11241

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AM/LSC/2015/0189**
Property	:	**31A Cotesbach Road, London E5 9QJ**
Applicant	:	**Ms Margaret Josephine Heaven**
Representative	:	**Ms M J Heaven In Person**
Respondent	:	**Ms Elizabeth Feliciana Martins**
Representative	:	**Ms E F Martins In Person**
Type of Application	:	**Sections 20C and 27A Landlord and Tenant Act 1985 – determinations as to landlord's costs and service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Michael Taylor FRICS** **Mrs Rosemary Turner JP BA**
Date and venue of Hearing	:	**21 and 22 January 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**8 February 2016**

DECISION

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Decisions of the tribunal

1. The tribunal determines that:

   1.1 As at 24 March 2015 service charges amounting to £3,003.18 (made up as shown in the column headed 'Balance Now Due' on the spreadsheet attached to this decision marked 'Appendix A') were payable by the applicant to the respondent;

   1.2 The lease, as properly construed does not exclude the equitable right of set-off enjoyed by the applicant;

   1.3 The lease, as properly construed does not, at a matter of contract, impose an obligation on the applicant to pay interest on ground rent or service charges not paid on the due date(s) as provided for in the lease;

   1.4 An order shall be made to the effect that none of the costs incurred or to be incurred by the respondent in these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant to the respondent; and

   1.4 The applicant shall by **5pm 31 March 2016** pay to the respondent the sum of £2,000.00 by way of penal costs pursuant to rule 13(1)(b).

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing files provided to us for use at the hearing. The prefix 'A' refers to the files prepared by the applicant and the prefix 'R' refers to the file prepared by the respondent.

General and Procedural background

3. 31 Cotesbach Road, London E5 9QJ was originally constructed as a house laid out on basement, ground and first floors. On 12 June 1964 the freehold title was registered at Land Registry with title number LN242079.

4. At some point the house was adapted to create two self-contained flats – one on the basement and ground floors and one on the first floor.

5. At some point the freehold interest was vested in Roger Feldman and Gerald Feldman. By a lease dated 10 December 1982 the Feldmans demised the first floor flat) known as 31 or 31B Cotesbach Road) to a Julian William Cartwright and Lorna Mary Cartwright for a term of 125 years from 29 September 1982 for a premium of £24,950 [R10]. That lease was registered at Land Registry with title number NGL446364. On 8 January 1992 the respondent (Ms Martins) was registered as the proprietor of the lease [4]. Ms Martins may have resided in that flat for

a while but evidently it has been sub-let to tenants for a good number of years.

6. The freehold then became vested in Gerald Feldman and Angela Feldman. By a lease dated 20 July 2007 the Feldmans demised the basement and ground floor flat (known as 31 or 31A Cotesbach Road) to the applicant (Ms Heaven) for a term of 125 years from 20 July 2007 for a premium of £272,000 [A208]. That lease was registered at Land Registry with title number EGL525667 and on 22 August 2007 Ms Heaven was registered as proprietor [R7].

7. Both leases oblige the tenant to pay a contribution to the cost of services provided by the landlord. It was not in dispute that 31A contributes 50.45% and 31B contributes 49.55%. In broad terms the two service charge regimes are in common form. We shall have to explain in more detail the service charge regime for 31A shortly.

8. Evidently there came a time in or about 2009 or 2010 when the Feldmans wished to dispose of their freehold interest. It appears that separate discussions took place between the Feldmans and Ms Heaven on the one hand and between the Feldmans and Ms Martins on the other hand. It would also appear that there were some preliminary discussions initiated by Ms Martins between herself and Ms Heaven about the possibility of them making a joint purchase but in the event nothing came of that.

9. Ms Martins decided to go ahead with the purchase alone and on 15 September 2010 Ms Martins was registered as proprietor of the freehold [R1].

10. Thus it is that Ms Martins is both the landlord of the building and the tenant of the first floor flat.

11. It is not material, but by way of background, we were told that Ms Martins was a reluctant purchaser of the freehold and only made the purchase to ensure that it did not fall into the hands of a rogue landlord.

12. Ms Martins freely admits that she has no experience of the ownership or management of residential property let on long leases which she recognises is a very highly regulated sector of the property market. Whilst Ms Martins may have gleaned some experience of being a 'buy-to-let' landlord she acknowledges that that is something quite different.

13. It would also appear that the Feldmans may not have had much experience either, or at any rate if they did, they did not apply it to their management of the building. It would appear that their management was very informal and ad hoc and no accurate accounts or records were maintained. Ms Heaven has explained that when she purchased the lease of her flat in 2007 the Feldmans were unable (or unwilling) to provide any information about historic service charge levels or accounts

and in consequence the parties agreed an adjustment of £2,000 to the price to be paid by Ms Heaven. It appears that the Feldmans made ad hoc demands for contributions – see for example [A19] dated 12 February 2010 which appears to include a demand for the contributions to the cost of insurance for the years ended 22 December 2008, 2009 and 2010. A further example can be seen at [A24] which appears to concern a bill of £85 which the Feldmans incurred in having the gutters cleared and it seems that the Feldmans suggested to Ms Heaven that she should get in touch with Ms Martins so that between the two of them they should make arrangements to pay the contractor direct.

Ms Martins has explained that when she purchased the freehold in 2010 the Feldmans were unable to provide any service charges accounts or information and no accounts or records were handed over on completion; Ms Martins had to start afresh.

14. It would also appear that in part due to naivety and/or inexperience and in part due to the informal management of the Feldmans which Ms Martins had become used to since 1992 when she acquired the leasehold interest in the first floor flat, Ms Martins did not fully follow the service charge regime as set out in the leases when she became the landlord.

15. It would also appear that more or less since Ms Heaven purchased her flat she has experienced problems with a communal drain which periodically erupts into her kitchen (the drainage issue). Understandably this has (and still does) cause her considerable distress. We shall need to return to this in a little more detail shortly.

16. For different reasons neither Ms Martins nor Ms Heaven enjoy good health. We were told that Ms Heaven has the misfortune to be afflicted by bipolar disorder and that Ms Martins suffers gastric reflux.

17. We have sympathy for both parties. For a combination of reasons, the relationship between the parties of landlord and tenant has wholly broken down and there is a huge degree of mutual mistrust and hostility. Our overview is that whilst by no means perfect Ms Martins has made some efforts to manage the building effectively but Ms Heaven is quick to demand that things be done her way and has from time to time made unreasonable and inappropriate demands and is quick to take offence. Her condition and sudden and unexplained changes of mind does appear to affect the manner in which she sees matters being dealt with. Just by way of example Ms Martins has from time to time made agreed arrangements for prospective contractors or others to have access to Ms Heaven's flat for the purpose of inspection, estimating or carrying out works only to find that at the last minute access is refused or only permitted on unreasonable terms or access is suddenly curtailed and terminated because something or someone has upset Ms Heaven and she will no longer have them in her home.

Inevitably Ms Martins has found this frustrating and it impedes her efforts to get contractors to attend the building to undertake works.

18. There has been placed before us a considerable amount of correspondence (mostly email) passing between Ms Heaven and Ms Martins and it is sad to note that much of it emanating from Ms Heaven is intemperate and quite a good deal of it is grossly and gratuitously offensive.

19. Clearly the tone of the correspondence has led to both parties taking fairly entrenched positions on most issues. From what we saw at the hearing it seems most unlikely that the parties will be able to work with one another to mutual advantage any time soon.

20. We have set the relationship out in some detail because it has a severe impact on the how the issues have been addressed and it had a severe impact on the hearing before us.

The application, directions and case papers

21. Against that background Ms Heaven made an application to the tribunal pursuant to section 27A Landlord and Tenant Act 1985 (the Act). The application sought a determination as to whether or not certain service charges were payable by her. Reference was also made to Ms Martin's alleged refusal to contribute to certain investigations/repairs effected by Ms Heaven in connection with the drainage issue. The application also included a related application pursuant to section 20C in connection with any costs which the landlord might incur in connection with these proceedings.

22. A case management conference was held on 28 May 2015. Both parties attended each, with a friend to assist them and directions were issued. Reference was made to matters raised in the application form that the tribunal did not have jurisdiction to deal and the directions identified the matters that it had jurisdiction to deal with and would determine as follows:

    22.1 Amounts received and paid on the applicant's account (the Running Account);
    22.2 Insurance, to include whether the applicant's name should be on the policy, whether a policy has been in force from September 2010 to date, the physical extent of the property covered by the policy and whether the terms of the policy comply with the terms of the lease;
    22.3 Repairs to include to include drainage issues and whether the respondent asked for or gave permission to the applicant to carry out certain works, the reasonableness of the cost of major works to cure a roof leak and general maintenance (the Samuels Works) in August 2013, and a minor roof repair in 2011;
    22.4 Sinking Fund 2010 -2015; to include whether such is permitted under the lease or by agreement between the parties;

22.5 Administration/management charges 2012/13 and 2013/14; to include whether such is permitted under the lease, and if so, amounts;
22.6 Contractual interest; to include whether such is permitted under the lease, and if so, amounts;
22.7 Whether an order under section 20C of the Act should be made.

23. The directions noted that the parties were agreed that what was not in dispute was:

23.1 The contribution formula in the lease; and
23.2 The cost of insurance contributions demanded over the period 2010 – 2015.

24. Those directions were varied on several occasions at the request of one or other of the parties, mostly for medical reasons. In one letter issued by the tribunal and dated 27 August 2015 in which the direction were varied, Ms Heaven was directed not to introduce new issues not identified at the case management hearing.

25. The directions provided that:

25.1 The applicant should send to the respondent a full statement setting out the relevant provisions of the lease, the service charges in issue. Legal arguments and copies of documents upon which she proposed to rely;

25.2 The respondent should send to the applicant copies of all invoices and service charge accounts in dispute, a statement setting out the material provisions of the lease, legal submissions and copies of documents upon which she proposed to rely;

25.3. The applicant should provide a brief reply, limited to matters raised by the respondent in her statement of case;

25.4 Witness statements should be exchanged.

The directions also noted that it did not appear that there was a need for expert evidence, but stated that if a party disagreed they should make an application for permission to adduce expert evidence. No applications have been made.

26. In the event, and after much toing and froing what we have is:

26.1 From Ms Heaven an undated one-page statement of case [A16] plus two lever arch files of papers presented in a confused and confusing manner page numbered in a slightly unusual way running to a total of over 700 pages on many of which there are manuscript annotations not all of which are readily legible; and

26.2 From Ms Martins a reasonably comprehensive statement of case dated 19 November 2015 (evidently prepared by solicitors on her behalf) plus a page numbered lever arch file 1-304.

Neither party has filed any witness statements.

We shall have to return to it later in regards to a rule 13(1)(b) penal costs application, but suffice to say at the moment, it appears the approach adopted by Ms Heaven is that all of her case is to be gleaned from the contents of the two folders, being the documents and annotations but we have to work out for ourselves what that case is. There is no meaningful summary or helpful guidance given.

The hearing

27. The application was finally listed for hearing on 21 and 22 January 2016.

28. Ms Heaven appeared in person to represent herself. Ms Heaven was accompanied by two students from the University of Law – Mr Durward and Ms Edwards who had assisted in the preparation of written opening submissions and who were to assist with note-taking but who were not permitted by their principal to offer legal advice to Ms Heaven or to undertake advocacy on her behalf.

29. Ms Martins appeared in person to represent herself. Ms Martins was accompanied by Mr C Coleman and Mr Michael Sullivan, both lay persons, who were to assist Ms Martins present her case. The principal advocate was to be Mr Sullivan but with contributions from Mr Coleman from time to time on the basis that he had a greater knowledge of the way around the various files of papers relied on by the parties.

30. For avoidance of doubt we record that the representation as mentioned above was perfectly in order and was compliant with rule 14(5).

31. At the commencement of the hearing Ms Heaven handed in the written submissions which had been prepared on her behalf and copies were provided to Ms Martins. There was some initial opposition on the part of Ms Martins but it was explained that filing a skeleton argument or providing written opening submissions was in order and that if before the end of the hearing Ms Martins wished to hand in written submissions, it would be in order for her to do so.

32. However, the written submissions go a bit further than a skeleton argument. The main items are listed, namely:

a. Repairs – drainage;
b. Repairs – major works;
c. The running list/cash account;
d. Insurance;
e. The sinking fund;

f. Administration and management charges;
g. The section 20C application.

However, for the first time there was included a claim for damages pursuant to the Defective Premises Act 1972 and other relief to include:

a. Damages for financial loss and stress caused by the sewage eruptions;
b. A declaration that the applicant is not liable for costs incurred by the respondent in carrying out the major works in (August) 2013;
c. Specific performance of the respondent's obligations to produce accounts in the format specified under 'Section 2' of the lease;
d. Compensation for diminution in the pension credits of the applicant caused by the respondent's breach of her duties under 'Section 2' of the lease;
e. A declaration that the applicant's interest should be noted on any insurance policy in such a way as to allow her to initiate claims independently;
f. A declaration that no agreement in relation to a sinking fund was reached by the parties;
g. A declaration that the applicant is not and will not be liable for administrative and management charges until the respondent adheres to her obligations under the lease; and
h. A costs order under section 20C of the Act.

What we can deal with and what we cannot deal with

33. At this point it may be helpful if we set out what we can deal with and what we cannot.

34. Our objective is to make as many determinations as we can in order to assist the parties and to resolve as many issues between them as we can.

35. We find that what we can deal with (and what we have dealt with below) are:

35.1 Routine service charges September 2010 to March 2015, which includes: the form of accounts, insurance, one minor repair, one set of major works and costs of management;
35.2 The sinking fund;
35.3 The equitable right of set-off;
35.4 The claim to interest;
35.5 The applicant's section 20C costs application; and
35.6 The respondent's rule 13(1)(b) penal costs application.

36. What we have decided we cannot properly deal with and determine is the drainage issue. There are several reasons for this, including:

36.1 It appears there has been a problem with the drains from the outset of the grant of the lease to Ms Heaven in 2007. In the papers there is reference over the period June 2009 to January

2010 to costs of unblocking the drains, CCTV survey and works being carried out at at a cost of £2,587.35 [A21]. In addition, there is also reference to one or more connected insurance claims having been made in the Feldman's time.

36.2 Since Ms Martins became landlord Ms Heaven called out Dynorod on five occasions in 2011 and they undertook unblocking/flushing and a further CCTV survey, at a total cost of about £4,987 to Ms Heaven [A1(a) and (b)].

36.3 In 2012 Ms Heaven claims to recover about £312 paid out by her in connection with drainage works by Dynorod/Property Consortium [A1(b)].

36.4 In 2013 and 2014 Ms Heaven claims to have incurred further unblocking/decontamination costs totalling about £1,532.

36.5 Ms Heaven made a further claim on the buildings insurance and in January 2013 and the insurers paid to her a sum of about £5,200.

36.6 Ms Heavens claims that she would have made a further claim on the buildings insurers but there was a period when she did not know who the insurers were because Ms Martins changed insurers and Ms Heavens appears to claim damages as a result.

36.7 There is a suggestion that a summer house erected by Ms Heaven in the rear garden (sometime prior to 2010) within her demise and which is plumbed into the drainage and from which Ms Heaven conducts her interest in pottery may have some impact on clay particulates getting into drains and adversely affecting the operation of them. This is denied by Ms Heaven who claims to have installed a filtration system, but this would appear to a live issue requiring more detailed consideration.

36.8 The drain problems continue and a further eruption occurred in early January 2016. Evidently this is the subject of a further insurance claim and we were told that the claim may span several insurance years in the light of works that have been carried out in the past. It is not clear to us what sums Ms Heaven claims. Loss adjusters have been instructed to investigate and pursue the claim; they require access to Ms Heaven's flat as part of their investigations and we were told that gaining access has been a problem. The outcome of the claim will plainly impact on what sums if any, Ms Heaven will eventually claim from Ms Martins.

36.9 Under this general head of drainage issues, Ms Heaven has included damages claims to recover £740 legal fees paid out by her and £80 to replace a common parts hallway carpet.

36.10 In the written submissions filed on 21 January 2016 Ms Heaven has included a claim for damages under the Defective Premises Act 1972 and a claim for damages for personal injury and stress caused by the drainage eruptions, both of which are unspecified in amount.

36.11 In the papers before us there is no, or no clear:

36.11.1 basis set out as to the circumstances relied upon to support the alleged failure on the part of Ms Martins to carry out repairs from time to time;

36.11.2 witness statement from Ms Heaven dealing with each incident which is alleged to have occurred;

36.11.3 expert evidence supporting that the eruptions complained of are due to disrepair on the part of Ms Martin in breach of her obligations in the lease, or indeed any evidence as to the reason for or cause of so many eruptions;

36.11.4 schedule of damages claimed, and no clear explanation of the costs incurred which have been repaid by way of the insurance pay-outs and what is left outstanding and forming the present claim to damages;

36.11.5 no medical evidence to support the claim for damages due to stress;

36.12 It is plain that the drainage issue is ongoing and that further investigations are required and are or should be in hand.

36.13 This is not an issue which can properly be undertaken on a piece meal basis. In short there is not before this tribunal the materials necessary to undertake a full assessment and analysis of Ms Heaven's various claims arising from this issue.

36.14 It seems to us that when investigations are complete the appropriate course is for Ms Heaven to set out a comprehensive claim dealing with all aspects of the drainage issue that she relies upon and if that claim is contested the appropriate forum to determine it is either mediation (preferably) or in the local county court, if need be.

36.15 In these circumstances we conclude that this is not one of those (relatively rare) cases where this tribunal should assume jurisdiction to determine whether a lessee has a claim for damages arising from breach of an obligation under the lease which can be set-off against service charges otherwise due and payable and, if so, the amount or quantum of such a claim.

36.16 We should also mention for the sake of completeness that in the papers [A615-A619] Ms Heaven alleges that the contractors (Samuels) who carried out the major works in August 2013 did some damage to the flat roof of part of her flat. Ms Heaven appears to hold Ms Martins responsible for this damage and seeks to set-off repair costs incurred by her against service charges otherwise due and payable. It is not entirely clear to us why Ms Martins should be held responsible for the acts of an independent contractor but it seems to us that any claim that Ms Heaven may see fit to pursue should more conveniently be included with the drainage claim.

Similarly, with regard to a claim concerning an alleged rotting door/lintel mentioned in [A620-A621].

Accordingly, we do not propose to make determinations on these claims.

37. In an email to the tribunal dated 19 January 2016 Ms Heaven requested that the tribunal also vary or alter the terms of her lease. It was not entirely clear but it seems that Ms Heaven wishes the principal of consultation to apply to arrangements for sums to be paid into a reserve fund.

38. Lease variation is not something that this tribunal could properly deal with on the hearing of this application. Not only is to too late to raise this point but it is also contrary to the direction given to Ms Heaven not to raise new points or new issues. Further section 35 Landlord and Tenant Act 1987 sets out the limited circumstances in which a tribunal has jurisdiction to vary the terms of a lease. Any such application as Ms Heaven may wish to make must be made in accordance with the provisions of section 35. Accordingly, we will not make any determinations as regards variation of the terms of the lease.

39. Finally, before leaving the subject of the hearing we should record that recognising the respective difficulties affecting each of the parties we endeavoured to conduct the proceedings as informally as possible, consistent with each party putting their side of the issues as and when we addressed them. We explained the process we proposed to adopt to the parties and there were no objections. We also explained that once both parties had put their respective evidence to us they would both have the opportunity to make final submissions to us.

40. On the first day reasonably good, albeit slow, progress was made. We covered several subjects including the major works. Ms Heaven was certain that there was in the files before us a letter which she said was material but she was unable to locate it. When we adjourned at the end of the day we suggested that Ms Heaven take time to go through her papers calmly at home to try and locate the document and that we would finish off the major works first thing in the morning. Ms Heaven

also enquired if she was permitted to lodge 'an impact statement' before the conclusion of the hearing. Thinking this may have some bearing on final submissions we gave permission for that. Ms Martins also asked if she could lodge 'an impact statement' and, in order to be even handed, we said that she could.

41. At the commencement of the second day Mr Sullivan, on behalf of Ms Martins, said that she wished to make an application for costs under rule 13. We said that we would deal with it at the end of the hearing when we would also deal with Ms Heaven's section 20C application as regards costs and when we would invite both parties to make oral submissions to us.

42. The hearing got underway and we concluded major works. In the event Ms Heaven was unable to locate the document she had mentioned the previous day but she made clear to us that she had agreed to contribute to the scope of works described as option 1 and she was now willing to do so, but that she had not agreed to contribute to the extra work described as option 2 and was not willing to pay the extra. Ms Heaven thus argued that her contribution to the major works should be limited to the cost of option 1 plus some other extras which had been carried out, which she had been properly carried out, the cost of which she agreed was reasonable in amount.

43. We then moved on to management fees. The process we proposed to adopt was that Ms Martins would first give her oral evidence to explain the fees claimed and how she had arrived at the amount of them. The fees claimed reflected her time spent on management because she had not engaged a professional managing agent.

44. Ms Heaven plainly disagreed with most of what Ms Martins was telling us and made a number of objections and interjections. We endeavoured to explain that we had to hear Ms Martins' side first before we could hear what Ms Heaven had to say in answer. Ms Heaven was placated for a while but this was short lived. Ms Heaven said that she was not prepared to sit and listen to such lies and made to leave. We encouraged Ms Heaven to stay and assured her that she would shortly have the opportunity to put her case.

45. Ms Heaven decided to stay and we continued with Ms Martins' oral evidence. However, a short while later Ms Heaven found it unbearable to stay and listen to any more. There was quite an outburst and a good deal of allegations made which we would consider outrageous and a good deal of profane language.

46. In the course of collecting her papers and writing materials together Ms Heaven made a number of observations about the outcome of the proceedings but said that she would abide by the outcome that we decided upon. Ms Heaven then left the hearing room and the building.

47. Following a short adjournment Ms Martins and her team returned along with Mr Durward and Ms Edwards. Mr Durward and Ms Edwards said they had consulted with their principal and were prepared to stay and to continue taking notes of the hearing which they said would be passed on to Ms Heaven along with any additional papers which might be produced on behalf of Ms Martins.

48. In these circumstances the tribunal considered rule 34 and whether we should continue the hearing in the absence of Ms Heaven. Rule 34 permits a tribunal to hear a case in the absence of a party if satisfied that the party has been notified of the hearing and that it is in the interests of justice to do so.

49. Here it is plain that Ms Heaven had been notified of the hearing. When leaving part way through the hearing Ms Heaven said that she would abide the outcome. We took that to mean two things. First that in leaving Ms Heaven was not withdrawing or abandoning her application and secondly that she was not objecting to the hearing continuing in her absence.

50. At the time Ms Heaven left we had covered a good number of the issues and that some of those that remained were more of a legal nature which had been covered in the written submissions lodged on Ms Heaven's behalf the previous day.

51. In these circumstances we considered that it would be interests of justice to continue with the hearing in the absence of Ms Heaven and that it would be in the interests of the parties to do so in order that we could determine a good number of the issues between them. We also took into account that the determinations we would make on the service charges payable would have implications for both parties and having spent a good deal of time and money on preparing her case it would be unjust to Ms Martins for the proceedings to be abandoned at such a late stage.

52. Finally we wish it to be clear that we accept Ms Heaven's outburst and decision to leave the hearing was a consequence of her condition and that in certain situations, especially stressful situations, persons afflicted with bipolar disorder can sometimes act in an uncharacteristic manner.

The lease and the service charge regime

53. At this point it is convenient to consider the lease and the service charge regime set out in it.

54. The lease is at [A208]. It is dated 20 July 2007. The lease demises the ground floor, the basement and the rear garden. The lease plan [A209] shows that the whole of ground floor is demised save for a small communal hallway.

55. Material provisions of the lease include:

55.1 By clause 1 the demise includes:
"... the ceilings and floors thereof and the joists and beams on which the floors are laid and all cisterns tanks sewers drains pipes wires ducts and conduits used solely for the purpose of the flat and no other..."

55.2 By clause 1 a yearly ground rent is reserved at £200 for the first 25 years (and increasing during the term) payable by equal half-yearly payments in advance on 29 September and 25 March in every year and then:

"AND PAYING ALSO DURING the said term hereby granted a further and additional rent hereinafter mentioned..."

55.2 Clause 2 sets out a number of covenants on the part of the tenant and material are:

"2(1) To pay the reserved rent at the times and in the manner aforesaid without any deductions whatsoever

(2) To pay the Lessor without deductions by way of further and additional rent a proportionate part ... of the expenses and outgoings incurred by the Lessor in the repair maintenance and insurance of the building and the provision of services therein and the other heads of expenditure as the same are set out in the Third Schedule hereto such further and additional rent hereinafter called 'the service charge' being subject to the following [terms] *and provisions:*

(a) the amount of the service charge shall be ascertained and certified by a certificate (hereinafter called 'the certificate) signed by the Lessor or the Lessor's auditor or accountant or agent (at the discretion of the Lessor) acting as expert and not as an arbitrator annually and so soon after the end of the Lessor's financial year as may be practical and shall relate to such year in manner hereinafter mentioned
(b) the expression 'the Lessor's financial year' shall mean the period from the 6th April in each year to the 5th April of the next year or such other annual period as the Lessor may in his discretion from time to time determine as being that in which the accounts of the Lessor either generally or relating to the building shall be made up
(c) a copy of the certificate for each such financial year shall be supplied to the Tenant on written request and without charge
(d) the certificate shall contain a summary of the Lessor's said expenses and outgoings incurred by the Lessor during the Lessor's financial year to which it relates together with a summary of the relevant details and figures forming the basis of the service charge and the certificate (or a copy

thereof duly certified by the person by whom the same was given) shall be conclusive evidence for the purposes hereof of the matters which it purports to certify

(e) the annual amount of the service charge payable by the Tenant as aforesaid shall in respect of the aggregate of the said expenses and outgoings incurred by the Lessor in the year to which the certificate relates be determined by reference to the rateable values of the ground floor and first floor flats in respect of expenditure under the third schedule

(f) the expression 'the expenses and outgoings incurred by the Lessor' as hereinbefore used shall be deemed to include not only those expenses and outgoings and other expenses hereinbefore described which have been actually disbursed incurred or made by the Lessor during the year in question but also such reasonable part of all such expenditure outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the said term or otherwise insofar as the same relate to the period from the date hereof including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessor or his accountant or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances

(g) the Tenant shall with every half-yearly payment of rent reserved hereunder pay to the Lessor such sums in advance and on account of the service charge as the Lessor its accountants or managing agents (as the case may be) shall specify at their discretion to be a fair and reasonable interim payment

(h) as soon as practicable after the signature of the certificate the Lessor shall furnish the Tenant an account of the service charge payable by the Tenant for the year in question due credit being given for all the interim payments made by the Tenant in respect of the said year and upon the furnishing of such account showing such adjustment as may be appropriate there shall be paid by the Tenant to the Lessor the amount of the service charge as aforesaid or any balance found payable or there shall be allowed by the Lessor to the Tenant any amount which may have been overpaid by the Tenant by way of interim payment as the case may require

(i) ...

(j) ..."

(6)(a) To pay to the Lessor all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Lessor incidental to the preparation and service of a notice under Section 146 Law of Property Act

1925 or incurred in or in contemplation of proceedings under Section 146 or 247 of that Act notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court
(b) ...

55.3 Clause 5 sets out a number of covenants on the part of the landlord and material are:

"5(1) Subject to the payment by the Tenant of all rents and the services [sic] *charge and provided that the Tenant has complied with all the covenants agreements and obligations on his part to be performed ad observed to maintain repair redecorate amend clean re-point paint grain varnish whiten and colour and keep on good and tenantable repair and condition:*
(a) the structure of the building and in particular but without prejudice to the generality thereof the balconies roofs foundations external and internal walls as bound the flat (excluding the internal faces of walls within the flat) or the rooms therein and timbers chimney stacks gutters and rainwater and soil pipes thereof
(b) the sewers drains watercourses gas and water pipes ... in under and upon the building...
(c) ...
(d) ...

(2) To insure and keep insured the building against loss or damage by fire and all other risks as are normally contained within a comprehensive policy as required by the Council of Mortgage Lenders Handbook to the full reinstatement value thereof ... and to ensure that the relevant interest of the Tenant is noted on the appropriate policy or policies (together with such other interests as may from time to time be reasonably required or necessary) and to produce to the Tenant or his agent on request the said policy or policies and evidence of payment of the current premium

55.4 The Third Schedule to the lease is headed

"LESSOR'S EXPENSES AND OUTGOINGS AND OTHER HEADS OF EXPENDITURE IN RESPECT OF WHICH THE LESSEE IS TO PAY A PROPORTIONATE PART BY WAY OF SERVICE CHARGE

1. *The expense of maintaining repairing redecorating ... the building and all parts thereof and all appurtenances apparatus ... thereto belonging and more particularly described in Clause 5(1) hereof*
2. *The cost of insuring and keeping insured ... the building and all parts thereof ...*
3. *The reasonable fees of the Lessor or the Lessor's agent for the collection of the rents of the flats in the building and for*

the general management thereof provided that such fees shall at no time exceed the maximum therefor allowed by the scales authorised for the time being by the Royal Institution of Chartered Surveyors

4. *All fees and costs incurred in respect of the annual certificate and of accounts kept and audits made for the purpose thereof*
5. ... [contributions to costs to which the landlord is liable to contribute in connection with party walls or other structures used in common with the building and any adjoining premises]
6. *The cost of maintaining ... the television and radio receiving aerials ...*
7. ... [representations against proposed legislation]

56. In evidence Ms Martins told us that her financial year for service charge purposes year was the period 25 March to the following 24 March, although in practice as will be seen shortly Ms Martins tended to prepare documents or demands on a six-monthly basis.

57. In summary the service charge regime should have worked along the following lines:

57.1 Ms Martins is entitled to demand an interim payment on account payable as on 25 March. Such interim payment was to be a sum that was a *'fair and reasonable'* as Ms Martins in her discretion specified. As we shall see shortly such sum the lease permits there is included in that demand a sum to be allocated to a reserve fund. The sum to be allocated to the reserve fund may be such sum as Ms Martins, in her discretion, considers to be a fair and reasonable sum.

57.2 Ms Martins is entitled to demand a second interim payment on account payable as on 29 September. That sum, which might be different to the sum demanded to be paid on 25 March, is subject to the same restrictions as set out in paragraph 57.1 above.

57.3 As soon after 24 March Ms Martins is to issue or procure the issue of a certificate which should set out the amount of the service charge for the preceding service charge year. Upon a written request from Ms Heaven that certificate was to be provided to her free of charge.

57.4 As soon after the certificate has been signed Ms Martins is to furnish Ms Heaven with an account of the service charge payable by her for that year which account is to show such adjustments as may be necessary if one or more interim payments on account had been made.

If the aggregate of any interim payments made is less than the actual service charge payable for the year, there will be a debit balance and that is payable on demand.

If aggregate of any interim payments is greater than the actual service charge payable for the year, there will be a credit balance allowed to Ms Heaven.

57.5 To keep track of demands made, interim payments made and balancing debits and credits it is usual for a landlord to maintain what might be termed a 'running account' or a 'cash account'. Many professional managing agents include on the cash account debits and credits relating to ground rent. Although it is not unlawful to do so it is sometimes unhelpful to this tribunal because we have no jurisdiction with regards to ground rent and when trying to settle a disputed cash account as between landlord and tenant as regards service charges payable, the inclusion of ground rent debits and credits can give rise to an added complexity.

The service charges claimed by Ms Martin

58. As mentioned earlier for a variety of reasons when Ms Martins acquired the freehold interest no service charge accounts were handed over by the Feldmans. Ms Martins started from scratch and adopted an accounting system which did not fully comply with the regime set out in the lease.

59. However, the building is not sophisticated and comprises only two flats, the services provided are basic comprising really only buildings insurance and repairs.

60. Ms Martins issued statements of account from time to time, sometimes at six-monthly intervals. Some were complicated in that previously claimed sums were carried forward and added in. The contemporaneous statements can be found within pages [A121-A150]. At [36] is a composite certificate and[R296] is an account prepared by Ms Martins in November 2015 for the purposes of these proceedings. It contains helpful information and materials.

Putting these various documents together we were able to take the parties through them and establish what service charge costs Ms Martins claimed to have incurred in each of her service charge years of account and of them which were admitted and which were contested.

The fruit of this task is the spreadsheet appended to this decision. It can be seen that there are relatively few heads of expenditure in challenge.

61. Ideally Ms Martins ought to have procured annual certificates, annual accounts and an easily understood running account or cash account. We can understand why Ms Martins did not do so. All the required

information was to be found in the accounts/statements Ms Martins issued but it just needed to be teased out. If there had been a more cordial relationship between the parties, we have no doubt that any queries raised by Ms Heaven would have been readily answered and explained.

62. In these circumstances we do not see why Ms Martins should be deprived from recovering from Ms Heaven contributions to expenditure reasonably and properly incurred under the terms of the lease and which is reasonable in amount.

63. One of Ms Heaven's complaints was that the information that was provided by Ms Martins was not in a format which the Department of Work and Pensions (DWP) required in order to consider and calculate such pension credits as Ms Heaven might be entitled to. Whilst we have some sympathy with that it is our experience that DWP can sometimes be over demanding in the format of residential service charge information and DWP appears to struggle with the concept of interim payments on account and balancing debits/credits as the case may be, which arrangement does not appear to fit neatly into its software for calculating pension credit. That is not the landlord's fault. Whilst a landlord is required to set out the amount of service charges due in a clear way, a landlord is not required to adapt its accounting systems to suit DWP's perceived requirements.

The service charges in dispute

64. We can now turn to the service charges in dispute.

Reserve fund

65. There was an issue as to whether the service charge regime as set out in the lease enabled the landlord to set up a reserve fund if and when considered appropriate. Ms Heaven contended that it did not. Ms Heaven argued that the Feldmans had never set up a reserve fund and Ms Heaven was adamant that at no time did she ever agree to a reserve fund and that at no time did she ever agree to or make payments of £500 or £250 to such a fund.

66. Ms Martins contended that clause 2(2)(f) of the lease entitled the landlord to set up a reserve fund and to exercise discretion as to the amounts to be paid into each year, which amounts were limited to those which were *'fair and reasonable in the circumstances'*.

67. Ms Martins told us that as part of her discussions with Mr Feldman concerning the sale of the freehold he suggested that some major works would be required at a cost of about £5,000. Ms Martins said that she had some discussions with Ms Heaven about that and it was agreed that £500 would be included in the demands. Later that sum was reduced to £250 after the major works had been carried out. All of that evidence was hotly denied by Ms Heaven who was adamant that she had never paid anything to or towards a reserve fund.

68. At [A121] is what appears to be Ms Martins' first 'certificate/account'. It makes a demand for £166.88 as a contribution towards the cost of insurance. It then claims:

"Service charge for 2010	*£500*
Service charge for 2011	*£500"*

Ms Martins told us the £500 demands were the reserve fund demands; £500 for the part- year September 2010 to 24 March 2011 and £500 for the year ending 24 March 2012, Subsequent demands were made and the 'arrears' carried forward so that for example at [A128] there is a claim for £2,000 being four annual payments of £500 each.

69. Ms Martins also said that the Feldmans did have a reserve fund but that they did not hand over any monies on completion of the sale of the freehold.

70. Further Ms Martins said that she had not set up a dedicated bank account to run the building, to hold funds on account and draw down when bills were required to be paid, but instead she used her private bank account. Also she said that in her capacity as lessee of 31B she had not set aside or paid sums into any reserve fund. Ms Martins explained that she rarely held any funds on account, and tended to make payments from her own funds, mostly for insurance and repairs and then sought to recoup contributions from Ms Heaven, which, if made at all tended be made late.

71. As to the construction of the lease we have no hesitation in holding that clause 2(2)(f) does permit (but does not oblige) the landlord to allocate sums in each set of accounts to a reserve fund. In doing so the landlord must be reasonable as regards the strategy for and purpose of the reserve fund and also the annual amounts allocated to it must be reasonable.

72. Ms Heaven argued that the Feldmans did not have a reserve fund and therefore Ms Martins cannot have one and in any event she, Ms Heaven, did not agree to it or the amounts to allocate to it. We reject both of those arguments. Whether the Feldmans did or did not have a reserve fund is immaterial. There does not have to be a reserve fund in existence throughout the term of the lease. It is quite feasible that the landlord should identify the need for a reserve fund for a particular project or item of expenditure, allocate funds to it and then when the project has been undertaken and the funds drawn down to pay for it the reserve fund might then be closed and a new one opened later when another appropriate project is identified.

73. It is also immaterial whether Ms Heaven did or did not agree to a reserve fund being set up. The setting up of a reserve fund is a matter for the landlord and the landlord alone. Whilst a landlord might well discuss such a move with tenants to gauge their reaction and to keep them informed and involved (which we would consider to be good

practice in any event), the landlord is the person who makes the final decision both as to the principle of a reserve fund and the annual amounts allocated to it.

74. Where the oral evidence of the parties was in conflict we attempted to find other evidence which might assist us to determine which witness was more likely to have a more accurate recollection of events or conversations.

75. Although academic we consider we should make a finding as to whether or not the Feldmans had set up a reserve fund. There is no independent evidence to assist us. On balance we find that they did not. The reasons for that finding are that firstly it appears common ground that the Feldmans managed the building in a rather chaotic manner which involved the least input on their behalf and it seems to us unlikely that they would have thought through a strategy for a reserve fund. Secondly, if there had been such a fund and that both parties had made payments into it such that it was in credit we find it highly unlikely that upon the sale of the freehold to Ms Martins either of the two parties would have meekly stood by silently and let the Feldmans keep that money.

76. As regards the reasonableness of setting up a reserve fund we prefer the evidence of Ms Martins. We accept her evidence that in 2010 when she acquired the freehold interest it was brought to her attention that certain major works were required. We are reinforced in this finding because in August 2013 major works were carried out with the approval and active participation of Ms Heaven.

77. We accept the evidence of Ms Martins that on her purchase of the freehold Mr Feldman had suggested to her that major works at a rough cost of £5,000 were required. We accept that on that basis an annual contribution of £500 by each of the two lessees was a fair and reasonable decision for Ms Martins to have arrived at. We find it to have been well within the range that a landlord acting reasonably could have arrived at.

78. As to whether Ms Heaven agreed to make annual payments of £500 into a reserve fund we find that on balance she did and that later, after the major works were carried out in August 2013, Ms Heaven agreed the reduced sum of £250 per year.

At [R294] is a copy of a letter dated 30 May 2010 which Ms Martins says she sent to Ms Heaven but which Ms Heaven denies receiving. It is a letter suggesting the joint purchase of the freehold and sets out reasons why that would be sensible. A key paragraph which assumes that a joint purchase occurs is:

"We can then open a joint account that requires joint signatures for withdrawals and we can then put £500 a year for maintenance etc and then review it after a year to ascertain whether it is enough."

There is no doubt that from the outset of the accounts/demands Ms Martins sent out there was included £500 per year which was intended for the reserve fund, even though it was mis-termed 'service charge'. There is no documentary evidence that that position was challenged by or objected to by Ms Heaven until July 2013 when in an email to Ms Martins, Ms Heaven said, amongst other things:

"First I need your agreement to cancel the requests for £500 Maintenance Charges for which you have so far failed to provide any validation, actually because you carried out no maintenance work apart from the small roof repair for which I have paid you. There has been no precedent or agreement for me to pay you this sum annually and automatically. I have suggested, as my solicitor advised me, that £250.00 per annum would be appropriate, and I agree to pay this sum annually and automatically from the year following the completion of the current round of substantial repairs. You would still need to justify outlays with proper accounting once a year."

Indeed, on one occasion Ms Heaven did pay £250 to Ms Martins which was expressly referable to a reserve fund. On 24 April 2014 Ms Heaven made a bank transfer to Ms Martins' bank account in the sum of £594.14. In an email sent the same day by Ms Heaven to Ms Martins she explained [A129]:

"Dear Ms Martins

I am today transferring to your bank account the following sum, comprising:

Ground rent ...	*£300.00*
Buildings Insurance ...	*£ 44.14*
Maintenance – regular annual payment	
March (?) each year on A\c date	*£250.00*
	£594.14

The remaining charges you are trying to make of me are in dispute and, after the exhaustive attempts I have made, with no result, I can only await the legal decision you are promising.

Yours sincerely
Jo Heaven"

We infer from that email that Ms Heaven was disputing some service charges claimed by Ms Martins but what she was not disputing was £250 to go into a reserve fund to held on account of future expenditure.

79. So, to summarise we have held that it was fair and reasonable of Ms Martins to have allocated funds in each annual account to a reserve fund and we have held that initially a sum of £500 (later £250) from each lessee was a fair and reasonable sum.

80. However, apart from the one sum of £250 Ms Heaven has not made payment in respect of an allocation to a reserve fund. If such payments had been made and set aside in a designated bank account, the reality is that Ms Martins would have drawn down those monies from the reserve fund to pay for the major works carried out in August 2013.

81. As will be seen shortly we have held that Ms Heaven's contribution to the major works costs amounts to £2,126.47. That sum has been outstanding for some while and certainly prior to April 2014 when Ms Heaven made a payment of £250 to Ms Martins to go into a reserve fund. In cash terms it seems to us that it would be perfectly in order for that sum to have been paid into the reserve fund and then drawn down in part payment of Ms Heaven's contribution to the major works. Thus is seems to us that the short and most effective way to deal with this is to credit that £250 against Ms Heaven's liability towards the major works thus reducing the balance now payable by her to £1,876.47 (see also para 94 below). That will draw a line under both issues to date.

82. Going forward it seems to us that the significant hostility and mutual distrust between the parties is unlikely to improve any time soon. We would urge Ms Martins to try and find and engage a local competent managing agent. Not only should that ensure compliance with the lease and statutory requirements concerning residential service charges and the accounts, it would ensure that funds and reserve funds are held on trust in properly designated bank accounts which Ms Heaven may find reassuring. Also, the appointment of a managing agent might lessen the emotional clash between the parties. We would also urge Ms Martins to separate out her two roles, one as landlord and the other as tenant of the first floor flat. If there is to be a reserve fund it is important that both tenants contribute to it in fair proportions.

Major works

83. It was not in dispute that major works were required and were carried out in August 2013. Ms Heaven was heavily involved in the project. Ms Heaven assisted in the drawing up of the specification and prepared a template to help analyse the competing tenders/quotes.

The quotes received were copied to Ms Heaven and she expressed her preference – see for example:

1. An email dated 18 July 2013 [A603] sent by Ms Heaven to Ms Martins in which she says:

"Ref: Your email+ attachments today's date

1. *Samuels' quote Option 1 (plus additional Obs.) Chimney Pot £300 is my preferred option of all the quotes you obtained. (£3,290 +£300 = TOTAL £3,590) of which my share of costs would be 223 i.e.£1,811.24*
2. *Ref. Buildings Insurance ..."*

2. An email dated 19 July 2013 [R248] sent by Ms Heaven to her son and which was copied to Ms Martins in which she said, amongst other things:

> *"1. I have agreed to the building Quotation from Samuels as follows:*
> *Option 1 No Leads as per my specification sum of £3,290.00*
> *Plus their Observation new Chimney sum of £300 Total £3,590"*

3. An email to Ms Martins dated 27 July 2013 at [A607] in which she says:

"Dear Ms Martins
Reminder
Please confirm which builder you want to go with out of the quotes you obtained.
My first choice is Samuels' Option 1 as applies to our lease.
My second choice would be the quote I obtained from a recommended roofer.
..."

In the event the contract was awarded to Samuels.

84. In an email sent by Ms Heaven to Ms Martins dated 9 October 2013 she said, amongst other things:

"I note from your copy correspondence with the builder/managing agent that the costs were revised upwards and that you did not go with Option 1 that I agreed to. These increased sums were not agreed by me and you and the builder went ahead on your own determination.

...

I repeat my acceptance of Option 1 at £3,290.00 in the builder's quotation, and my part of it according to the lease i.e. x223 over 442, that is £1,659.89.

..."

85. It was also not in dispute that Ms Martins did not comply fully with the technical and complex consultation requirements imposed by section 20 of the Act and the regulations issued pursuant to it. Ms Heaven's approach to the major works has fluctuated. At times she had view that her contribution should be limited to £250 but at other times she

readily accepted her liability to make a contribution of 50.45% to the Option 1 costs.

86. If Ms Heaven had insisted on arguing that her contribution should be limited to £250 due to failure to comply fully with the consultation requirements it would have been necessary to give consideration to any retrospective application for dispensation and/or issues of estoppel.

87. However, at the hearing Ms Heaven's final position was that she was prepared to make a contribution of 50.45% to the Samuels Option 1 works but not the costs incurred in connection with Option 2.

88. Evidently Option 2 was the same specification as Option 1 save that the existing flashing on the roof which was a lightweight man made material, was to be replaced with a heavier duty lead flashing as recommended by Samuels.

89. In her oral evidence Ms Martins asserted that Ms Heaven had orally agreed to the upgrade in flashing to Option 2 and she also thought that there had been written confirmation of that somewhere. However, in her statement of case dated 19 November 2015, and which is endorsed with a statement of truth, she makes reference in paragraph 41 to the express agreement about Option 1 and in paragraph 42 explains her preference for Option 2 and says:

"... Unfortunately it was not possible to reach an agreement with the Applicant on that issue and so the Work was carried out in accordance with Option 2 without the Applicant's express consent on that issue."

Evidently Option 2 was £1,300 more expensive than Option 1.

90. On this issue we prefer the evidence of Ms Heaven because the contemporaneous correspondence supports her evidence that she only ever agreed to Option 1. In November 2015 the evidence of Ms Martins was of like effect. We infer that the stress and pressure of the court room affected Ms Martins' oral evidence and her recollection of a contrary position.

91. We thus find that Ms Heaven did not expressly agree to the scope or costs of the Option 2 works.

92. In these circumstances and given the admitted failure to comply fully with the consultation requirements we find that Ms Heaven's contribution to the major works should be limited to Option 1 but as subsequently adjusted for other factors which were not in dispute.

93. Samuels final costing of the works is at [A602(d) and (e)]. We took the parties carefully through the document. On page 602(d) Ms Martins agreed with the items numbered 1-8 which came to a total of £3,290. On page 602(e) Ms Heaven originally objected to item 1, £300 for the chimney pot because she said this was to be done gratis. When it was

explained that no labour charge had been made and the £300 was the cost of supplying the chimney pot Ms Heaven readily accepted that the £300 should be included in the reckoning because it was the labour only that to be gratis. Thus Ms Heaven agreed items numbered 1, 2, and 3. Both parties agreed that items 4 and 6 should be left out of the reckoning because they related to extra private works carried out in their respective flats.

94. Thus at the hearing both Ms Martins and Ms Heaven agreed that the proper cost of the major works was £4,215 and that Ms Heaven's share at 50.45% amounted to £2,126.47. We find that against this should be set £250 Ms Heaven paid in April 2014 in respect of the reserve fund (see para 81 above) so that the balance now due in respect of major works is reduced to £1,876.47.

Insurance

95. The landlord's obligation as regards buildings insurance is set out in clause 5(2) – see para 55.3 above.

96. We observe that the lease granted to Ms Heaven in 2007 was plainly modelled on the lease of the first floor flat granted in 1982 but the provisions as to buildings insurance are not identical. This may not matter in practice whilst the freehold and the leasehold of the first floor flat remain in the same hands but difficulties may arise if they came into separate hands.

97. In essence the obligation on the landlord is *"To insure and keep insured the building against loss or damage by fire and all other risks as are normally contained within a comprehensive policy as required by the Council of Mortgage Lenders Handbook..."* Neither party adduced any evidence as to what (if any) requirements are set out in the Mortgage Lenders Handbook. It was not suggested by Ms Heaven that the policies effected by Ms Martins were not compliant with that obligation.

The particular issue which has caused Ms Heaven angst is the obligation *"... to ensure that the relevant interest of the Tenant is noted on the appropriate policy..."*

The insurance effected by Ms Martins was as follows:

08.10.2010 to 08.10.2011 - period of insurance
A document [A460(a)] issued by the broker Towergate and headed 'PrimeLet Policy Schedule' records, so far as material:

Policy Number: CIA10090911100901

Insurer: Specialist Consortium (comprising RSA 50%, Allianz 30% and Groupama 20%. Buildings Sum Insured £300,000. Premium £330.75. The risk address is given as 31 Cotesback [sic] Road. Against 'Noted

Interest(s)' there is a blank. Against 'Type of Property' it states 'Converted Flat'.

10.09.2011 to 10.09.2012 - period of insurance
A document [A461(a)] issued by the broker Towergate and headed 'Towergate Underwriting Let Property – Policy Schedule' records, so far as material:

Policy Number: 21051 – CIA0027797

Insurer: RSA 50%, Allianz 30% and Groupama 20%.

In the section headed **'Buildings'** it records:

Sum Insured:	*£300,000.*
Accidental Damage included:	*Yes*
Interested Parties:	[Left blank]

Premium £318.15. The risk address is given as 31 Cotesbach Road.

10.09.2012 to 10.09.2013 - period of insurance
A document [A462(a)] issued by the broker Towergate and headed 'Towergate Underwriting Let Property – Policy Schedule' records, so far as material:

Policy Number: 21051 – CIA0027797

Insurer: RSA 50%, Allianz 30% and Groupama 20%.

In the section headed **'Buildings'** it records:

Sum Insured:	*£300,000.*
Accidental Damage included:	*Yes*
Interested Parties:	[Left blank]

Premium £349.97. The risk address is given as 31 Cotesbach Road.

17.07.2013 to 09.09.2013 - period of insurance
A document [A463(a)] issued by the broker Towergate and headed 'Towergate Underwriting Let Property – Policy Schedule' records, so far as material:

Policy Number: 21051 – CIA0027797

Insurer: RSA 45%, Allianz 20% and Pinnacle 35%. Broker:

In the section headed **'Buildings'** it records:

Sum Insured:	*£300,000.*
Accidental Damage included:	*Yes*

Interested Parties: *Mrs Jo Heaven*

Premium £0

Ms Heaven submitted that this was revised schedule issued part way through the insurance year and which had been expressly issued to record her as an 'Interested Party'. Given that it covered only the remaining 3 months of the year Ms Heaven said that she should only pay 25% of the annual premium which she calculated to be £44.14 which she has in fact paid.

10.09.2013 to 09.09.2014 period of insurance
A receipt and a certificate issued by Discount: Insurance records:

Insured:	Ms Elizabeth Martins & Mrs Jo Heaven (Leaseholder of one flat)
Insured Address:	31 A&B Cotesbach Road ...
Premium:	£251.59
Insurer:	Amlin UK
Details of Cover:	Buildings £230,000

10.09.2014 to 09.09.2015 – period of insurance
A document [A467(a)] issued by the broker Towergate Connect and headed 'Home Insurance – Policy Schedule' records, so far as material:

Policy Number: 21051 – CIA0027797

Insurer: Allianz 51% and Pinnacle 49%. Broker:

In the section headed **'Buildings'** it records:

Cover included:	*Yes*
Sum Insured up to:	*£275,000.*
Accidental Damage:	*Yes*
Interested Party:	*C and G*

Premium	£216.45
IPT	£ 12.98
Towergate admin fee	£ 32.00
Total	£261.43

At [A467(e)] a page headed: 'Endorsements Applicable' it records:

"We hereby note and agree thas [sic] *Mrs Jo Heaven is a leaseholder of the downstairs flat.* Against that Ms Heaven had added a manuscript note which reads *"meaningless"*

"8ZZ – Occupants
We hereby note and agree that the Property is 2 flats. Top floor flat is let to Professionals and Endorsements FG18, FG23 and TUH22 applies."

Evidently the expression 'C and G' above refers to Cheltenham and Gloucester which has made a mortgage loan on the first floor flat.

For the sake of completeness, we record that at [A465(a)] there is booklet issued by Towergate entitled: 'PrimeLET Policy Wording' and at [A466(c)] there is a booklet issued by Discount Insurance entitled: 'Policy Terms & Conditions'. Neither party drew to our attention any particular provisions of either document.

We also note that neither party provided us with copies of the actual policies issued by the insurer, the best we have are copy documents/policy schedules as issued by brokers and it appears the parties require and expect us to do the best we can with the materials supplied to us by them.

98. The amount of the premiums achieved by Ms Martins was modest and there was no dispute between the parties as to the reasonableness of the amount of the premiums incurred. We observe that the premiums achieved might be connected to the relatively low building sums insured and, going forward, this is something that Ms Martins might consider it wise to take professional advice on.

99. It was also not in dispute that throughout the relevant period the building was insured with an appropriate policy compliant with the provisions of the lease. There was a complaint by Ms Heaven that for a while on one occasion she was unaware who the insurer was. It will be seen from the above summary that save for one year the business has always been placed through the broker, Towergate. The issue for Ms Heaven was that in some of the insurance years her interest as tenant was not evidently noted on the policy as required by clause 5(2) of the lease.

100. It did not appear to be Ms Heaven's case that such alleged failure caused her any loss or damage and it does not appear that such alleged failure has precluded Ms Heaven from making several successful insurance claims over the years.

101. In respect of the insurance year October 2010/11 Ms Heaven has paid a contribution of £166.88 and does not dispute that item.

102. In respect of the insurance year September 2011/12 Ms Heaven has paid a contribution of £160.51 and does not dispute that item

103. In respect of the insurance year September 2012/13 Ms Heaven's interest was noted on the schedule as issued by Towergate part way through the year hence Ms Heaven's argument that she should only make a proportionate contribution to the amount otherwise payable by her. We reject that submission. Insurance is effected by an annual contract. It may be that if a change in circumstance occurs part way through the year a revised policy schedule is issued by the broker and dated as of date of issue but there was no evidence that the information recorded on the revised schedule did not apply to the policy for the whole of the insurance year. It was not in dispute that Ms Heaven was entitled to a credit of £49.55 in respect of an insurance excess charge borne by her and we have taken this into account in arriving at a net balance due of £82.88 in respect of the service charge year ended 24 March 2013.

104. In respect of the year September 2013/14 Ms Heaven was in fact joint insured and the certificate issued by the broker expressly referred to her leasehold interest. In some respects, being a joint insured gives a person wider rights than simply having an interest noted on a policy. In any event the certificate at [A466(b)] plainly records: *"...& Mrs Jo Heaven (Leaseholder of One Flat)"*. We find that this expression plainly fulfils the requirement of clause 5(2) of the lease which is that the interest of the tenant is noted on the policy.

105. In respect of the year September 2014/15 the policy schedule issued by Towergate records:

> *"We hereby note and agree thas* [sic] *Mrs Jo Heaven is a leaseholder of the downstairs flat.* Against that Ms Heaven had added a manuscript note which reads *"meaningless"*

Ms Heaven submitted that the endorsement was not sufficient because a loss adjuster had advised her in a letter that a different form of wording was required to enable a tenant, in a position such as her, to make a claim direct on the insurer rather than have to go via the landlord as the insured. Ms Heaven was unable to identify or draw to our attention the letter mentioned by her.

We make two observations about that submission. First the lease does not oblige the landlord to effect annotations on the policy in such wording as may enable the tenant to make a direct claim on the policy. The obligation is to have the tenant's interest noted on the policy. We find that the endorsement noted above fulfils that obligation.

Secondly, we draw to Ms Heaven's attentions the provisions of paragraph 7 of the schedule to the Landlord and Tenant Act 1985 concerning the statutory right of tenants to notify insurers of possible claims. The text of paragraph 7 is set out in the schedule to this decision for ease of reference.

106. For the sake of good order and before leaving this issue we record that we accept Ms Martins' evidence set out in paragraph 21 of her statement of case to the effect that she has always notified the insurers of Ms Heaven's interest and that the relevant insurer has always stated that Ms Heaven was covered by the policy and entitled to make claims on it. We are reinforced in that finding by the email dated 18 November 2013 at [R227] and by the fact Ms Heaven has made successful claims.

Costs of management

107. Paragraph 3 of the Third Schedule to the lease [A233] makes provision for the landlord to recover through the service charge the reasonable fees of the landlord or the landlord's agent for the collection of rents of the flats in the building and for the general management thereof. It goes on to provide that such fees shall not exceed the maximum allowed by the scales authorised for the time being by the RICS. First we take the use of the plural expression 'rents' to include both the ground rent and the further and additional rent defined to be the service charge. Second we find that the expression 'general management' includes the organisation of insurance and repairs and correspondence relating thereto.

108. At the time the lease was granted the building was managed by the landlord at the time, the Feldmans, and we find that the expression 'the reasonable fees of the lessor or the lessor's agent ...' was adopted so that the parties understood that if the Feldmans, as the lessor, continued to manage the building the reasonable fees or costs incurred in doing so were recoverable through the service charge.

109. The subject lease was based on the 1992 lease from which the Third Schedule was replicated. In fact, by 2007 when the lease was granted, the RICS had ceased to authorise scales for residential management and instead was advocating unit fees. If this had been raised and brought to the attention of the parties at the time we have little doubt that they would have readily agreed that the costs of management were not to exceed a reasonable and competitive unit fee because, objectively, that it what parties circumstanced such as those here with the requisite knowledge of the background would have agreed. We also infer for the same reasons that where major works were to be undertaken by the landlord himself the fees recoverable by him should be limited to a reasonable and competitive fee such as a chartered surveyor might seek to recover if undertaking the management and supervision of the project. We find that the range of such fees would be in the order of 10-15% of the net cost of the works subject to location, scale and complexity.

110. Paragraph 4 of the Third Schedule makes reference to the fees and costs incurred in respect of the annual certificate and of accounts kept.

111. Ms Martins has carried the burden of management throughout since she acquired the freehold in September 2010. That management may

not have always been perfect and given her inexperience it may be that she has learned lessons along the way.

112. Ms Martins did not seek to recover any costs to reflect the time and effort she put into management in the years ending 24 March 2011 and 2012. Ms Martins seeks to recover costs of management as follows:

Year ending 24 March 2013 £180
Year ending 24 March 2014 £335
Year ending 24 March 2015 £ 20

All of these are challenged by Ms Heaven who says that she should not be obliged to pay anything for management.

113. The evidence of Ms Martins was that originally she did not wish to make a charge for management however, as time went on she found it more and more difficult and time consuming to manage the building largely due to the attitude and approach adopted by Ms Heaven who inundated her with a plethora of email, sometimes several a day, and many of which were gratuitously and needlessly offensive. Several examples in the bundles were drawn to our attention.

114. Ms Martins explained to us that in an effort to dissuade Ms Heaven sending so many email and offensive email Ms Martins informed Ms Heaven that in future she would make a charge of £5 for each email replied to and £10 for each offensive email she replied to. Evidently this did not have the desired effect and the charges Ms Martins seeks to recover are broadly calculated by reference to a number of email/offensive email.

115. Ms Heaven had left the hearing part way through Ms Martins evidence on this point but it was made clear to us that Ms Heaven objected to making any payment towards the costs of management on the footing that throughout Ms Martins had not managed properly and effectively to her satisfaction and that had caused her numerous problems and difficulties.

116. We are not persuaded that it is appropriate and effective management to impose a charge for each email sent out and to impose a penalty for each offensive email replied to. That is not an approach adopted by RICS or advocated in the RICS Service Charge Residential Management Code 2nd Edition approved by the Secretary of State for England under section 87 Leasehold Reform, Housing and Urban Development Act 1993.

117. We find as a fact that Ms Martins has managed the building and she has incurred time and cost in doing so. Insurance has been arranged, minor and major works have been carried out, certificates and accounts have been prepared albeit not perfectly and a good deal of correspondence has been entered into. We find that Ms Martins is

entitled to a contribution to the time and costs incurred provided that they do not exceed the limits mentioned in paragraph 109 above.

118. As regards the year ended 24 March 2013 we find, drawing on the accumulated expertise and experience of the members of the tribunal, that a competitive unit fee for management of a block of just two flats in London E5 who be a deal greater than £180 and thus we find that a management charge of £180 is fair and reasonable in amount and thus payable by Ms Heaven.

119. As regards the year ended 24 March 2014 this included the supervision and management of major works. We acknowledge that Ms Heaven was also engaged in that project and assisted with drawing up the specification and analysing the competing quotations but the terms of the lease do not entitle Ms Heaven to impose a charge or be paid recompense for doing so. We have found that the total costs of major works amounted to £4,215. If a fee at 10% on that was allowed the management fee for that project would amount to £421.50 of which Ms Heaven's share at 50.45% would amount to £212.65. Taking this and a unit fee for general management into account, we find that a fee of £335 for the whole year as claimed by Ms Martins is fair and reasonable in amount and thus payable by Ms Heaven.

120. As regards the year ended 24 March 2015 the fee claimed is a mere £20. We find it is fair and reasonable in amount and thus payable by Ms Heaven.

The equitable right of set-off

121. One of the issues between the parties was whether the terms of the lease, as properly construed, excluded the equitable right of set-off. Both parties put forward their respective cases. Whilst we have declined to determine whether Ms Heaven has a genuine claim which amounts to a set-off, and if so, to quantify it, it seems to us that in accordance with the overriding objective and to assist the parties we should determine the issue as to whether or not the equitable right of set-off has been excluded by the terms of the lease.

122. Equitable set-off arises when two claims are so closely connected that it would be unjust to allow one party (X) to enforce its claim without giving credit for the claim of the other party (Y) where Y has been wronged.
An equitable right of set-off often arises where the claimant has defaulted in performing the obligation for which it is seeking payment. For example, a seller who has delivered defective goods should not be able to claim the full purchase price from its debtor. Instead, the seller should take into account the debtor's cross-claim for damages for breach of contract to reduce the seller's primary claim to its real value.

The features of equitable set-off are that:

- there must be an inseparable connection between the claim and the cross-claim, and
- it must be manifestly unjust to refuse the set-off

The basis of equitable set-off hinges on fairness to the victim of a party who has been wronged. It is not simply about claims which are transactional.

Unlike in legal set-off, the claims do not have to be liquidated and a right of equitable set-off can be exercised outside court.

123. Parties who enter into a contract are free to agree between themselves that the right of set-off shall be excluded from the bargain they propose to enter into.

If a landlord wishes to prevent a tenant from setting off sums claimed against rent or service charges it is necessary for there to be an express provision to this effect in the lease.

Leases of both commercial and residential properties commonly exclude the right of set-off so that rent and/or service charges are required to be paid in full.

124. Clause 2(1) of the lease is a covenant by the tenant:

"To pay the reserved rent at the times and in the manner aforesaid without any deductions whatsoever"

We take that to refer to the ground rent only because the 'further and additional rent' defined to be the service charges in mentioned in clause 2(2).

125. Clause 2(2) is a covenant by the tenant:

"To pay the Lessor without deductions by way of further and additional rent ... the expenses and outgoings incurred by the Lessor ... in the repair maintenance and insurance of the building..."

126. It will be noted that the two provisions are not quite identical in that as regards the ground rent the expression 'without any deductions whatsoever' is adopted whereas as regards the service charge the expression adopted is simply 'without deductions'.

127. There was no evidence before us as to what significance (if any) the parties to the lease at the time of grant attached to the additional expression 'whatsoever' as regards the ground rent. That need not concern this tribunal because we are concerned only with the service charge privision.

128. The legal submissions prepared on behalf of Ms Heaven drew attention to current authorities on this point. In particular *Connaught*

Restaurants Ltd v Indoor Leisure Ltd [1994] 1WLR 501 CA which held that the covenant to pay the rent or service charge 'without any deduction' was not sufficient to preclude a set-off being exercised.

In contrast in *Electricity Supply Nominees Ltd v IAF Group Ltd* [1993] 1 WLR 1059 it was held that the expression 'without any deduction or set-off whatsoever' was sufficient to preclude a set-off being exercised.

It appears therefore that there is some significance to be attached to the expression 'set-off' and/or 'whatsoever'.

129. On behalf of Ms Martins it was argued that the lease made clear that the service charge was to be paid without deductions. In the light of the authorities we must find that the use of the expression 'without deductions' was not sufficient to preclude Ms Heaven from seeking to exercise the right of set-off in respect of any claims that she considers she has against Ms Martins arising under the lease.

The claim to interest

130. Ms Martins claimed interest on sums demanded but not paid or not paid promptly.

131. At paragraph 66 of her statement of case Ms Martins conceded that the lease does not, as a matter of contract, impose an obligation on Ms Heavens to pay interest on sums not paid on the due date provided for in the lease. Ms Martins says that she was led to believe in good faith that the arrears were a debt that attracted interest, if pursued in the small claims court. That may well be right. Section 69 County Courts Act 1984 provides that in certain claims for recovery of a debt or damages there may be included a claim for simple interest at such rate and for such period as the court shall be fit.

Ms Martins argued that she has been out of pocket for some while and that her personal and financial circumstances precluded her from issuing court proceedings. It was argued on her behalf that she should not be adversely prejudiced by those circumstances and requests that the claim be considered on a just and equitable basis and in accordance with natural justice.

133. Whilst having some sympathy with Ms Martins' position the fact is Ms Martins has not commenced court proceedings to recover a debt and the discretion to make an award of interest pursuant to section 69 does not apply to proceedings in this tribunal. This tribunal is not a court of equity and this tribunal can only determine issues within the jurisdictions provided for in statue. It does not have a residual jurisdiction to do what is just and fair.

134. The substantive application before the tribunal is one brought by Ms Heaven pursuant to sections 27A of the Act and is limited to the

determination of the amount (if any) of service charges claimed by Ms Martins to be payable pursuant to the terms of the lease. A claim to interest on late payment is not a claim to a service charge.

135. We therefore determine that sums claimed by Ms Martins by way of interest in several of her demands are not payable by Ms Heaven under the terms of her lease.

The section 20C application

136. Ms Heaven made an application pursuant to section 20C of the Act and sought an order that none of the costs incurred or to be incurred by Ms Martins in respect of these proceedings be regarded as relevant costs recoverable by Ms Martins through the service charge.

137. The application was opposed.

138. The starting point is whether, as a matter of contract, the lease enables the landlord to pass such costs through the service charge. Out task is to interpret the words used in the lease and in so doing we are not to take into account the personal circumstances of the parties.

139. The provisions of the Third Schedule are relatively crude. On behalf of Ms Martins, it was contended that paragraph 3 was material. The words relied upon being *"The reasonable fees ... for the general management of the [building]..."*

140. In these proceedings Ms Heaven seeks a determination of the amount payable (if any) by way of service charges demanded of her by Ms Martins. Ms Martins' role as respondent is to seek to justify the recoverability of the various sums she has demanded. We find that that role is not one concerned with the management of the building but one seeking to justify the sums she has claimed.

141. We thus find that as a matter of contract any sums by way of costs which Ms Martins may have incurred or may incur in these proceedings are not items of service charge expenditure within the Third Schedule to the lease.

142. An alternative argument was advanced on behalf of Ms Martins, namely that the costs are payable pursuant to clause 2(6)(a) of the lease which concerns a covenant to pay certain costs incidental to the preparation and service of a notice pursuant to section 146 Law of Property Act 1925. Our attention was drawn to the Court of Appeal decision in *Freeholders of 69 Marina, St Leonards-on-Sea Robinson, Simpson & Palmer v John Oram & Mohammed Ghoorun* [2011] EWCA Civ 1258.

143. Our observations on that clause and on that authority are:

143.1 Any costs which may be payable pursuant to clause 2(6)(a) are not service charges – to be shared amongst the two lessees – but variable administration charges payable (if at all) wholly by the tenant if, but only if, the relevant criteria are met.

143.2 Variable administration charges within the meaning of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 are only payable to the extent they were reasonably incurred and are reasonable in amount and they are not payable unless and until demanded in a manner compliant with the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007: SI 2007/1258. We are not aware of any such demand having been made of Ms Heaven. If such a demand were to be made it would be open to Ms Heaven to challenge it and if, necessary, make an application to the tribunal pursuant to paragraph 5 of Schedule 11.

143.3 In *Freeholders of 69 Marina* the landlord was the applicant and sought a determination for the purposes of section 81 Housing Act 1996 (HA 1996). That is not the position here where the landlord is the respondent opposing a section 27A of the Act application. We do however accept that this decision will amount to a determination that the amount of certain service charges are payable by the tenant (subject to any right of set-off that may vest in the tenant) and that such a determination may be adopted by the landlord for the purposes of section 81 HA 1996.

144. In the circumstances we are satisfied that any costs which Ms Martins may have incurred or incur in connection with these proceedings are not costs which can be recovered through the service charge regime. Having made that finding and for the avoidance of doubt it seems us that it would be just and equitable to make an order pursuant to section 20C and we have done so.

The respondent's penal costs application pursuant to rule 13(1)(b)

145. At the conclusion of the hearing and, as we had intimated to the parties on the morning of the second day, that we would do, we heard Ms Martins' application for a penal costs order. It was supported by written submissions and further documents were handed in. We have page numbered them [R305 – R310].

146. On behalf of Ms Martins it was submitted that Ms Heaven had acted unreasonably in the conduct of these proceedings in three main respects:

146.1 Contrary to directions Ms Heaven had failed to file a full statement of case setting out the nature of her case, the lease provisions relied upon, legal submissions and supporting

documents or a witness statement, but had instead served a one-page statement of case [A16] plus two lever arch files with a numerous documents presented in an unsatisfactory way most of which was incomprehensible save to an experienced solicitor who had the time and ability to wade through the documents and try to work out the gist of the applicant's case. In consequence Ms Martins felt she had no alternative but to engage a solicitor to undertake that exercise and to prepare her statement of case in answer at a cost in excess of £5,000.

In support of that we were handed an interim invoice dated 15 December 2015 issued to Ms Martins by DWF LLP, a firm of solicitors, in the sum of £5,320.86 – we have page numbered that document [R311].

We were told that Ms Martins did not have funds readily to hand to pay that bill and has borrowed to be able to do so.

We note that in an open email dated 30 July 2015 Ms Martins put Ms Heaven on notice that if the application was not withdrawn she would have to incur legal costs and would pursue a claim for them [R306].

146.2 Ms Heaven had unreasonably refused an open offer to mediate made in an email dated 21 September 2012 [R279/280].

146.3 By email dated 5 November 2015 sent by Ms Martins' solicitors to Ms Heaven a comprehensive settlement offer was put forward 'without prejudice save as to costs' [R306/308] which Ms Heaven rejected out of hand by email dated 9 November 2105 saying:

"Dear Ms Hadley

Thank you for your letter of 5th November which I have only just seen.

This is to let you know that I do not wish to pursue any correspondence with yourself at DWF or with your client in advance of the tribunal hearing in relation to any out of court settlement."

147. In addition to the legal costs mentioned above Ms Martins also sought to recover miscellaneous stationery, printing and travel costs plus something for the considerable time spent by Ms Martins in the preparation for the hearing and attending the hearing – all in such sum as the tribunal might allocate and determine.

148. By the time this application was made Ms Heaven had left the hearing. Whilst not appropriate to take points on behalf of Ms Heaven the tribunal discussed with Ms Martins and her representatives the

provisions of rule 13(1)(b) and the expression *"if a person has acted unreasonably ..."* and how high the bar might be set.

149. The predecessor of this tribunal as regards its residential property jurisdiction was the leasehold valuation tribunal (LVT).

When originally created the LVT had no jurisdiction to award costs or to make costs orders in connection with proceedings before the LVT.

The LVT was regarded as a 'no costs' jurisdiction.

150. The LVT's jurisdiction as to costs was modified by paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act). That paragraph empowered an LVT to make an award of costs limited to £500 if it concluded that a party had, in its opinion, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with proceedings before it.

151. As of 1 July 2013 the functions and jurisdictions of the LVT were transferred to this tribunal. This tribunal's rules are bespoke for the Property Chamber but were modelled on a generic set of rules applied across a number of chambers of the First-tier tribunals in order to provide some level of uniformity of approach and practice.

152. Rule 13 still imposes a threshold to be met before an award of costs can be made but now there is no limit on the amount of costs which this tribunal may award.

Rule 13 is only applicable where an award of costs is to be made of a penal nature. In the case of rule 13 (1)(a) where a 'wasted costs' order is sought against a representative (professional or otherwise) and in the case of rule 13(1)(b) where a costs order is sought against a party alleged to have acted 'unreasonably' in some respect.

153. The above summary and the concept of a tribunal determining issues and disputes in the residential sector, often where the parties are not professionally represented, leads to the conclusion that an award of costs under rule 13 should only be made in exceptional circumstances and where a party has clearly behaved unreasonably and that such conduct has increased the amount of costs incurred by the other party.

154. There is a view that the transition of jurisdictions from the LVT to this tribunal was not intended to bring about a major shift in the approach to costs arising in the determination of residential leasehold cases, and that, in essence, the tribunal would continue to be a 'no costs' jurisdiction. However, rule 13 was cast to enable and empower a tribunal to make an award of costs in those exceptional cases when it considered it appropriate to do so.

155. It is considered that rule 13 should be reserved for those cases where, on any objective assessment, a party has behaved so unreasonably that

it is only fair and reasonable that the other party is compensated by having some of their legal costs paid. The bar is thus set quite high.

156. There is reinforcement for this view by the general approach taken by civil courts when making orders as to costs which are intended to be of a penal nature, as opposed to orders for costs which simply follow the event.

157. The question then arises as to what level of conduct is characterised by the expression in rule 13(1)(b) *"... if a person has acted unreasonably in bringing, defending or conducting proceedings ..."*.

Where the landlord is the respondent the applicant tenant must show that it was unreasonable for the respondent to have opposed the application and that some aspect of the landlord's conduct of the proceedings was unreasonable.

In both circumstances the behaviour complained of must be out of the ordinary. In *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd*, HHJ Huskinson sitting in the Lands Tribunal considered the provisions of paragraph 10 of Schedule 12 to the 2002 Act and the meaning of the words "otherwise unreasonably".

He concluded that they should be construed "*ejustem generis* with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably". The word "otherwise" confirms that for the purposes of paragraph 10, behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour".

158. Judge Huskinson adopted the analysis of Sir Thomas Bingham MR in *Ridehalgh v Horsfield* [1994] 3 ALL ER 848 which concerned the approach to the making of a wasted costs order under section 51 of the Supreme Court Act 1981, where dealing with the word "unreasonable" he said as follows:

"Unreasonable' also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement, but it is not unreasonable"

159. In the context of the present case we do not consider it acceptable that a party seeking a penal costs order should ask for costs generally

without putting forward details of the costs actually incurred and sought to be recovered. It is necessary to test the amount of the costs incurred against the unreasonable conduct complained of and see to what extent the unreasonable conduct has increased the amount of costs the party would have incurred in any event.

160. In context we find that Ms Heaven did behave unreasonably in not complying with directions to provide a comprehensible statement of case. In those circumstances we find that it was not unreasonable of Ms Martins to instruct solicitors to review the files supplied by Ms Heaven and draft Ms Martins' statement of case in answer. If a comprehensible statement of case had been provided by Ms Heaven, it may well have been possible for Ms Martins (or her lay assistants) to have answered it paragraph by paragraph. We are satisfied that Ms Martins incurred more costs than she would have done had it not been for Ms Heaven's unreasonable behaviour. However, we consider that we should also bear in mind that it would have been open to Ms Martins to have made an application to the tribunal seeking an order that Ms Heavens serve a compliant statement of case or risk facing a sanction. Further we have to have in mind that the certificates and accounts sent by Ms Martins to Ms Heaven were not in a lease compliant format and were themselves confused and confusing. This combination of circumstances puts both parties at some fault whilst at the same time both of them were wanting a determination of the amount (if any) of the service charges payable.

161. We find that we can give little (if any) weight to the failure by Ms Heaven to respond positively to the offer to mediate because that the offer was made as long ago as 2012, and thus long before these proceedings were contemplated. Further, it is not immediately clear to what issue in the proceedings before us that the offer to mediate referred. Rule 13(1)(b) requires that the unreasonable behaviour relied upon must have some bearing on bringing, conducting or defending the proceedings.

162. We find that we can properly take into account that Ms Heaven unreasonably rejected out of hand a comprehensive offer to settle made in the email/letter dated 5 November 2015, although it is not clear what additional costs were incurred by Ms Martins after that date. Parties are expected to make strenuous efforts to compromise and endeavour to reach a settlement on as many issues as they possibly can. It is unacceptable for a party simply to dismiss a comprehensive set of proposals out of hand as Ms Heaven did here. The obligations imposed by the overriding objective impose an obligation on the parties to help the tribunal further the overriding objective and that includes an obligation on the parties to cooperate with the tribunal and to cooperate with one another. The least Ms Heaven ought to have done was to explain why she was unwilling to settle on the terms put forward and ideally she ought to have dealt with each proposal and where appropriate put forward a counter-proposal.

163. We also consider that we should bear in mind that both parties suffer ill-heath, albeit in different respects, but this does impact on behaviour and on the way in which the parties have approached the proceedings and prepared their respective cases.

164. Drawing these various, rival and competing considerations together we can but take a broad overview. We find that rule 13(1)(b) is engaged. Ms Heaven has on occasions acted very unreasonably to the detriment of Ms Martins. We find it is reasonable to make a costs order in favour of Ms Martins in the sum of £2,000 which is intended to help part recompense Ms Martins for the additional legal costs incurred by her in the preparation of her statement of case in answer and the costs of putting together comprehensive settlement proposals.

Impact statements

165. As mentioned earlier both parties requested permission to lodge impact statements. In the event Ms Heaven's statement was not filed until after the conclusion of the hearing. We have page numbered it [A644-649]. Ms Martins' statement was handed in at the conclusion of the hearing. We have page numbered it [R312 -315]. We have read both of the statements. But, we have to make the observation that the decisions we have made and recorded in this decision turn, as they must, on the proper interpretation of the documents before us and the facts we have found based on the evidence, both written and oral presented to us and the application of the law as we understand it to be.

Statutory materials

166. The statutory materials we have taken into account in arriving at our decisions are set out in the Schedule to this decision.

Judge John Hewitt

8 February 2016

The Schedule

Statutory Materials

Landlord and Tenant Act 1985

18.— Meaning of "service charge" and "relevant costs".

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose—

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19.— Limitation of service charges: reasonableness.

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

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

(2A)-(3) (4) ... [repealed]

(5) If a person takes any proceedings in the High Court in pursuance of any of the provisions of this Act relating to service charges and he could have taken those proceedings in the county court, he shall not be entitled to recover any costs.

20.- Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in

accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

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

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

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

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

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

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

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

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

20C.— Limitation of service charges: costs of proceedings.

(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—

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

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

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

(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;

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

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

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

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

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Landlord and Tenant Act 1987

35.— Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and Tribunal Procedure Rules shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section *"service charge"* has the meaning given by section 18(1) of the 1985 Act.

(9) For the purposes of this section and sections 36 to 39, *"appropriate tribunal"* means—

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

County Courts Act 1984

69.— Power to award interest on debts and damages.

(1) Subject to rules of court, in proceedings (whenever instituted) before the county court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as may be prescribed, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—

(a) in the case of any sum paid before judgment, the date of the payment; and
(b) in the case of the sum for which judgment is given, the date of the judgment.

(2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect—

(a) with the substitution of "shall be included" for "may be included"; and

(b) with the addition of "unless the court is satisfied that there are special reasons to the contrary" after "given", where first occurring.

(3) Subject to rules of court, where—

(a) there are proceedings (whenever instituted) before the county court for the recovery of a debt; and

(b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant shall be liable to pay the plaintiff simple interest, at such rate as the court thinks fit or as may be prescribed, on all or any part of

the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.

(5) Interest under this section may be calculated at different rates in respect of different periods.

(6) In this section *"plaintiff"* means the person seeking the debt or damages and *"defendant"* means the person from whom the plaintiff seeks the debt or damages and *"personal injuries"* includes any disease and any impairment of a person's physical or mental condition.

(7) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.

(8) In determining whether the amount of any debt or damages exceeds that prescribed by or under any enactment, no account shall be taken of any interest payable by virtue of this section except where express provision to the contrary is made by or under that or any other enactment.

Expense								
	2011							
Insurance		£ 166.88	No	£ 166.88	N/A		£ -	
Reserve Fund		£ 500.00	Yes	£ -	No		£ -	
Repairs		£ -						
	2012							
Insurance		£ 160.51	No	£ 160.51	N/A		£ -	
Reserve Fund		£ 500.00	Yes	£ -	No		£ -	
Repairs		£ 81.73	No	£ 81.73	N/A		£ -	
	2013							
Insurance*		£ 176.57	Yes	£ 44.14	Yes	£ 176.57	£ 82.88	
Reserve Fund		£ 500.00	Yes	£ -	No		£ -	
Repairs		£ -						
Management fee		£180	Yes	£ -	Yes	£ 180.00	£ 180.00	
	2014							
Insurance		£ 126.93	No	£ -	N/A		£ 126.93	
Reserve Fund		£ 250.00	Yes	£ 250.00	Yes	£ 250.00	£ -	
Repairs/Major works		£ 2,782.32	Yes	£ -	Yes	£ 2,126.47	£ 1,876.47	
Management fee		£ 335.00	Yes	£ -	Yes	£ 335.00	£ 335.00	
	2015							
Insurance		£ 131.90	Yes	£ -	Yes	£ 131.90	£ 131.90	
Reserve Fund		£ 250.00	Yes	£ -	Yes	£ 250.00	£ 250.00	
Repairs		£ -						
Management fee		£ 20.00	Yes	0	Yes	£ 20.00	£ 20.00	
Total							**£ 3,003.18**	
* Balance payable takes into acount a credit of £49.55 due to A re: excess								