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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BA/LSC/2017/0008**
Property	:	**Various Flats at Drive House, 337 London Road, Mitcham, Surrey CR4 4BE**
Applicants	:	**(1) Mr Pravin Pankhania (Flat 1).** **(2) Mr T. Sanislas (Flat 2)** **(3) Mr Namasivayam (Flat 3)** **(4) Reverend Stephen Antwi-Boayke (Flat 7)** **(5) Landmark Properties (Flat 9)** **(6) Mrs Mithila Balakrishnan (Flat 10)**
Representatives	:	**Mr David Foulds (Solicitor)** **Mr Nirmal Kalirai MRICS (Consultant Surveyor)**
Respondent	:	**Rimex Investments Limited**
Representatives	:	**Ms Frances Ratcliffe (Counsel)** **Mr John Naylor MRICS (HNF Property Managers)** **Mr David Newman MRICS (Group Surveyor)** **Ms Natalie Levine (Solicitor) of Bude Nathan Iwanier Solicitors**
Type of Application	:	**Liability to pay and reasonableness of service and/or administration charges**
Date of Hearing		**29th and 30th January 2018**
Date of Decision		**13th February 2018**
Tribunal Members		**Judge Shaw** **Mr Peter Roberts DipArch RIBA**
Venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**

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DECISION

Introduction

1. This case involves an application dated 29th December 2016 ("the Application") made pursuant to Section 27A of the Landlord & Tenant Act 1985 ("the Act"). The property concerned comprises the various flats referred to in the heading of this Decision, all of which are situate at Drive House, 337 London Road, Mitcham, CR4 4BE ("the Property"). The Applicants are the leaseholders of Flats 1, 2, 3, 7, 9 and 10 respectively as referred to in the heading of the Decision and will be referred to throughout as "the Applicants". The freeholder of the block is a company called Rimex Investments Limited ("the Respondents"). The dispute concerns the claims for service charges for the years 2011 to 2015 inclusive. In fact there was a further claim in the application in respect of the budget for 2016/17 but the Tribunal was informed that that matter is not being pursued and so it is the service charge years between 2011 and 2015 which fall for determination.

The Hearing

2. The hearing of this matter took place before the Tribunal on the 29th and 30th January 2018. All parties attended in person with the exception of the Reverend Stephen Antwi-Boayke, the leaseholder of Flat 7, but since the Applicants' cases were in effect identical, and by agreement with the

parties, it was concluded that his case could proceed in his absence. Mr David Foulds, solicitor, appeared on behalf of all the Applicants assisted by Mr Nirmal Kalirai, a consultant surveyor who had compiled the Applicants' comments in respect of various contested charges. Ms Frances Ratcliffe of Counsel appeared on behalf of the Respondent, assisted by Mr John Naylor MRICS, the senior property manager at HNF Properties, the managing agents of the Respondent, and also by Mr David Newman, MRICS who is the in-house group surveyor of the Respondent company. Mr Paul Gough, MRICS also gave some assistance in respect of the major works dispute, to which reference will be made below.

3. The parties had prepared no less than nine full ring pull files of documents for the assistance of the Tribunal. Ms Radcliffe on behalf of the Respondent had prepared a helpful Skeleton Argument. It was agreed with the parties that the hearing would proceed upon the basis of an examination of the service charge accounts for each of the service charge years, in order that the Tribunal could determine the disputed issues in respect of each year. The parties agreed that, having made its findings on these issues, the parties themselves could carry out the arithmetic to arrive at the balance due in respect of each individual Applicant. It should be said that the claim in respect of the last named Applicant, namely Mrs Mithila Balakrishnan, is relevant only in respect of the service charge years after the date of her purchase in December 2015. Furthermore, there is an issue in respect of the first named Applicant, namely Mr Pravin Pankhania; Mr Pankhania entered into an

arrangement for the payment of the major works part of the claim against him with the Respondent. There is an issue as to whether or not this amounts to an agreement for the purposes of the Act, and this issue will be dealt with separately in the context of this Decision. It is proposed therefore to deal with each service charge year separately, to make findings in respect of the disputed items, and in addition to deal separately with the dispute over the major works, which were carried out during the service charge year 2011.

Service Charge Year 2011

4. The first item challenged for this service charge year was the sum of £102.15 claimed in the service charge account for bank charges. The Respondent's position was simply that this was a charge made to a business account by the bank and it was recoverable as part of the management of the building. The Applicants argued through Mr Foulds that the particular provision in the lease was in the nature of a sweeping up clause only, and that this was not a usual charge to see for an ordinary banking account held by the Respondent or their agents.

5. The provision in the lease appears at Part 2 of the Fourth Schedule, paragraph 6 which provides that:

   "All legal and other costs incurred by the lessor in the running and management of the building and in the enforcement of the covenants, conditions and regulations"

6. It seems to the Tribunal that this is a perfectly ordinary charge in a service charge account, that it falls squarely within the provision

providing for the recovery of costs incurred in the management of the building, and is allowable as claimed by the Respondent.

7. The next item challenged was that of £3,749.92 in respect of the insurance of the Property during this service charge year. The Applicants' challenge was essentially on the basis, not that alternative less expensive insurance could have been obtained supported by alternative quotations by them. Rather, the claim was that the sum was excessive when compared to subsequent years, for example 2013 when the insurance premium was £1,448.

8. However, there was an explanation for the low cost in certain subsequent years. It transpired after explanation by Mr Newman, the Group Surveyor, that in fact the figure claimed in this year (which was part of a group policy) was based on a correct valuation of the building of which the Property is part. The lower figures for some of the subsequent years came about because of a mistake in the valuation of the Property which resulted in the Applicants paying less. Accordingly, the Applicants did not have appropriate cover for those subsequent years, but happily no claims arose during those years. Overall therefore, the Applicants were charged perhaps less than the full liability when the latter years were taken into account. In any event the Tribunal was satisfied on the evidence of Mr Newman, that the sum claimed was correct, a reasonable sum and recoverable against the Applicants.

9. During this service charge year cleaning costs of £3,180 were incurred. There were considerable complaints from the Applicants at the hearing concerning the quality of the cleaning at the Property. There were written witness statements in the Tribunal's bundles, and the Tribunal heard oral evidence both from Mrs Balakrishnan and Mrs Stanislas. The effect of their evidence was that the common parts were never properly cleaned; in particular the Respondent's cleaner did not come to the top floor where the Applicants' flats were situate and the walkway there was untouched by her. They complained that the stairs and yard at the back or side of the building were always in a dirty condition. The Tribunal also heard evidence from Mrs Bond, the cleaner engaged by the Respondent to deal with the common parts. Mrs Bond told the Tribunal that it was correct that she did not generally clean the top floor, because whenever she went to the top floor walkway, it was already clean and tidy. Nobody took her to one side from the Applicants and asked her specifically to clean that area. However, she would attend three times a week on Mondays, Wednesdays and Fridays for about one to two hours from 7.30am. She would check and remove rubbish in the common parts. There were two sets of stairs, one she described as being in the middle and the other on the side. The Applicants, because of the position of their flats, would not have seen the middle stairs but would see the side stairs. She accepted that these common areas were left, as she described it, in a "disgusting" condition either by occupants or more probably from intruders behaving in an anti-social fashion. She did her very best to clean these areas, but one had the impression that they were fouled quickly after having been cleared.

10. In cross-examination, Mrs Balakrishnan said that she had knowledge of the Property prior to her purchase in December 2015. She said that although she didn't talk specifically to Mrs Bond, she did render complaints by phoning the managing agents and through her MP. There is indeed a letter in the supplementary bundle prepared by the Respondent at page 8 dated 25th January 2016 to the managing agents complaining, amongst other matters, of "Lack of any sweeping, cleaning ...". Mrs Sanislas said that English was not her first language and she was reluctant to take the matter up directly with Mrs Bond but that she did phone between 2014 to 2017 to the managing agents making complaints. It was pointed out to both witnesses that the Respondent's agents had kept a detailed log of phone calls of complaints of tenants and no such recording in respect of these witnesses had been made.

11. The Tribunal did not find this an easy issue to resolve. There was no evidence of any written complaint apart from the letter from the MP referred to and this was relatively late in the history of this matter, in January 2016. The application was issued later that year. The Tribunal found the evidence of Mrs Bond persuasive. It seems to the Tribunal that (and mention will be made in this regard in respect of the costs for fly tipping) this is a building which for some years has suffered from anti-social behaviour from the local community and has been a very difficult building to keep properly clean. Mrs Bond herself was the first to accept that despite her cleaning, within a short time the common parts became "disgusting". It seems to the Tribunal that there is only so much that

could have been done by the Respondent to maintain cleanliness in these parts, and that they were doing their reasonable best. There was no criticism of the quantum of the costs as such. On balance, the Tribunal accepts Mrs Bond's evidence and takes the view that reasonable steps were being taken in difficult circumstances by the Respondent, and that the costs as claimed are reasonable and payable.

12. The final item challenged for this service charge year (with the exception of the major works, to be dealt with separately) was a sum of £4,525.20 under the heading of General Repair Work. The essence of the challenge on behalf of the Applicants was that although these repairs appeared to have been documented by the Respondent and itemised, they had seen no evidence of the repairs actually having been carried out. In effect, they were putting the Respondent to proof of these repairs. The Respondent did in fact produce each and every invoice referable to the itemised repairs which were, for example, removing a broken glass and reglazing a skylight at Flat 10 (before the ownership of Mrs Balakrishnan), unblocking a waste pipe, clearing some rubbish in particular areas etc. Some of these repairs perhaps might not be immediately evident to the Applicants. In any event, the challenge was really of a very generalised kind. The works were, as indicated by the Tribunal, specifically evidenced by contractors' invoices, and on balance the Tribunal is satisfied that the works were indeed carried out, that they were reasonable works charged at reasonable sums, and the costs are recoverable and payable by the Applicants.

Service Charge Year 2012

13. During this service charge year, the claims for cleaning, insurance and repairs and maintenance are all challenged on the same basis as the preceding year and are allowed as being recoverable from the Applicants, for the same reasons indicated in the preceding year by the Tribunal.

14. A sum of £570 by way of accountancy fee was challenged by the Applicants as being excessive. The Applicants pointed out that the following year the fee is £264. The explanation given on behalf of the Respondent was that there were some high value invoices to be examined during this year which had spilled over from the major works the previous year. The Tribunal did not really consider that that was a full explanation for a significant increase in the fee. Accordingly the Tribunal allows a sum of £350 for the accountancy work for this year, reducing the £570 claimed.

15. The management fee in respect of the building works in the sum of £3,744.22 was challenged by the Applicants. They queried the need for this fee when there was already a management fee charge of £3,720 for that year (which was not challenged). The explanation from the Respondent was that the separate fee was for the management of the major works, which charge had fallen into the following accounting year and was charged at the rate 2.5% of the cost of the works. This seems to the Tribunal to be reasonable and in accordance with the usual practice. It is recoverable and allowed by the Tribunal.

Service Charge Year 2013

16. The items challenged during previous years were also raised in respect of this year (cleaning, insurance, repairs and maintenance, bank charges) and all are allowed for the reasons previously indicated.

17. The particular items of contention in this year were firstly the management fee of £3,720. The quantum was not seriously in dispute (it amounts to £155 per unit plus VAT, and the Tribunal doubts that any agent would take on the project for significantly less than that sum). The challenge was more in the nature of whether or not this fee was a long term qualifying agreement under the provisions of the Act which would have required consultation. As it transpired, the Respondent informed the Tribunal that in fact it was in the nature of a "rollover" contract and therefore the provisions of the Act do not apply.

18. The other major item of contention was the sum of £3,075 in respect of refuse removal. There were nearly 20 separate items of cost, each of them in reasonable sums, so it seems to the Tribunal, in relation to removal of rubbish and other fly tipping refuse from the site. The essential complaint by the Applicants was that the sums in themselves individually were not disproportionate, but that some initiative and foresight to counter the problem should have been exercised by the managing agents. Given the high overall cost for the year, it was suggested that CCTV should have been used in order to reduce the incidence of fly tipping. Alternatively, some other more lateral thinking should have been applied to avoid these overall high costs building up.

The Tribunal heard direct evidence from Mr Naylor, the principal of the managing agents, who referred to his statement at Volume E page 1 in the documents. He said that the building was *"a challenging block"* and that to the extent that they could, the agents were trying to save the Applicants money. They were reluctant to take on high costs given that there had been difficulties in recovering the more regular service charges from the Applicants. He had looked into the possibility of gates and fencing to discourage such fly tipping, but the overall cost would have come to something in the order of between £15-25,000, which was not a level of expenditure he expected to be able to recover from the Applicants. He was perfectly open to installing a CCTV unit; indeed, he said that CCTV signs had already put up as a possible discouragement. However, CCTV was not a perfect or guaranteed answer to the problem because, so he told the Tribunal, what is required is clear evidence to take to the local authority to be used for prosecution, and such evidence does not always emanate in a sufficiently clear way from CCTV. Instead, what the agents had done, when these costs recurred in subsequent years (as to which see later) was to go to a local building development, which was being used by squatters, and intruders from which were suspected as having been guilty of most of the major acts of fly tipping. There was a meeting, and after the meeting had taken place the problem very nearly stopped. As a result, for significantly less than the charges that would have been incurred by taking more drastic methods, the problem had been brought under control.

19. It was to some extent significant that this specific issue was not raised by the Applicants, or at any rate there was no clear evidence in this regard, until approximately 2016. When raised, the Respondent's agents did in fact take proper steps to do what they could, given the difficulties referred to above, to deal with the situation.

20. Mr Naylor's evidence was to the effect that his firm would have been dammed if they had acted, and dammed if they had not. They did clear away the rubbish from the site in order to keep it appropriately clean, but there were costs to pay for that. If they had installed gates and fencing, the cost would have been even greater and more difficult for the Applicants to bear. On balance, the Tribunal takes the view that the Respondent, through its agents, did the best it could with a difficult situation which has now been brought under control. The sum claimed seems to the Tribunal to be reasonable and is recoverable.

Service Charge Year 2014

21. As in previous years, the costs for cleaning, refuse removal, repairs and maintenance and bank charges were challenged in this year; the sums claimed are allowed as reasonable and recoverable for the self-same reasons as provided above in respect of previous years.

22. A further significant sum of £2,280 in respect of the cost of drainage was also challenged by the Applicants. The figures are itemised in the service charge account and amount to three separate charges, all of them in respect of unblocking various drains at the Property. There was no

affirmative contrary evidence from the Applicants and the challenge was in the nature of a generalised assertion that they had not been aware of such blockages. The work is specifically itemised and evidenced in invoices supplied by the Respondent and the balance of the evidence in the view of the Tribunal is in favour of the Respondent. These sums are allowed in full in the sum claimed as being reasonable and recoverable.

23. The Applicants pointed out through Mr Foulds that there was a particular sum of £1807.80 which was not in this year challenged but which would be relevant in respect of the subsequent year. The charge was in respect of the cost of a report carried out by a company named ISIS, in respect of loose rendering at the Property. The Tribunal was told that the company had also removed certain loose rendering when inspecting and carrying out the report. In the circumstances, further reference will be made to this work in respect of the service charges in the following year.

24. There were two further charges under the heading "Exceptional Expenditure". The particular items concerned are two separate invoices for £1500 and £783 respectively. The advice is in respect of some detailed calculations and schedules which were presented to solicitors for guidance in respect of calculating contributions to be divided between the residential lessees and the commercial lessees at the building of which the Property forms part. The canopy dividing the shops from the flats was and is of joint use and some consideration had to be given as to how to divide these costs and also some costs in relation to major works

which does not seem to the Tribunal to be unreasonable. There was also a need for some guidance about the Section 20 Notices which sometimes do require some legal input to preclude problems for the future. Whilst the sums concerned do seem to the Tribunal to be somewhat at the upper end of the scale, they are not beyond the appropriate scale and in the circumstances are allowed by the Tribunal.

Service Charge Year 2015

25. During this year, once again similar items of expenditure were challenged, that is to say cleaning, refuse removal, the general repairs and maintenance and bank charges. For the same reasons as indicated in previous years, these sums seem to the Tribunal to be both reasonably incurred and reasonable in quantum and are allowable as charged. The Applicants furthermore challenged expenditure in the sum of £1426 relating to pest control. There were four invoices which have been properly documented. The challenge seems to be from Mr Kalirai to be on the basis that he had an associate who could have done similar work for £850. He also criticised the fact that monthly checks have been made during that year rather than quarterly and overall said that the appropriate figure was £850. There was no documentation or any alternative evidence to support this. The Tribunal takes the view that the decision to eradicate so far as was possible the pest infestation was reasonable on the part of the Respondent and that the sums claimed, properly evidenced, are in addition reasonable and payable.

26. The other specific sums challenged this year were in respect of works to the render of the building of which the Property forms part and some advice obtained under the heading of Major Works and also relating to render but also the canopy works, to which reference has been made in the preceding year. Dealing first with the two items of £10,749.60 and £2,599.20 in respect of emergency works to the render and the erection of scaffolding for the render works, the complaint on the part of the Applicants was that no works were actually carried out at this time. Upon enquiry from Mr Kalirai to a woman called Frankie at the contractors, he told the Tribunal that Frankie had informed him that the whole of this cost was in respect of scaffolding and none referable to works. Although it was not specifically articulated, the challenge seemed to be that this was a high cost for scaffolding, and that either the rendering work should have been done whilst the scaffolding was up, or that the scaffolding should have been brought down sooner or perhaps not erected at all if the rendering work was not to be carried out. The evidence from the Respondent was that although some minor work to remove obviously dangerous loose render may have been carried out, it was agreed that substantially this cost was for scaffolding which was erected during the period of October 2014 to March 2015. Apparently it had been intended that some works would be carried out to the render as part of some major works, but it transpired that the cost was significant and a decision was made to defer those works until the major works plan had been approved, either by the Applicants or by determination from a Tribunal. The methodology therefore adopted to protect the building and more importantly leaseholders, tenants and passers-by, was to erect

and keep this scaffolding to obstruct falling parts and maintain the building as best as possible in the shorter term. Mr Naylor told the Tribunal that this methodology is quite commonly used in such circumstances and that evidence was supported by Mr Paul Gough MRICS, a chartered building surveyor employed by Calford Seaden LLP. Both of them said that some limited use of netting can be used but that the safest method is to prop up the fascia with scaffolding. There was no specific rebuttal of this evidence so far as can be ascertained by the Tribunal by Mr Kalirai, but even if there had been, the Tribunal is satisfied on the weight of the evidence that this is a reasonable explanation and that the costing is itself also reasonable. In the circumstances both of these invoices are allowed.

27. Two other items of expenditure were challenged under the heading Exceptional Works "Major Works". One was the advice obtained in respect of the canopy works in the sum of £2,256; the other was for advice received in respect of roof and render survey and report production. The Applicants queried whether there was some duplication with the invoice in respect of a render survey for the previous year and also whether either of these pieces of advice was necessary, given that the Respondent did have professional managing agents, for which the leaseholders pay a management fee. The explanation from the Respondent was that the two items of expenditure are for separate matters. One related to the rendering and the other to canopy works. The invoice in respect of the canopy works was from Calford Seaden and was dated February 2015. Those works were not straightforward. They

involved both the shops and the flats above and advice was needed as to how specifically to carry out that work and was appropriate advice in all the circumstances. The other invoice came about because, as understood by the Tribunal, there was a transfer of personnel from the firm Calford Seaden to a firm called Cirpro. In order to maintain continuity of personnel which would in the long term save rather than increase costs, the Respondent moved so as to retain the same personnel and some further reporting was necessary in this context. The explanation seemed credible to the Tribunal, the expenditure is specifically documented at Bundle I Tab E page 67 and page 68. These sums are allowed as being both reasonably incurred and reasonable in quantum.

The 2011 Major Works

28. In the service charge accounts for 2011 there is a total sum of £166,444.05 in respect of major building works. These are works which were challenged in the context of this application by the Applicants. As it transpires, from the description of the works in the accounts, it appears that much if not most of the work involves refurbishment work to Flats 1, 2, 3, 4 and 5.

29. There is considerable documentation in the bundle in respect of these works, including the tender specification, the consultation documents and detailed schedules.

30. So far as the Applicants are concerned, a very detailed schedule has been prepared which appears in the supplemental bundle prepared (in fact by the Respondent) and appearing at pages 10 to 53. As understood by the Tribunal, this schedule follows the specification of works utilised by the Respondent in the major works. For each challenged item, the Applicants have identified the sum claimed and made various comments in relation to these challenged items. At the two day hearing booked for this case, Mr Foulds very sensibly agreed to deal essentially with those complaints that fell under two main headings and really to limit himself to items initially of £1,000 but then £2,000 in cost. The two headings of challenge were that first, these works were carried out in the absence of a building survey, which one would have expected in relation to works of this size. His second point was that if it was reasonable to carry out these works, then the costing and methodology were challenged.

31. The evidence to marshal these challenges came essentially from Mr Kalirai, the consultant surveyor engaged by the Applicants. Mr Kalirai had not had the benefit of seeing the building in 2011 and was brought into this case during 2016 for the purposes of the application. He had had to work largely from photographs although he told the Tribunal that he did at one stage mount a ladder in order to have a view of the roof, although he did not go up onto the roof. No disrespect is intended to Mr Kalirai in respect of his evidence, and he was undoubtedly doing the best that he could with the material before him. However, the evidence which the Tribunal heard on the second day of this case amounted in large part, if not exclusively, to Mr Kalirai

querying whether particular work may or may not have been necessary, and thereafter in many cases indicating that he had other contractors, often sole proprietors, who could have done the work at a lesser price. Not a single document was produced by Mr Kalirai to support these estimated lower costs, there were no witness statements from the contractors concerned, and no appearances from such contractors. The Tribunal in the circumstances, was able to give relatively little weight to the evidence given by Mr Kalirai, notwithstanding his undoubted experience and background within the building trade, and his efforts methodically to give a critique of these major works.

32. The Tribunal is satisfied that the work was both necessary and reasonably costed, on the evidence before it for the following reasons given on behalf of the Respondent and some additional reasons emanating from the Tribunal;

    (i) The major works were subject to the usual consultation process and with the exception of the first named Applicant, nobody submitted any objection at all to the Respondent. Even Mr Pankhania's objection was more related to a back addition, than to the matters challenged on behalf of the Applicants at the hearing.

    (ii) The works were competitively tendered, and the Respondent elected to proceed with the lowest tender.

    (iii) The works were undertaken approximately six years ago. To the extent that the Applicants now claim that the works were of poor quality, this does seem inherently implausible given the supervision of those works at the time and the passage of time which has now

taken place, rendering it impossible to make a reliable finding as to whether or not the works were carried out to a reasonable or alternatively a poor standard.

(iv) These works were heavily supervised by the contract administrator, CalfordSeaden, by Mr David Newman MRICS, the group surveyor of the Respondent, in conjunction with the Respondent's managing agents and with some further input from Mr Paul Gough MRICS from whom the Tribunal heard evidence.

(v) In order to mount a challenge to such works six years after the event, it does seem to the Tribunal that it is incumbent upon the Applicants to have produced proper expert evidence supported by an appropriate report and alternative quotations from contractors dealing both with the appropriateness and the costing of the works. None of this has been forthcoming from the Applicants and indeed a telling and impressively candid concession was made by Mr Kalirai in cross-examination when he told the Tribunal that:

(a) *"I do accept that they (the Respondent) accepted the most reasonable cost as a whole; and*

(b) *The picking of individual items out of a detailed schedule wholly defeats the purpose of competitive tendering. I accept that the Respondent was under an obligation to obtain the most reasonable price which may not have been the cheapest price."*

33. It does seem in relation to this last mentioned matter, that Mr Kalirai accepted that the exercise of picking individual items out of the lowest

price costing is not necessarily helpful – and certainly is not especially helpful in the absence of supportive evidence.

34. For all these reasons, the Tribunal is satisfied that the sum referable to major costs in the 2011 accounts is both reasonably incurred and at reasonable cost and should be allowed as claimed.

Alleged Agreement between Mr Pankhania and the Respondent

35. An issue arose at the hearing as to whether or not Mr Pankhania, the first named Applicant had reached agreement with the Respondent as to the cost and recoverability of the major works. The position was that it was agreed that there had been a meeting between Mr Pankhania and Mr Naylor of the Respondent's agents in July 2012. After that meeting Mr Pankhania paid off in instalments the contribution referable to his flat for the major works. Mr Pankhania told the Tribunal that he did so under protest without agreeing that the sums were reasonable and recoverable but in order to dispose of the case which had been brought in the County Court against him for the sums owing by him. He said he agreed to pay it but not that he agreed that the costs were reasonable. Mr Naylor said that the purpose of the meeting was to resolve the issue which had arisen concerning Mr Pankhania's contribution to these costs. He said that at the end of the meeting Mr Pankhania agreed that he would pay the sum by way of instalments and Mr Naylor had the impression that the matter had been agreed.

36. The question really is (as Mr Foulds pointed out) "**What** was agreed?" There are cases in which a payment of a disputed sum over a period of time, without other explanation, can justify a Tribunal concluding that in fact agreement has been reached. The matter is relevant of course because, under the Act, if agreement has been reached in respect of certain costs, then the Tribunal has no jurisdiction to examine their reasonableness. In the light of the Tribunal's findings as to the full recoverability of these costs in any event, this issue between the parties has become academic. Had the Tribunal had to make a meaningful finding upon the matter, it would have concluded that the evidence stopped short of the Tribunal being satisfied that Mr Pankhania had given up all his rights to challenge these costs. The agreement on the material before the Tribunal seems to have been that he agreed to pay the sum outstanding by way of instalments but the Act specifically provides that the payment of itself is not agreement of the costs. As indicated, whilst payment of costs over a period of time can amount to the implication of an agreement, there is in fact an explanation in this case, which explanation is that Mr Pankhania was under pressure at the time because of the illness of his wife as described to the Tribunal, and he did not have the enthusiasm or energy to engage in a contest with the Respondent at that time. It seems to the Tribunal that in order safely to be able to conclude that there was a positive agreement as to reasonableness, there would have had to be some clear evidence in this regard, which evidence is lacking in this case. However, as already indicated, the matter is of academic interest only, because the Tribunal has determined that the full sum is recoverable in any event.

37. The only other matter which arose at the close of the case was the question of whether or not the Tribunal should make a Section 20C Order in respect of the costs in this case. The matter was left on the basis that after the Tribunal had issued its Decision, the parties would consider whether any such application should be made, most likely in writing. It is a matter for the parties, and in particular the Applicants, as to whether or not such an application is to be pursued. The Tribunal's findings which are set out in this Decision are substantially in favour of the Respondent, and accordingly such an application for costs by the Applicants may present a challenging task, but the Tribunal's mind remains open on the matter and the parties no doubt will consider their respective positions.

38. **Conclusion**

The Tribunal's findings on the contested items are as set out in the Decision above, and the adjustments to the parties' respective accounts should be made to take into account those findings.

JUDGE SHAW

13th February 2018