Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0026/08/14

In the Matter of Flat 11, Llannerch Hall, Llannerch Park, St. Asaph, LL17 0BD

In the matter of an Application under Section 27A and Section 20C Landlord and Tenant Act 1985 and Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

APPLICANT	Llannerch Hall Limited
RESPONDENTS	Mr T.E.M McGregor and Mrs S.L McGregor
TRIBUNAL	Richard Payne LLB, M Phil. Tom Daulby B.Sc., MRICS, FNAEA. Bill Brereton M.A. Cantab., B.A. Hons.
HEARING;	25TH March 2015, The Oriel Hotel, Upper Denbigh Road, St.Asaph.

Upon hearing Mr Nicholas Warren, Mrs Last and Mr Dean for the Applicant and the Respondents in person.

REASONS

1. The Applicant, Llannerch Hall Limited (hereafter referred to as "LH") applied to the Northampton County Court on 4th April 2014 for a judgement against the Respondents for arrears of service charge of **£1407.84** and arrears of administration charges **of £3833.22** and in both cases, of sums continuing to accrue. The total claimed as at 31st March 2014 was **£5241.06** plus solicitors' costs. A defence was filed by the Respondents dated 9th May 2014, broadly pleading that various of the sums claimed against them had already been paid, and disputing the reasonableness of the charges claimed. The periods in question for which the charges were being claimed were not clear from the particulars of claim. The file was subsequently transferred to the Rhyl County Court where Deputy District Judge Hynes by order made on 19th August 2014 and promulgated on 26th August 2014 transferred the matter to the Leasehold Valuation Tribunal for Wales ("LVT").

2. On the 12th September 2014 separate application forms were submitted to the LVT by LH in relation to the applications for service and administration charges. The tribunal gave directions on the 7th October 2014 and 14th January 2015 to prepare the matter for hearing which included that the applications were to be heard at the same time. The service charge application form to the LVT sought a determination of service charges for three periods;
    a) 1st July 2012 - 30th June 2013,£1032.48
    b) 1st July 2013 – 30th June 2014, £1,415.15.

c) The current service charge year of the 1st July 2014 – 30th June 2015, £1242.57.

These service charge sums total **£3690.20.**

3. The administration charge application form claimed variable administration charges incurred in pursuit of arrears "including the managing agent's Credit Control and professional legal fees, court and Tribunal fees, and other disbursements." The form did not break these down into amounts. However in compliance with directions the Applicant subsequently provided a hearing bundle, the Applicant's bundle (subsequently referred to as "AB"). At section 2, page 25 of this bundle was a breakdown of the variable administration charges being claimed for the appropriate periods and this totalled £4,663.22. When this is added to the service charges sought, the total of administration and service charges that the tribunal was being asked to determine was **£8353.42.** The administration charges that had been incurred before the date of the particulars of claim (4th April 2014) total **£4078.22**.The Respondents had also prepared and submitted a bundle which will be referred to as the Respondents bundle or RB for short.
4. The tribunal members inspected Llannerch Hall on the 24th March 2015 and heard the case on the 25th March 2015. Subsequently, further written representations were received from the Applicant on 9th April 2015 and from the Respondents on 21st April 2015. We also had a written copy of the documents that the Respondents read their representations from at the hearing.

THE INSPECTION

5. Llannerch Hall is a grade ll listed building which has been converted into 13 flats, numbered, perhaps superstitiously, 1-12 and 14. It is accessed by a private road that is not in the Applicant's ownership and has enviable views over open countryside from the front. It has a parking area and a separate forecourt accessible to vehicles, as well as its own grounds that include various flowerbeds and a lawned area. We were accompanied at the inspection by Mrs Last who is a leaseholder of flats at Llannerch Hall as well as being a director of the Applicant. We knocked at the door of the Respondents' flat and rang the bell to invite them to accompany us on the inspection but we did not receive a reply. The Respondents had been previously notified of the date and time of the inspection by letter. We inspected the common parts of the building, including the staircases, landings, cellar, entrance hallway and porch. We also inspected the grounds and the side and rear of Llannerch Hall. Unfortunately, a large tree had recently been blown over from the car park and had caused some damage to the roof of Mrs Last's flat and to the surface of the car parking area but this of course was not a matter that was before us. We inspected the window of flat 4 externally and noted the location of the re-sited gas pipe to the exterior of flat 14 on the third floor, the respective replacement and re-siting costs of which are the subject of challenge from the Respondents.
6. We noted that most of the flowerbeds appeared to have been untouched for some time, particularly the one adjoining the lawned area and we considered the extent of the lawned area that is contained in the LH freehold according to the office copy entry plan (AB, tab 6 page 11). The condition of the road surface in the forecourt was in poor condition in places with pot holes evident.

THE LEASE

7. The Applicant's bundle contained a copy of the lease relating to flat 11 made between the parties predecessors in title dated 2nd November 1979 for a term of 999 years from the 29th September 1979 at a yearly ground rent of £40. Llannerch Hall is referred to as "the Mansion" and the premises demised to the lessee as "the flat". The numbering of the lease is not always clear but at page 3 of the lease are the lessee's covenants regarding the service charge. At clause 3 (i)(b), the lessee covenants

"(b) to pay to the Lessors without any deduction by way of further and additional rent a proportionate part of the expenses outgoings incurred by the Lessors in the repair maintenance renewal and insurance of the Mansion and the provision of services therein and the other heads of expenditure as the same are set out in the Fourth Schedule hereto such further and additional rent (hereinafter called "the Service Charge") being subject to the following terms and provisions:-

(1) The amount of the Service Charge shall be ascertained and certified by a Certificate (hereinafter called "the Certificate") signed by the Lessors' Auditors or Accountants or Managing Agents (at the discretion of the Lessors).....annually and so soon after the end of the Lessors' financial year as may be practicable and shall relate to such year in manner hereinafter appearing..."

8. Clause 3 (i)(b) (2) recorded that the Lessors' financial year was originally from the seventh April to the sixth April but could be such other period as the Lessors determine. Clause 3(i)(b)(3) requires a copy of the certificate for each financial year to be supplied by the Lessor to the Lessee upon written request and clause 3(i)(b)(4) states;

"(4) The Certificate shall contain a Summary of the Lessors' said expenses and outgoings incurred by the Lessors during the Lessors 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."

9. Clause 3(i) (b) (5) contained details on the calculation of the proportion of the service charge payable by reference to the expenses and rateable values of the flats, and subsection (6) clarified that the expression "the expenses and outgoings incurred by the Lessors" includes estimated future expenditure as well as costs that have actually been incurred. Subsection 7 contained the obligation on the Lessee to pay to the Lessors payments in advance and on account in respect of the service charges on the sixth of April and October each year.

10. Clause 3 (i)(b)(8) states that;

"(8)As soon as practicable after the signature of the Certificate the Lessors shall furnish to the Lessee an account of the service charge payable by the Lessee for the year in question due credit being given therein for all interim payments made by the Lessee 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 Lessee to the Lessors the amount of the Service Charge as aforesaid or any balance found payable or there shall be allowed by the Lessors to the Lessee any amount which may have been overpaid any the Lessee by way of interim payment as the case may require."

11. Therefore it is clear that in respect of any balancing payments that may be due for the service charge, the Lessee's obligation to pay is dependent upon the issue of the certificate and the summary of the expenses in accordance with the machinery of the lease set out above.

12. The Fourth Schedule to the lease, detailing the matters that make up the service charge refer to the expenses of maintaining, repairing and renewing parts of the mansion, the cost of cleaning the common parts, the costs of fuel, the managing agents fee and disbursements and at clause 7, (a sweeping up clause) "All other expenses (if any) incurred by the Lessors in

and about the maintenance and proper and convenient management and running of the Mansion."

THE HEARING-PRELIMINARY ISSUES.

13. There were two preliminary issues raised by the tribunal, firstly relating to jurisdiction and secondly as to the requirements of section 21B of the Landlord and Tenant Act 1985 ("the 1985 Act').With regard to the first matter, the Leasehold Valuation Tribunals (Procedure)(Wales) Regulations 2004 at regulation 2 define a transferred application *as "so much of the proceedings before a court as relate to a question falling within the jurisdiction of a tribunal as have been transferred to the tribunal for determination by order of the court."* The question therefore was whether we could consider all of the amounts claimed in the application forms before the LVT, namely £8353.42 (see paragraph 3 above), or whether we are confined to the amount of £4078.22 on the particulars of claim. This was a point raised by the Respondents. The Applicants urged that we could consider the higher sums. **We determine** that since the particulars of claim specifically plead "and continuing to accrue" in relation to both administration and service charges, that we do have the jurisdiction to deal with the sums of £8353.42 claimed before us, since these included further sums that have continued to accrue and satisfy regulation 2 above.

14. The second point referred to the notice to accompany the demands for service charges required under section 21B (1) of the 1985 Act. Subsection (1) states

> *"A demand for the payment of a service charge* ***must*** *be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges."*(Our emphasis).

Under section 21B (2) the Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations and under 21B (3)

> *"A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand."*

Further, 21B (4) states

> *"Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it."*

This is clearly an important mandatory provision that must be complied with for a service charge demand to be enforceable.

15. In Wales, the appropriate regulations are "The Service Charges (Summary of Rights and Obligations, and Transitional Provisions)(Wales) Regulations 2007 which came into force on 30th November 2007, ("the 2007 Regulations").Regulation 3 headed "Form and Content of summary of rights and obligations states that

> *"Where these Regulations apply, the summary of rights and obligations which must accompany a demand for the payment of a service charge must be legible in a typewritten or printed form of at least 10 point, and* **must** *contain-" (our emphasis)*

and it then lists the title and at 3(b) *"the following statement-".* There then follows, a detailed numbered paragraphed statement first in Welsh and then in English, and the use of inverted commas or speech marks (" and ") at the beginning and the end of the statement together with the mandatory wording indicates that it must be reproduced in precisely the same wording and order as in the regulations. There is no saving provision enabling the information to be provided in substantially the same way or with similar words to those in the regulations. It follows therefore that if the summary of rights and obligations served with

service charge demands in Wales after 30th November 2007 does not comply with the 2007 regulations, then the service charges are not properly demanded and not payable until such time as the regulations are complied with.

16. There are similar provisions with regard to the notice of rights and obligations that are to be served with any demand for administration charges in Wales. Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), Part 1, section 4 states as follows;

> *"(1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.*
>
> *(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.*
> *(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.*
> *(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it."*

17. In Wales, "The Administration Charges (Summary of Rights and Obligations) (Wales) Regulations 2007 ("the 2007 AC regulations") came into force on 30th November 2007 and apply to demands for administration charges made after that date. The 2007 AC regulations have similar provisions to the 2007 service charge regulations with regard to the form and content of the summary of rights and obligations and these appear at regulation 2 and similarly contain a mandatory instruction ("...must contain...") as to the title and the following statement which is again to first be in Welsh and then English in a particular form. As with the service charges, there is no saving provision and the notice must appear as it does in the regulations.

18. The tribunal considered the demands for service charges and administration charges included in the AB. At tab 2, pages 26-28 were copies of the service charge demands. At pages 35 and 36 were copies of the service charges and administration charges summary of tenant's rights and obligations respectively. These summaries were in English only and referred to the First Tier Tribunal. The summaries did not comply with the 2007 Welsh service charge and administration charge regulations. The First Tier Tribunal has jurisdiction in England, but not in Wales where the LVT for Wales remains the relevant tribunal.

19. The tribunal considered that the demands for service charges and administration charges did not comply with the Welsh regulations and that consequently the charges demanded are not payable or enforceable until such time as compliant demands are served. However this was not a point that was directly raised by the Respondents. Therefore, we raised this with the parties and in particular asked Mr Warren if he required a short adjournment during the morning to consider this and to take further advice. Mr Warren indicated that he was content for the hearing to continue and for him to seek advice during the morning break and lunch break. The Respondents wished to adopt and rely upon the points questioning the validity of the summary of rights and obligations.

20. In the event Mr Warren addressed us on these points during the afternoon and submitted that his previous experience had been restricted to the First Tier Tribunal in England and that he was not a legal professional. However he suggested that this was not a "black and white issue" and he urged the tribunal to consider whether the Respondents had suffered any prejudice as a result of the Welsh notices not being served. He submitted that the tribunal should adopt a similar approach to the Supreme Court in Daejan Investments Ltd v Benson and others [2013] UKSC 14. Although that case dealt with dispensation from the consultation requirements under section 20ZA of the 1985 Act, the Supreme Court held that the tribunal should focus on the extent, if any, to which the tenants were prejudiced by the landlord's failure to comply with the consultation requirements. Mr Warren submitted that by analogy with Daejan, the Respondents have not suffered any prejudice by the notices not being served in compliance with the Welsh regulations, indeed that the Respondents had not even raised the point themselves and do not speak or read Welsh. He stated that failure to include the correct summaries was a technicality and that a summary of rights and obligations had been sent to the Respondents. He urged what he termed a "common sense approach" on the tribunal and submitted that the evidence suggested that even if the correct notices and summaries had been sent, that the Respondents would still have challenged matters. He referred to page 77 in the RB, a letter from the Respondents to Watson Property Management dated 3rd November 2013, in which they had made a payment towards service charges of £1873.94 but stated that "This sum is paid to you on a without prejudice basis and we do not accept that the sum charged to us fairly represents the amount payable by way of service charges under the lease." He said that by making payments previously the Respondents had tacitly accepted that the summary of rights and obligations were correct even if they were disputing reasonableness.

21. Mr Warren therefore submitted that notwithstanding the failure to comply with the Welsh regulations, that the demands for both service and administration charges should be found to be valid. However, given that he had not been aware of the point before the hearing date, he asked for further time to seek legal advice if necessary on this issue. The tribunal therefore allowed further time for him to make any legal submissions on this point that he wished and likewise allowed the Respondents further time to make submissions in response.

22. Mr Warren duly submitted further written representations on these issues dated 8th April 2015 which added to and amplified his oral arguments. He relied on the case of Beitov Properties Limited v Elliston Bentley Martin [2012] UKUT 133 LC, a decision of the former President of the Lands Chamber of the Upper Tribunal, George Bartlett Q.C. and cited paragraph 13 of the judgement thus;

> *"...it is in my view generally inappropriate for a tribunal to take on behalf of one side in what is a party and party dispute a purely technical point, by which I mean a point that does not go to the merits or the justice of the case....No purpose will in the circumstances have been served in imposing on the landlord the need to deal with the issue raised, to serve a fresh demand and, quite possibly, to take further proceedings for recovery."*

Mr Warren suggests that "these comments, due to the fact that they arise from an Upper Tribunal decision, set a binding precedent on the LVT not to raise matters, ...not raised by either party, where such matters do not go to the merits or justice of the case at hand."

23. Mr Warren's written submissions further developed his point that there had been no prejudice caused to the Respondents and he pointed out that the purpose of the summary of rights and obligations was to provide the tenants with an overview of their rights and obligations in respect of the service charges that they were being asked to pay and detailing how they may challenge a service charge and the details provided by the Applicant to the

Respondent in this case did that since there were only minor technical differences between the Welsh and English summaries of rights. He also pointed out that there was in any event no evidence that the Respondents have ever sought to initiate the challenge to the service charges themselves; instead it was the Applicants who were obliged to take enforcement action against the Respondents that they then defended.

24. Mr Warren also submitted that section 21B(4) referred to a tenant withholding a service charge "under this section" and that this meant that "where a tenant is withholding payment due to a failure to comply with section 21B, the tenant must be able to demonstrate that it is on these grounds that they are withholding payment. In instances where a tenant is unable to do this, or is withholding payment for other reasons, then it is suggested that subsection 4 does not apply and that any provisions within the lease relating to non-payment or late payment of service charges will still have effect, in the same manner that they would had Section 21B been complied with." He pointed out that in this case it had been established that the Respondents were not withholding rent due to a "perceived failure to comply with section 21B" and therefore subsection 4 does not apply.

25. With regard to Schedule 11 and the administration charges, Mr Warren submits that firstly it must be established whether the charges were rightfully incurred. He suggests that all of the administration charges have been so incurred and seeks to rely upon the argument expounded above in relation to service charges, namely that, with regard to administration charges, section 4 (4) of Part 1, Schedule 11 to CLARA 2002 is the analogous provision which says *"Where a tenant withholds an administration charge under **this paragraph**...."* (our emphasis). In other words, the Respondents have not failed to pay the administration charges demanded because of their concerns that the summary of rights and obligations required for administration charge demands have not been served in the proper form. Mr Warren similarly urges that there has been no prejudice to the Respondents as a result of the summary of rights and obligations not being in the proper form.

26. Mr Warren cites the lease clause at 3(i)(e) which states that

> *"The Lessee hereby covenants with the Lessor....to pay all costs charges and expenses (including Solicitors costs and surveyors fees) incurred by the Lessors for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act notwithstanding forfeiture may be provided otherwise than by relief granted by the Court."*

He says that this, combined with section 81(1) of the Housing Act 1996, (which restricts forfeiture for failure to pay a service charge unless the amount is agreed or admitted or is the subject of a determination by a court or tribunal) means that it is necessary for a landlord to seek the determination of the LVT in a case such as this where there are service charge arrears that are not agreed or admitted and where a determination is required in order to take action pursuant to section 146 of the Law of Property Act 1925.

27. Mr Warren submits that any action taken to satisfy section 81 must be considered as directly incidental to the preparation and service of a section 146 notice and that therefore under clause 3(i)(e) of the lease, the Respondents are liable for these costs, subject to them being reasonable.

28. The Respondents submitted further written representations dated 17th April 2015 in compliance with the tribunal's directions and in answer to the Applicant's written statement of case on these matters. They submitted that, regardless of by whom or how the issue was raised, the Applicant failed to comply with the relevant law. They submit that if the LVT were to follow George Bartlett Q.C in Beitov, that this would have the effect of negating the

authority of the LVT to raise an issue of non-compliance with the law. They point out that it is the landlord's responsibility to be aware of and to comply with leasehold legislation and regulations.

29. The Respondents did not directly address the Applicant's point about withholding payment under section 21B (4), (or the administration charge equivalent) merely repeating that the Applicant has failed to comply with the law rendering the service charges not due or payable.

30. With regard to administration charges, the Respondents disagree that it has been demonstrated that the charges have been rightfully incurred.

Determination on the summary of rights and obligations for service and administration charges.

31. The Tribunal determine that in respect of the service and administration charge demands for the years in question before us, that they fail to comply with the mandatory requirements of the 2007 regulations and the 2007 AC regulations. The summaries of rights and obligations are not provided in the mandatory form required by the Welsh regulations. This is accepted by the Applicant. Furthermore, notwithstanding that the Applicant's agents are based in England, the Welsh regulations have been in force since November 2007 and there is sufficient information about them in the public domain to have expected the Applicant and its agent to be aware of them. There is no provision in the regulations that enables the notices to be served in a similar form to substantially the same effect.

32. What then is the effect of this? We are to determine the payability of the charges under section 27 of the 1985 Act and Schedule 11, Part 1, CLARA 2002 section 5. The most fundamental point is that any service or administration charges demanded are not payable by the tenant unless and until the respective regulations are complied with and the accompanying summary of rights and obligations are served in the mandatory form. It will not be possible for the Applicant to take enforcement action where the sums are not properly demanded and are therefore not yet payable in law.

33. With regard to the Applicant's arguments on prejudice, this is not a situation that is analogous to the section 20ZA requirements where there can be dispensation granted where the tribunal is satisfied that it is reasonable to do so. There is no discretion or element of reasonableness that a tribunal can apply to the decision on the summaries of rights and obligations, rather it is a matter of whether the regulations have been complied with. They have clearly not been complied with here and the question of prejudice is not relevant where the tribunal's function is to determine whether a set of mandatory as opposed to discretionary regulations have been complied with.

34. The Applicant also relies upon the words of George Bartlett Q.C in Beitov as set out above in paragraph22 and considers that this is merely a technical point. Beitov itself raised what George Bartlett Q.C called the "single issue" of whether the requirement in section 47(1) of the Landlord and Tenant Act 1987 is satisfied by giving the name of the landlord and the address of its agent. That was the ratio decidendi (or rationale/central point) of the case. The comments cited by Mr Warren with regard to technical points were obiter dicta, namely comments not necessary or central to the issue that was being determined. Although this tribunal will consider and take into account such comments, we are not bound to follow them in the way that we are bound by the ratio of Beitov. We also consider however, that if there is relevant law and regulations that we are aware of and that appear not to have been complied with, then it is incumbent upon us to raise this with the parties and give them an

opportunity to comment and make representations upon the same, rather than to make a decision that we know is legally incorrect in certain respects. To take the latter course of action, would, in our view undermine the role of the tribunal. We sit as an expert tribunal- that is why matters are referred to us by the courts.

35. In any event, we consider that although of a technical nature, these issues do go directly to the merits and justice of the case where the sums demanded are not legally due or enforceable until the law has been complied with.

36. With regard to the Applicant's 'submissions on section 21B (4) of the 1985 Act ("Where a tenant withholds a service charge under this section...") and Schedule 11, Part 1 section 4(4) CLARA ("where a tenant withholds an administration charge under this section"), we accept that before the hearing, the Respondents were not withholding payment because of the failure to serve the summary of rights and obligations in the proper format because the Respondents were not aware of this. Payment of the amounts demanded was withheld for other reasons. However we reject the Applicant's submissions on this point. The starting point, as already mentioned, is that in law the service and administration charges were not payable or enforceable because of the failure to provide the correct summary of rights and obligations. The law is clear on this. As paragraphs 14 and 16 above make clear the demand for payments of the charges **must** be accompanied by the correct summary of the rights and obligations. This is a mandatory requirement.

37. If the Applicant's submission was correct, (i.e. the tenants are withholding payment for other reasons), then the amounts would still be payable and enforceable at law even if the landlord had failed to comply with mandatory legal provisions. We do not accept that this is correct. There would also be practical issues. For instance, this would require a reverse burden of proof to be on the tenant to demonstrate the precise reason why they were withholding payments and thus the emphasis would shift to the tenant rather than to the landlord's initial legal default. Furthermore, what is the situation, as in the current case, whereby the tenants are not initially aware of the effects of section 21B (3) and (4), and CLARA Schedule 11 Part 1 section 4 (3) and (4), and yet then become aware and seek to rely on it? Are they to be prevented from doing so because it was not made explicit earlier?

38. In our judgement, the Applicant's submissions on this point are wrong. The Applicant suggests that if the Respondents can't demonstrate that they are withholding "under this section" then the above cited provisions do not apply "and that any provisions within the lease relating to non-payment or late payment of service and administration charges will still have effect in the same manner that they would had section 21B been complied with." This is to suggest the precise opposite of the clear effect of the provisions and moreover to suggest that those provisions are conditional upon the actions of the tenant even where the landlord defaults on its legal obligations. It is the landlord's failure to comply with the obligations that triggers the tenant's right to withhold payment, and in our view, this is the key factor. The references to "this section" refer back to the mandatory obligation for the "notice to accompany demands for service charges" as section 21B is headed.

39. **Therefore we determine that in respect of the administration charges and the service charges that are the subject of this application, then subject to the rest of this decision, that they are not payable by the Respondents or enforceable against the Respondents until such time as any fresh demands for service and administration charges have been served accompanied by the relevant and correct summaries of rights and obligations.**

HEARING-SUBSTANTIVE ISSUES.

40. We considered that it was appropriate to continue to hear the evidence and to make a decision on the reasonableness of the sums claimed[1], even if at the time of the hearing, they were not enforceable against the Respondents by reason of the matters discussed. Service of the demands with the correct notices would in due course render payable any sums found by us to be reasonable. There have been previous determinations of the LVT in relation to service charges at Llannerch Hall and copies of these were included in the AB at tab pages 26-42. These included a decision dated 9th July 2008, a decision dated 14th June 2010, and most recently a decision dated 27th February 2013 relating to the service charge year ending the 30th June 2012. The last two decisions were between the same parties as in this case.

41. In the Scott Schedules the Applicant in particular made frequent references to the previous tribunal decisions, and the Respondents, in their submissions on costs (paragraph 9) say that "it was stated at the outset and repeated during the hearing that previous LVT decisions would have no bearing on this case." In fact, the tribunal made it clear to the parties that we were not bound by nor obliged to follow the previous decisions but the parties were entitled to draw to our attention to any parts of those decisions if they wished to do so as part of their case.

SERVICE CHARGES FOR THE PERIOD 1ST JULY 2012 – 30TH JUNE 2013
Section 47 of the Landlord and Tenant Act 1987.

42. In accordance with directions, the parties had completed a Scott Schedule recording their respective positions on the points and amounts at issue. We consider that it will be helpful to set out our decisions dealing with the points raised in turn. The Respondents had contended that the demand for the claimed service and administration charges did not comply with section 47 of the Landlord and Tenant Act 1987 which state that the landlord's name and address must be contained in demands for rent or other sums payable to the landlord under the terms of the tenancy (which would include service and administration charges.)This challenge was on the basis that the address on the demands (at tab 2, pages 26- 28) was that of the managing agents, namely of Watson Property Management, and not of the landlord. The Respondents again relied upon the case of Beitov (cited above).Mr Warren indicated however that the Landlord was Llannerch Hall Limited, a limited company, and that the registered office of the company was now at his company's address.

43. We noted that the only office copy entry included within the bundles was at AB, tab 6 pages 1-11, dated 30th April 2010 and showing the address of Llannerch Hall Limited on the proprietorship register to be that of Llannerch Hall itself in St. Asaph. Mr Warren informed us that this was out of date and he cited paragraph 11 of the Beitov judgement, namely that "the address of the landlord for the purpose of section 47(1) thus seems to me to be the place where the landlord is to be found. .....In the case of a company it would be the company's registered office or the place from which it carries on business." Mr Dean and Mrs Last said that they had received letters keeping them informed of the landlord's change of address, although the Respondents said that they had not received such correspondence. Although there was no documentary evidence in the bundle, the Applicant was able to demonstrate by means of an internet search that the registered office for the landlord was also that of Watson Property Management and this was accepted by the Respondents. We are therefore satisfied that the notices do comply with section 47 of the 1987 Act as they do

[1] Under section 19 of the Landlord and Tenant Act 1985.

contain the address of the landlord which happens to now coincide with the address of the agents.

Administration fees and arrears charges under Schedule 11, Commonhold and Leasehold Reform Act 2002.

44. The Respondents had argued that these were unreasonable. The Applicant referred us to the previous decision of the LVT dated 27th February 2013, where it was found that the administration charges claimed were reasonable and recoverable in full. The Applicant also referred us to Watson Property Management's Credit Control Policy and to the Respondents' liability under clause 3(i) (e) of the lease to pay such sums. This clause, which appeared at page 7 of the lease and AB page 8 of tab 4 states:

> *"(e) To pay all costs charges and expenses (including solicitors costs and surveyors fees) incurred by the Lessors for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be provided* [sic] *otherwise than by relief granted by the Court".* (It seems clear that this should read "avoided" rather than provided and to this extent there appears to be an error in the lease.)

The Applicant relied upon the Court of Appeal decision of Freeholders of 69 Marina, St. Leonards-on-Sea v Oram [2011] EWCA Civ 1258 (pages 114 – 125) as being the leading authority on this matter that the landlord's could claim their costs under this provision including all the costs leading up to and including this LVT case.

45. The Respondents disputed this and relied instead on the case of Barrett v Robinson [2014] UKUT 0322 (LC). Mr Warren referred to section 81 of the Housing Act 1996 which restricts a landlord from seeking the forfeiture of a lease of residential premises for failure by a tenant to pay a service charge or administration charge unless the amount of such charges is finally determined by an LVT or a court (section 81(1)(a). In 69 Marina, Sir Andrew Morritt upheld the decision of the County Court to allow the landlord's costs of earlier LVT proceedings to be recovered, by relying on the tenant's covenant to pay costs incurred by the landlord incidental to the preparation and service of a section 146 notice. This decision has attracted critical comment because the previously held view had been that the requirements of section 146 do not apply where the landlord seeks forfeiture for non-payment of rent and that where the lease provides that service charges are deemed to be additional rent, then the service charge acquires "all the attributes of rent" (Escalus Properties v Robinson [1996] 2 QB 231.)

46. In this case, the lease, at clause 3 (i) (b) (page 3 of the lease and AB tab 4 page 4) and reproduced above at paragraph 7 of this decision contains the lessee's covenant to pay *"such further and additional rent (hereinafter called "The Service Charge"...."*. Clearly then the service charge is explicitly described as "additional rent" in the lease. In "Commercial and Residential Service Charges" by Adam Rosenthal et al (Bloomsbury,2013), Sir Andrew Morritt's views in 69 Marina are described as "...surprising and contrary to the long established view that the requirements of section 146 of the Law of Property Act 1925 do not apply where a landlord seeks to forfeit for non-payment of rent."[2] Rosenthal suggests that the decision is open to doubt for a number of reasons including that "section 146(11) of the Law of Property Act specifically excludes forfeiture for non-payment of rent from the

[2] 45-39 at page 403

ambit of the section"[3], that "Neither section 18 of the Landlord and Tenant Act 1985 nor section 81 of the Housing Act 1996 imposes any obligation on the landlord to serve a section 146 notice before forfeiting for non-payment of service charge reserved as rent"[4] and that "In Khar v Delmounty Ltd (1998) 75 P&CR 232) the Court of Appeal confirmed that the jurisdiction to grant relief from forfeiture under section 146(2)... to an immediate tenant may only be exercised where service charge is *not* reserved as rent."[5] Furthermore, Rosenthal suggests that "Accordingly, if Freeholders of 69 Marina.... is correct, then where the service charge is reserved as rent, the requirement to service notice in section 146(1)...does apply, but the jurisdiction to grant relief in section 146(2) does not. This would be a curious result."[6]

47. The Respondents' argued further that administration costs had been charged in a court case, the costs of the LVT hearing in February 2013 were followed by a County Court case in July and September 2013 and in neither the County Court case nor these current LVT proceedings have they received a section 146 notice. They argue that Barrett v Robinson says that a section 146 notice may be necessary (for costs recovery) and they have not had one.

48. The judgement in Barrett v Robinson was given by Martin Rodger Q.C. He stated that the appeal raised a question of general significance namely "In what circumstances does a covenant for the reimbursement of costs of proceedings under section 146 render a tenant liable for costs incurred by their landlord in tribunal proceedings to determine the amount of a service or administration charge?"[7] Martin Rodger considered the clause of the lease in Barrett (which was clause 4(14) and said "Clause 4(14) must therefore be understood as applying only to costs incurred in proceedings for the forfeiture of a lease or, in steps taken in contemplation of such proceedings. Moreover, even where a landlord takes steps with the intention of forfeiting a lease, a clause such as clause 4(14) will only be engaged (so as to give the landlord the right to recover its costs) if a forfeiture has truly been *avoided*." (Paragraph 49).

49. Martin Rodger Q.C went on to point out that proceedings could be started before the LVT (or First Tier Tribunal) for a determination of service and administration charges which need not be a prelude to forfeiture proceedings at all, and that County Court proceedings are often commenced to recover service charges without a claim for forfeiture being included. (paragraph 51) . He held at paragraph 52;

> *"Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146, if , at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not* ***in fact*** *contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as clause 4(14) as providing a contractual right to recover its costs."*

50. Martin Rodger further said, at paragraph 57,

> *"If a service charge or administration charge is reserved as rent the decision of the Court of Appeal in 69 Marina is binding authority that a determination*

[3] 45-39 para. 2 p.404 and as confirmed by the Court of Appeal in Khar v Delmounty Ltd 1998.
[4] 45-39 para. 3 p.404
[5] 45-39 para.6
[6] As above.
[7] Barrett v Robinson [2014] UKUT 0322 (LC) paragraph 38.

by the First-tier Tribunal is nonetheless a pre-condition to the service of a notice under section 146. But the decision does not require that whenever a lease includes such a clause the landlord will necessarily be entitled to recover its costs of any proceedings before the First- tier Tribunal to establish the amount of a service charge or administration charge. It is always necessary to consider the terms of the particular indemnity covenant and whether any relevant contemplation or anticipation existed in fact in the circumstances of an individual case."

Therefore, the Upper Tribunal, Lands Chamber, provided further guidance and authority upon the need to be satisfied that forfeiture and the section 146 notice were being contemplated, whilst recognising the precedent of 69 Marina.

51. In this case of Llannerch Hall, it is clear that we would need to be satisfied upon the evidence of the steps taken towards forfeiture by the Applicant in accordance with the points made by the Upper Tribunal at paragraphs 49 and 50 above for the costs to be contractually recoverable under the lease. We shall return to this issue later.

Do the interim payments demanded comply with the lease?

52. The Respondents argued that the interim demands do not comply with clause 3(i)(b)(7)of the lease at page 6 of tab 4 which requires the six monthly service charge payments on account to be made on the 6th of April and October in each year. However the Applicant counters that, pursuant to clause 3(i) (b) (2) that it has used its discretion to determine that its financial year shall run from the first day of July in each year to the thirtieth day of June of the next year and that accordingly the dates upon which the service charge may be demanded upon account are the 1st day of July and January in each year of the term. Since this clause states "*the expression "the Lessor's financial year" shall mean the period.....or such other annual period as the Lessors may in their discretion from time to time determine as being that in which the accounts of the Lessors... shall be made up"*, then we agree that the Applicant is able to do this **and accordingly we determine that the interim demands do comply with the lease on this point.**

<u>Individual items under the Scott Schedule.</u>
<u>Cleaning</u>

53. The Scott Schedule recorded that the cleaning costs for 2012-2013 had been estimated at £400, with the actual figure being £334 and the contribution due from the Respondent's of £25.69. The communal cleaning was said to be carried out at the property on a fortnightly basis for an hour per visit but this is subject to change should any additional work be required. The invoices are charged to the service charge period for which the invoice was received. The Applicant's evidenced the cleaning costs incurred with invoices and submitted that the costs were both reasonably incurred and reasonable in amount[8] and drew our attention to the previous tribunal decisions of 2010 and 2013 that had found the costs to be reasonable.

54. The Respondents' argued that in the LVT hearing of February 2013, the rate of pay for a cleaner had been determined as £8.25 per hour, and that this figure multiplied by twenty four weeks equals £198, and that this was the reasonable figure. At one point it appeared that Mrs McGregor accepted that the invoice at tab 4 AB, page 46 was reasonable. This was for £80 for cleaning services for four months September – December 2012 inclusive, or £20

[8] In accordance with section 19 of the Landlord and Tenant Act 1985.

per month. However Mrs McGregor then clarified that although this was reasonable, if the overall cleaning costs exceeded £198 for the year, then they were unreasonable. Mrs McGregor accepted that the standard of cleaning was reasonable.

55. Mrs Last had clarified that the cleaning was for cleaning the carpets, the common parts and occasionally cleaning the brass handles and so forth. She explained that the invoices are paid from petty cash when they are received and that she believed that the cleaner was paid between £10-11 per hour. This was a sum that was described by Mrs McGregor as "extremely generous for a cleaner".

56. Having considered the evidence we determine that **the cleaning costs are reasonably incurred and reasonable in amount.** The decision of the February 2013 tribunal relied upon by the Respondents simply says (tab 4 AB page 38, paragraph 6*)"At the hearing Mrs McGregor having sought confirmation of the hourly rate, accepted this charge was reasonable. The Tribunal confirmed the cleaning charge of £198...was reasonable."* This does not mean that the hourly rate figure broken down by the Respondents is set in stone and can never be increased and we consider the Respondents objection to the current cleaning amount upon the basis of hourly rates to be wholly misplaced. The communal areas are fairly extensive and include a large hallway and stairwell and the cleaning charges for the year remain relatively modest. The tribunal is determining the reasonableness of the charges and, as is well established, this means that there will be a range of figures and services that will be reasonable, that come within a band of reasonableness. The Applicant is not obliged to utilise the cheapest services on the market. We determine that the costs incurred this year are reasonable and that the hourly rates of £10 or £11 will both come within the band of reasonableness. We also note that the Respondents did not produce any evidence as to unreasonableness of these costs.

Gardening and grounds maintenance

57. The estimated figure for this category was £4,800 and the period end amount was £4,000 with a contribution required from the Respondents of £307.69. The Applicant indicated that grounds keeping and gardening services are carried out twice weekly during the summer months and weekly during the winter months although this is subject to the weather. The sum is fixed at £400 per month with the contractor carrying out all work and providing all equipment. The costs were evidenced by invoices for the months in question (at AB tab 4 pages 49-58) which all bore the following narrative; "Mowing of lawns, strimming, weed killing and general upkeep of gardens, as discussed."

58. The Respondents' objections to this figure were two fold. Firstly, they argued that this contract was a Qualifying Long Term Agreement (QLTA) under section 20ZA (2) of the 1985 Act,[9] and as such was subject to the need for the landlord to have undertaken consultation. They stated that since there had not been any consultation then the maximum amount that they could be required to contribute to this head of costs was £100.[10] Secondly that the amounts were unreasonable for an average 2/4 hours per week, that gardening was not undertaken in November, December 2012 or January 2013, and that consequently the amount charged is overstated by £1,200. Mrs McGregor did say, helpfully, that the Respondents accepted "across the board", that service charges are to be paid, it is the reasonableness that they take issue with.

[9] "qualifying long term agreement" means ..... an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months." (section 20ZA(2)).
[10] Service Charges (Consultation Requirements) (Wales) Regulations 2004, regulation 4(1).

59. The Applicant argued that since these services are not carried out under a contract for a period of longer than twelve months that they are not a QLTA and argued that this has been previously determined by the LVT in both 2010 and 2013 in the Applicant's favour and therefore the Respondents are acting vexatiously in raising the point again. Mr Dean for the Applicant said that these costs were split equally throughout the year because it was easier for the gardener to invoice them rather than for the gardener to have to invoice them for just a few hours work if invoicing was done following the hours worked. The Applicant told us that they don't need a fixed hourly rate and pointed out that the fee also includes the upkeep of the car parking area.

60. With regard to the QLTA point raised by the Respondents, we understand that the previous tribunals in 2007, 2010 and 2013 heard the same arguments and rejected them. The decision of the 2010 tribunal recorded at numbered paragraph 7 (AB tab 4, page 32) "*the second objection was on the grounds that the gardening contract was a QLTA requiring consultation. We had already dealt with this point in our decision of July 2007.Just because a contract actually lasts for more than 12 months does not mean that it is a QLTA within the meaning of the Act".* In fact we were told by Mr Dean that there was no written contract with the gardener but that the Applicant will sit down with the gardener at the end of the 12 month period and invite the submission of a quote for the next twelve months. In fact, Mr Dean explained that this process had resulted in a different gardener now being chosen and the current gardener lives at Flat 5 of the property.

61. There was no evidence before us of a contract for gardening and maintenance services exceeding 12 months. It is important that the Respondents' understand that, simply because a contractor may in fact work at the property for a period in excess of twelve months, that it does not follow that this is as a result of a contract for a period in excess of twelve months duration. It is not uncommon for contracts to be of twelve months duration and for the contractor to still be providing services after that twelve months expires. If that is the case, the services may well be provided under a new 12 month contract or, in the absence of any formal renewal of a contract, the contractual relationship between the contractor and Llannerch Hall Limited (in this instance) will be a periodic contract. If the gardener had an agreement for 12 months work at Llannerch Hall and then continued working after that, being paid monthly, without having negotiated a new contract, then the duration of the existing contract will be a monthly periodic one.

62. In the case of Paddington Walk Management Limited v Peabody Trust[11], the court determined that an agreement for an initial one year period which was then to continue on a year to year basis (determinable on three months' notice by either side) was not a QLTA. Rosenthal et al[12] comment that "*It follows that an agreement is only a QLTA if, **at the outset, the fixed term exceeds 12 months** and the possibility of the contractual arrangements continuing for a longer period, subject to one of the parties giving notice terminating the agreement, is irrelevant."*[13][Our emphasis**.] It follows that we agree with the Applicant- the gardening and maintenance contract at Llannerch Hall for the service charge year in question is not a QLTA and therefore no consultation was required.** The Respondents are, again, mistaken in their belief that this was a QLTA.

[11] [2010]L&TR 6
[12] "Commercial and Residential Service Charges" by Adam Rosenthal et al (Bloomsbury,2013)
[13] 30-30 page 271

63. Are the grounds maintenance charges reasonable? We had noted on our inspection, and by comparing the grounds that are maintained with the extent of the Applicant's demise on the supplied Land registry plan, that it appears that there is a strip of lawn of maybe three feet in width but extending along the boundary with the adjoining land owner, that in fact as a matter of law falls within the adjoining owner's demise. Since this strip is to the naked eye, a part of the Applicant's lawn and abuts the natural boundary of mature shrubs, it would look visually odd if the groundsman were to stop mowing the lawn a few feet from the shrubbery. We were told that the precise location of the boundary and the neighbour's garden has not been determined. We mention this because Mr Warren specifically informed us that the costs to the tenants in the service charge would be precisely the same if the groundsman did not mow this 'strip' belonging in law to the neighbour.

64. **We determine that a reasonable figure for the gardening and grounds maintenance is £3,500.**We find that billing monthly throughout the year is a reasonable approach and that the costs incurred are reasonable when considering the extent of the work required and that this will be extensive and time consuming in the summer months. The Respondents did not produce evidence to support the argument of unreasonableness of the costs.

General Maintenance

65. The sum of £3,000 was budgeted for general maintenance, the year end costs for this category were in fact £1,624.41, of which the Respondents' contribution was £124.95.The Respondent's object to two items under this head, firstly £213.44 for the re-fitting of a gas pipe for Flat 14, which they argued was the liability of that individual resident, and secondly, the £700 costs of a replacement window and timber frame for Flat 4 (the Respondent's share of this item would be £53.85)on the basis that there was no provision in the lease for window replacement to be charged to the service charge. The Applicant stated that the obligation to pay towards general maintenance is at clause 3(i) (b) of the lease and under various clauses of the Fourth Schedule. The Applicant has an obligation to maintain the gas pipe under clause 5 (d) (b) of the lease (AB tab 4 page 15) that says the Lessors will maintain repair decorate and renew *...."(b)the gas and water pipes drains and electric cables and wires in under and upon the Mansion and enjoyed or used by the Lessee in common with the lessees of the other flats"*

66. With regard to the re-siting of the gas pipe, the Applicant's evidence was not initially consistent. It was said by Mr Warren that the gas pipe had to be moved due to major roof works and that the pipe was not demised to Flat 14. Mrs Last said that the pipe was demised to Flat 14 but it needed to be moved for communal roof works. Mrs McGregor said that the roof works had been completed in 2008 but Mrs Last said that the roof works were undertaken in three phases, the main piece in 2008 and the final piece of work was what she described as being over the hexagonal part at the rear and side of the mansion. Mrs Last said that the pipe needed to be moved so as not to interfere with the lead work being replaced on the roof.

67. Upon the basis that we accept Mrs Last's explanation and the re-siting of the pipe was as a result of the last part of the roof works, then we accept that this work is not done to benefit the resident of Flat 14 only, but was properly recorded against the service charge fund and **the sum of £213.44 (evidenced by an invoice) was reasonably incurred and reasonable in amount.**

68. In relation to **the replacement window at Flat 4**, the Applicant says that the previous window had rotted to such an extent that its structure was unable to support the window pane. The Applicant's Scott Schedule entry for this point states; "It is noted that the lease does not explicitly identify who is responsible for the maintenance and repair of the windows of the building, however within Clause 1 a description of the demised property is given which does not provide any suggestion that the windows are demised to individual flats. Further guidance may be found at Clause 5 (d) (a) of the Lease..... which identifies the Applicant as being responsible for the maintenance and repair of the main structure of the building. In consideration of it being evident that the windows are not demised to the individual flats, it is respectfully suggested..... that the intention of the Lease was that the "main structure of the building" includes all of the windows contained therein." The Applicant also referred to previous tribunal decisions where the Respondents have been found liable for costs including the maintenance and repair of windows."

69. Mr Dean explained that the wooden window sill had rotted at the bottom and the glass fell out and there was no viable repair to be undertaken. He confirmed in answer to a question from the tribunal about whether the rotten window had caused structural damage, that the need to replace this window was nothing to do with the masonry above it and there was no sagging brickwork above it as a result of the window frame rotting. He also confirmed that they used the particular contractor because he had done work for them before and that the window had to be a bespoke window to fit the existing aperture otherwise they would have had to alter the structure of the building to accommodate a more 'standard' sized window.

70. The window in question was in Flat 4 which is situated at the side and rear of the Mansion and has the appearance of an annex to the main house. Mr Dean was asked about any potential distinction between the part of the building that was listed and the window to Flat 4. He explained that for the replacement of original windows that they had had to involve CADW and he estimated that about £11,000 had been spent on windows through the service charges in the past.

71. With regard to the price of the replacement window, the Respondents were unable to gainsay the reasonableness of the cost and had no evidence of alternative or comparable figures for us. **We are satisfied on the evidence that the costs were reasonable**; however the main question is whether they are reasonably incurred against the service charge fund? Mrs McGregor indicated that she had sought guidance from the Leasehold Advisory Service and accordingly wished to rely on the contra proferentem rule with regard to the lease and its silence on the question of liability for windows. She argued that this rule states "broadly, that where there is doubt about the meaning of the wording in a contract (lease in this case) the words will be construed against the person who put them forward. In other words, the courts are more inclined to find in favour of the leaseholder, where the clause is unclear, and the freeholder is arguing it allows him to recover costs."

Decision on the window.

72. As the Applicant acknowledges, the lease does not explicitly refer to windows. We had the lease for Flat 11 before us but had not been told that the lease for Flat 4 was any different. Clause 5(d) relied on by the Applicant states that

> *"...the Lessors will maintain repair decorate and renew (a)* ***the main structure*** *and in particular the roof chimney stacks gutters and rainwater pipes of the mansion..."* [our emphasis].

Further, the Fourth Schedule details the service charge items which the lessee covenants to pay and says at paragraph 1

> *"The expenses of maintaining repairing and renewing (a)* ***the main structure*** *and in particular the roof chimney stacks.... [etc]"* [our emphasis].

Paragraph 7 of Schedule 4 requires the lessee to pay

> "*All other expenses (if any) incurred by the Lessors in and about the maintenance and proper and convenient running of the Mansion"*

And clause 11 states

> *"When any repairs or redecorations or renewals are carried out by the Lessors they shall be entitled to charge as the expenses or costs thereof their normal charges...in respect of such work."*

73. We reject the Respondent's submission that the contra proferentem rule applies here. Again, citing Rosenthal et al[14], they conclude, having reviewed the relevant authorities of the maxim's application in a service charge context that

> "*The contra proferentem rule is distinct from the requirement that the lease must state in clear terms what a tenant is obliged to contribute towards under a service charge and it will only have any relevance in the case of ambiguity. The maxim is likely to have a very limited role in the modern process of construction."*

74. We consider that the lease clause in question is not ambiguous, it is, rather a question of deciding whether the windows are included in the definition of the main structure. Assistance is derived from the case law. In the case of Sheffield City Council v Hazel St Clare Oliver, [15] heard in the former Lands Tribunal in 2008, the then President, George Bartlett Q.C considered a requirement under the lease to "keep in repair the structure and exterior of the dwelling house and the building in which it was situated". He said "the principal question that arises is whether the external windows are part of the structure and/or the exterior of the maisonette and/or the building."[16] He referred to the case of Irvine v Morgan [1991] [17] decided by Mr Thayne Forbes Q.C sitting as a Deputy Judge of the Queen's Bench Division in which the judge held that certain items including external sash windows were both part of the structure and part of the exterior of the dwelling house.

75. The President went on to cite[18] with approval the following passage from Irvine v Morgan[19]

> *"I have come to the conclusion that windows do form part of the structure of the dwelling- house.....In the case of a dwelling-house, it seems to me that an essential and material element in a dwelling-house, using ordinary common sense and an application of the words 'structure of the dwelling-house' without limiting them to a concept such as 'load-bearing', must include the external windows and doors. Therefore, I hold that windows themselves, the window frames and the sashes do form part of the structure."*

76. The President reviewed the authorities on this matter which supported this conclusion including the Court of Appeal in Quick v Taff Ely Borough Council (1986)[20] where he observed that

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[14] Commercial and Residential Service Charges, op.cit at page 27, 2-49
[15] LRX/146/2007
[16] Paragraph 15.
[17] [1991] 1 EGLR 261
[18] At paragraph 17 of Sheffield City Council v Oliver
[19] Paragraph 262M-263B of Irvine v Morgan

"*The council accepted the findings of the judge at first instance that the windows formed part of the exterior and probably part of the structure of the house....., and it is clear that each of the lords' justices also had no difficulty in accepting those findings."*[21]

He also said

"*The LVT thought that the windows and frames were excluded from the definition of "the Building" because they were not expressly mentioned in it,*

but I can see no reason why this should be so."[22]

This issue has recently been considered by Siobhan McGrath, the President of the First tier Tribunal (Property Chamber) sitting as a Judge in the Upper Tribunal in the case of Miss C Waaler and the London Borough of Hounslow[23] where she cited and agreed with George Bartlett's analysis of this issue in Sheffield City Council v Oliver.[24]

77. Having carefully considered the submissions, evidence and the law, **we determine that the windows are part of the main structure and accordingly that the costs of the replacement window in Flat 4 were reasonable and reasonably incurred against the service charge fund.**

Miscellaneous general repair and maintenance matters.

78. Although not on the Scott Schedule, the Respondents also challenged certain items of expenditure that appeared at page 19 of tab 2, AB under the category "General Repair". These were for £150 to investigate and repair damp issues at Flat number 5 on 5th October 2012, £132 for re-pointing and sealing a wall on 22nd October 2012, £420 for Beaumont on 14th December 2012 and £8.97 for frames for fire notices on 1st February 2013. Mrs McGregor said that the total of £710 was not an insignificant amount. Mr Dean explained however that the £150 investigation was to find the source of penetrating damp in Flat 5 and the £132 covered the resultant sealing and re-pointing of the wall. These were concerned with the structure of the building and were recoverable against the service charge. The Beaumont invoice was for a five year hardware test on fire equipment to satisfy health and safety requirements. Mr Warren pointed out that this was included at the bottom of page 19 and top of page 20 where that narrative appeared and that it had initially been placed in the wrong category of expenditure.

79. Having heard these explanations, the Respondents still disputed the reasonableness of the costs incurred, although they did not produce any evidence as to unreasonableness. **However we were satisfied that these cumulative costs of £710 were reasonable in amount and reasonably incurred against the service charge fund.** We accepted Mr Dean's evidence on these matters.

Buildings Insurance

80. The amount of the policy for this year was £4094.98, the Respondents' share being £231.56. The Respondents again argued that this was a QLTA. The Applicant referred to the policy at page 61, tab 4 AB which ran from 14th October 2012 until 13th October 2013 and so did not exceed 12 months. We agree that this is not a QLTA and refer to our earlier comments on QLTA's. The Respondents referred to breaches of the rights under section 30A of the 1985

[20] [1986] 1 QB 809
[21] Paragraph 20.
[22] Paragraph 24
[23] [2015] UKUT 0017 (LC), dated 26th January 2015
[24] At paragraph 39.

Act and that the Applicant had not complied with clause 5(b) of the lease, namely the Lessor's covenant to produce to the Lessee whenever required, the insurance policy and the receipt for the last premium. The Respondents had requested this by letter of 26th February 2012 (page 105, tab 4 AB) and Mr Warren said that the insurance schedule had been sent in response on 2nd March 2012 (page 106). Mr Warren said that the agents do search each year to ensure that the insurance premium is competitive.

81. The tribunal is to determine the reasonableness of the insurance premium rather than to determine any disputes under section 30A, and having considered the evidence, and noting that there was no comparative evidence called by the Respondent to suggest that the premium was unreasonable, **we are satisfied that the premium of £4094.98 is reasonable in amount and reasonably incurred.**

Legal Fees

82. The Respondent's contended that they had paid legal fees throughout this period and there was some discussion of this matter. However Mr Warren stated that there had been no legal fees payable through the service charge for this period, and having considered the matter **the tribunal find this to be the case**. We had heard from the Respondents about various legal costs that they had paid but these were in connection with the detailed assessment of costs for a separate hearing in the County Court and were not payable through the service charge.

Administration costs

83. The Applicant's admitted that the annual return fee of £14 for this and future years was wrongly charged to the service charge account and would be re-credited. This left the sum of £464, namely £370 plus vat for company secretarial services provided by Watson Property Management (WPM) for the year ended 30th June 2013, totalling £444, and £3 for a Land Registry office copy. This would equate to £34.15 for the year for the Respondent's and the company secretarial fees would be £37 a month of which the Respondents' share would be £2.85. The company secretarial services were in addition to the services provided by Watson in the management agreement. Mr Dean explained that WPM undertook all of the duties in arranging the annual meeting of Llannerch Hall Limited and undertook all of the company secretary duties, and that they had looked to see if these services could be undertaken locally at a cheaper price but found that they could not be.

84. The Respondents' challenged the payability for such services under the lease and Mr Warren relied upon clause 3 (i)(b) and paragraph 7 of the Fourth Schedule (see paragraph 72 above) which referred to "..all other expenses." He pointed out that Llannerch Hall Limited's sole aim is to facilitate the management of Llannerch Hall and so all of these expenses are costs that are properly claimed under the service charge. Mr Warren referred to the favourable decision on this issue in Solarbeta Management Company Ltd v Akindele[25] .The Respondents also suggested that the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act") applied but did not amplify this any further.

85. **We determine that the £444 costs are payable under the service charge, that they are reasonable in amount and are reasonably incurred. We accept Mr Warren's submissions and Mr Dean's evidence upon this.** The 1999 Act gives a person who is not a party to a contract (a third party) the right to enforce a term of the contract in certain limited

[25] [2014]UKUT 416 (LC), Judge Gerald.

circumstances. The Respondents have simply referred to this Act without reference to the contract or the contract term in question, let alone the right that they say they are entitled to enforce. We appreciate that they are not lawyers, but the tribunal is unable to find, on the basis of a bare assertion of the applicability of the 1999 Act, that it is of relevance here and in any event this does not have a bearing on the reasonableness or payability of the service charges in question.

Accounts

86. The estimated amount for this period had been £500 and the actual amount £544 of which the Respondent's share was £41.85. The Applicant contended that the Respondents' were liable to pay such fees under clause 3(i) (b) and 3 (i) (b) (6) of the lease and clause 7 of the Fourth Schedule. Mr Warren explained that an accrual system was operated for the accountancy fees, that the accountant can not undertake the work and produce an invoice until the service charge year end is finished and so the fees are charged on an accrual basis. He said that the sum of £544 was derived from crediting an accrual in the sum of £480 for the previous year, charging the cost of the invoice (at page 63 AB for the year ended 30th June 2012) of £504, and charging an accrual of £520 in respect of the anticipated accountancy fees for the period. He submitted that the fees were reasonable and reasonably incurred and referred to previous LVT decisions upholding the reasonableness of the accountancy fees charged.

87. The Respondents said that they are lessees and were not required to pay towards the accounts, just the certificate which was included in the management fees. The lease at AB tab 4 page 4, in clause 3(i)(b)(1) contains the lessee's covenant to pay the amount of the service charge as shall be ascertained and certified by a certificate "signed by the Lessors' Auditors or Accountants or Managing Agents (at the discretion of the Lessors)...". A copy of the certificate for each financial year shall be supplied by the Lessors to the Lessee on written request and without charge to the Lessee (3(i) (b) (3)). The Respondents said that the fees were for unaudited accounts and vary considerably from year to year, namely in 2011 they were £220, in 2012 were £460 and in 2013 were £544. They submitted that clause 7 of the Fourth Schedule, cited at paragraph 72 above, did not specify accountants' fees. Further they argued that clause 1.10 of the management agreement (tab 4, page 100 AB)headed 'Accounts', demonstrated that the managing agents fees with regard to the accounts were included in the general management fees and that the certificate was the one signed by the managing agents within the year end accounts.

88. With regard to reasonableness, the Applicants said that they do test the market, that they have changed accountants and that the fees were reasonable. The Respondents did not have any comparable figures in support of their contention that the fees were unreasonable.

Decision on accountant's fees

89. We consider that the accountant's fees are an expense that is covered by the lease clauses cited above. The fees have been supported by evidence and the accruals system explained. The Respondents' contention that the fees have been varying does not make them unreasonable. Further the management agreement (at 1.10 on page 65, tab 4 AB) requires the agents to "arrange for preparation of statutory accounts for each accounting period...) and instructing accountants will be part of this duty. Professional fees will vary over time and in accordance with the amount of work required to be undertaken. There was no comparable evidence before us to gainsay the charges being claimed. **Accordingly we determine that the accountancy fees are reasonably incurred and reasonable in amount.**

Management fees

90. These were £2760 (inclusive of vat) of which the Respondents' share was £212.31 (or £230 and £17.69 per month respectively). The Management Agreement with Watson Property Management for this year appeared at tab 4 pages 64-69 AB, and was for a period of 12 months commencing 1st July 2012. At page 98 was the management agreement to commence 1st July 2013. The 2012 agreement clearly recorded that the fees were £2300 plus vat, payable monthly in arrears and outlined the duties of the managing agents in detail.

91. The Respondents contended that the managing agreement is a QLTA and that the agents had been in place since 2006 and were therefore misrepresenting the legislation by claiming that their agreement does not qualify as a QLTA. They also referred to regulation 3 (d)(ii) of the Service Charges (Consultation Requirements)(Wales) Regulations 2004 which, they contended, said that an agreement was not a QLTA if it was for a term exceeding five years. If found liable, they said when asked to comment on the reasonableness of the fees, that they challenged the whole amount because they have not had another manager since 2006.

92. The Applicant said that the QLTA agreement had been raised by the Respondents unsuccessfully before and that they were behaving in a vexatious manner by continuing to raise this point.

Decision on management fees

93. The management agreement is clearly not a QLTA as it is for twelve months. The fact that another new twelve month agreement is entered into each year so that the same managing agents have in practice been working at Llannerch Hall for a number of years does not alter this fact, although it appears to be a matter that the Respondents have hitherto been either unable or unwilling to appreciate. We refer to paragraphs 58 – 62 above. The Respondents have not produced any comparative or other evidence that would substantiate a challenge to the reasonableness of the management charges. **We find that the management fees are reasonable in amount and are reasonably incurred.**

94. We consider that it is important to deal with the Respondents' contention that the Service Charges (Consultation Requirements) (Wales) Regulations 2004 help them. Regulation 3(1) says that "An agreement is not a qualifying long term agreement" and then lists a number of examples, such as a contract of employment (3(1) (a). Regulation 3(1)(d) is a further example of what is not a QLTA if -

> *(i) when the agreement is entered into, there are no tenants of the building or other premises to which the agreement relates;* ***and***
>
> *(ii) the agreement is for a term not exceeding five years.*

The Respondents have only cited part of this regulation which clearly does not apply because at the time that the management agreement was entered into there were tenants of the building in any event. We have set this (and other matters) out in detail so that the Respondents will hopefully be able to see that their arguments have in many instances, been misplaced.

SERVICE CHARGES FOR THE PERIOD 1ST JULY 2013 -30TH JUNE 2014.

95. The amounts for communal cleaning of £150 and communal electricity of £271.86 that had been in dispute on the Scott Schedule were agreed and so do not require a determination.

Gardening/grounds maintenance.

96. The amount claimed was £4680 with the Respondents' share being £360.The Applicant advised that a new gardener had been appointed in May 2014 which had resulted in the monthly costs for these services reducing from £400 to £340 and that this evidenced testing of the market to ensure that the costs were reasonable. Mrs McGregor said that they were not aware that a new contractor had been appointed until receipt of the Scott Schedules and that this was a Mr Berry resident in Flat 5, but otherwise raised the same arguments as for 2013 namely that this was a QLTA and the costs were unreasonable, although she did not produce any evidence to support her contention as to unreasonableness.

97. We apply the same law and general reasoning as our decision for 2013 in this category and **determine that this contract is not a QLTA, and that the reasonable costs for this category are £4000.**

98. We record that the categories of "General Maintenance" of £3180.24 and "Health and Safety" of £300 were accepted by the Respondents and so do not require a determination.

Major Works.

99. This was the sum of £3246.60 of which the Respondents' contribution was £249.74. This was in relation to the costs of re-wiring the common areas at Llannerch Hall. The Respondents had indicated that they required to see the invoice and this was at tab 4, pages 94 and 95 AB from Martin Leeds Electrical Services Limited. This contained a full breakdown of the costs of the materials and labour and was for £2,705 plus vat of £541.10. The tribunal was concerned that the amounts payable by individual tenants had come in at just 26p under the amount that would have required consultation as qualifying works if the tenant was required to contribute more than £250[26] and questioned the applicant closely about this. Mrs McGregor argued that electrical works had previously come under the category of general maintenance and that this had been allocated instead to 'major works' as a strategy to avoid consultation and it was the whole category that is subject to the qualifying works rule.

100. Mr Warren assured the tribunal that the company would not behave in such a manner and Mrs Last said that the original estimate had come in at quite a bit under that amount and although it had come extremely close the figure was not calculated to avoid consultation requirements. Upon questioning, it was found that there had been some five or six section 20 consultations in the past eight years. Mr Warren also referred to the decision of the Court of Appeal in what he described as Phillips v Francis[27] which established that works were not to be aggregated for the purposes of consultation. He added that the categorisation of major works or maintenance was undertaken by surveyor Chris Macfarlane and that he may have thought that this was a major work (requiring consultation) but in the event the amount came in at under the amount that would have required consultation.

[26] Landlord and Tenant Act 1985 sections 20, 20ZA, Service Charges (Consultation Requirements) (Wales) Regulations 2004, regulation 6.

[27] Francis and another v Philips and another, Secretary of State for Communities and Local Government [2014] EWCA Civ 1395

101. After careful consideration of the evidence **we determine that the £3246.60 was reasonably incurred and reasonable in amount.** Although very close to the qualifying works amount of £250, we are satisfied that this was coincidental and was not done at the behest of the Applicant to avoid consultation procedures. There was no evidence before us to support such a conclusion, nor did the Respondents' produce evidence as to unreasonableness.

Buildings insurance

102. This was £4,300 of which the Respondent's share was £231.56. We were invited to consider similar arguments to that for 2012-2013 (see paragraphs 80-81 above) by both parties. We have done so and conclude **that the amount was reasonable in amount and was reasonably incurred.** There was no evidence from the Respondents to support their contention of unreasonableness.

Administration expenses

103. The amount being claimed was limited to £444 for WPM providing company secretarial services to the Applicant (of which the Respondents' share would be £34.15). Mrs McGregor indicated that she did not understand what Mr Watson meant by an accrual. Mr Watson explained that no invoice had been received for the company secretarial fees when the service charge accounts for 2013/14 had been reconciled, however as the cost was one for which it was expected that an invoice would be submitted, an accrual was made within the accounts to account for the cost in the period to which it relates. He pointed out that a credit entry was made within the 2014/15 accounts to 'contra' this accrual and to ensure that when the invoice is received then the net effect on the 2014/15 accounts is minimised. **Mrs McGregor said that if they were liable then she had no comparable figures to put before the tribunal and so would accept this. Accordingly the tribunal in any event determine that these fees of £444 are reasonably incurred and are reasonable in amount.**

Accountancy fees

104. These were estimated to be £400 but the Scott Schedule says that the actual figures were £259 of which the Respondents' contribution was £19.92 but the invoice at tab 4 page 97 AB was from Brays accountants for £384 inclusive of vat. Both parties relied upon similar representations as for the previous year (see paragraphs 86-89 above) and **accordingly we find that the £384 amount on the invoice was reasonable and reasonably incurred, applying our earlier reasoning.**

Management fees

105. The sum of £2,842 was claimed with the Respondents' contribution being £218.62. Both parties made similar representations as before with the Respondents arguing that section 20 consultation was required as this was a QLTA. For the reasons given above (see paragraphs 90-94), **we reject the Respondents' submissions and find that the management fees are reasonable in amount and are reasonably incurred.**

106. The Respondents had also claimed that the amount of £919.34 had been applied to their service charge accounts during this period for the resurfacing of the drive and that this had not been subject to section 20 consultation as it should have been. In the Respondents' bundle at pages 79-90, there were various examples of correspondence on this issue, some of it going back to 2009.In fact the drive that leads to Llannerch Hall is in separate ownership (that is, it is not owned by the Applicant) and the lessees enjoy an easement over it subject

to contributing to its upkeep and maintenance. Work was undertaken by Richard Jones of The Colonnade, Llannerch Park (which adjoins Llannerch Hall) and it was he who charged the residents of Llannerch Hall. However at page 79 of the Respondents' bundle, is a letter to them from WPM dated 12th August 2013 explaining that the amount of £11,836.55 had been paid to Mr Jones in full for the drive resurfacing work and that the Respondents' contribution to this was included in an updated statement, so it is possible to see how any potential confusion over this matter arose. Nevertheless, as Mr Warren pointed out, and we accept, this was not a cost incurred by the service charge since it related to work undertaken to property outside of the ownership of the Applicant. The Respondents are possibly mistaken therefore about the nature of this liability for which the tribunal has no jurisdiction since it was not a service charge.

SERVICE CHARGES FOR THE PERIOD 1ST JULY 2014 -30TH JUNE 2015.

107. For this year the figures for the various categories were estimates since the year end had not arrived and there were no post year end service charge accounts. In this situation, the tribunal is being asked to determine the reasonableness of the estimates provided (which impact on the payments on account requested from leaseholders). Mrs McGregor indicated that the Respondents relied on the same comments and submissions that they had made previously. However, there was no evidence before us to suggest, in the light of our earlier findings, that any of the estimates were unreasonable and **we therefore determine that all of the estimated costs in tab 3 pages 15-18 AB for 2015 are reasonable**. Of course, once the actual figures are available post year end, the appropriate adjustments and credits will be made and if there are any figures that the Respondents then consider to be unreasonable they will have the right to seek a determination upon the same from a future tribunal.

ADMINISTRATION CHARGES UNDER SCHEDULE 11 COMMONHOLD AND LEASEHOLD REFORM ACT 2002

108. A list of the variable administration charges between 30th November 2012 and 11th September 2014 appeared at tab 2 page 25 AB totalling £4663.22. Tab 5, pages 1-3 AB contained a Scott Schedule of the variable administration charges being claimed. We refer to paragraphs 31-39 above on the enforceability of the administration charges, namely that at the date of the hearing, none of the claimed charges were enforceable by reason of the failure to comply with the requirement to serve the summary of rights and obligations in accordance with the 2007 AC Regulations. We consider that, as with the service charges, it is necessary for us to decide upon the reasonableness of the charges. The Respondents indicated that all of the administration charges claimed were at issue.

Administration charges incurred between 1st July 2012 – 30th June 2013.
Legal Costs

109. There was an invoice from Clarion solicitors in Leeds dated 30th November 2012 for £2358 plus vat and a disbursement of £28.02 for special delivery, totalling £2857.62, and a further bill from Clarion dated 27th December 2012 for £600 inclusive of vat (pages 4-6, tab 5 AB). There was a breakdown of time spent from the 23rd November 2012 to 17th December 2012 which totalled £1160, although this did not tie in with the bills rendered suggesting that a fixed fee of £500 had been agreed for subsequent work plus vat, namely £600. The solicitor involved, a Mr Burkinshaw was described by Mr Warren as a grade A fee earner with an hourly rate of £255. . Mr Warren relied upon clause 3(i) (e) of the lease, (recited at paragraph 26 above) in relation to all of the administration charges claimed, namely the

costs for the purposes of or incidental to the preparation and service of a section 146 notice point.

110. Mrs McGregor disputed the hourly rate and also stated that in proceedings in the Rhyl County Court against the Applicant that she and her husband had faced a bill of over £28,000 reduced to £27,363.02. It transpired that this was in a detailed assessment of previous court costs for county court hearings up to July 2013. Mr Warren said that as at November /December 2012, the Respondents were £12-13,000 in arrears on their account. Upon making enquiries we were satisfied that these Clarion legal costs being claimed were not a duplication of costs that the Respondents had already been asked to pay in county court proceedings. However, we consider that there is, for example no explanation of what the 1 hour and 6 minutes for preparation and drafting were for on the 27th and the 29th of November 2012. In relation to advising on LVT proceedings, we determine that reasonable costs at that point in time in the absence of further evidence would be **£1850 plus vat for the two bills.** Is this sum recoverable under the lease?

111. Paragraphs 44-51 above summarise the arguments on the recoverability of the costs under the lease and recent case law. Mr Warren again indicated that under section 81 of the Housing Act 1996 that a landlord may not exercise the power of forfeiture for failure by a tenant to pay a service or an administration charge unless the LVT has finally determined the amount payable and as such, as per his written submissions on costs, "...that any action taken in order to satisfy section 81 must also be considered as being directly incidental to the preparation and service of a notice under section 146.." He considered that the costs associated with this LVT hearing were steps recoverable under the lease as being incidental to the service of a section 146 notice. However, the Respondents pointed out that in the previous proceedings both before the LVT and the county court in 2013 that they had not at any stage had a section 146 notice served upon them. This was not denied or contradicted by Mr Warren on the Applicants behalf. There was no previous or current section 146 notice before us. As Martin Rodger Q.C said in Barrett (cited at paragraph 50 above) *"It is always necessary to consider the terms of the particular indemnity covenant and whether any relevant contemplation or anticipation existed in fact in the circumstances of an individual case."*

112. We consider it surprising that, despite the history of litigation in the LVT and the county court between these same parties over the last few years that**, upon the evidence before us,** no section 146 notice has been served on the Respondents. For example, after the LVT determination in February 2013 (dealing with the amounts owing by Mr and Mrs McGregor for the service charge year ending on the 30th June 2012) no section 146 notice was served although there was subsequently county court action. This leads us to the conclusion that the proceedings that have been taken against the Respondents in the past have been to recover service and administration charge arrears rather than to seek forfeiture of the Respondents' flat. Whilst it is a simple matter to assert that steps have been taken incidental to or in contemplation of the service of a section 146 notice, we must be satisfied, as per Martin Rodger's guidance in Barrett, that this is indeed the case in practice. Mr Warren says that is the case, and of course, he would need a determination under section 81 in relation to the current matters before proceeding to seek forfeiture of the Respondents' flat in any event. Although, as per paragraph 46 above, he would not need a section 146 notice to be served if seeking forfeiture on the grounds of rent arrears. We note that in the Rhyl County Court proceedings that were transferred to us, the particulars of claim seek service and administration charge arrears and that forfeiture is not pleaded. **Therefore, upon the evidence before us, we cannot be satisfied that the legal costs have been incurred for the**

purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925, as opposed to the recovery of monies due without forfeiture, and we therefore determine that in any event they are not recoverable under the lease.

113. Mr Warren also argued in the alternative that clause 7 of the Fourth Schedule of the lease applied to the administration charges and the legal expenses, namely *"All other expenses (if any) incurred by the Lessors in and about the maintenance and proper and convenient management and running of the Mansion."* This sort of broad clause is sometimes referred to as a 'sweeping up clause.' The question for us to determine was whether this clause covers the legal expenses incurred in this case?

114. In past cases the courts have considered the lease as a whole and taken the view that if the costs sought by the Lessor should have been included in a particular part of the lease and have not been, then they ought not to be allowed and recoverable under a sweeping up clause. In Sella House Ltd v Mears [28] clause 5(4) (j) of the lease allowed the landlord to recover the costs associated with employing "a firm of Management Agents and Chartered Accountants to manage the buildings...including the cost of computing and collecting the rents and service charges" and "all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance, safety and administration of the building". The landlord argued that his legal costs related to the proper administration of the building but Taylor LJ held that "Nowhere in clause 5(4) (j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j) (i) is concerned with management. In (j) (ii) it is with maintenance, safety and administration." He referred to the need to see a clause in clear and unambiguous terms.

115. This issue has recently been considered by the Upper Tribunal (Lands Chamber) by Martin Rodger Q.C in Union Pension Trustees Limited (1) and Paul Bliss (2) and Mrs Maureen Slavin[29], a case heard on the 4th March 2015 with the decision dated 11th May 2015 and hence was promulgated whilst this decision was being prepared. In that case the relevant issue was described by Martin Rodger Q.C as "whether the language of a particular lease permits legal costs incurred in tribunal proceedings to be recovered from leaseholders as part of a service charge."[30] It was submitted on the appellants behalf in that case that the relevant paragraph of the sixth schedule to the lease was sufficiently widely drawn to allow for the service charge to include legal costs incurred in tribunal proceedings. The wording was

> *"...**any other costs and expenses reasonably and properly incurred in connection with the landlord's Property i**ncluding without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents and (b) the cost of any Accountant or Surveyor employed to determine the Total expenditure and the amount payable by the tenant hereunder." (Our emphasis)*

The Appellant's Counsel was said to have placed particular reliance on the words highlighted in bold above. Martin Rodger Q.C said that "The question to be asked in this case was therefore whether the costs which the appellants sought to recoup had been incurred 'in connection with the landlord's Property.'[31] On that point he concluded [32]that "The parties

[28] [1989]1 EGLR 65,
[29] [2015]UKUT 103 (LC)
[30] Ibid para 1.
[31] Ibid Para 56.
[32] At paragraph 66

cannot seriously be taken to have intended that all legal or other professional expenses incurred by the landlord in connection with the Building should be recoverable from all leaseholders through the service charge. For example, can it be suggested that the leaseholders would be liable for costs incurred by the appellants in contested proceedings.. over the renewal of the lease of the cafe on the ground floor, or the costs of a contentious rent review arbitration? Very clear language, absent from this lease, would be required to support such an improbable charge."

116. Martin Rodger Q.C stressed that it is necessary to look at the provisions of the lease as a whole and found that in this case the costs of managing and administering the building and the employment of professionals were covered extensively in other clauses, and that absent from those other clauses was any reference to lawyers or the costs of proceedings.[33]He said "While I agree that the absence of a specific reference to legal expenses is not fatal, provided there is other language apt to demonstrate a clear intention that such expenditure should be recoverable, when considering the scope of any general words relied on for that purpose it is necessary to have regard to other relevant provisions of the lease." Mr Rodger contrasted the explicit language of the clause that dealt with liability for professional fees and another clause, (3(9), that dealt with solicitors', counsels' and surveyors costs and fees incurred in a specific category of legal proceedings, namely those under sections 146 and 147 of the Law of Property Act 1925), with the general wording in Schedule Six highlighted in the preceding paragraph. He concluded that "the parties cannot be taken to have slipped in, under general words, an obvious category of potential expenditure which their more specific provisions appear consciously to omit."

117. Applying the guidance from the earlier decided cases to Llannerch Hall, and then considering the matter in the light of Union Pension trustees v Slavin,[34] there is no mention of legal or solicitors costs save for that in clause 3(i)(e) relating to Section 146 of the LPA. Construing the lease as a whole therefore, if the sweeping up clause were to include legal fees then this would be a case of slipping in under general words, a category of expenditure that is omitted elsewhere in the lease and **therefore the legal costs from Clarion solicitors are disallowed as against the service charge.**

118. The remainder of the administration charges at AB 5 are essentially in two categories, firstly reminder letters and matters relating to the application to the County Court, (items 3-11 on the administration charges Scott Schedule) and secondly, items relating to charges undertaken for this LVT hearing (items 12-17.

119. With regard to the first category (items 3-11), numbers 3-7 relate to reminder letters about the administration charge. The tribunal is referred to WPM's credit control policy at section 4, pages 107-113 AB. This policy refers to first, second and final reminder letters to be sent to chase up any overdue service charge payments. It is made clear for all steps under the credit control procedures that "A Notice of Tenants Rights and Obligations for Service Charge and Administration Charge" is to be enclosed (credit control policy at pages 107-109 for 2010 and 2011) . The copy of the credit control policy that appears at pages 110-113) uses slightly different terminology referring to "A Summary of Tenants Rights and Obligations for Service Charges and Administration Charges" that "will be enclosed with the reminder." This policy refers (at page 112) to the professional rates effective from 1st July 2014.

[33] Paragraph 61.
[34] As above [2015] UKUT 103 LC

120. There is no doubt that the notices and summaries of tenants rights and obligations referred to are intended to be those summaries required under section 21B of the 1985 act and Schedule 11 to the Commonhold and Leasehold Reform Act 2002, Part 1, section 4, and set out in the 2007 regulations and 2007 AC regulations discussed at length in paragraphs 13 – 39 above. As we have already established, the incorrect notices were served meaning that the administration charges were unenforceable. The charges made to the Respondents were 2 x £42 for second reminder letters, 2 x £60 for a final reminder letter, £21.60 for a notice to the Respondent's, and £150 for the administration fees involved in applying to the county court. Thereafter, county court fees of £245, £50 and £335 were incurred.

121. The Applicant has not correctly followed its own credit control procedures by serving the incorrect notices and summaries of rights and obligations. Therefore at the time of issuing the County Court claim, no administration fees were owing or enforceable. The service charges claimed too were not enforceable at the time of the court application. Paragraph 5 (1) of Schedule 11 of CLARA 2002 confers on us the jurisdiction to determine whether an administration charge is payable. Since Schedule 11 paragraph 4(1) was not complied with we determine that none of the administration fees mentioned in the preceding paragraph are payable (namely those at numbers 3-11 on the variable administration charges Scott Schedule**). The question of the reasonableness or amount of those charges therefore does not arise to be considered. The questions of the amount payable and to whom it is payable and by whom only arise if the administration charge is payable.**[35] These charges, in our view cannot be retrospectively validated by the serving of the appropriate notices under the 2007 AC regulations and in any event it would not have been reasonable to institute court proceedings when at law the amounts pleaded in those proceedings were not due or enforceable.

122. With regard to the administration fees at numbers 12-17, these are all fees incurred to comply with directions of the LVT to prepare for the hearing. The rates charged by WPM are set out at page 112, tab 4 AB. These are, with effect from the 1st July 2014 and excluding VAT, £160 per hour for senior staff, £140 per hour for junior staff (Senior Managers, Company Secretaries) and £90 per hour for time spent by support staff (Maintenance Surveyors, Accounting and Administration staff.) Mr Warren informed us that the work that he had done was at £140 per hour and that work undertaken by administrative staff collating bundles was at £90 per hour. Mrs McGregor argued that these were unreasonable rates equivalent to a solicitor. Mrs Last and Mr Dean confirmed that between them that they had dealt with every case that the company had been involved in for the last 12 years and that the most concise work and production of an LVT bundle during that time had been undertaken to prepare for this matter, and they praised WPM's conduct of the case. The tribunal too were impressed with the manner in which Mr Warren conducted his case. We consider that costs of solicitors and counsel, who are often retained in disputes of this nature that raise these many issues, would have greatly exceeded those charged by WPM. We consider that the hourly rate for Mr Warren is reasonable but that the £90 per hour for administration staff is unreasonable and that £60 per hour for this type of work would be reasonable.

123. Are these costs recoverable? The Tribunal notes that these are described as administration charges by the Applicant but we consider that in fact these charges are part of WPM's management charges and are service charges. The management agreement (tab 4 page 98-104 AB) refers to additional services (page 3 of the agreement, page 100, tab 4). These include preparing statutory notices, preparing specifications and obtaining tenders and at

[35] CLARA 2002 Schedule 11, Part 1, paragraph 5(1).

2.1.4, "Attending at courts and tribunals." At the Fourth Schedule of the lease, section 10, the Lessees' are to pay the fees and disbursements paid to any managing agents appointed by the Lessors in respect of the mansion. Therefore, the work involved in attending at the tribunal on the Applicant's behalf is covered by the management agreement and we consider that these fees are recoverable as part of the service charge.

124. We distinguish between the legal costs incurred by external solicitors that we have discussed and disallowed above and WPM's costs in relation to the tribunal. WPM are property managers and the management agreement refers separately to the instruction of solicitors[36]. We do not consider that, when WPM are preparing for and representing at the tribunal, that they are incurring external legal costs as opposed to additional management agent's costs. We distinguish between legal costs incurred on external legal professionals such as barristers or solicitors and the costs of the managing agents when involved in the legal process of tribunals. We therefore consider that these costs are recoverable subject to reasonableness.

125. Are the costs reasonable? We have addressed the matter of the hourly rates above. With regard to the individual amounts, the **£200 application fee to the LVT is reasonable** and reasonably incurred. **The £168 for the drafting of the statement and collation and preparation of documents on 21/10/2014 is reasonable** and we suspect that in fact the work took more time than is reflected in this charge. This charge and others that were in response to the LVT's directions are clearly reasonably incurred as they were in pursuance of the directions. **The £35.10 for the printing of the bundles is reasonable as is the £504 for the preparation and drafting of responses to the Respondents' Scott Schedule answers**. This would clearly have taken considerable time given the materials to be considered and the issues that were at large, likewise the **£54 and £76.14** for the collation of evidence and the printing of documents on the 26th November 2014.

126. We have not seen a full breakdown of Mr Warren's times for preparing for and attending at the LVT hearing but he was at the hearing all day and he had clearly spent considerable time in preparation given his knowledge of the materials before us. We consider his time travelling to and appearing at the hearing was reasonable and the costs were reasonably incurred and that, preparing for the hearing was incurring costs reasonably subject to full details on the amount claimed.

The Respondents' application under section 20C.

127. Section 20C of the 1985 Act enables a tenant to make an application for an order that all or any costs incurred by the landlord in connection with proceedings before the LVT are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person specified in the application.[37] The Respondents have made such an application before us and we are to make such an order on the application as we consider just and equitable in the circumstances.[38]

128. The Respondents in written submission in support of their application allege that the Applicant has consistently failed to substantiate the allegations that the Respondent is in arrears of service charge and administration charge. The Respondents also sought to rely on their own calculations in their bundle that cover the periods 2005-2014 and which they say

[36] For example at 1.14 "Legal Proceedings", tab 4 page 100 AB
[37] Section 20C(1)
[38] Section 20C (3).

reflect the true financial situation. They further highlight the statement from the Applicant of the 19th October 2014 that says that WPM are unable to provide copies of service charge demands prior to 1st July 2013 owing to limitations of the computer software used. The Respondents say that this admission proves that the Managing Agent's accounts processing system has been in previous years, and is currently, dysfunctional and not fit for purpose.

129. The Respondents also assert that the Directors of the Applicant "have demonstrated breathtaking incompetence and negligence in their duties" not only in their responsibilities as landlords but they allege various breaches of the Companies Act 2006 on the part of the Directors. The Respondents also criticise the managing agent saying that they have "exploited the above failings of the minority and the apathy of the majority shareholders' and sought to inflate their 'professional fees', 'administration fees' and therefore the overall service charges." With regard to this allegation, after careful consideration of all of the evidence in this matter we find such allegations to be groundless. There was no evidence before us that the managing agents or the company directors had behaved in the manner suggested by the Respondents. We also note that previous LVTs' (that do not bind us) have largely held the managing agent's costs and the service charge to be reasonable. We are also unable to consider the figures and spreadsheets submitted by the Respondents (from 2005-2014) where the previous years' service charges have been dealt with and adjudicated upon by previous differently constituted LVT's that have not been appealed. We can only consider the years that are the subject of the present application.

130. The Applicant in written submissions on section 20C submitted that the Applicant was justified in bringing this matter to the LVT owing to the Respondents' arrears of service charges and administration charges. They refer to the history of litigation and service charge disputes between the parties and point out that the Respondents have never issued proceedings themselves to challenge the service charge but instead have withheld payment obliging the Applicant to take action to recover the arrears. The Applicant also points out that there have been previous LVTs' with minimal success for the Respondents and that they continue to argue the same points that have already been determined by previous tribunals and describe this as 'frivolous conduct' by the Respondents. The Applicant also invites the tribunal to consider that the Applicant is a small limited company that owns the freehold of Llannerch Hall and whose sole purpose is to facilitate the management of the property and has no opportunity to generate revenues other than from the relatively low levels of ground rent. If a section 20C order was made, then this would have a significant impact on the company.

Decision on the section 20C application.

131. We are to make such order as we consider just and equitable in the circumstances. We take into account the evidence and the representations that we have heard and notwithstanding the issue with the service of the appropriate summaries of tenants' rights and obligations in Wales, we do not find that the Respondents' allegations about poor management of the property are made out. We have found the majority of the service charges to be reasonable and reasonably incurred. We note that the Respondents have raised arguments (for example on QLTAs') that have been previously decided against them and that we have also decided against them. We accept that the Applicant was acting in good faith in seeking to recover service charge arrears in initiating legal action and that the officers of the Applicant company give of their time voluntarily. **We therefore determine that it would not be just and equitable to make an order under section 20C and we decline to do so.**

Costs.

132. Paragraph 10 of Schedule 12 CLARA 2002 provides that a LVT may determine that a party to proceedings shall pay the costs incurred by another party (up to a limit of £500[39]) where that party has, in the opinion of the LVT, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings[40]. The Applicant invites us to make such an order and contends that the Respondent, by raising issues that have previously been determined against them by more than one LVT, are behaving in a vexatious fashion and causing time and expense to be incurred unreasonably. The Respondents counter that they are lay people who are seeking to do their best and to put the points that they wish to do so. As an aside, both parties confirmed at the conclusion of the hearing that they considered that they had been given the opportunity to say all that they wished to on the issues before us.

133. There is no doubt that the Respondents have raised issues such as the QLTA point that have been previously determined and that we have been obliged to consider afresh and have reached the same conclusion as our colleagues. It is certainly arguable that to continue to press such points is unreasonable. However, we noted during the hearing that the Respondents and Mrs McGregor in particular, as the lead representative, had clearly spent a lot of time researching and arguing the legal points that have been dealt with in this decision and Mrs McGregor made it clear to us how tiring and stressful she found the case. They have not succeeded on many of those points but as lay people they were entitled to make their arguments, and we did not find that they were motivated by vexatious intent but rather, sincerely believed in the points that they were putting forward. We therefore do not consider it appropriate to make a costs order against the Respondents on this occasion.

134. The Leasehold Valuation Tribunal's (fees) (Wales) Regulations 2004, at Regulation 9 provide the Tribunal with discretion to require any party to the proceedings to reimburse any other party to the proceedings the whole or part of any fees paid by him in respect of the proceedings. The Applicant was entitled to seek to pursue unpaid service charges and was obliged to seek a determination upon the reasonableness of those charges by reason of the stance taken by the Respondents. The Applicants have largely succeeded on the reasonableness of the sums claimed and **we therefore order that the Respondents are to pay the application fee of £150 and the hearing fee of £150, totalling £300 to the Applicant within 21 days of receipt of this determination.**

135. Finally, the parties will note that this is a lengthy determination and that we have taken time to set out the arguments and the reasons for our decision. We hope that this will narrow the scope for disagreement in the future.

Dated this 24th day of July 2015

Richard Payne

Chairman

[39] Paragraph 10 (3)(a) Schedule 12 CLARA 2002

[40] Paragraph 10 (2) (b) Schedule 12 CLARA 2002.