

Unrepresented Litigants in Modern Courts – Ordeal by Combat

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Self-represented litigants in England and Wales, as well as many other countries, form a large heterogeneous proportion of the population. In contrast, the justice system provides for the whole population a standard platform that cannot accommodate the variability in education, ability, personal characteristics and circumstances. In addition, there are high barriers to access, including high costs, excessive formalities and unclear interpretation of the law. These barriers are prevalent even in venues of justice designed to be public-friendly. To provide justice for all, the legal system needs to assimilate latest scientific findings on individual differences and minimise barriers to access.

INTRODUCTION

The number of cases involving self-represented litigants (SRL) (or litigants in person (LiP)) has increased significantly in the last few years (Lord Chief Justice's (LCJ) Report, 2015; House of Commons Justice Committee, 2015). The precise estimates are not available, because there

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is an 'acute lack of data on current numbers of litigants in person' (Judiciary of England and Wales, 2013). One large study, conducted between spring 2002 and summer 2003 (when numbers of LiPs were significantly lower), found that 85% of county court defendants and 75% of litigants in adoption cases were unrepresented (Moorhead & Sefton, 2005). Later data show that in all family cases, approximately 80% had at least one LiP (Tinder et al. 2014). A further substantial increase in numbers of LiPs followed the April 2013 justice reforms, when the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 significantly reduced legal aid. According to Government figures, 623,000 of the 1 million people who benefited from Legal Aid annually were forecasted to be denied access to this aid from April 1, 2013 (Zuckerman, 2014).

There is growing theoretical literature in relation to unrepresented litigants. For example, in a recent book 'Injustice in Person: The Right to Self-Representation', the author proposes to restrict the right of the unrepresented to bring matters to courts or tribunals as they pose significant burden on the system (Assy, 2015; Assy, 2011). It is proposed that those of lower ability be denied access to courts unless they can hire legal representation, with a high threshold of ability: those able to conduct their case competently (Assy, 2011). The author recognises individual differences, but takes a utilitarian approach - that those of lower ability should not be allowed to burden the system. The proposal has received some critical responses from legal scholars. For example, one review suggests that the author removed the messy empirical realities from the analysis and that doing so is unsafe (Toy-Cronin, 2017).

This paper provides analysis of the current inflexible features of the justice system for the unrepresented in the light of: the large proportion of unrepresented litigants; the vast variability in terms of ability, education, personality characteristics and personal circumstances; and recent scientific findings on individual differences within a population.

This paper focuses on the situation in the UK. However, it is relevant to other justice systems, and in particular the US justice system, which shares similar issues. In the US, there are similar increases in the number of LiP (or SRL). For example, the Center on Court Access to Justice for All reports that 90% of tenants did not have a lawyer, while the vast majority of landlords did (Center on Court Access to Justice for All, web). The National Centre for State Courts emphasises that one of the biggest challenges in the US court system is the increasing number of SRL (NCSC, web). Similarly, Center for American Progress reports a high ratio (1 to 6415) of free legal services attorneys available and the number of low-income Americans who need one (Center for American Progress, web).

The costs of legal representation are also high. For example, for Automobile Tort Cases, the costs range from \$18,000 to \$109,000 per party (National Center for State Courts, 2013).

To highlight the existing problems that LiPs face, the paper focusses on one venue of justice that was established to be particularly LiP friendly – the First-tier Tribunal (Property Chamber) 'FTT'. The FTT has an enormous range of work (Powell, 2013) and is made up of a significant proportion of LiPs (Tribunal Procedure Committee, 2013). It deals with about 160 different property, landlord and tenant, and housing jurisdictions; and handles around 11000 cases per year (Senior President of Tribunals 2015). As of October 2017, the FTT has 15 judges who are members of the judiciary (Courts and Tribunals Judiciary, judges); and around 300 judges who are not members of the judiciary, including around 100 lawyers, 100 non-lawyer experts (e.g. surveyors) and 100 lay members (Powell, 2013). The FTT's objective is to provide a more informal environment than courts, avoiding unnecessary formality and seeking flexibility in the proceedings (Tribunal Rules, 2013). Cases are judged by a panel which includes a qualified lawyer, a non-lawyer expert and a lay member, who are referred to as 'madam' or 'sir'. There are no dress requirements, and cases are dealt with in a discussion manner. This paper illustrates some of the main issues with a detailed example case ('DE') involving LiPs at the FTT (in Box 1).

A HETEROGENEOUS POPULATION ON A RIGID PLATFORM OF JUSTICE

The justice system is described by Courts and Tribunals Judiciary as resting on '900 years of legal evolution' (Judiciary.gov.uk). 'Evolution' is generally understood to mean adaptation to environment and to changes in the environment. Assuming that the true purpose of the legal system is to provide justice to all people, evolution of the legal system should bring the system closer to the fulfilment of this purpose. However, as stated in the Lord Chief Justice's (LCJ) Report 2015, 'our system of justice has become unaffordable to most' (LCJ, 2015). This was the case even before the legal aid cuts of 2013, when those who could not afford legal services and for whom no legal aid was available comprised the larger part of the population in England and Wales (Civil Justice Council, 2011). With further barriers to access, the situation today is that only a small proportion of the population can afford the justice system. In addition to the high costs of legal representation, recent increases in court fees (by as much as 600%) have further reduced access to justice (Parliament.uk, 2017). For example,

between 2012 and 2013 there was around a 70% decrease in employment cases after the increase in tribunal fees; followed by a further decrease of around 72% per quarter from October 2013 to June 2014; and 67% per quarter from October 2014 to June 2015 (for claims brought by individuals) (Ministry of Justice, 2013; The Bach Commission, 2017).

The Employment Tribunal (ET) fee increases (e.g. £1,200 for single-claimant actions), following The Employment Tribunals and the Employment Appeals Tribunal Fees Order (SI 2013/ 1893), was contested by the trade union. The Supreme Court recently ruled that the Lord Chancellor cannot lawfully impose whatever fees he chooses in to order make resources for the justice system; and that the Fees Order will be *ultra vires* 'if there is a risk that persons will effectively be prevented from having access to justice' (R v Lord Chancellor 2017). This is a positive outcome. However, most of this judgement is specific to ET fees, and the impact on other areas is not clear. Fees throughout the system remain high. For example, The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015, since it came into force, increased fees by as much as 622% for some claims (Bar Council, web).

These facts show that the fruits of the 'internal' evolution of the legal system over the 900 years are out of reach of the majority of the population. As put by Baroness Gardner of Parkes, rights are meaningless unless the system provide individuals with the tools to enforce them (Parliament.uk, 2017). The fact that most people are not able to afford the system, means they can only 'see' the platform of justice, but cannot use it. This situation is reminiscent of the time of the Magna Carta (1215), when the 'no one' in 'To no one will we sell, to no one deny or delay right or justice' applied only to a selection of the population. Similarly, in '...all men are created equal' in the US Declaration of Independence (1776), 'men' excluded a significant proportion of people, e.g. those of colour.

Individual differences and justice

The unrepresented are, on average, less knowledgeable and skilled in conducting litigation than lawyers. In addition, among the unrepresented - those of greater cognitive ability, education level, or possessing more desirable personality traits may be able to self-represent more efficiently, and cope better with legal jargon and procedures. In contrast, those of lower ability, education level and with certain personality characteristics (e.g. highly anxious) are disadvantaged by the existing one-size-fits-all system (e.g. same high prices, same complex procedure, expectations for certain behaviour).

Recently, materials on dealing with vulnerable witnesses and defendants have been made available to advocates. For example, the Inns of Court College of Advocacy (ICCA) provides materials on dealing with a range of categories of ‘vulnerable groups’, including children, people with learning disabilities, and people with mental disorders (ICCA, web). The ICCA guidance materials are a positive step towards greater access to justice. However, the available materials conceptualise ‘vulnerability’ as distinct categories, such as specific diagnoses (e.g. Autism). This is inconsistent with the latest understanding of disability as representing a low end on a continuum of ability, with diagnostic cut-offs being arbitrary points on the continuum (Kovas et al. 2016). For example, autism today is most commonly referred to as Autistic Spectrum Disorder, in recognition that it is not a distinct category, but a spectrum. Moreover, autistic traits are continuously distributed in a population. This means that a person, although not diagnosed with autism, can have a number of related characteristics, such as impairment in social communication and lower intelligence. Similarly, although learning disabilities (e.g. dyslexia and specific language impairment) represent diagnostic categories, they also represent the low end of continuously distributed traits (e.g. reading, spelling, verbal ability). Therefore, someone without a learning disability diagnosis can suffer from many associated problems (Plomin et al. 2009). The prevalence of diagnosed learning disabilities, emotional problems, personality disorders and behavioural problems is high (Kovas et al. eds. 2016). For example, the prevalence of most diagnosed disorders ranges from about 1% to more than 30% (Bandelow & Michaelis, 2015). These already high numbers do not include people who are not diagnosed but suffering from related problems – making the numbers of people with vulnerability extremely high.

These recent findings as well as other interdisciplinary scientific advances, described in this section, highlight the need for advocates and judges to acquire a good understanding of individual differences and their origins. Understanding the sources of individual differences will form a foundation for removing misconceptions, preconceptions and judgemental attitudes within the legal system. In particular, it will contribute to changing erroneous views about control people have over their personal characteristics and circumstances. This in turn will reduce conscious or unconscious biases and blaming attitudes, so that personal characteristics of an individual (e.g. rude impulsive behaviour) do not affect the outcome of their case.

Much relevant information on the origins of individual differences comes from fast evolving genetic science. The mapping of the human genome, described by Bill Clinton as ‘the most important, most wondrous map ever produced by humankind’ (Genome.gov), has already led to

changes in conceptualising health, disease, personality and intelligence (Knopik et al. 2016).

Individual differences in intelligence (*general cognitive ability* or *g*), for example, have been shown to be the best predictors of life outcomes such as education, occupation, mental and physical health and illness, and longevity (Plomin & Deary, 2014). Therefore, it follows that individual differences in intelligence have implications for outcomes in litigation. Research has shown that intelligence in adulthood is highly heritable, with up to 80% of differences in intelligence among adults explained by differences in their genetic makeup (Plomin & Deary, 2014; Nature Editorial, 2017).

The powerful role of genetic differences in differences in people's behaviour and educational success has been emphasised by a number of large scale studies (e.g., Rimfeld et al. 2016; Rimfeld et al. 2017; Selzam et al. 2016; Malanchini et al. 2017; Krapohl et al. 2014). In fact, this research has shown that individual differences in most human characteristics stem from multiple genetic and environmental factors that together contribute to the differences in neural, hormonal, cognitive, emotional and other processes (Kovas et al eds. 2016). For example, genes contribute to intelligence and academic success via different pathways, including via their influences on personality, motivation, health and psychological wellbeing (Krapohl et al. 2014; Rimfeld et al. 2017).

Research has also suggested that the effects of genetic factors can depend on environments – genes expressing differently in different environments (Kovas et al eds. 2016). For example, environmental disadvantage, such as economic deprivation or residential segregation, can suppress positive gene expression (Selita & Kovas, in press). Moreover, people often create, choose, modify and perceive their environment differently – based on their genetic predispositions (e.g. Rimfeld et al. 2016). Over generations, the disadvantages often increase through a number of processes. For example, assortative mating (selecting a spouse similar to self) for intelligence is 40% (Plomin & Deary, 2014), which in turn contributes to the genetically enhanced intelligence gap across families.

Environmental factors also play a crucial role in individual differences. For example, there is clear evidence that income and wealth inequality (now at high levels (Credit Suisse, 2016; The World Bank)) are related to educational investment gaps. In turn, this contributes to the performance gaps, leading to greater income and wealth disparities (Selita & Kovas, in press). This creates a vicious cycle for those starting disadvantaged or becoming disadvantaged due to circumstances.

The legal system is organised on the basis that there is free will and that we have control over our actions, and therefore should be punished accordingly, unless the person is, for example, deemed to have diminished capacity. This paper does not consider the relationship between free will and punishment. It instead discusses issues of control, as they relate to access to justice, procedures and attitudes LiPs face in the justice system. It is just harder (and sometimes impossible) for some people to do something or behave in a certain way than it is for others. The system has to take into account the partial or complete limitations that our genes and environments impose on our personal characteristics. Indeed, providing flexibility to accommodate individual differences is a prerequisite to justice.

Rigid barriers to access to justice

Beyond high costs (see above), there are a number of inflexible features of the justice system, which mainly affect the unrepresented. These include, unnecessary court formalities; judges' attitude towards LiPs; inaccessible interpretation of the law; and inaccessible procedural information. Difficulties the unrepresented face in courts have been recognised by the Judiciary to be beyond those of lack of knowledge of the law and procedure, including that most LiPs 'are stressed and worried, operating in an alien environment in what for them is a foreign language'; experience 'feelings of fear and bewilderment, especially if appearing against a represented party' (Courts and Tribunals Judiciary, 2013, p1); and find experience with courts intimidating with negative impacts on them, including health (Judicial Studies Board, 2009). Many of these issues are likely to stem from unnecessary court formalities.

Formalities during proceedings

Often, unimportant-for-justice issues cause anxiety to LiPs and occupy the attention of the court, distracting from the substance of the case. These issues include dress code, manner of addressing the court, requirements of written submissions and other formalities. For example, in a guide to writing skeleton arguments, two Queen's Counsels quote judges commenting on a 35-page skeleton argument as 'This is not a skeleton, it's a fat stiff'; and in relation to coffee spots on the papers as 'disgusting to touch' (The Honourable Society of Gray's Inn, 2004). Considering the huge power judges wield over society (Judicial Studies Board, 2009; Civil Justice Council, 2011), such reactions on secondary, unimportant-for-justice issues would generally make the court environment an unpleasant place for

the unrepresented. Dress requirements, such as gowns for barristers, further increase the pressure.

In addition, proceedings are conducted in a language alien to LiPs (Courts and Tribunals Judiciary, 2013), also known as legalese. Legalese continues to be a common practice despite it having received much criticism. Legalese is evident in judgements, legislation, procedural rules and contracts, which are usually written in long convoluted sentences (Butt, 2012). As expressed by Felsenfeld: 'Lawyers have two common failings. One is that they do not write well and the other is that they think they do' (Felsenfeld, 1982). Legalese causes a number of issues for justice. First, it makes key information (e.g. case law, legislation, contracts) inaccessible to most people. Second, it contributes to inconsistencies in the interpretation of cases, legislation or documents - often judges being able to pick between a number of interpretations. Third, it may require more time for LiPs to understand, and therefore is costlier to deal with. Moreover, it can lead to important procedural information being inaccessible. Considering the justice system (lawyers, judges etc.) is there to serve the public/society, it is paradoxical that it harbours a language which is 'foreign' (Courts and Tribunals Judiciary, 2013) to the larger proportion of society.

Other unnecessary barriers include the amount and format of paperwork to be submitted. For example, in a relatively simple case (see DE case in Box 1), in a 'public friendly' venue, the FTT backed the represented parties' complaint about bundles being hand paginated by LiPs instead of electronically paginated. In the same case, 17 large lever arch bundles of documents had to be prepared by the unrepresented and submitted to the court (4 copies of each document) and to the opponents in hard copy. The amount of paperwork would have been much greater had the Tenants included all the documents the represented landlords requested to be included in the bundles, including copies of 12 identical lease agreements (2 for each flat). This procedure not only presents difficulties for the unrepresented, but also leads to a waste of costs and damage to the environment. For example, if cases at the FTT require, on average, similar amounts of documents as the DE case, the amount of hardcopy documentation required per year would be around 115,500,000 pages, for the FTT only.

Such formalities may also be part of the reason why the unrepresented leave the courtroom confused, not knowing what is to happen next with their case (Civil Justice Council, 2011). The extent of this confusion is exemplified by a remark from an unrepresented tenant who has just lost the case (see DE case), who asked the Tribunal - 'when should we expect the overcharges back?'

Excessive formalities do not have to be features of court proceedings. For example, although dress codes apply to advocates in courts in most

countries, there has been a trend of adjustment of dress codes around the world, including removing excessive features such as long robes and wigs, and abandoning the practice of using expressions such as my Lord and my Lady (Haque, 2012). Similarly, there is a trend towards switching to electronic submissions. For example, the UK Supreme Court, as stated in its practice directions (PD 14), ‘intends to take full advantage of the opportunities offered by modern information technology’ and accommodates electronic submissions (supremecourt.uk). However, even in the most technologically advanced jurisdictions, very few courts are reported to be 100% paperless from start to end of proceedings (Mentis Technology Solutions, 2012) and some do not accept electronic submissions. For example, some lower courts in England and Wales (e.g. the FTT) do not accommodate electronic submission. In the digital era we now live in, it is hard, however, to justify requiring parties to submit documents in hard copy to courts.

There are also several affective and cognitive processes described in scientific research that explain why the unrepresented may be disadvantaged by the way proceedings are conducted. For example, anxiety negatively affects cognitive resources, and in particular, working memory (e.g. Eysenck & Calvo, 1992; Eysenck et al. 2007). As formalities during proceedings increase anxiety in the unrepresented, it reduces their ability to process what is happening during proceedings and respond adequately.

Research has also shown that memory is unreliable and is susceptible to distortion (Lacy & Stark, 2013). Memory is influenced by many factors, including preconceptions and the way information is presented, to the extent that memories can be drastically changed or even created anew (Loftus, 2003). For example, in a widely-known experiment, after watching a video of a traffic accident, participants rated the speed of the car by around 30% higher when the question included the word ‘smashed’ (‘About how fast were the cars going when they smashed into each other?’) as opposed to the words ‘hit’, ‘collided’ and ‘bumped’ (Loftus & Palmer, 1974).

What people perceive as truth has also been shown to be fragile: even when we know the truth, it can be overwritten by an illusory truth (Fazio et al. 2015). For example, repetition can increase perceived truthfulness of statements, regardless of actual knowledge. Ease of comprehension is also a key factor in what is perceived as truth. In addition, we are more likely to accept as truth that which is more familiar to us (Fazio et al. 2015).

These realities affect the unrepresented through a number of pathways. For example, lawyers internationally receive much training in preparing cases and presenting them in court. In England and Wales this training is highly specialised – barristers take extensive training in making submissions in court (oral and written), including how to be persuasive. In addi-

tion, LiPs are often perceived as unable to maintain objectivity and emotional distance from the case (Lord Chief Justice's Report, 2015) – a perception that lowers the weight of their submissions in the eyes of judges. Therefore, lawyers' submissions to the court are significantly more likely to remain in judges' memory and be accepted as truth, than are those of non-lawyers. In addition, the format and language of LiPs' written and oral submissions would generally be different from what judges are familiar with. In lower courts, proceedings generally follow a less formal structure (more of a discussion format), leading to judges keeping only limited notes and rely significantly on memory or written submissions.

Case lengths are a further negative factor. In England and Wales, for example, first instance cases take on average 350 days (the DE case took over 600 days) – over 30% longer than the average in OECD countries (240 days), and over twice as long as in Japan (170 days) (OECD, 2013).

Judiciary's attitude towards litigants in person

There is an unfortunate tendency for judges to view LiPs as a nuisance and a cause of additional workload for them. For example, Lord Woolf emphasised in his report on access to justice that: 'all too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists' (Woolf, 1995). This is further exemplified by the following conclusion reached in a large study on LiPs:

'A striking, though possibly superficial, impression gained during the conduct of this research has been the extent to which lawyers, academics, court staff and others, on learning of our work, have quickly framed the research issues in terms of difficult, trouble making vexatious or litigants in person' (Moorhead & Sefton, 2005).

Such attitudes are also evident in a number of reports and comments by the judiciary. For example, the Lord Chief Justice's (LCJ) Report states that the burdens of work imposed on judges have increased, in part due to increase of cases involving LiPs (LCJ, 2015). In addition, the Judicial Working Group on Litigants in Person reports that cases involving unrepresented parties 'inevitably take more time' (Judiciary of England and Wales, 2013). Dame Elizabeth Gloster stated: 'I'm horrified at the number of litigants in person. ...The large numbers of [litigants in person] leads to delay and is going to clog up the system' (LexisNexis, 2014). The Master of the Rolls stated that '...the two Deputy Masters of the court have to

spend about two hours each day on utterly unproductive Registry work... They handle matters which take up an inordinate amount of the court's time for very little advantage' (Court of Appeal, 2004). It is not clear, however, on which empirical data such opinions are based on, as there are no references to specific data available in these reports.

In contrast, a large study by Cardiff University researchers found that 'there was at best only modest evidence that cases involving unrepresented litigants took longer...' (Moorhead & Sefton, 2005). This study was conducted in three phases. In Phase I, records for 2,432 cases (1,098 civil and 1,334 family) were analysed. In Phase II, data from 748 cases (492 with LiPs) were collected and analysed. And in Phase III, a number of focus groups, interviews of judges, LiPs, barristers and solicitors were conducted.

The empirical study also found that the view of LiPs being mostly applicants/claimants (and so seen as aggressors or 'obsessive') was incorrect – a significant majority of LiPs were defendants (with only 10% and 6% being claimants in County Courts and High Courts respectively). These figures, also make the term 'litigants in person' not a suitable term. A better term would perhaps be 'unrepresented parties' or 'self-represented parties'.

Another issue is that characteristics of 'difficult' or 'obsessive' – terms used as synonyms of vexatious when applied to LiPs – are actually generalised to all LiPs (Moorhead & Sefton, 2005). For example, the Master of the Rolls in the Court of Appeal Review states that 'there has been a significant increase of obsessive litigants determined to have no procedural stone unturned ...' and indicating that nearly 40% of all permissions to appeal are from LiPs, 90% of whom have no arguable ground of appeal (i.e. vexatious litigants).

Contrary to this, empirical data from large studies show that the number of vexatious (obsessive) LiPs is very small (Moorhead & Sefton, 2005). For example, District Judges have described the numbers of such difficult (obsessive) LiPs as 'de minimis', 'a fraction of a per cent', or 'a tiny proportion, very, very, tiny'; and Circuit Judges, as two or three times a year (Moorhead & Sefton, 2005, p.80). Moreover, in each of the courts, staff reported that there were 'a handful of problem litigants whose names they could reel off immediately' (p.81) – on average between 4 and 6 per year.

According to the Judiciary, LiPs are also 'more likely to complain about judges' and that these complaints are usually 'on the basis, not of any substantive impropriety, but because they disagree with the findings and conclusions the judge has properly reached' (Judiciary of England and Wales, 2013, p.12). This view assumes that decisions and procedures are fair for the unrepresented litigants. However, it is likely that many of complaints

by LiPs have valid reasons. For example, proceedings conducted ‘in what is for them foreign language’ (Courts and Tribunals Judiciary, 2013, p.1), could be a valid reason. Moreover, as ‘our current court system is not really designed’ for LiPs (LCJ, 2015), it cannot provide a fair service to them.

Negative attitudes are expressed not only towards LiPs, but also towards any non-licensed persons who attend court with a LiP to assist in presenting a case (e.g. McKenzie friends – see *McKenzie v McKenzie* [1971] P 33). Negative attitudes towards McKenzie Friends were found to be more inflated among less experienced judges, as well as lawyers, who sometimes show outright hostility (Legal Services Consumer Panel (‘LSCP’), 2014; Smith et al. 2017); and are also present among Senior members of the judiciary. For example, Lady Justice Hallett stated that ‘the court will only allow a non-qualified third party to address the court in exceptional circumstances, and this will be decided on a case-by-case basis’ (R v Conaghan & Ors 2017). In addition, the Judicial Executive Board (JEB) proposes that recovery of expenses and fees incurred by McKenzie Friends should be prohibited (Lord Chief Justice of England and Wales, 2016) – a view which is supported by Civil Justice Council (Civil Justice Council, web). The justification used against McKenzie Friends is to ‘protect the public interest’ and ‘vulnerable litigants who would otherwise have little to no effective protection’ (Lord Chief Justice of England and Wales, 2016, p.20).

McKenzie Friends, however, provide an accessible alternative solution for those who cannot afford legal representation. Research has shown that most McKenzie Friends are either trained lawyers; good Samaritans; or people who previously had bitter experience with the justice system. They charge significantly lower fees (as little as £15 per hour) than lawyers (average around £300 per hour) (Smith et al. 2017; LSCP, 2014). The LSCP has also concluded that the ‘legitimate role of fee-charging McKenzie Friends is recognised and accepted by all stakeholders’ (LSCP, 2014).

The Judiciary’s negative views towards LiPs have a number of associated risks. This prejudice means that the focus of hearings is often ‘upon the difficulties that litigants in person pose for the courts rather than the other way around’ (Courts and Tribunals Judiciary, 2013, p2). There is also a danger that judges’ negativity towards the situation is transferred, consciously or unconsciously, on to the unrepresented litigants who are viewed as the cause of the problem. Negative attitudes towards LiPs by the judiciary could also inspire harsh attitudes by lawyers. Furthermore, depriving people of the option of alternative representation (McKenzie Friends), leaves people who cannot afford legal representation completely unprotected.

Inaccessible interpretation of the law

Another problem that LiPs face is that the law is interpreted in ways accessible only to lawyers, and often only to those specialising in the areas of law concerned. Inaccessible interpretations extend even to cases where the natural meaning of the words is clear. For example, s20B LTA 1985 requires that a demand for payment of a service charge to be recoverable it must be issued within 18 months of the costs being incurred, unless the tenant is notified in writing within the 18 months. The wording is clear, but the meaning of the word 'incurred' has received multiple interpretations by the courts/tribunals (e.g. *Holding & Management (Solitaire) Ltd v Sherwin* 2011; DE case in Box 1; *OM Property Management Ltd v Burr* 2013). The common sense meaning, and that found by the Court of Appeal, is that costs "are 'incurred' on the presentation of an invoice or on payment" (unless there is a dispute with the provider); and that 'whether a particular cost is incurred on the presentation of an invoice or on payment may depend on the facts of the particular case' (*OM Property Management Ltd v Burr* 2013). The Upper Tribunal (UT) on the other hand, provided a different interpretation – that costs start being 'incurred' from the time payments on account are exhausted (*Holding & Management (Solitaire) Ltd v Sherwin* 2011). The UT reversed the decision of the Leasehold Valuation Tribunal, that s20B required the Tribunal to disallow any costs that were incurred more than 18 months prior to the demand date.

More recently, these conflicting interpretations were followed by another different interpretation by the FTT in the DE case (Box 1). The FTT held that "... it was clear to the Tribunal that the balancing payment sought on 30 September 2014 related to the actual cost of providing the services and the demands for services on account. Thus all costs comprised in the balancing payment were incurred within 18 months of the service of the demand." The problem with the UT's and the FTT's interpretations is that, for most service charge schemes it is practically impossible for tenants to know when the moneys on account are exhausted, unless they hire accounting experts and obtain detailed disclosures. These differences in interpretation mean that a person cannot know in advance what the rules actually are and what the expected outcome is. In fact, these conflicting interpretations make the relevant law redundant and leave tenants without protection in practice.

Another example of inaccessible interpretation is in relation to burden of proof in civil cases. A distinction is made between legal burden (also referred to as *persuasive burden*), and evidentiary burden of proof. The legal burden means that, if the burden is not discharged to the required standard of proof (by a preponderance of the evidence or beyond reasonable doubt), the party bearing the legal burden on the issue in question, will

lose (Ormerod & Perry, eds. 2016). Also, the Law Dictionary defines the burden of proof as 'the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause'; and clarifies that "the term 'burden of proof' is not to be confused with 'prima facie case'" (thelawdictionary.org). The 'evidential burden is not a burden of proof' (Ormerod & Perry, eds. 2016), but is the burden of bringing sufficient evidence so that a matter may be considered in a court or tribunal - in other words, it is the burden to raise an issue (Tapper, 2010). According to Cross and Harper on Evidence, discharge of evidential burden proves nothing (Tapper, 2010). Another way the burden has been referred to is as 'only a rule' for deciding which of the parties' turn it is to provide evidence (Schilling v Canary Riverside Development 2005; Arbrath v. North Eastern Ry. Co. 1883) - so, the burden switches back and forth between the parties throughout the case.

It is unclear whether it is the *legal burden* or the *evidentiary burden* that parties are required to satisfy; or that the concept of burden applies only in exceptional circumstances in civil cases. The Court of Appeal has stated that 'It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof ... the burden of proof is a last, not a first, resort' (this case was successfully appealed to the Supreme Court but the point on burden was not reversed) (Daejan Investments v Benson 2011, at 86). There is also a great deal of other binding legal authority, including from the House of Lords, confirming that it is only in exceptional civil cases, where the issue at question 'is too finely balanced to be decided one way or another', that the issue will be determined by the evidence of the legal burden (a list of authorities, at Tapper, 2010, p 132).

In practice, it seems not only that both burdens are applied without following a particular rule, but that both terms are used interchangeably (Daejan Investments v Benson 2011; Yorkbrook Investments Limited v Batten 1986; Country Trade Limited v Noakes 2011); Schilling v Canary Riverside Development 2005; DE Case in Box 1; The Gateway Management v Naghash 2015) - making the distinction blurry (Hay & Spier, 1997). One example where rules on burden of proof have received a number of interpretations is in relation to s19 LTA. Under s19 LTA, costs are recoverable if: (a) the costs are 'reasonably incurred' (e.g. services are not disproportionate, and costs are similar to those of the market); and (b) that the services or works provided 'are of a reasonable standard' (Forcelux v Sweetman 2001). The key problem is that it is not clear if and which party has to prove whether costs are reasonable or unreasonable.

In one of the key cases, the judge, quoting a Court of Appeal decision (Yorkbrook Investments v. Batten 1985), stated that, 'liability in respect of the service charges... was not determined by the burden of proof, but by

consideration of the whole evidence' (Schilling v Canary Riverside Development 2005). The judge further emphasised the distinction between burdens (legal and evidential) stating that the burden depends on who brings the application: 'if the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard; and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable' (Schilling v Canary Riverside Development 2005, at 15). The judge added that: 'if the applicant does not have the burden, what determination is the LVT to make if an application is made but not pursued?' The judge here did not specify which burden. The judge further added that the evidential burden—this time specifying—is not upon the applicant throughout. Other judgements suggest that, in cases where costs are unreasonably high, the burden is on the landlords to show that the costs were reasonably incurred (Wallace-Jarvis v Optima 2013).

Often Tribunals place the burden of proof on tenants even for items for which evidence is difficult or impossible for them obtain, such as building insurance for large buildings that include blocks of flats and commercial units (Country Trade Limited v Noakes 2011; DE case in Box 1). In the DE case (Box 1) the FTT rejected almost all challenges raised by the Tenants, placing the burden on them even for items where costs were unreasonably high. For example, burden was not considered to have been discharged by evidence that water charges had increased in one year from £15,000 to £28,000 per annum, and that the cost for two occupants was 41% higher than that of Thames Water Guidance (£311 v. £440). The judge held that 'no evidence was produced of any wastage or excessive use' – even though the Tenants submitted that, for such a large building which includes commercial venues, it was not possible for them to bring evidence of wastage (e.g. broken pipes). Furthermore, the burden was extended to requiring the Tenants to challenge specific invoices for each item, including items with hundreds of indistinguishable invoices. In another case, the LVT also dismissed the challenges of costs of around 50 service charge items/elements on the basis that the tenants did not satisfy the burden of proof (Schilling v Canary Riverside Development 2005).

It is clear that there is no consistency regarding the application of the burden of proof in civil cases, making it impossible for LiPs to make relevant informed decisions. LiPs would expect a set law that the courts are to follow, and would be unaware of the number of interpretations by the courts.

Precedent

Lack of clarity in relation to the application of precedent, or *stare decisis* (which means, ‘to stand by matters decided’), in lower courts is another issue for LiPs. LiPs generally rely on established law when bringing or defending proceedings, and are generally unable to argue in court effectively on possible interpretations of the law. The doctrine of precedent, beyond providing legal certainty, is important for a number of other reasons. For example, decisions of higher courts are a product of extensive experience of our most senior judges, numerous hours of work, and large amounts of public money. These decisions are an asset for other courts that do not have such resources at their disposal. Therefore, it is a waste of resources when they are not followed.

Despite their importance, however, rules of precedent have not been clarified and still present problems in some lower courts. The issue of precedent was, for example, left unclarified for over 160 years for County Courts (CC) – CC were established in 1846 (Courts and Tribunals Judiciary, history), with decision on precedent reached in 2007. Two CC judges recently stated that High Court decisions of first instance are not binding on CC (Morgan, 2012). The issue was then considered by the Court of Appeal, which held that High Court decisions, of first instance or on appeal, are binding on CC (*Howard De Walden Estates Ltd v Les Aggio* 2007). This decision however, has not clarified the issue for other lower courts/tribunals, such as the FTT, where the situation remains unclear. In contrast with the UT rules, which require the UT to follow binding precedent (Tribunal Procedure Rules 2010, r 56), the FTT rules do not cover precedent: there is no rule, or readily accessible decision, requiring the FTT to follow decisions of higher courts/tribunals.

This can lead to established law being decided anew each time based on a judge’s opinion. For example, one of the most well-established principles of English and international law is the interpretation of contracts according to the natural meaning of the words. Diverting from the natural meaning when the meaning is clear is generally seen as unthinkable. This was recently reaffirmed by the Supreme Court which held that ‘[the] mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even *disastrously*, for one of the parties is not a reason for departing from the natural language’ (*Arnold v Britton* 2015, at 19; *Wood v Capita Insurance* 2017).

However, in the DE case, the FTT diverted from the clear natural meaning of the lease agreement (Box 1). According to the lease, the service charge is to be ‘*computed before the beginning of the Account Year*’; and is payable ‘*by equal monthly payments in advance on the first day of each month in each year*’. The FTT upheld the service charge being collected

differently: around half of the charge – monthly, and the remaining part – around 18 months after the start of the account year (as an unexpected balancing charge). Such a deviation from a well-established legal principle by the FTT, may have cost to one or more of the unrepresented tenants their home, having made the application relying on well-established law, but then losing the case and facing costs of the Landlords' legal teams.

Vesting individuals (e.g. judges) with unfettered discretion can lead to harmful decisions due to negligence, mistakes, or circumstances beyond the control of the individual. For example, all people's decisions can be affected by health and mental health problems. OECD data shows that 'at any one moment, around 20% of the working-age population in the average OECD country is suffering from a mental disorder in a clinical sense'; and that the life time prevalence has been shown by many studies to be around 1 in 2 people, meaning that 'the risk of experiencing mental ill-health at any moment during working life is high for everyone' (OECD, 2011, p.200). These figures are likely to be underestimated due to the 'the hidden nature of mental health issues' (Mental Health Foundation, 2016, p.13). Large studies have also shown that people with common mental health problems take long before seeking professional help (e.g. between 10 and 15 years for Obsessive Compulsive Disorder) (National Collaborating Centre for Mental Health, 2006). Other factors affecting people's decisions include conscious and unconscious biases and prejudices (Georgiadis, 2017; Judicial Studies Board, 2009); and temporary impairments in cognitive processes (Eysenck et al. 2007). This is exemplified by unreasonable remarks by judges that are not uncommon (e.g. 'I didn't know that people who were on benefits were into Champagne?' (The Telegraph, 2017); and recent reports by barristers on the pressure caused by 'rude judges', with no way of telling 'why they turn' (Legal Futures, 2017). Clear rules on precedent are therefore essential to justice.

Procedural information

Another serious barrier to access to justice LiPs face is inaccessible procedural information. As it currently stands, sufficient understanding of essential procedural information requires expertise in the area concerned. Lord Woolf in his report on LiPs stated that although 'Only too often the litigant in person is regarded as a problem for judges and for the court system... The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people' (Woolf, 1995, ch17. Para.2). Such inaccessibility and lack of transparency is evident even for simple disputes in lower courts, including those designed to be public friendly, such as Property Tribunals.

One example of key procedural information being inaccessible is the misleading no-costs image of the UT and the FTT. These Tribunals can make a costs order only in relation to 'wasted costs' and 'for unreasonably bringing, defending or conducting proceedings' (Tribunal Procedure Rules 2013, r 13; Tribunals, Courts and Enforcement Act 2007, s29). On the other hand, the Tribunals have unrestricted powers (as they consider just and equitable in the circumstances) on whether to grant a s20C LTA Order (LTA 1985, s20C). Section 20C is designed to protect tenants from having to pay landlords' legal costs (part or all) through the service charge. It has a wide reach – it applies in connection with proceedings before the FTT, the UT, a court, or arbitration proceedings. As most leases contain a clause covering legal costs, tenants have to pay landlords' costs arising from leasehold disputes - unless a s20C Order is granted. It is therefore true that, in service charge cases, there is only an infinitesimal risk that landlords would have to pay tenants' legal costs. Whereas, based on tribunals' use of this power, there is a high risk that tenants would have to pay landlords' legal costs.

The application of s20C has received a number of interpretations. Nicholls LJ, with whom Farquharson LJ and Lloyd LJ agreed, stated that, where no order as to costs has been made (e.g. granting to landlords or tenants legal costs), allowing landlords to recover these costs through the service charge (through contractual agreement) is 'indeed a case of seeking to get through the back door what has been refused at the front' (*Holding and Management Ltd v Property Holding and Investment Trust* 1990, at 948). The CA has also stated that '[the] policy of the Rent Acts was and is to protect the tenant in his home... It is not a policy for the protection of an entrepreneur...' (*Horford Investments Ltd v Lambert* 1974, at 139).

However, this clarity on application of s20C has been complicated by a number of decisions of lower courts/tribunals. For example, the UT in an important decision on s20C (SCMLLA 2014), held that a s20C Order can be 'extremely serious', as freeholders, not having tenants to pay for their legal costs, can become insolvent. The Deputy President of the UT, Martin Rodger QC, reached his decision citing a CA judgement with unusual facts (*Iperion v Broadwalk* 1995) and so only rarely applicable on this point. The facts in the CA case were that the freeholder company was owned by the residents and had no money, whereas the tenant applicant was a Liberian corporation. These facts are the opposite of the common situation, where freeholders are corporations, and tenants are members of the public, who risk losing their homes.

The FTT in the DE case, concluding that the Landlords' accounts '*were either wrong or misleading*' (see Box 1), allowed the Tenants to recover application costs from the Landlords (around £500). At the same time the

FTT denied the Tenants the s20C Order, allowing the Landlords to recover their legal costs (amounting to over £50,000) from the Tenants. Other FTT and UT decisions on s20C are also unhelpful, finding that granting of a s20C Order does not depend on which party wins or on how many points (*The Tenants of Langford Court v. Doren Ltd 2000*; *Veen SA v. Cheong 2003*).

There is yet another complication with the interpretation of s20C: it is unclear who exactly is to pay landlords' legal fees. For example, the judge in SCMLLA held that s20C protects only the tenants named in the s20C application; and that the landlords can recover their legal costs even from tenants who are not part of the proceedings (and are not included in the s20C application) – who may not even be aware of the legal action in the first place. On the other hand, in the DE case, the FTT held that the Landlords were to recover costs *only* from the Tenants who were parties to the proceedings (rather than from all tenants in the block or estate).

A further consequence of the Tribunal's discretion in relation to s20C Order, is that a decision on s20C cannot succeed as a ground of appeal. The FTT's s20C Order can be set aside and be considered as a fresh point by the UT, only if an application for appeal is successful on other grounds (SCMLLA 2014). Tenants, after being refused a s20C Order, have the option of challenging legal costs by withholding payments. This would require landlords to prove that costs were 'reasonably' or 'properly' incurred (*Morgan v Stainer 1993*). However, tenants, already financially strained by the case, are unlikely to take this option in the fear of incurring further costs. These and other applications of s20C (*Volosinovici v Corvan 2006*), have, therefore, built an incomprehensible net of interpretations, making it impossible to predict the Tribunals' decision on costs.

Despite potential serious consequences, there seems to be little mention and awareness of the dangers associated with this section. In fact, according to the UT Deputy President, the issue of who is to benefit from a s20C Order was dealt with for the first time in SCMLLA – more than 20 years after the provision came into operation. Even among service charge lawyers, there is a belief that Property Tribunals present a minimal risk of costs to tenants. For example, leading practitioners in the field, Justin Bates and Francis Daley, state that it is difficult to know why few tenants appeal considering the UT has the same costs powers as the FTT and so "there is only a very limited additional costs 'risk' in appealing" (Bates & Davey, 2014, p.248). Even in materials specifically on costs at the FTT, published by leading practitioners, there is no mention of s20C (Holland QC, landmarkchambers.co.uk). It is possible that among practitioners this situation arises due to the 'curse of knowledge' - whereby experts cannot

imagine that other people do not have knowledge on the matter (Pinker, 2015).

Another procedural uncertainty for LiPs relates to risks associated with making false statements in court or witness statements. LiPs would generally expect that knowingly giving false evidence in court can amount to Perjury, which is commonly known to be a serious offence that can even lead to imprisonment (maximum penalty of seven years) (Perjury Act 1911, s1). Whereas, the represented would know of the minimal risk associated with making a false statement, and may tailor their evidence to support their case. For example, in the DE case, the Landlords' key witnesses had conflicting evidence (verified by statement of truth), on the main issue before the Tribunal (see Box 1). In addition, LiPs will generally have minimal chance of testing the validity of evidence through cross-examination as they may lack required skill (Courts and Tribunals Judiciary 2013, p.3). Sometimes cross-examination of witnesses is not allowed at all. For example, at the FTT LiPs are usually only given the opportunity to give 'evidence in an ad hoc manner as the case progresses' (DE case in Box 1).

The represented have an additional advantage over LiPs during proceedings. Lawyers are trained to 'think like a lawyer' (disassociate feelings from the case). Moreover, research has shown that the legal profession attracts people who on average score higher on psychopathic traits (ranking second after CEOs, with Surgeons being 5th) (Dutton, 2012). The training, combined with personality, may help lawyers to remain objective and withstand pressures. However, the ability to disassociate from potential harmful outcomes may also increase the risk that lawyers behave 'oppressively or aggressively' towards LiPs (Courts and Tribunals Judiciary, 2013, p1). For example, lawyers often make applications, on any possible excuse, to strike out the unrepresented parties' cases or simply raise various complaints towards the unrepresented. In the DE case (Box 1) for example, the Landlord's lawyers made an application to strike out the Tenants' case for not having brought comparative market evidence, even though the Landlords had unlawfully deprived the Tenants of the information needed to do that. Although not successful on the day, due to the overwhelming evidence available, these tactics extended the length of the case leading to increased costs.

It is therefore evident that lack of accessible procedural information can trap people in a manner similar to that in 'I, Daniel Blake' – a recent film in which the main character is progressively brought to his demise by the inefficiencies and inhumanity of the system.

CONCLUDING REMARKS AND RECOMMENDATIONS

An advanced society cannot accept ‘that the bank of justice is bankrupt’ (King, 1963), or that the larger part of the population has no access to it. On the one hand, our legal system is highly regarded internationally. For example, it has gained the confidence of the international commercial world for our commercial courts where clients know that ‘they will be treated fairly’ (The Lord Chancellor, the Lord Chief Justice and Senior President of Tribunals, 2015). This international trust in our legal system brings to our economy around £25 billion (£25.7 billion in 2015) annually.

On the other hand, the system does not provide similar fairness to the whole of society. According to the OECD report, England and Wales ranks 18th (of 24 countries) in the budget allocated to courts (0.1% of its GDP) – approximately 8 times less than Israel. At the same time England and Wales has amongst the highest trial costs (as a percentage of the value of the claim) (OECD, 2013). It is clear that more resources are required to help the system become more efficient. Moreover, procedures are not suitable for the unrepresented. As it stands, the experience of the unrepresented in litigation is often like *Medieval Judicial Ordeal by Combat* (Bartlett, 2014) – the outcome depending on the strength of the representation. The ‘playing field’ provided, is far from levelled – the system allows parties to arrive at a justice venue, with one side bringing sophisticated weapons and the other side – wooden sticks.

This injustice in the justice system exacerbates inequality and associated losses of social connections and cohesion within communities (County Health Rankings and Roadmaps, 2015). Inequality trends have been recognised as the most likely global risk to manifest in the next 10 years (World Economic Forum, 2012).

It is not without a reason that our justice system and lawyers hold a certain reputation in society – evident in research, jokes, literature and trends. For example, the word ‘judge’ has a negative connotation (e.g. judging others), when in fact it should have a positive connotation (doing justice). Connotations of words arise thorough public usage (Pinker, 2015) and reflect society’s experience. The three passages below exemplify the image of the justice system among the public. Charles Dickens in *Bleak House* observes: ‘The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous make the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make

business for itself at their expense, and surely they will cease to grumble' (Dickens, 1852). Geoffrey Robertson QC, a world-leading human rights lawyer, states that 'although the occupations and preoccupations of mid-seventeenth-century society are long gone, it is the lawyers... who have changed least' (Robertson, 2005). A famous joke mocks: 'An ancient, nearly blind old woman retained the local lawyer to draft her last will and testament, for which he charged her two hundred pounds. As she rose to leave, she took the money out of her purse and handed it to him, enclosing a third hundred pounds bill by mistake. Immediately the lawyer realised he was faced with a crushing ethical question: should he tell his partner?' (Galanter, 2011).

Many lawyers themselves recognise the loss of public's trust in decisions and judicial process (Hodge Jones & Allen, 2014). We should not be satisfied with a fair trial being an option to *only* those who satisfy certain rigid criteria (e.g. financial, ability, personality) in a population with vast variability, including in ability, wealth, education and circumstances. It is not true that the system can only improve through significant financial investment by the government or recovered through system users (e.g. paying higher fees). There are a number of updates that require little expense, including the following six recommendations stemming from the issues described in this paper.

Recommendations

1. Include in the training of stakeholders of the justice system scientific information on individual differences and cognitive processes.
2. Enforce that all parties in formal dispute resolution use accessible language and that all legal documents are free of legalese.
3. Require that judges interpret the law consistently and in language accessible to non-lawyer members of the public.
4. Make information on procedure (including potential risks) available online and through leaflets in formats accessible to non-lawyer members of the public.
5. Use technological advancements, such as digital submissions and automated court services. Courts should have an e-filing system where parties are randomly (digitally) allocated an assistant to help complete the e-submissions (e.g. facts, issue and necessary documentation) for a set accessible fee. This assistance can be provided by law graduates or paralegals. To minimise errors, every e-submission should be double entered, and cross checked (as is common practice

in research and academic settings). The submissions should be considered by a judge, without access to names of parties, minimising the need for costly trials.

BOX 1

Detailed Example Case involving unrepresented litigants (‘DE case’)

Ref: LON/00AM/LSC/2014/0264

Parties:

A group of tenants / leaseholders of a block of flats in central London (‘Tenants’) v. Family Mosaic Housing and Aviva Investor Ground Rent GP Ltd (‘Landlords’).

Representation:

-The Tenants: Unrepresented.

-The Landlords: A City Law Firm, Barristers Chambers, and a large Consultancy Firm.

Judges: Sonya O’Sullivan (solicitor); and 2 non-lawyer members of the panel.

Facts

Between 2008 and 2014, Family Mosaic (which holds a 999 years lease) sold flats to the Tenants by advertising service charges which proved to be an incorrect representation (around half) of the actual service charge. The Tenants had been promised on sale that the service charge would only increase by very little - in line with inflation. In the first year the Tenants were refunded some service charge money at the end of the year (balancing credit). However, for the following four years, the Tenants were issued large payment demands (balancing charges) of around as much as the annual service charge. For example, for year ending 2014, one of the flat’s annual service charge (collected monthly in accordance with the lease) was £2,718 and the balancing charge for that year was £3,275. These charges were issued each year around 18 months after the beginning of the accounting year, and tenants were required to pay them as a lump sum or to set up a payment schedule.

The Tenants protested about these charges every year, but were told by Family Mosaic that these were one-off charges due to unexpected expenditure, such as sediment in water pipes, which would not happen again. Family Mosaic's explanations included: *'[at] the time we were setting the budgets, we did not have the full annual budget as set by Rendall & Rittner'* - Family Mosaic's managing agent (MA); and *'we have recharged you the full annual budget as determined by the MA Rendall & Rittner'*. However, Family Mosaic's annual service charge statements, issued each year in March, stated: *'the anticipated annual service charge is calculated by analysing a range of data such as expenditure incurred in the current year, expenditure incurred in the previous years and the rate of inflation.'* Therefore, all annual costs—for the block and the estate—were confirmed to have been taken into account and included in the annual computation and therefore the monthly payments. All formal complaints had failed, and in the year before the case, a number of tenants had given a pre-action notice, were these charges to reoccur.

In March 2014, Family Mosaic's computation of the service charge for the following account year more than doubled without explanation to the tenants. After persistent complaints, the explanation tenants received from Family Mosaic was: *'the reason for the increase in your 2014/15 budget is because at the time that we were setting the budget for 2013/14, we were not informed by Rendall & Rittner (the external managing agent), of the estate services costs.'* When the matter was brought to the FTT, the Landlords maintained this position until it became evident that it could not have been the case (this procedure had repeated for four years). Family Mosaic then admitted that they had failed to include (both on sale and over the years) estate costs (which make the greater part of the service charge) in the annual computation and had failed to inform the Tenants about this (see judgement below).

Key issues before the FTT

1. Interpretation of the lease agreement

Issue: whether Family Mosaic had demanded and collected the service charges (SC) in breach of the lease.

- On how the SC is payable, the Lease states: *'The Leaseholder hereby covenants with the Landlord to pay the Service Charge during the term by equal payments in advance at the times at which and in the manner in which the rent is payable under this Lease.'* The rent is payable under the

lease: '*... by equal monthly payments in advance on the first day of each month in each year of the term...*' So, according to the *natural* meaning of the lease, the SC is payable by equal monthly instalments on the first day of each month - not as collected by Family Mosaic.

- On computation of the SC, the Lease states: '*The Service Charge in respect of any account year shall be computed before the beginning of the Account Year...*'; '*Account Year*' means a year ending on the 31st March'. Therefore, according to the *natural* meaning of the lease, the computation of the SC for the year ahead is to take place each year by 31 March - not as computed by Family Mosaic.

FTT's decision:

The FTT decided that the Landlords had set / computed and collected the SC in accordance with the lease, including: '*...We do not agree that the fact that some of Aviva's charges are included as a balancing charge renders them unpayable.*'

The decision contradicts the judges' own written directions that: '*Family Mosaic had ... failed to include the estimated costs of the freeholder who provided the majority of the services. As a result the leaseholders were faced with a large balancing payment each year with little explanation.*' Moreover, the Landlords had confirmed the same in their legal statement, namely that: '*Family Mosaic sent out the service charge demands based on solely the internal block estimated charges and then sought to recover the estate charges in a form of balancing charge...*'.

2. Reasonableness

Issue: whether the costs were reasonable and therefore payable.

Tenants challenged the cost of various items, such as boiler maintenance and water charges. On boiler maintenance the Tenants' evidence included: (1) That the Tenants were charged for over 170 separate engineer call-outs per year, on top of the annual maintenance - the total costs amounting to over £51,000.00 per year; (2) a detailed expert report, confirming among other things that: '*Tenants have been charged twice for same job; the gas system is at a state that should be shut off for safety reasons; the control panel has been bypassed giving no sequencing control over the boilers - this in turn will generate excessive bills for the tenants ...; three boilers are running at the same time when only one or maximum one and a half is needed*'; and that: '*the annual contract for maintaining the boiler room at the state it is now at should not be more than £9000 per year*'; (3) a quote from British Gas for £2,292.00 per annum for unlimited call outs; (4) that,

for boiler maintenance, the landlords' managing agents hired a midlands micro-company, not gas-safe registered.

FTT's decision:

In relation to the boiler charge the FTT held against the Tenants stating that the Tenants: *'had not raised a challenge in relation to specific invoices but had rather challenged the global cost of the maintenance as too high'*.

The burden of proof placed on the Tenants was not in line with binding case law and impossible to satisfy. The boiler maintenance was one separate item/element that could not be broken down any further. There were hundreds of invoices with little to no information recorded on them, and therefore challenging each invoice separately was not possible.

3. Consultation

Issue: Whether Family Mosaic has complied with consultation requirements.

The Tenants had not been consulted in relation to insurance provision, managing agent's contract and other issues. Consultation had been denied, Family Mosaic stating that: *'...Family Mosaic is under no obligation to carry out a section 20 consultation under the Landlord and Tenant Act 1985... the consultation would be between Rendall & Rittner and Family Mosaic'*. Rendall & Rittner is (at the time of the case) the managing agent for both Landlords, Family Mosaic and Aviva, and Aviva is also the insurance provider.

In relation to the managing agent's services, the Landlords produced to the Tribunal an unsigned and undated 'agreement' that did not state a term - an invalid agreement. The facts were that the managing agent had been involved with the estate since it was being built (before 2008), and therefore before Family Mosaic purchased the 999 year lease. They continued to act as the managing agent for the block and the estate even after the estate freeholder changed from Urban Rustic (Pegaso) Limited to Aviva (2012). Therefore, it was clear that the intention was for long term services / agreement, and not for one year only; and as per the law, it qualifies as a long term agreement (Arnold v Britton 2015, at 17-23).

FTT's decision:

In relation to insurance, the FTT held that: *'the landlord relied on a letter from the broker which confirmed that the market was tested...'* and *'we saw no reason why we should not place reliance on the letter from Arthur J Gallagher confirming that four alternative insurers had been approached'*

on renewal'. In relation to the managing agent's services, it held that *'As far as the managing agent's fees were concerned we noted that the contract in relation to the headlease has rolled over since 2008'*. The FTT held against the tenants on both points and placed a heavy burden on the Tenants and no burden on the Landlords.

4. Costs

Issue: Whether a s20C LTA Order should be made.

The FTT acknowledged in the decision: The position on how service charges were currently invoiced *'was somewhat confusing as the headings for the various components in the service charge accounts did not marry with the headings in the leases'*; *'After much discussion it emerged that Family Mosaic had not properly estimated the estimated on account payments for each year and had failed to include the estimated costs of the freeholder who provided the majority of the services. As a result the leaseholders were faced with a large balancing payment each year with little explanation'*; *'There has been a clear lack of transparency in the method of charging'*; and that some of the figures in the Landlords' accounts *'were either wrong or misleading'*.

FTT's decision:

The FTT awarded to the Tenants the cost of filing the application (around £500) providing reasons for doing so (above). However, the FTT denied the s20C Order, therefore allowing the Landlords to recover their legal costs (over £50,000) from the Tenants. The FTT provided no reasons for the decision on this point; it only stated that *'having heard the submissions from the parties and taking into account the determination above, the Tribunal declines to make such an order'*.

5. Credibility of evidence and examination of witnesses

Issue: Reliability of Landlords' evidence.

The Landlords had two witnesses: Rendall and Rittner's managing director ('MD'), who *'developed the service charge strategy and estimates... and approved all subsequent service charge estimates'*; and Family Mosaic's Senior Property Accounts Manager ('SPAM'). To determine the key issue, their evidence on the following two key points was crucial:

Issue 1: the reasons for the large 'balancing' charges. SPAM's written evidence stated in relation to balancing changes, that *'[u]nfortunately, FM appear to have only demanded part of the full annual budget. This was a*

clerical error, which was not realised under year-end'. The Landlords' final position, however, was that estate (Aviva's) charges were demanded as balancing charges, for four consecutive years. This was also confirmed by the judge in her directions (see above).

Issue 2: the reasons for not including the estate charges in the annual service charge estimates. Aviva's accounting year ends 3 months prior (December) to that of Family Mosaic (March), when the annual service charge is set by Family Mosaic. SPAM's written evidence was that the reason for not including the estate services costs in the annual estimates *'lay in the different accounting periods under the respective leases'*, leading to Family Mosaic not having Aviva's accounts when the annual service charge was set. MD's evidence stated the opposite, namely that the differing accounting periods *'does not present too many difficulties in practice as I understand Family Mosaic sets their budget two or three months in advance and therefore it is useful to them to have the Aviva areas estimates in advance'*.

The opportunity during the proceedings to formally assess the Landlords' evidence was ruled out as an option by the judge at the beginning of the hearing. In fact, as the Tribunal ran out of time, this issue was not dealt with during the hearing.

FTT's decision:

Refusing permission to appeal, the same judge held that *'it is said that the tenants were not given an opportunity to cross-examine the landlords' witnesses. This is strongly denied'*. In her reasons for refusing permission to appeal, the judge stated that *'the tenants were allowed to give evidence in an ad hoc manner as the case progressed, as is often the case in tribunal proceedings involving litigants in person'*. Therefore, it is clear that there was no opportunity during the trial to present evidence formally, which rules out cross-examination. From the decision, it seems that the FTT judge considered informal occasional exchanges between the Tenants and the Landlords' team during the hearing to amount to cross-examination.

Overall case outcome

As per judges' description, *'the Landlord has been overwhelmingly successful'*.

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