UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2021] UKUT 99 (LC)
UTLC Case Numbers: LC-2020-000089

LANDLORD AND TENANT – SERVICE CHARGES – Landlord & Tenant Act 1985, s. 27A - Landlord's legal costs of proceedings before Upper Tribunal under Law of Property Act 1925, s. 84 – Whether landlord's contractual entitlement to recover such costs under service charge provisions of chalet leases on holiday park precluded by consent order agreed between the landlord and the majority (but not all) of the chalet owners that there be no order as to costs as between the landlord and those chalet owners – FTT determining that legal costs irrecoverable by way of service charge – Appeal dismissed

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
AN APPEAL FROM A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

SHEARBARN HOLIDAY PARK LIMITED

Appellant

-and-

(1) STEPHEN WORNELL
(2) GLYNNIS WORNELL
(3) SHIRLEY MANS

Respondents

Re: Chalets 67, 68 and 123 Kingsdown Park Holiday Village,
Kingsdown, near Deal,
Kent,
CT14 8EU

His Honour Judge David Hodge QC
Hearing Date: 19 April 2021
Royal Courts of Justice

Miss Rebecca Cattermole (instructed by **Thrings LLP**, Swindon) appeared for the appellant
Mr Stephen Wornell appeared for the first and second respondents
Mr Brian Cox appeared as authorised representative for the third respondent

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36, [2015] AC 1619
Canary Riverside Property Limited v Schilling LRX/65/2005
Chaplair Ltd v Kumari [2015] EWCA Civ 798, [2015] HLR 39
Conway v Jam Factory Freehold Ltd [2013] UKUT 592 (LC)
Express Newspapers plc v News (UK) Ltd [1990] 1 WLR 1320
Geyfords Ltd v O'Sullivan [2015] UKUT 683 (LC)
Holding & Management Ltd v Property Holding & Investment Trust Plc [1989] 1 WLR 1313
Iperion Investments v Broadwalk House Residents Ltd (1995) 27 HLR 196, [1995] 2 EGLR 47
Lamble v Buttaci [2018] UKUT 175 (LC)
Morgan v Stainer (1995) 25 HLR 467, [1993] 2 EGLR 73
Sinclair Gardens Investments (Kensington) Ltd v Clemo [2015] UKUT 573 (LC)
St George's Square Management Ltd v Whiteside [2016] UKUT 438 (LC)

Introduction

1. The issue raised on this appeal is whether an order made in litigation to which the landlord was a party that there be no order as to costs overrides the landlord's contractual entitlement to recover its legal costs incurred in that litigation under the service charge provisions of a lease.

2. This is an appeal from a decision of the First-tier Tribunal (Property Chamber) ("**the FTT**") dated 30 October 2020, made on the papers and without a hearing, pursuant to s. 27A of the Landlord & Tenant Act 1985, that the appellant, Shearbarn Holiday Park Limited, was not entitled to recover from the respondent leaseholders, by way of service charge, the legal fees which it had incurred in opposing an application made pursuant to s. 84(1) of the Law of Property Act 1925 to discharge the holiday period restrictions in a great many of the leases of chalets situated on the Holiday Park. The FTT also made an order under s. 20C of the 1985 Act prohibiting the appellant from seeking any costs of the application through the service charge, such outcome reflecting the FTT's decision in respect of the major area of dispute before it, which had revolved around the recoverability of those past legal costs.

3. The appellant is represented by Miss Rebecca Cattermole (of counsel). The first and second respondents, Mr and Mrs Wornell, are the leasehold owners of Chalets 67 and 68; and they were the lead applicants in the s. 84 proceedings. They are represented by Mr Wornell. The third respondent, Ms Shirley Mans, is the leasehold owner of Chalet 123. Ms Mans (together with the appellant and the owners of four other chalets) had objected to the s. 84 application. Ms Mans is represented by Mr Brian Cox as her authorised representative. The appeal proceeded by way of a review of the FTT's decision, conducted under the Tribunal's standard procedure, at a hearing at the Royal Courts of Justice on Monday 19 April 2021.

4. The s. 84 application (Case ref: LP/50/2017) was instigated by Mr and Mrs Wornell; and most, but not all, of the 149 leaseholders of chalets at the Holiday Park joined in the application. The appellant and Ms Mans were amongst those who objected to the s. 84 application. Miss Cattermole points out that the fundamental problem underlying the application was that all of the leaseholders enjoyed the benefit of the restriction, which was mutually enforceable between the leaseholders of the chalets, yet not all of the leaseholders joined in, or supported, the application. (106 leaseholders and 12 interested parties joined in the application. Some leaseholders of chalets on the Holiday Park were prevented from pursuing the application by s. 84(12) of the 1925 Act because 25 years of the term of their respective leases had not by then expired.) Shortly before the two day substantive hearing was listed to commence on 2 May 2019, the applicants agreed with the appellant (but not with the other objectors) that they would withdrew their application on the basis of an agreement, set out in a schedule attached to the draft order, that the appellant would offer all the leaseholders of chalets on the Holiday Park the opportunity to vary their respective leases so as to modify (but not discharge) the holiday period restriction. In return for increasing the annual ground rent by £315 (from £25 to £340), the holiday period was to be extended from 37 to 47 weeks in each year for those leaseholders who accepted the appellant's offer. As between the applicants to the s. 84 application and the appellant, the

order recorded *"no order as to costs"*. The rights of the other five objectors to apply for a costs order were reserved. The order which gave effect to this compromise was perfected by the Tribunal on 8 October 2019. Miss Cattermole points out that once the applicants proceeded to withdraw their s. 84 application, the Tribunal's jurisdiction was limited to approving the withdrawal and making any consequent costs orders. Upon application to the Tribunal, on 6 November 2019 Ms Mans was awarded £975.16 from the s. 84 applicants in respect of her own costs incurred in objecting to their application.

5. The appellant incurred £35,519.50 by way of legal costs in opposing the s. 84 application. It is this sum (together with a 15% management fee and 20% VAT) that the appellant now seeks to recover pursuant to the service charge provisions in each of the Holiday Park chalet leases. Unknown to the leaseholders, in the interval between agreeing the terms of the draft order to compromise the s. 84 application (on or about 25 April 2019) and 8 October 2019 (when the order was finally perfected by the Tribunal), this sum was included within the annual service charge statement for the year ended 31 December 2018 (which was certified by the independent accountants on 23 September 2019). This sum forms part of the figure of £87,742 for legal and professional fees recorded in the service charge statement although apparently this did not become clear to the leaseholders until sometime after the supporting accounts were inspected on or about 8 November 2019.

The FTT's decision

6. The FTT agreed with the appellant that there was a contractual entitlement under each chalet lease for the reimbursement of the legal costs of the s. 84 application; and there is no cross- appeal in respect of that determination. It is therefore unnecessary to rehearse all the arguments that were advanced by the appellant in support of that conclusion (which are summarised at paragraphs 14 to 31 of Miss Cattermole's skeleton argument). Where the FTT departed from the appellant's case was in holding that that contractual entitlement was automatically lost because of the *"no order as to costs"* provision in the draft order and the final order which was made by consent.

7. The material parts of the FTT's determination are contained in paragraphs 20 and 21 of its Decision, as follows:

> *"20. In relation to the first issue as to whether the First and Second Applicants are liable under the leases to pay their share of the legal costs associated with LP/50/2017, it is the Tribunal's view that although the Respondent would be entitled to reimbursement for its legal costs in objecting to the application to discharge the holiday period restriction in the leases, this entitlement to reimbursement was lost as soon as the Respondent made the decision to withdraw its objection on 25th April 2019. The Respondent made essentially a commercial agreement with the Applicants to extend the holiday period to 47 days in return for an increased ground rent and the draft order specifically stated that there was 'no order as to costs'.*
>
> *21. The Tribunal is satisfied that the position on costs was reinforced by the Upper Tribunal consent order of 19th August 2019 specifically stating that there was 'no order as to costs'. The Tribunal does not accept that having openly accepted the position on*

costs, the Respondent can revert to the leaseholders in order to recoup the costs of the legal fees both in law and as a matter of procedural fairness. It has no doubt that 'no order as to costs' can only mean what it says. The Tribunal therefore finds in favour of the First and Second Applicants in relation to this issue."

The appeal

8. The appellant sought permission to appeal the FTT's decision dated 30 October 2020 on five grounds. Ground One concerned the alleged failure to give adequate reasons. In respect that ground, the FTT was satisfied that this amounted to no more than a disagreement with the FTT's substantive decision. It had made findings of law and fact which were clearly open to the FTT to make. There was nothing in the permission to appeal document that established an error of law or some other outcome. The FTT granted permission to appeal to the Tribunal on the remaining four grounds. Essentially these were said to amount to a variation on the same theme, with Ground 5 explicitly raising the issue of a wider public importance in the light of conflicting authorities. The FTT was satisfied that the appellant had established that the point or points at issue raised by Grounds 2-5 was or were of potentially wide implication and permission to appeal was accordingly granted in respect of those grounds. *"This is in light of the conflicting authorities and the wider issue around whether a landlord ought to be prevented from recovering legal costs as a service charge where the proceedings in which those legal costs were incurred resulted in 'a no order as to costs'."*

9. The appellant renewed its application to the Tribunal for permission to appeal on Ground One. By an Order dated 20 January 2021 the Tribunal (Mr Martin Rodger QC, Deputy Chamber President) determined that the additional ground appeared to add nothing to the appeal since the arguments said to have been dismissed without adequate reasoning by the FTT would all have to be reconsidered by the Tribunal in determining the grounds for which permission had already been given by the FTT. The Tribunal directed that no party was to make further submissions concerning the application.

The appellant's submissions

10. For the appellant, Miss Cattermole points out that the real thrust of the application to the FTT was that the appellant had abandoned its contractual entitlement to recover its legal costs from all of the leaseholders through the service charge provisions of the chalet leases when it had agreed not to recover those costs from the s. 84 applicants. The FTT's decision had not been based on the conduct of the appellant in the s. 84 proceedings generally and there had been no real suggestion that those costs had not been reasonably or properly incurred. The sole effective basis of challenge to the recoverability of the legal costs through the service charge provisions had been directed to the effect of the agreement that there should be no order as to costs between the s. 84 applicants and the appellant. Miss Cattermole emphasises that no express representation had been made as to the recovery of legal costs by way of service charge under each chalet lease. There had been no discussion, negotiation, or agreement that the appellant would not seek to recover its legal costs through the service charge. The representation which was relied on was that contained in paragraph 2 of the draft order that*: "There is no order as to costs",* which was

"confirmed" by the Tribunal order at paragraph 2 of its draft and perfected Orders: *"There be no order as to costs as between the Applicants and the First Objector"*. This was the order, which related solely to the proceedings between the parties to the s. 84 application and not to the contractual recovery of service charges under the chalet leases. The Tribunal had possessed jurisdiction under s. 20C of the 1985 Act to preclude recovery by way of service charge under the chalet leases; but neither Mr and Mrs Wornell nor any of the other parties to the s. 84 application had applied for any order under s. 20C, and the Tribunal had not been exercising that jurisdiction when it had made its order. Any suggestion that the power conferred by s. 20C was not available because the s. 84 application had not amounted to substantive proceedings since it had not been determined at a hearing was said to be clearly wrong. Proceedings under s. 84 had been issued; and it was only shortly before the substantive hearing that the s. 84 application was withdrawn and the hearing vacated. Proceedings having been issued under s. 84, any of the leaseholders could have applied in those proceedings for an order under s. 20C on behalf of themselves and any other persons specified in the s. 20C application.

11. Miss Cattermole points out that the order as to costs is not part of the terms of the agreement between the s. 84 applicants and the appellant, which are set out in the schedule to the Order. The draft order agreed between the parties was always subject to the Tribunal approving and making an order, even if that meant the Tribunal doing so on its own terms, because only the Tribunal had the necessary power to make the costs order. Miss Cattermole submits that it is of significance that the provisions which are relevant to all of the leaseholders (as opposed only to those leaseholders who were either applicants or objectors to the s.84 application) are those set out in the schedule, which was not subject to any determination or approval by the Tribunal. The schedule is silent either way as to the recovery at a later date of the legal costs incurred in the s. 84 application under the service charge provisions of each chalet lease. Neither the appellant nor any of the s. 84 applicants ever asked the Tribunal to adjudicate on the issue of their entitlement to costs either way. The Tribunal's order merely provided that the legal costs were not recoverable in the s. 84 proceedings. It said nothing about whether those costs could be recovered under the service charge provisions of the individual chalet leases. This issue was never raised by anyone. The chalet leases imposed no legal requirement on the applicant to recover the costs of the s. 84 proceedings from the applicants. Paragraph 4 of Part III of the 4th Schedule to the chalet leases merely entitles the appellant to recover such costs as management expenses under the service charge *"save in so far as the costs shall be recovered from"* the s. 84 applicants. In summary, the order for costs made by the Tribunal concerned only the applicants to the s. 84 application and thus not all of the leaseholders; whereas the recovery of costs through the service charges affected all of the leaseholders. It is said that the two were, and are, distinct and separate.

12. Miss Cattermole addresses the authorities. In *Morgan v Stainer* (1993) 25 HLR 467, [1993] 2 EGLR 73, a case decided by Mr David Neuberger QC (as he then was), sitting as a deputy High Court judge, the majority of tenants had brought proceedings against their landlord for the appointment of a manager and declarations about service charge trusts. That had resulted in a consent order whereby the landlord agreed to pay almost £90,000 out of £130,000 in costs to the tenants, and the tenants agreed to pay the service charges. The landlord subsequently sought to recover the entire £130,000 through the service charge, relying on the contractual provision: *"to pay all legal and other costs that may be*

incurred by the landlord in obtaining the payment of maintenance contributions from any tenant in the building". One reason for rejecting the landlord's claim was that the legal costs were held not to be recoverable by way of service charge because of the terms of the consent order and, importantly, the term concerning the landlord's agreement to pay the tenants' costs. Miss Cattermole explains that the consent order in that case amounted to a contract between the landlord and the tenants who had been party to the proceedings to the effect that the landlord would pay the tenants' costs. Inherent in that contract was not merely the agreement that the landlord would pay the tenants' costs but that he would bear his own costs. That contract must have been made in the full knowledge of the parties' rights and obligations under the leases: see *Morgan v Stainer* at page 474. During the course of his judgment, the deputy Judge cited the Court of Appeal decision in *Holding & Management Ltd v Property Holding & Investment Trust Plc* [1989] 1 WLR 1313 where it was held that there could be no recovery under the lease in that case since the lower court had expressly declined to make any order as to costs following a contested claim against the tenants. Miss Cattermole stresses that the citation of *Holding & Management* was not for the purpose of showing that a landlord could not be contractually entitled to his costs where no order as to costs had been made in earlier proceedings; rather the deputy Judge had been emphasising that the case before him was more unattractive than the case that had been advanced by the landlord in *Holding & Management*. The deputy Judge in *Morgan v Stainer* did not suggest that making *"no order as to costs"* automatically precluded a landlord from exercising its contractual entitlement to recover litigation costs by way of service charges under a lease. *Morgan v Stainer* was a quite different case. Indeed, the deputy Judge recognised (at page 474) that: *"Different considerations may apply to the effect of an agreed order no order for costs by a landlord claiming and obtaining service charges from a single recalcitrant tenant on the one hand and on the other hand to the landlord agreeing to pay the costs of the majority of the tenants in a case where they are seeking relief of the type sought and obtained in the 1985 proceedings."* Miss Cattermole therefore submits that upon a closer reading of the decision, *Morgan v Stainer* does not support the proposition that where no order as to costs has been agreed, that, of itself, precludes the landlord from seeking recovery from the tenants under the service charge provisions of any relevant lease.

13. Miss Cattermole also refers the Tribunal to *Iperion Investments v Broadwalk House Residents Ltd* (1995) 27 HLR 196, [1995] 2 EGLR 47. There the Court of Appeal made an order under s. 20C of the Landlord and Tenant Act 1985 in circumstances where a tenant had been substantially successful in litigation against his landlord and an award of costs had been made in his favour. On the nature and exercise of the discretion under s. 20C, the Tribunal was referred to *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC) at paragraphs 51 to 56. However, that discretion was never invoked in the s. 84 proceedings here even though it had been open to any of the leaseholders at any time to have done so because there had been an extant substantive application under s. 84 even though it had not gone to a full hearing. Miss Cattermole reminded the Tribunal that the s. 84 applicants had been in receipt of professional legal advice from directly instructed counsel throughout.

14. Miss Cattermole seeks to distinguish the present case from all three of those earlier authorities. First, the *"contract"* in the present case was contained in the schedule, and possibly also the recitals, to the Tribunal's Order, and not in the terms of the order itself, which was made by the Tribunal. Second, the costs are not referred to in the recitals, nor

are they referred to in the schedule, to the order albeit the parties had agreed the wording of the original draft order (which was then amended by the Tribunal so as to preserve the right of the objectors other than the appellant to apply to the Tribunal for their costs). Third, whilst it might be said the parties entered into any agreement knowing their full rights and obligations, there had been no consideration in either *Morgan v Stainer* or *Holding & Management* as to the availability, or the absence, of any application under s. 20C of the 1985 Act. Whilst a s. 20C order had been made in *Iperion*, that was because such an application had been made in those proceedings, unlike the present case where none of the leaseholders had made any such application despite having been offered the opportunity to seek costs orders by the Tribunal. Fourth, any agreement that there be no order as to costs, where the leaseholders had neither applied for, nor obtained, any s. 20C order must have been made in the full knowledge that the landlord could still recover its legal costs through the service charges. None of the respondents to this appeal, nor any of the other leaseholders, had ever made any such application. The FTT had wholly failed to consider the significance of this point. Fifth, the s. 84 proceedings had concerned the proper management of the Holiday Park; they were not akin to an unsuccessful defence to a claim for damages or the forfeiture of a lease. In her oral submissions, Miss Cattermole emphasised that in *Holding & Management* the judge at first instance had expressly considered the issue of costs and had decided that it was appropriate to make no order as to costs, an order which (as Nicholls LJ said on appeal, at page 1323G) *"... in the exercise of his discretion, he was fully entitled to make"*. Recovery of those costs through the service charge would have subverted that order and amounted (as Nicholls LJ also observed at page 1324F) to *"... seeking to get through the back door what has been refused at the front"*. In the present case, the Tribunal's order merely recorded that neither the s. 84 applicants nor the appellant had invited the Tribunal to make any order as to costs as between themselves. Not all of the chalet leaseholders had been parties to the s. 84 application. The schedule's silence about the appellant's entitlement to recover the legal costs through the service charge meant that the appellant's contractual entitlement was not affected.

15. Miss Cattermole then addresses the four extant grounds of appeal. Ground 2 is that the FTT was wrong in law as to the meaning of *"no order as to costs"* in the Tribunal's order in the s. 84 proceedings. It did not mean, as the FTT held in its substantive decision at paragraphs 20 and 21, that costs could not be recovered by way of service charge under each chalet lease. There is no statutory provision or authority which automatically precludes a landlord from recovering legal costs by way of service charge where the proceedings in which those legal costs were incurred has resulted in *"no order as to costs*". Any order for costs sought in the s. 84 proceedings would have been directed to the applicants, and not all of the leaseholders; whereas the recovery of costs through the service charge is directed to all of the leaseholders by way of contractual entitlement under each chalet lease. The two are distinct and separate. Moreover, the FTT fell into error in two important respects which led it to an erroneous interpretation of the meaning of an order making *"no order as to costs"* in other proceedings. First, at paragraph 20, the FTT stated that *"... the entitlement to reimbursement was lost as soon as [the appellant] made the decision to withdraw its objection on 25 April 2019."* However, it was not the withdrawal of the objection, but the applicants' withdrawal of the s. 84 application, which had triggered the order. There had been no abandonment of the objection but rather the withdrawal of the application to *discharge* the holiday period restriction in return for the opportunity for chalet leaseholders to modify that restriction. The application had not

sought any such modification. Moreover, as the recital to the order records, there was an admission by the applicants to the s. 84 application that the restriction was enforceable. Second, the FTT was wrong in stating (at paragraph 21) that the appellant *"openly accepted the position on costs"*. The appellant's only acceptance was as to no costs being ordered by the Tribunal against Mr and Mrs Wornell, and those other leaseholders who had joined in the s. 84 application, and *not* as to the non-recovery of the litigation costs through the service charge. There was no express agreement or representation made as to the recovery of service charges through the lease.

16. Miss Cattermole seeks to address any suggestion that the costs arrangements for withdrawal are prescribed in favour of the appellant so as to protect the service charge payers. Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010/2600) governs orders for costs in the Tribunal and provides (so far as material) that any costs application must be made not later than 14 days after the Tribunal sends notice under r. 20 that a withdrawal which ends the proceedings has taken effect or notice of withdrawal is sent to the Tribunal with the consent of all the parties: see r. 10 (10). Each decision on costs is case-sensitive, although it is correct that there is a reasonably consistent and well-defined practice that where the applicant withdraws, objectors ought to have their costs unless there is good reason otherwise. However, this is not for the purposes of *"protecting service charge payers"*; the protection afforded to leaseholders is contained in s. 20C of the Landlord and Tenant Act 1985, a protection of which the respondents chose not to avail themselves before the Tribunal. For completeness, Miss Cattermole also challenges any assertion that the appellant agreed to forego its legal costs to *"significantly increase its profit"* in the form of the increased ground rents. This is not accurate because the increase in the ground rents was not significant, and the modification of the holiday restriction period enabled the leaseholders to increase their own profits by letting out their chalets for longer periods of time. In any event, this is said to be beside the point because the increased ground rents were only achievable from any of the leaseholders who chose to vary their leases. The appellant's true motivation had been to seek to achieve uniformity as regards the holiday restriction period in all of the chalet leases.

17. Ground 3 is that if the FTT did consider the law, it wrongly applied it, failing to distinguish the present case from the trilogy of cases previously cited, for the reasons stated at paragraph 14 above.

18. Ground 4 is that the FTT failed to consider that there were two ways in which the s. 84 proceedings could have reflected any inability to recover the legal costs through the service charge provisions of each of the chalet leases: first, in the schedule itself, which set out the terms of the agreement between the parties to the s. 84 proceedings and the offer to *all* of the leaseholders; or by order on an application under s. 20C of the 1985 Act. Neither option was pursued by the respondents. Thus it is submitted that the respondents forfeited their right to prevent recovery of the legal costs incurred by the appellant by way of service charge at a later date because they chose not to pursue any s. 20C order or address this issue in the schedule.

19. Ground 5 notes that the points at issue are of potentially wider implication because there is not a definitive decision on facts similar to the present case, or consideration of the

relevance of a leaseholder failing to apply for an order under s. 20C of the 1985 Act. In *Morgan v Stainer* the deputy Judge is said to have left open the possibility of different considerations, and a different outcome, where no order as to costs was agreed.

20. In summary, Miss Cattermole submits that the FTT equated a provision that there be *"no order as to costs in legal proceedings"* to a provision that there be *"no recovery of the costs as a service charge"*. The settlement of the s. 84 application - whether that is said to have been on 25 April 2019, when the draft order was first proffered to the Tribunal, or when the Tribunal perfected the final order on 8 October 2019 – had not addressed the recovery of costs by way of service charge; and the FTT had been wrong to determine that it had. It follows that the appeal should therefore be allowed.

21. In a written note sent to the respondents by email shortly before 1.00 pm on Friday 16 April, the last working day before the hearing, Miss Cattermole sought to address a point raised in Mr Cox's skeleton argument (dated 12 April 2021) which was said to require reference to three further authorities which had not been included in the original bundle of authorities. Mr Cox had referred to the Tribunal's decision on an application to modify restrictive covenants in *Lamble v Buttaci* [2018] UKUT 175 for its citation (in paragraph 61) of observations of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320 at 1329 F-G to the effect that:

> *"There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."*

Mr Cox argues that the appellant has maintained inconsistent position on costs by agreeing that there should be no order for costs in the s. 84 proceedings yet seeking to recover those costs under the service charge provisions of each of the chalet leases.

22. Miss Cattermole points out that a similar point was considered by the Deputy President (Mr Martin Rodger QC) in *87 St George's Square Management Ltd v Whiteside* [2016] UKUT 438 (LC) at paragraph 31 in which it was held that:

> *"Where a party has two legal routes to the recovery of the same sum, it will not be entitled to recover that sum twice but there is no reason why it should be required to elect between those routes unless they are inconsistent. In Stevens & Cutting Limited v Anderson [1990] 1 EGLR 95 Stewart-Smith LJ stated the principles relevant to the doctrine of election between causes of action in the following terms: 'A party may be deprived of the right to pursue a certain course of conduct if, when faced with two alternative and inconsistent courses of action, he chooses one rather than the other and his election is communicated to the other party.' In this case there is no inconsistency between a claim to enforce the contractual right to recover costs and an invitation to the FTT to exercise his discretionary power to award costs."*

23. *Whiteside* concerned a contractual indemnity clause in a lease rather than a service charge clause but Miss Cattermole contends that, in this respect, the principle is no different. The Tribunal also referred (at paragraphs 36 to 37) to the decision of the Court of Appeal in *Chaplair Ltd v Kumari* [2015] EWCA Civ 798, [2015] HLR 39 where it was held that the landlord's concession before the leasehold valuation tribunal that it did not have the right to recover its costs through the service charge had not prevented it from recovering under another clause in the lease which had given it a contractual right to an indemnity against costs.

24. Miss Cattermole refers to one other decision relating to an administration, rather than a service, charge: *Sinclair Gardens Investments (Kensington) Ltd v Clemo* [2015] UKUT 573 (LC). The issue there was whether a consent order operated to compromise the landlord's entitlement to the administration charge under the lease. At paragraphs 16 and 17 the Tribunal (Deputy Judge Elizabeth Cooke) accepted that even when a court makes an order for costs, that does not preclude further recovery by the landlord under the terms of the lease (even where an order for costs has been made following a contested hearing) unless the court order had expressly dealt with that entitlement. On the facts, however, the Tribunal decided that the consent order had embodied a compromise that had disposed of all of the costs of the action as a whole and had left nothing open. Miss Cattermole points out that the consent order in that case was only made between the tenant and the landlord; and the case only related to the enforcement of the costs as an administration charge rather than as a service charge against all of the leaseholders.

25. Miss Cattermole reiterates that the appellants' position in the present appeal is that the *"no order as to costs"* provision in the Tribunal's order relates specifically to the position of the applicants in the s. 84 application and not to the position of the body of all the leaseholders generally. Nor did it amount to any representation as to the amounts recoverable by way of service charge. The appellant has not taken any inconsistent position because the entitlement to recover by way of service charge under each chalet lease is different from the order that there be no costs in the s. 84 application.

26. At about 2.30 on the same afternoon Mr Cox responded by email contending that the production of a further note and three additional authorities the day before the hearing was procedurally unfair to a non-legally represented party. At the hearing I indicated that I would adopt the pragmatic course of hearing submissions on these additional authorities and then address the extent to which Miss Cattermole might properly rely upon these further submissions when I came to make my determination.

The respondents' submissions

27. Mr and Mrs Wornell submit that the appellant's primary motivation in compromising the s. 84 application was the opportunity to increase the income from its land given the number of applicants, the increase in the ground rents and the 60 years remaining on each chalet lease. This potential was indicated by the appellant's offer to pay its own legal costs as an incentive to the s. 84 applicants to agree the increase in rent. However, by initiating the withdrawal of the s.84 application, instead of presenting its case to the Tribunal, and reaching what was primarily a commercial agreement with the s. 84

applicants, the appellant had lost its entitlement to recover its legal costs by way of service charge. As such, the appellant's agreement to pay its own costs meant just that; and this was confirmed by the jointly signed draft Order. As for the omission of any application for an order under s. 20C, Mr and Mrs Wornell point out that having agreed that the appellant would pay its own legal costs, the appellant remained silent about any entitlement it might claim to recover those costs through the service charge when the matter was concluded by the Tribunal's final consent order of 8 October 2019**.** In fact, the appellant had already included the legal costs within the accounts certification on 26 September 2019 although none of the chalet leaseholders had discovered this fact until after the 2018 Service Charge Statement was inspected in November 2019. As a result, Mr and Mrs Wornell say that the s. 27A application was the only route of challenge left available to the leaseholders. Had the s. 84 applicants known about the charging of the appellant's legal costs to the service charge account of each chalet leaseholder earlier, this would have been brought to the notice of the Tribunal before it perfected its order on 8 October 2019. At this hearing, Mr Wornell made it clear that the s. 84 applicants had always anticipated that they would have to pay the costs of the s. 84 application and he indicated that funding had been put in place to enable them to do so. He also said that the appellant's agreement that there should be no order as to the costs of the s. 84 proceedings had encouraged all of the applicants to concur in the withdrawal of the proceedings on agreed terms which had been of advantage to the appellant.

28. In terms of the appellant's entitlement to recover their legal costs under the service charge provisions of the chalet leases, aside from the fact that this had ended when the appellant had agreed with the s. 84 applicants to pay its own legal costs, there were said to be other factors indicating that those legal costs were not recoverable. Aside from the potential estoppel in respect of the s. 84 applicants' belief that they had the full benefit of the appellant's agreement to pay its own legal costs, had it not so agreed those costs would have been recoverable from the s. 84 applicants. In this case, the appellant appears to have given the legal costs to the applicants to secure the increase in the ground rents with one hand, and then taken its *"gift"* back from all of the leaseholders with the other. In agreeing with the s. 84 applicants to pay its own legal costs to secure the increase in the ground rents, the costs were not then recoverable from them; in agreeing to bear legal costs otherwise recoverable from the s. 84 applicants, those costs should not then be recoverable from those leaseholders who had taken no part in the s. 84 application.

29. In terms of the proper management of the Holiday Park, prior to its offer to the s. 84 applicants, the appellant, as the first objector, had set out in detail how the discharge or modification of the holiday period restriction would be detrimental to the proper management of the Park. In that context, Mr and Mrs Wornell say that it is clear that the appellant's offer to bear its own legal costs was primarily motivated by the opportunity to benefit from a significant increase in the income from its land. Whilst the impact of the commercial agreement might or might not be detrimental to the proper management of the Park, the appellant's primary motivation in bearing its own legal costs had been to secure that agreement. As such, it was not expenditure that was recoverable by way of service charge.

30. In terms of the appellant making the agreed Deed of Variation available to every leaseholder as a new *"service"*, this is said to represent a variation of each lease contract that would further enhance the appellant's commercial benefit from the agreement that it had reached with the s. 84 applicants. If this were a *"service"*, it is on a *"for profit"* basis and as such was not expenditure that was recoverable by way of service charge.

31. Mr and Mrs Wornell contend that the first *"port of call"* for the appellant's legal costs should have been the parties who were liable in law to pay them. In the context of the withdrawal of the s. 84 application, those legal costs were recoverable from the s. 84 applicants, but the appellant had contracted to bear its own legal costs. As such, it is perfectly reasonable to ask: *"Why have the costs it incurred in reaching a commercial settlement with the parties liable been recovered from the service charge?"* The chalet leases confirm that legal costs incurred by the lessor in seeking to enforce covenants against any lessee are recoverable *"save in so far as the cost shall be recovered from the Lessee"*: see paragraph 4 of Part III of the 4th Schedule to the chalet leases. This principle must apply to litigation, or its withdrawal, where there is a party liable to pay those costs as a matter of law. The appellant volunteered to bear its legal costs, instead of recovering those costs from the s. 84 applicants, in the course of its commercial management of the estate. This is said to be a material consideration in deciding whether the *"no order as to costs"* agreement prevents recovery of those costs through the service charge.

32. In *Holding & Management*, following the refusal of the landlord's costs by the making of no order as to costs, the landlord could not then *"get through the back door what has been refused at the front"*. Mr and Mrs Wornell cite the following passage from the judgment of Nicholls LJ at page 1324D-F:

> *"The effect of the plaintiff's claim to reimbursement is this. The plaintiff brought proceedings against the tenants. At the conclusion the judge decided that, as between the plaintiff and the tenants, there should be no order as to costs; each party should bear his own costs of the proceedings. On the plaintiff's argument that still leaves the plaintiff entitled to require the self-same tenant to pay its costs, by including those costs in the following year's maintenance provision which the tenants are contractually bound to pay. This is indeed a case of seeking to get through the back door what has been refused at the front. The contention has, I think, only to be spelled out for its unattractiveness and unreasonableness to become apparent."*

The Court of Appeal rejected the contention. In the present case, the appellant had declined the opportunity to recover its legal costs in order to secure the benefit of the additional ground rents. If the service charge extended to the recovery of legal costs the appellant had chosen not to recover from the parties liable for them, it might always be more convenient for the appellant to rely upon the service charge provisions at the expense of all the leaseholders. Whether a *"no order as to costs"* provision results from the refusal of a claim, or a request from the party otherwise entitled to an order for costs, the meaning should be the same. In the present case, in declining the opportunity to recover its costs through the *"front door"* the *"back door"* should be firmly closed.

33. In summary, Mr and Mrs Wornell submit that the appeal should be dismissed on the following grounds: First, in withdrawing its objections in favour of a commercial agreement with the s. 84 applicants, the appellant had negated its entitlement to recover its legal costs. Second, the Tribunal's draft and perfected orders reflected and reinforced the parties' original jointly signed draft order that there should be *" no order as to costs"* and meant that the appellant had agreed to bear its own legal costs. Third, there was no proper opportunity for the s. 84 applicants to apply for a s. 20C order because the appellant had already taken steps to recover its legal costs, and had certified these, before the Tribunal had perfected its order on 8 October 2019. Fourth, the s. 84 applicants had understood that the appellant had openly accepted its liability to bear its own legal costs and the agreement to any increase in the ground rents had been negotiated and made on this basis. Fifth, in the absence of the appellant's agreement with the s. 84 applicants to bear its own legal costs, no liability would have fallen to the service charge because those costs would have fallen on the s. 84 applicants as the consequence of the withdrawal of their s. 84 application. Sixth, the appellant had agreed to bear its own legal costs primarily to secure the increase in the ground rents and this fell outside the *"proper and convenient running of the Estate"*. It represented a matter of commercial management where the costs should be recovered out of the appellant's income.

34. On behalf of Ms Mans, Mr Cox advances essentially the same submissions. He contends that, having submitted terms for the withdrawal of the s. 84 proceedings in a draft Order to the Tribunal, which had incorporated an agreement that there should be no order as to the costs of those proceedings, the appellant cannot now seek to recover those self-same costs from the same s. 84 applicants as leaseholders under the service charge provisions of the chalet leases. All contractual entitlement to recover its legal costs by way of service charge under the leases was negated by the appellant's agreement to withdraw its objections to the modification of the holiday period restriction in the chalet leases and not to recover those costs from the s. 84 applicants (who would otherwise have been liable for them) in return for the commercial agreement embodied in the schedule to the draft Order. Since the appellant had agreed the terms of the draft order, the s. 84 applicants had, quite reasonably, not expected the appellant to seek recover its costs from the chalet leaseholders through the service charge. Under the terms of the chalet leases, the appellant had been entitled to recover its legal costs through the service charge if, in law, it could not recover those costs from the s. 84 applicants; but the appellant was not entitled to recover its costs through the service charge if it chose not to recover those costs from the s. 84 applicants. The catalyst for the leaseholders' non-liability for the appellant's costs under the service charge provisions in the chalet leases was the appellant's consent to the withdrawal of the s. 84 proceedings, having entered into a commercial agreement that potentially decreased the holiday period restriction by ten weeks. This totally flied in the face of the objections that the appellant had originally raised by the appellant in the s. 84 proceedings.

35. As noted at paragraph 21 above, Mr Cox also relies upon the principle (recognised by the Tribunal in *Lamble v Buttaci* [2018] UKUT 175 when citing, in paragraph 61, observations of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320 at 1329 F-G) that it is not possible to approbate and reprobate (or to blow hot and cold). Mr Cox submits that the appellant cannot claim its entitlement to recover its legal costs under the service charge provisions of the chalet

leases having previously agreed that there should be no order as to those costs. There would not have been any legal costs for the appellant to recover had it not agreed that there should be no order as to those costs because they would otherwise have been recovered from the s. 84 applicants.

36. Mr Cox also relies upon observations in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at paragraphs 15 to 23 and *Geyfords Ltd v O'Sullivan* [2015] UKUT 683 (LC) at paragraphs 1 to 3 as to the proper interpretation of service charge provisions in leases. He also refers to *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC) at paragraphs 36 to 39 for citations from the decision of the Tribunal (Judge Rich QC) in *Canary Riverside Property Limited v Schilling* LRX/65/2005.

Determination

37. As Miss Cattermole rightly points out, at paragraph 20 of its Decision the FTT agreed with the appellant that there was a contractual entitlement under each of the chalet leases for the appellant to recover its legal costs of the s. 84 application; and there is no cross-appeal in respect of that aspect of the FTT's determination. It is therefore unnecessary to consider any argument to the effect that those legal costs did not properly fall within the scope of the service charge provisions of the individual chalet leases aside from the effect of the *"no order as to costs"* provision in the Tribunal's draft and final orders, which were made by consent. Where the FTT departed from the appellant's case was in holding that the appellant's contractual entitlement had been lost because of the *"no order as to costs"* provision in those orders. It is the correctness of that aspect of the FTT's decision that is the proper focus of this appeal. The issue for this Tribunal is whether the agreement that there should be no order as to costs between the s. 84 applicants and the appellant had the effect of precluding the appellant from recovering those legal costs through the service charge provisions of the individual chalet leases.

38. It is convenient to dispose of two preliminary points at the outset. First, I am satisfied that there is no procedural unfairness in allowing the appellant to rely upon the contents of Miss Cattermole's note of 16 April and her three additional authorities. Since the authority cited by Mr Cox of *Lamble v Buttaci* had been cited before the FTT, I do not consider that his reliance upon what is said to be the appellant's inconsistent position on costs by reference to the observations in *Express Newspapers* should have taken Miss Cattermole by surprise. I accept that it could have been addressed in her primary skeleton argument. However, counsel is under a duty to draw the Tribunal's attention to all relevant legal authorities; and that duty has a particular resonance in any case where the respondents to an appeal are not professionally represented by legally qualified and regulated advocates. Miss Cattermole has quite properly discharged that duty by her written note and her citation of the three additional authorities. In any event, whilst it is always comforting to be assured that a proposition of law is supported by case law authority, I do not consider that such authority is needed to support the proposition that where a party has two legal routes to the recovery of the same sum, whilst it will not be entitled to recover the same sum twice, there is no reason why it should be required to elect between those routes unless

they are inconsistent. It seems to me that that is a submission that was properly open to Miss Cattermole.

39. Second, I am satisfied that it was always open to any of the s. 84 applicants (or, indeed, to any of the respondents, other than the appellant, or to any of the other leaseholders) to have made an application to the Tribunal under s. 20C of the 1985 Act in relation to the legal costs of those proceedings at any time whilst those proceedings remained on foot. Proceedings having been issued under s. 84, any of the leaseholders could have applied in those proceedings for an order under s. 20C, on behalf of themselves and any other persons specified in the s. 20C application. In light of the way that matters have developed, it is unfortunate that this was not done in this case; although I accept that the s. 84 applicants considered that there was no need to do so in view of the agreement that they thought they had reached with the appellant that there should be no order as to the costs of the s. 84 proceedings. It may be a matter for future consideration by the relevant Rules Committees as to whether to require notice of legal proceedings to be given to all leaseholders where there is any prospect of the costs of those proceedings being visited upon non-party leaseholders in accordance with the service charge provisions of any relevant lease so as to alert them to the potential need to apply for relief under s. 20C of the 1985 Act. This case should serve as a moral to leaseholders, and their advisers, always to bear in mind the potential need for, and the utility of, applying for relief under s. 20C.

40. I am in general agreement with many of Miss Cattermole's submissions. I accept that the *"no order as to costs"* provision in both the original draft order and the Tribunal's perfected order in terms relates specifically to the position of the applicants in the s. 84 application and not to the position of the general body of chalet leaseholders. That provision did not amount to any representation as to the sums that might be recoverable by way of service charge under the individual chalet leases. Neither the appellant nor any of the s. 84 applicants ever asked the Tribunal to adjudicate on the issue of their entitlement to costs either way. The Tribunal's order merely provided that the legal costs were not recoverable in the s. 84 proceedings. It said nothing about whether those costs could be recovered under the service charge provisions of the individual chalet leases. This issue was never raised by anyone. The chalet leases imposed no legal requirement on the applicant to recover the costs of the s. 84 proceedings from the applicants. The order for costs made by the Tribunal concerned only the applicants to the s. 84 application, and thus not all of the leaseholders; whereas the recovery of costs through the service charges affected all of the leaseholders. In that sense, the two were, and are, distinct and separate. I accept that the appellant has not adopted any inconsistent position because the entitlement to recover by way of service charge under each chalet lease is different from the order that there be no costs in the s. 84 application. Miss Cattermole is also correct in her two specific criticisms of the FTT's decision identified at paragraph 15 above.

41. I accept that none of the authorities that have been cited to this Tribunal are determinative of the outcome of the present appeal because none of them are on all fours with the facts of the present case. The result in *Holding & Management* turned on the express finding by the judge in the lower court that there should be no order as to costs as between the plaintiff and the tenants, leaving each of them to bear their own costs of the proceedings, which was held to preclude recovery of those costs through the service charge from the self-same tenants. The case can be explained on the basis of the judge's express order and the

identity of the parties. *Morgan v Stainer* involved the landlord assuming liability for a considerable part of the tenants' costs rather than the making of no order as to costs; and at page 474 the deputy Judge expressly recognised that: *"Different considerations may apply to the effect of an agreed no order for costs by a landlord claiming and obtaining service charges from a single recalcitrant tenant on the one hand and on the other hand to the landlord agreeing to pay the costs of the majority of the tenants in a case where they are seeking relief of the type sought and obtained in the 1985 proceedings."* The case of *Sinclair Gardens* turned on a narrow question as to the true meaning and effect of the particular consent order that had been made in that case.

42. I accept Miss Cattermole's criticism that in the present case the FTT's written decision provided no detailed legal analysis or explanation for its determination that, having openly accepted the position that there should be no order as to costs, the appellant could no longer revert to the leaseholders in order to recover its legal costs through the service charge *"both in law and as a matter of procedural fairness"* or for having *"no doubt that 'no order as to costs' can only mean what it says"*. The FTT appears to have decided the matter as one of first impression from the wording of the *"no order as to costs"* provision. I agree with Miss Cattermole that rather more detailed analysis and explanation was and is required.

43. In my judgment, the question whether an order made in litigation to which a landlord was party that there be no order as to costs overrides the landlord's contractual entitlement to recover its legal costs incurred in that litigation under the service charge provisions of a lease admits of no single, definitive answer. In every case, it is necessary to construe the order in question to determine its true scope and effect. That is what the Tribunal did in *Sinclair Gardens*. In construing the order, the court or tribunal will have regard to principles of contractual interpretation which are no longer in any doubt. As explained by Lord Neuberger PSC (with the agreement of Lords Sumption, Hughes and Hodge) in *Arnold v Britton* at paragraph 15:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Limited v Persimmon Homes Limited [2009] AC 1101, para. 14. It does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

44. In the present case, the relevant admissible factual background includes: (1) the landlord's contractual entitlement to recover the legal costs of litigation concerning the Holiday Park through the service charge provisions of each individual chalet lease; (2) the availability, in the s. 84 proceedings, of relief under s. 20C of the 1985 Act; (3) the fact that the majority, but not all, of the chalet leaseholders, were parties to the s. 84 proceedings; (4) the fact that

no s. 20C application had been made in respect of the appellant's legal costs of the s. 84 proceedings; (5) the fact that nothing had been said either way about whether the appellant's legal costs were to be recovered from the individual chalet leaseholders through the service charge provisions; and (6) the terms of the original, and the Tribunal's revised, draft orders

45. Does the agreement in the present case that there be no order as to the costs of the s. 84 proceedings, as between the s. 84 applicants and the appellant, on its true construction operate to preclude the appellant from recovering those legal costs through the service provisions of the individual chalet leases? Against the admissible factual background outlined in paragraph 44 above, in my judgment it does. To hold otherwise would, in my judgment, allow the appellant to get through the back door what it had agreed to forego at the front. In arriving at this conclusion I am fortified by the observations of the deputy Judge in *Morgan v Stainer* (at pages 474-5) when giving the first of his reasons for holding that the terms of the consent order disposing of the earlier legal proceedings had operated to prevent the defendant landlord from successfully resisting the tenants' claim for a declaration that the costs of those proceedings were irrecoverable under the service charge provisions of their respective leases:

> *" The first is that, at least as between the defendant and the plaintiffs from the 1985 proceedings, there is a contract to the effect that the defendant will pay the costs of the plaintiffs. Inherent in that contract is not merely the agreement that the defendant will pay the costs of the plaintiffs but that the defendant would bear his own costs. That contract must have been taken to have been made in the full knowledge of the parties' rights and obligation under the respective leases, particularly as the terms of the consent order itself involve references to and various of those various service charge provisions. In those circumstances, assuming in the defendant's favour that immediately before the consent order was agreed he had the right to recover any costs incurred in the 1985 proceedings under paragraph 5(b), it seems to me at the proper reading of the contract embodied in the consent order as a whole, and particularly the agreed term that the defendant would pay the costs of the plaintiffs, leads to the conclusion that the plaintiffs would not then be held liable for the defendant's costs. It is one thing for a person to argue — as the plaintiff did (albeit unsuccessfully) in Holding & Management — that as a result of the court making no order for costs the lease properly construed, nonetheless, entitles him to recover his costs as a matter of contract from the tenants. It is quite another to contend that an agreement by a landlord that he would pay the tenants' costs, nonetheless, does not impliedly prevent the landlord from invoking the terms of the lease subsequently to recover the costs from the tenants, not only being the costs he had to pay them but also his own solicitor and client's costs.*
>
> *Mr. Cryan argued that to abrogate the landlord's contractual right to recover costs as part of the service charges it was necessary for the order expressly to provide for this as happened in Holding and Management but not in the 1987 order. Where, as here, he argued, the order does not provide for anything in those terms the landlord and indeed the tenants is and are free to rely on their own contractual rights under the lease.*

While it would obviously be better if the parties had spelt out in the 1987 order the position with regard to the landlord's arguable right to recover the costs under paragraph 5(b) the parties did not do so. In those circumstances it seems to me that one must do the best one can with the material one has, which is what the parties had agreed. For the reasons I have given it seems to me that the proper construction of the agreement is that the landlord, the defendant, would not claim the costs through the service charge provision — namely paragraph 5(b). Different considerations may apply to the effect of an agreed no order for costs by a landlord claiming and obtaining service charges from a single recalcitrant tenant on the one hand and on the other hand to the landlord agreeing to pay the costs of the majority of the tenants in a case where they are seeking relief of the type sought and obtained in the 1985 proceedings.

My conclusion on this point is not altered by the fact that not all of the tenants of the building and not all the plaintiffs in the current proceedings were plaintiffs in the 1985 proceedings. It seems to me that the leases clearly envisage all the tenants be liable for the same costs and, therefore, if none of the plaintiffs to the 1985 proceedings can be held liable for these costs under paragraph 5(b) I think that none of the other tenants in the building could be held so liable otherwise."

46. In the present case, the contract was that there should be no order as to the costs of the s. 84 proceedings as between the s. 84 applicants and the appellant rather than a contract that the appellant should bear those costs; but in my judgment that does not alter the position. The hypothetical reasonable person, with all the background knowledge which would have been available to the parties, would have understood them to be contracting on the basis that the appellant and the s. 84 applicants would all bear their own costs of the s. 84 proceedings; and, in the case of the appellant, that it would do so without recourse to their recovery, not only from the s. 84 applicants, but also from the (much smaller) number of chalet leaseholders who had neither opposed the s. 84 application nor been involved in those proceedings. Whilst recourse to s. 20C relief had been available to all of the leaseholders, it was known to the parties to the consent order that there had been no such application. If anything, that should have indicated to the appellant that none of the s. 84 applicants was contemplating that it might seek to recover the legal costs which it had agreed to forego through the back door of the service provisions of each chalet lease.

47. Ultimately the resolution of this appeal is very much a matter of impression as to the true meaning and effect of the original and the revised draft orders and the Tribunal's perfected order, read in their context. It is my impression that the FTT got it right.

Conclusion

48. This appeal was very well argued on behalf of all the parties. Miss Cattermole should not regard her lack of success as any reflection upon her forensic abilities. For the reasons I have given, I take the view that the FTT's decision was correct. The decision of the FTT is therefore upheld; and the appeal is accordingly dismissed.

49. The order of the FTT made under s. 20C stands. In relation to the costs of this appeal, the Tribunal makes a further order under s. 20C in relation to those costs in favour of all those leaseholders who were identified in the schedule that was handed up during the course of the hearing of this appeal. This reflects the Tribunal's decision on the outcome of this appeal. Indeed, that order should be treated as extending to all of the leaseholders of chalets in the Holiday Park since they should all be accorded equal treatment.

Dated: 27 April 2021

David. R. Hodge

His Honour Judge Hodge QC

Sitting as a Judge of the Upper Tribunal

(Lands Chamber)