paragraph 10(4) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 did not operate to bar the recovery of the costs incurred before the LVT claimed herein by the respondent."

49. The written submissions which Mr Fain had made to the LVT on that issue were included in the bundle of documents for the appeal and he revived them in oral argument, while reserving his position on the question whether the appellants should be given permission to amend their grounds of appeal. I invited Mr Fain to submit written representations on the question of amendment and to include in them any further argument he wished to make on the substantive issue, and gave Mr Letman a further short period within which to respond.

50. In England (though not in Wales) the leasehold valuation tribunal ceased to exist on 1 July 2013 with the transfer of its functions, and those of rent assessment committees, residential property tribunals and other bodies, to the Property Chamber of the First-tier Tribunal effected by the Transfer of Tribunal Functions Order 2013. What follows concerns only the landscape as it was before 1 July 2013, although I will return briefly to the current position later.

51. The normal costs rules applicable in civil litigation did not apply to proceedings before the leasehold valuation tribunal; in particular "costs shifting", the principle that the successful party was entitled to recover its costs of the proceedings from the unsuccessful party, had no place. Instead, procedure before leasehold valuation tribunals was governed by Schedule 12 of the 2002 Act, paragraph 10(4) of which I have already set out in paragraph 46 above.

52. The reference in paragraph 10(4) to "a determination under this paragraph" is to the provisions of paragraph 10(2) (see paragraph 17 above) which enabled the tribunal to make a determination that costs incurred by one party should be paid by another party in two circumstances. Those were, first, where an application had been dismissed on grounds that it was frivolous, vexatious or otherwise an abuse of process, and secondly, where a party had, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

53. The reference in paragraph 10(4) to "provision made by any enactment other than this paragraph" accommodated, in practice, the statutory power to order reimbursement of fees under the Leasehold Valuation Tribunals (Fees) Regulations 2003 (and its 2004 Welsh equivalent) and the power of the tribunal under section 88(4) of the 2002 Act to determine in right to manage cases the costs payable by an RTM company which had failed in its application.

54. Subject to those limited exceptions, the effect of paragraph 10(4) was to protect a party to proceedings before the leasehold valuation tribunal from a requirement to pay costs incurred by another person in connection with those proceedings. On first encountering this provision it might have been thought that the effect of paragraph 10(4) was general and quite far reaching. An uninitiated applicant on being told that he "shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal" except in accordance with a determination under paragraph 10 or under an alternative statutory provision, might be forgiven for feeling confident that if he commenced such proceedings to dispute a service charge, and conducted them reasonably, he would not be at risk of having to pay costs incurred by his landlord if his complaint was eventually dismissed.

55. Although paragraph 10(4) does not make reference to the possibility of a contractual obligation to reimburse such costs, and does not expressly state that such a contractual obligation is to be unenforceable, viewed in isolation that would appear to be the effect of the provision. However, as the jurisprudence of the Tribunal already establishes, that appearance is deceptive, and the confidence of the uninitiated applicant would be misplaced.

56. The effect of paragraph 10(4) has been the subject of previous judicial consideration only in the context of service charges and not (as far as I am aware) in relation to administration charges. In *Canary Riverside Pte Ltd v Schilling* LRX/65/2005, the Lands Tribunal (His Honour Judge Rich QC) considered whether paragraph 10(4) restricted a landlord's contractual entitlement to recoup expenses incurred in proceedings before the leasehold valuation tribunal as a service charge item. The same question had previously been considered in the County Court (His Honour Judge Levy QC) in *Staghold Ltd v Takeda* [2005] 3 EGLR 45. In both cases it was decided that paragraph 10(4) did not have so far reaching an effect, and did not interfere with a landlord's contractual right to add the costs of proceedings to a service charge.

57. The basis of both decisions, as explained most fully in *Canary Riverside* was that, having regard to the statutory history of section 31A(4), Landlord and Tenant Act 1985 (the predecessor to paragraph 10(4)), the provision must be read as limited by its context and by its title ("Leasehold Valuation Tribunals: Procedure") to matters of procedure not extending to substantive interference with contractual entitlements. Section 31A(4) of the 1985 Act had provided in slightly different terms that "no costs incurred by a party in connection with proceedings … before a leasehold valuation tribunal shall be recoverable by order of any court." The mischief against which this original version of the rule was directed was the risk that costs incurred before the tribunal might be made part of an order for the payment of costs made by a court, which was clearly prohibited by section 31A(4). Given that lineage, and despite its different language, paragraph 10(4) had to be given the same limited effect. Additionally it was impossible to give paragraph 10(4) a wider meaning without rendering largely redundant the power given to courts and tribunals by section 20C of the 1985 Act to order that costs incurred in proceedings before the leasehold valuation tribunal were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge.

58. The Tribunal's conclusion in *Canary Riverside*, expressed at paragraph 39 of its decision, was that "properly construed [paragraph 10(4)] does not prevent the recovery of costs incurred before leasehold valuation tribunals which are otherwise recoverable by way of service charge." The issue in this appeal is whether the reasoning which

underlies that conclusion is equally applicable to permit the recovery from an individual leaseholder of such costs by way of an indemnity covenant as an administration charge.

59. By way of preliminary argument, Mr Fain contended that the Tribunal had no jurisdiction to give permission to appeal on a ground of appeal for which the permission of the first instance tribunal had not previously been requested. I am satisfied that that is not so, and that rule 21(1) of the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 requires only that an application for permission to appeal should have been made to the first-tier tribunal, and does not prevent an application from being pursued later in respect of additional grounds. It is not uncommon for parties to add to their proposed grounds of appeal in light of further thoughts and an interpretation of rule 21(1) which prevented that process would be unattractively inflexible. Nor is it required by the language of the rule itself which refers only to an application for permission to appeal against a decision, and makes no mention of the proposed grounds of appeal.

60. Mr Fain next argued that permission to appeal on the additional issue ought to be refused as a matter of discretion. One strand of his argument is that the appeal has no prospect of success. I will address that contention first.

61. Mr Fain relies on the identification of Schedule 11 in *Canary Riverside* as a set of procedural rules in support of his argument that when paragraph 10(4) states that "a person shall not be required to pay costs" it means only that a person shall not be required *by the leasehold valuation tribunal* to pay costs. Where a lease includes a contractual indemnity covenant against the costs of proceedings, a sum payable under that covenant is not required to be paid by the leasehold valuation tribunal, but rather is required by the parties' own contract. That is so notwithstanding the role of the leasehold valuation tribunal in quantifying the sum recoverable under the covenant in the exercise of its jurisdiction under paragraph 5 of Schedule 11 of the 2002 Act. Alternatively, if paragraph 5 of Schedule 11 is to be regarded as a provision by which a person may be required to make a payment of costs, it is then necessarily exempt from the scope of paragraph 10(4) of Schedule 12 which does not apply to costs payable in accordance with a provision made by any enactment other than paragraph 10 itself.

62. Mr Letman contends that the language of paragraph 10(4) is clear and that the reference to a person not being "required" to pay costs is perfectly general. It makes no sense, he suggests, to limit the relevant requirement to one imposed by the leasehold valuation tribunal itself, since the only powers which that tribunal had to order costs are specifically exempted from the restriction imposed by paragraph 10(4) by the reference to a determination "under this paragraph or in accordance with provision made by any enactment other than this paragraph". Mr Letman suggests that a determination under paragraph 5 of Schedule 11 is not one which requires that a person pay costs and that Mr Fain's alternative submission is therefore inapplicable.

63. I am satisfied that paragraph 10(4) does not have the wide effect contended for by Mr Letman and that Mr Fain's primary submission is correct. For the reasons given by the Lands Tribunal in *Canary Riverside*, an interpretation of paragraph 10(4) which treated it as imposing a blanket prohibition on the recovery of costs of tribunal proceedings through a service charge is impossible. It would be inconsistent with parliament's clear understanding, which underpins section 20C of the 1985 Act (an Act which was itself amended by the 2002 Act), that the costs of tribunal proceedings are within the scope of many suitably drafted service charge clauses and that it was therefore

appropriate to provide tenants with protection against being required to meet those costs (especially where the tenant had succeeded before the tribunal). In order to avoid paragraph 10(4) interfering with the right to recover costs through a service charge it is necessary to give it a more restricted effect than its language would seem naturally to bear. It must be read as a rule of procedure, regulating only the power of a court or tribunal to make an award of costs in relation to tribunal proceedings. As a rule of procedure it must necessarily leave unscathed the right of contracting parties to agree that costs incurred in such proceedings are to be the subject of an indemnity given by a tenant to a landlord.

64. This narrower reading of paragraph 10(4) is an oddity, but it is clearly correct. Odd because, the leasehold valuation tribunal being a statutory creation with no power to award costs other than under specific statutory authority, it might have been thought unnecessary to enact that costs incurred in proceedings before the tribunal may not be made payable except by a determination made under one of its own costs making powers or in accordance with another enactment. The explanation for that peculiarity may lie in the concern apparent in its statutory predecessor, section 31A(4) of the Landlord and Tenant Act 1985, to avoid costs incurred in tribunals being made recoverable "by order of any court".

65. That the treatment of paragraph 10(4) as a rule of procedure is clearly necessary is further confirmed by the omission of Parliament to enact a rule in equivalent terms to apply to proceedings before the first-tier tribunals of the Property Chamber on their accession to the jurisdiction formerly exercised by the leasehold valuation tribunal on 1 July 2013. The current rules relating to costs in the first-tier tribunal are framed in different terms (see rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013). If paragraph 10(4) ought properly to have been interpreted in its wider and perhaps more natural sense, so as to interfere with contractual indemnities for costs of tribunal proceedings, one would have expected its cessation in England to be accompanied by the introduction of a replacement designed to do the same job. There is no such replacement.

66. I am therefore satisfied that no protection is afforded to the appellants against the sums claimed by the respondent by paragraph 10(4) of Schedule 12 to the 2002 Act. I propose therefore to give permission to amend the grounds of appeal, but to dismiss the appeal on that ground as well as on the others I have already considered.

Martin Rodger QC

Deputy President

17 December 2013