FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

V:CVPREMOTE

Case Reference	**:**	**CAM/26UB/LSC/2020/0052**
Property	**:**	**Flat 2, 38 Lea Road Hoddesdon Herts EN11 0NP**
Applicant	**:**	**Natalia Savage**
Represented by	**:**	**In person**
Respondent	**:**	**Elyar Properties Ltd**
Represented by	**:**	**Mr Simon, solicitor and in-house counsel for Moreland Property Group Ltd**
Type of Application	**:**	**Application for the determination of the reasonableness and payability of service charges**
Tribunal Members	**:**	**Tribunal Judge Stephen Evans Mrs Mary Hardman FRICS IRRV (Hons)**
Date and venue of Hearing	**:**	**10 March 2021 & 27 April 2021, by video**
Date of Decision	**:**	**20 May 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing which was not objected to by the Parties. The form of remote hearing was V:CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents we were referred to were in 2 bundles, plus a tenant's response to the landlord's comments on disputed charges, the contents of which we had read in full in advance of the hearing. We have also received written submissions from both Parties since the hearing, on the matter of the tenant's application for hearing fees and for an order under s.20C Landlord and Tenant Act 1985/para. 5A, Schedule 11 to CLARA 2002.

DECISION

The Tribunal determines that:

(1) Service charges for cleaning and gardening were reasonably incurred (or to be incurred) but only in the following amounts:

- **2018: £1026.63 (Applicant's share £205.36)**
- **2019: £1119.26 (Applicant's share £223.99)**
- **2020: £1166.65 (Applicant's share £233.33)**
- **2021: £1120.00 (Applicant's share £224).**

(2) Estimated service charges for health and safety are considered reasonable in the sum of £90 including VAT for the year ending 2021 only (Applicant's share £18);

(3) Service charges for management fees were reasonably incurred (or to be incurred) but only in the amount of £761.60 (Applicant's share £152.32) for each of the years ending 2018 to 2021;

(4) Service charges for an insurance revaluation fee of £1200 in 2019 were reasonably incurred and reasonable in amount (Applicant's share £240);

(5) All other service charges considered in this decision were not reasonably incurred (or to be incurred) and/or not reasonable in amount;

(6) The Respondent's costs (if any) of defending this application should not be regarded as relevant costs to be taken into account in determining the amount of any

service charge or administration charge payable by the Applicant;

(7) The Respondent shall reimburse the Applicant the application fee of £100, and the hearing fee of £200.

Introduction

1. The Tribunal is asked to determine the payability and reasonableness of relevant costs incurred and to be incurred by way of service charges pursuant to an Application made under s.27A of the Landlord and Tenant Act 1985.

Relevant law

2. The relevant statutory provisions are set out in Appendix 1 to this decision.

Parties

3. The Applicant is the leasehold owner of the Property, a 1 bedroomed flat in a purpose built block of 5 flats, built around 1990. There is no garden. There is a parking area for 5 cars.

4. The Applicant acquired her leasehold title on 25 July 2013.

5. The Respondent is the successor in title to the lessor under the Applicant's Lease. It is, we were told, a wholly owned subsidiary of Moreland Property Group Ltd.

6. The Respondent engages a managing agent called Moreland Estate Property Management Ltd, which trades as Moreland Estate Management.

7. The Applicant has twice previously sought determinations under s.27A of the Landlord and Tenant Act 1985, in 2015 and 2017. We have had regard to the 2 decisions under case numbers CAM/34UF/LSC/2015/0077 and CAM/26UB/LSC/2017/0087, made on 26 February 2016 and 22 December 2017 respectively.

8. In the 2016 decision, the Tribunal found, amongst other things, that health and safety assessments need only be carried out periodically, unless there was a change in the building; and that a management fee was a reasonable charge to be incurred, but that £120 p.a was considered a reasonable sum for the Applicant to pay.

9. In the 2017 decision, the Tribunal once again found amongst other things that health and safety assessments need only be carried out periodically, unless there was a change in the building; and that a management fee was a reasonable charge to be incurred, but that £50 p.a. was a reasonable sum for the Applicant to pay.

The Application and related proceedings

10. On 18 November 2020 the Respondent in this application issued a claim in the County Court in respect of alleged unpaid service charges against the Applicant. A defence has been filed, but we have not been provided with a copy by either Party.

11. The County Court claim appears to have prompted the Applicant to make the instant application, which was filed at the Tribunal on 25 November 2020, and which initially sought determination of the payability and reasonableness of service charges for the years ending 2014 to 2021 inclusive. The application was originally brought against Moreland Estate Management, but by directions dated 18 December 2020, Tribunal Judge Wyatt substituted the Respondent for that management company.

12. In addition, Tribunal Judge Wyatt struck out the application in respect of service charge years up to and including 31 March 2017, on the basis that they had already been considered in the 2 earlier decisions set out above.

13. On 1 December 2020 the Applicant made an application in the County Court to strike out the Respondent's civil claim, which we understand is listed for hearing on the 26 May 2021 at the County Court sitting at Hertford.

The Lease

14. The Lease is dated 18 February 2009. As there is no dispute about the interpretation or construction of the Lease, the provisions can be summarised briefly, as follows:

15. The lessee's covenants are firstly contained within clause 2 of the Lease. These include at 2(5) a requirement to pay the lessor's costs of or incidental to the preparation and service of a section 146 notice, and at 2(12)(b) the lessor's costs and expenses in respect of a breach of covenant.

16. Clause 3 contains further lessee's covenants, including the requirement at 3(5) to contribute to and pay on demand 1/5 of all costs charges and

expenses of the lessor in complying with its obligations under Part IV of the Schedule to the lease.

17. Clause 4 of the lease contains the lessor's covenant to comply with the obligations in Part IV of the Schedule, which Part includes (at paragraph 6) an obligation to insure the building, and at paragraph 11 a provision that "the lessor may employ such staff or agents for the performance of its obligations here under as it shall think fit."

18. The service charge year ends on the 31st March in each year.

The Hearings

19. The matter first came before this Tribunal by video on 10 March 2021. The same parties and representatives were in attendance. The Tribunal heard a preliminary issue on the part of the Respondent to strike out or stay the Tribunal proceedings, on the basis that there was an ongoing County Court claim. The Tribunal heard submissions on that application and dismissed it. The Respondent then made a further application for an adjournment of the hearing on various grounds, which were acceded to by the Tribunal. These grounds included that it had been unable to reply to the Applicant's Scott Schedule of disputed service charges because there had been a bereavement amongst the relatives of a director of the Respondent company in February 2021, which in turn had led to a failure to comply with directions. The Tribunal agreed the adjournment not least because, in order to do justice between the parties, it was necessary to have the Respondent's line-by-line responses to the matters complained of by the Applicant.

20. The Tribunal thereupon took the opportunity to give revised directions and to narrow the issues further, based on sensible concessions on the part of the Applicant - that she would not pursue any argument in respect of drain clearance, gutter clearing and window cleaning for any of the years remaining.

21. The Tribunal reconvened for hearing on 27 April 2021. The issues were again narrowed on the basis of the tenant's written response to the landlord's comments on disputed service charges.

22. Both the Applicant and the Respondent were afforded full opportunity to ask questions of each other, and the Tribunal adopted a line-by-line approach to the items in dispute.

Matters in dispute

23. At the outset of the last hearing, it was confirmed that the Applicant was seeking to dispute only the following:

    (1) Cleaning and gardening (all 4 years);
    (2) Health & Safety (ditto);
    (3) Management Fee (ditto);
    (4) Insurance Revaluation Fee (2019);
    (5) Bank charges (2019-2021).

24. The Applicant in her Scott Schedule column had initially offered the following in respect of many of these items: "If the landlord cannot prove the charge was properly incurred, I would offer to pay 50% of what is claimed." However, the Applicant in her tenant's response withdrew any offer to pay any amounts in respect of invoices submitted, in the light of what she considered to be paucity or lack of quality of the documentation which had been provided by the Respondent after the first hearing.

The Issues

25. The issues defined were:

    (1) Whether the above costs were reasonably incurred/ to be incurred (and to a limited extent whether services were to a reasonable standard);

    (2) Whether the above costs were reasonable in amount;

    (3) Whether an order under s.20C of the Landlord and Tenant Act 1985 and/or paragraph 5A to Sch.11 to the Commonhold and Leasehold Reform Act 2002 should be made;

    (4) Whether the Applicant should be reimbursed the application and hearing fees.

The Parties' Arguments

Cleaning and gardening

26. The Applicant's case was that there had been no proper maintenance, or cleaning of the parking area, or gardening, particularly as the Property did not possess a garden in the true sense.

27. In her statement, the Applicant states that owing to the passage of time it is difficult for her to recall the dates and times of when actual cleaning and maintenance activity was carried out on behalf of the Respondent at the Property. She puts the Respondent to proof of this, including the provision of cleaning logs to show that a reasonable level of work was undertaken and to evidence the time(s) spent. She also pointed to the fact that leaseholders themselves have had to carry out weeding and cleaning, which was indicative of failures, she says, by the Respondent and its representatives. She included sample photographs indicating general lack of maintenance at the property, and also exhibited a statement of her neighbour Mr Nicky Evans. This statement is unsigned and undated, but bears the Tribunal reference for these proceedings, and was obviously drafted in contemplation of this hearing. It includes the statement: "In the last year I replaced old black plastic sheets to stop the weeds growing outside the house area, covered it with root bark chipping and raised the bed around the house feeling (sic) it with the stones."

28. In answer to questions from the Tribunal, the Applicant conceded that there had been some cleaning, but her case was that it was never done properly, adding that "two minutes" was habitually spent on the staircase, with no proper cleaning on the parking area, such as clearing of leaves. She conceded there was no evidence of any complaint in writing on her part to the agents about this, because (she said) there had been no response in previous years.

29. In response to questions posed by the Respondent, the Applicant said that she had done weeding and brushing of leaves herself, and that she has had to walk past rubbish in the car park. She did not think a sum of £18.67 per month for each tenant was a reasonable contribution in the light of this. She said that she did not have contact numbers for other leaseholders, except Mr. Evans, which is why she did not know why other leaseholders had not challenged this charge. She added that she had seen tenants doing cleaning, removing rubbish, and sweeping up leaves and weeds. She added that the bins at the Property quickly filled up. It was suggested to her that the rubbish being picked up could be rubbish belonging to the person doing the work. The Applicant disputed this, saying that it was not possible that people were picking up their own rubbish, simply because they wouldn't leave it outside their own doors.

30. The Respondent's case was that there are obligations for cleaning and gardening set out in paragraph 3 of Part IV of the Schedule. The Respondent relies on 11 invoices for the monthly sum of £93.33 (which state "cleaning" only) for 2018. One is accepted to be missing.

31. In relation to all other years, the Respondent relies on 12 invoices, again in the sum of £93.33 pcm, except for the period after September 2019, when there was an increase to £100 pcm, as shown thereon.

32. In answer to questions from the Tribunal, the Respondent confirmed that these invoices were internal invoices initially, sent by Moreland Estate Property Management Limited. The Respondent alleged that the cleaning would have been carried out initially by an employee of the company. The remuneration would have been based on time spent, but Mr Simon did not have the information to justify the times.

33. He did confirm that after 14 March 2018 the cleaning and gardening was carried out by another company called Marylebone Property Maintenance Limited. The Tribunal was initially concerned about the interrelationship between the managing agents/ the Respondent and this company. However, Mr Simon explained that this company did not share any directors with Moreland Estate Management, but they had at one stage been in common ownership. He confirmed that after 4 June 2019 (the date when Marylebone Property Maintenance Limited were dissolved) invoices continued to be sent in error in the name of that company, but the reality on the ground was that the same person who originally did the work continued to undertake it, but as a sole trader. The Respondent accepted that there should be in existence a contract with that person, but that it had not been disclosed. The Respondent could not say why the later invoices were not on separate headed notepaper. Mr Simon accepted there were system failings on the part of the agents in this regard.

34. The Respondent was also asked to explain the increase to £100 per calendar month in 2020. The Tribunal was told that a new contract was signed every year, and these rates would have been agreed as part of the contract. The Respondent accepted that the budget for 2021 should properly have been £1200, based on the previous year's expenditure, given the increase in the monthly cleaning charge, rather than the £1120 claimed. Mr Simon accepted that deficiency, adding that he suspected that whoever put the budget together (someone in the accounts department) had not paid attention to the real figures.

35. The Applicant asked no questions of the Respondent under this heading.

36. Weighing all the above, the Tribunal is just about persuaded that cleaning and gardening was a cost which was reasonably incurred and reasonable in amount. Whilst the standard of cleaning would appear to have left a lot to be desired from time to time, a monthly cost of about £19 per month (or £4.31 pw) does in the Tribunal's experience support an argument on the

part of the Respondent that the Applicant was nonetheless receiving value for money.

37. However, given the absence of an invoice for April 2017 the Tribunal is not satisfied that £1119.96 was expended in that year, instead of £1026.63 (11 x £93.33).

38. The Tribunal also takes into account that the figure for the year ending 2021 is an estimate only, so that the Applicant will have a further opportunity to challenge the actual figures when the Respondent sends out the same.

39. For sake of completeness, the Tribunal is not satisfied that the invoices from Marylebone Property Maintenance Limited were bogus or false, as the Applicant has contended.

40. Accordingly, the Tribunal determines that the service charges for cleaning and gardening were reasonably incurred (or to be incurred) in the amounts of:

- 2018: £1026.63 (Applicant's share £205.36);
- 2019: £1119.26 (Applicant's share £223.99);
- 2020: £1166.65 (Applicant's share £233.33);
- 2021: £1120.00 (Applicant's share £224).

Health & Safety

41. The Applicant relied on the previous decisions of the Tribunal, to the effect health and safety assessments need only be carried out periodically unless there was a change in the building; however, there was no documentation or physical evidence of an annual health and safety check, so the charge was not reasonable. In oral argument, the Applicant added that maybe once every five years would be the appropriate period; however that was just her view, she conceded.

42. The Respondent's position was that paragraph 11 of Part IV of the Schedule to the Lease allowed the Respondent to employ such staff and persons as it saw fit in the performance of its obligations. The Tribunal was informed that this cost every year is not in fact to do with a health and safety report, but was instead the sum of £175 each year occasioned by the requirement to have someone appointed to be responsible for fire safety duties under the Regulatory Reform (Fire Safety Order) 2005.

43. In this regard, the Respondent relied on a letter on headed notepaper from Moreland Estate Management to the Respondent regarding "professional services", being the provision of a responsible person for the building in accordance with the said Fire Safety Order. Mr Simon explained that this is something that the Respondent did across its entire portfolio; that the person who was responsible for providing these professional services was one Laurence Freilich, a director of the Respondent.

44. Mr Simon explained that Mr Freilich was personally responsible under this Order; that he has to give his name to the authorities as the person liable, and that he is registered by them as such. Moreover, Mr Simon informed us that Mr Freilich personally receives the money charged; that effectively, the Respondent is paying one of its directors to undertake this role, a post which Mr Simon emphasised made Mr Freilich personally responsible if there were any breach under the Order, as his name alone would appear on any Fire Risk Assessment.

45. None of this, we note, was in the form of a sworn statement, despite the Tribunal's directions. Mr Simon admitted that it would have been "helpful" to have had a statement from Mr Freilich.

46. Mr Simon further explained that the letter mentioned above came from Moreland Estate Management to the Respondent because Mr Freilich also has a role in Moreland Estate Management - he is both a director of the Respondent and managing director of Moreland Estate Management, albeit that the two are not in the same ownership, he emphasised.

47. The Applicant had no questions for the Respondent on this issue.

48. The Tribunal is not satisfied that this was a cost which was reasonably incurred or reasonable in amount. Aside from the fact that it is not easy to determine under which "obligation" of the Lease (whether in the Schedule, Part IV or otherwise) the employment of Mr Freilich would be justifiable, Tribunal proceedings must be determined on evidence, albeit that as an expert Tribunal some latitude maybe given to parties to advance their arguments purely orally. However, it is quite clear from a reading of the landlord's comments on the Scott Schedule that this matter was not properly explained in writing before the hearing, nor was it evidenced by way of written statement from Mr Freilich at any time. It was a matter which demanded much more than oral representation from Mr Simon, however helpful he may have tried to be.

49. There was also little justification for the figure of £175 per annum for this alleged service. Mr Simon could only say it was a figure which Mr Freilich must have thought reasonable to charge, and for the lessor to pay.

50. The Tribunal therefore does not allow the £175 per annum claimed under this head for any of the years in issue.

51. There was a discreet additional item being claimed for the year ending 2021, being an estimated further £225 over and above the £175 previously discussed. Only £90 could be evidenced by the Respondent as having been incurred, for an EWS1 form on 27 August 2020. Mr Simon was unable to justify the balance, positing (without evidence in support) that it might be an estimate for signage and reports (unspecified).

52. The Tribunal is not satisfied that a further £225 is justified. We allow only the estimated sum of £90 including VAT for 2021 as reasonably to be incurred.

Management fees

53. The Applicant requested the Tribunal to follow the decision it previously made in 2017 to cap her share of the management fee at £50 only per annum, because the charges claimed by the landlord were rejected as unreasonable by the Tribunal in those proceedings.

54. The Respondent relied again on paragraph 11 of Part IV of the Schedule, and contended that the 2017 decision (amongst other things) included a reduction in the management fee for various reasons which the Respondent believed were not relevant to the service charge years being scrutinised in the instant case.

55. The Respondent relied on the fact that Mr Freilich has been appointed a manager by this Tribunal in another case.

56. In answer to questions from the Tribunal, Mr Simon could not produce a written contract for management of this building, so he could not explain the duties contractually agreed under it. He could only say that he expected it would cover the obligations owed by the lessor under the Schedule to the Lease, Part IV.

57. Mr Simon was unable to explain why, notwithstanding the Tribunal decisions in 2016 and 2017, it had taken the agents until 18 May 2020 to apply the credits which flowed from those decisions.

58. Mr Simon explained that despite the certified accounts showing £1000 for 2019 and £1035 for 2020 in respect of management fees, only £952 was actually incurred. He could not explain the discrepancy in the accounts.

59. Mr Simon also was unable to explain why the budgeted figure for 2021 was £1066, when £952 only had in had been charged. His argument - that the accounts department may have considered some additional charges would be required - was not borne out on any documentary evidence.

60. In the Tribunal's determination, it was reasonable for the Respondent to have incurred the cost of a managing agent for the years in question. Indeed, the Applicant did not dispute that fact. Her argument was that it should be capped at the figure allowed in the previous Tribunal decision.

61. This Tribunal, however, is not bound by those determinations, nor do those circumstances necessarily reflect the position in the years 2018 to 2021.

62. The Tribunal reminds itself that the lessor is not required at law to pay the cheapest fee in respect of any management fees: *Forcelux v Sweetman* [2001] 2 EGLR 173. It is therefore not enough for the Applicant to complain that the fees of themselves are on the high side.

63. It is notable that the Applicant has not obtained any documentary evidence of alternative quotes of her own. In the Tribunal's experience, the management fee claimed of £952 p.a. for 5 flats (£192 per unit) is not on the high side for management of a block of this size, if the management had been optimal.

64. However, where the quality of the services delivered by the agents themselves and/or the condition of the development is below normal expectations, the Upper Tribunal has accepted this as being indicative of the management function not being executed to a reasonable standard. In *Kullar and Prior Place Residents Association v Kingsoak Homes Ltd* [2013] UKUT (LC) the managing agent's fees were reduced by 10% on account of the problems experienced in the block.

65. The Tribunal determines in this case that (1) there has been a lack of supervision to be expected of a reasonably competent managing agent in respect of services, (2) a failure to apply appropriate credits onto the Applicant's account until 3 years later, and (3) various other deficiencies as highlighted in paragraphs 33, 34 and 58 in particular of this decision.

66. In the circumstances, the Tribunal determines that the managing agent's fees should be reduced by 20% for each year, giving an amount per annum of £761.60 (Applicant's share £152.32).

Finance Charges

67. These were challenged for the years ending 2019, 2020 and 2021 only.

68. The Applicant's argument was that she was not convinced that it was her liability to pay these charges.

69. The Respondent's written case was that it was obliged to hold the Applicant's money on trust, and that under paragraph 11 of Part IV of the Schedule, the Respondent could employ such staff and persons as it saw fit.

70. The Respondent relied on internal invoices, again from Moreland Estate Management to the Respondent, which stated that these fees were "banking fees incurred in relation to the management of the above property as agreed on a fixed basis at £7.50 per unit per annum which includes all payments received by any payment method…"

71. Mr Simon alleged that this cost was to cover the cost of banking fees as a result of holding money. He could not explain why it was a fixed fee charge capped at £7.50. He was unable to produce any bank statements to show that the bank had in fact been charging fees for holding monies, and what the amounts were.

72. The Tribunal determines that this was not employment of staff or persons within the meaning of paragraph 11 of Part IV. In any event, in the absence of evidence from the bank, it is impossible to be satisfied that it was a cost which was reasonably incurred/ to be incurred, or that it was reasonable in amount.

Insurance Revaluation Fee

73. This related to the year ending 2019 only, in the sum of £1200.

74. The Applicant requested the Tribunal to follow the decision of 2017 to annul any purported insurance charges and costs apart from the premium itself, including purported arrangement or valuation fees. She alleged there is no evidence of what this intercompany charge relates to, and it is therefore challenged as per previous inter group management charges

claimed by the Respondent, which were rejected as unreasonable by the previous Tribunal.

75. The Respondent referred to its obligation to insure in the full value of the building are set out in paragraph 6 of Part IV of the Schedule to the Lease. In oral representations, and from the documentation provided, the Respondent emphasised that this was not an intercompany charge, but a revaluation fee carried out by an independent surveyor, to make sure that the building was being insured at the proper amount. Mr Simon stated that there was a need periodically to undertake such a report, not less than every 3 years but not more than every 5 years. Mr Simon further explained that, on his instructions, it had been sometime since the previous revaluation report had been undertaken; indeed, he pointed to the fact that such a report was not included in the 2016 or 2017 accounts. He also pointed to an invoice for the amount claimed and the revaluation report itself.

76. In answer to the questions from the Tribunal as to whether or not there was any connection between the valuers involved and the Respondent or Moreland Estate Management, Mr Simon explained that he was a non executive director of the valuers, and that he had recommended this company to the Respondent. He did not know if any alternative quotes had been obtained. He confirmed that no commission was taken as a result of this instruction. He was unable to say if it was a competitive figure. He added that his understanding was that the same price was fixed across all properties in the Respondent's portfolio, so as to provide a standard charge and economy of scale. He confirmed that he did not understand the amount charged to be linked to value, or any shift in value. He told the Tribunal he believed the charge was still £1200 even in 2021.

77. The Tribunal is satisfied that this was a sum which was reasonably incurred and reasonable in amount. It is clear that the revaluation did take place, and that such a task is necessary on a periodic basis, 3 years being reasonable in the Tribunal's experience. Given that there was no commission payable, and bearing in mind that the Applicant had provided any alternative quote herself, the Tribunal is satisfied but the amount was not outside the legitimate range of costs for this exercise.

78. The challenge to the £1200 claimed by the Respondent is accordingly not upheld.

S.20C/ paragraph 5A Application

79. In her written submissions, the Applicant submits that it is entirely just and equitable to refuse the landlord to the right to recover any legal costs in respect of the service charge, or by way of an administration charge. She contends this is the necessary result of the unnecessary cost and expense incurred in issuing incorrect demands for non-existent debts which had already been the subject of previous decisions. She further relies on the fact there was an adjournment on the 10 March 2021, by reason of the landlord's failure to prepare for the hearing. The Applicant also considers the Respondent's overall and historic conduct to be vexatious, believing that it has chosen to cynically ignore previous decisions of the Tribunal, and has wrongly attempted to recover debts which it knows it is not entitled to, and by apparently submitting false invoices delivered by inter group companies when there is no evidence of an actual services having been provided.

80. She considers court fees should be paid by the landlord and offset against any awards in favour of the landlord for service charges payable.

81. The Applicant relies on a decision in respect of *12, 19A, 27, 32B, 41 and 48 Lenwood Country Club, Linwood Rd, Northam, Biddeford, Devon* (CHI/18U/LSC/2019/0113), a case in which Moreland and its representative Mr Simon had been criticised by the Tribunal as adopting a cavalier approach to service charge budgeting which was not in accordance with the RICS management code.

82. She also submits that she should be reimbursed the application fee of £100 and the hearing fee of £200, for all the reasons given in her written submissions, and because she has had to come to the Tribunal for a third time to seek protection against the unreasonableness of the charges, when the Respondent had ignored, seemingly deliberately, the previous determinations of the Tribunal.

83. In its written submissions the Respondent relies on clause 3(5)(a) and paragraph 13 of Part IV of the Schedule to the Lease, the latter of which provides in full:

"The Lessor shall take all and any action or remedy available against any lessee who defaults in making any payment as provided for in clause 3(5)(a) or (5)(b) herein or otherwise and the lessor will be entitled to collect all costs charges and expenses including solicitors' costs barristers' fees surveyors' fees and court costs or otherwise and also its own administration expenses properly incurred in relation or incidental to any such action which the lessor is unable to collect from any such defaulting lessee by incorporating all such items expended or to be expended as part

of the costs charges and expenses of the lessor in carrying out its obligations as referred to in clause 10 of this Part and shall be properly accounted for in accordance with clause 11 again in this Part of the Schedule"

84. The Respondent further points to the fact that the Applicant has admitted at least 50% of the amounts demanded in respect of each financial year; and therefore it is reasonable that the Respondent can recover its costs as service charges.

85. The Respondent yet further relies on clause 2(12)(b) of the lease in the following terms:

"To pay and indemnify the lessor against all costs and expenses including (without prejudice to the generality of the foregoing) solicitors' costs and surveyors' fees in respect of or incidental to any advice sought or any action reasonably contemplated or taken by or on behalf of the lessor in order to prevent or procure the remedying of any breach or non performance by the lessee of any of the covenants conditions or agreements herein contained and on the part of the lessee to be observed and performed."

86. The Respondent further submits that the decision in *Chaplair Limited v Kumari* [2015] EWCA Civ 798 is authority for the proposition that a landlord is entitled to rely on its contractual obligations as prevailing over the jurisdictional discretion.

87. The Tribunal doubts that the cost of these proceedings fall within paragraph 13 of Part IV of the Schedule to the Lease or clause 2(12)(b) thereof, because this was not any action or remedy taken by the Respondent against the Applicant; instead, this was an application made by the Applicant against the Respondent.

88. In any event, it still falls on the Tribunal to decide whether or not it would be just and equitable for such costs to be recovered either as service charges or administration charges.

89. The Tribunal does not consider that the decision in *Chaplair Limited* is of any assistance on the issue of whether service charges or administration charges should be recoverable under section 20C and/or paragraph 5A. The issues in *Chaplair Limited* were quite different, namely (1) whether the court had power to order a tenant to pay any cost to the landlord under the terms of the lease where the costs arose within related leasehold valuation tribunal proceedings and (2) whether the court has power to

order a tenant to pay costs to the landlord under the terms of the lease where the case was allocated to the small claims track.

90. In the Tribunal's determination, its decision has to be solely a classic exercise of discretion on its part, having regard to the jurisprudence on the matter. In *Tenants of Langford Court v Doren Ltd* (LRX/37/2000), HHJ Rich said as follows:

"In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.....In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes it use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a Tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them."

91. The Tribunal therefore bases its decision on the facts of the instant case, and is not persuaded to make any order on the basis of other cases made on different facts.

92. Given the Tribunal's determination in respect of the management of this block, and in all the circumstances, we consider that it would be just and equitable to order that the Respondent's costs (if any) of defending this application should not be regarded as relevant costs to be taken into account in determining the amount of any service charge or administration charge payable by the Applicant.

93. Whilst the Tribunal accepts that the Applicant has conceded matters on her Schedule regarding building and terrorism insurance, common parts electricity, accountancy fees, general repairs and maintenance, drain clearance, and gutter clearance, the fact remains that she has had to come to this Tribunal to obtain a determination in respect of other service charges, the calculation of which have not been transparent until the hearing, and in respect of which there have been management failings on the part of the Respondent's agents as set out herein. It is not to be

expected that a litigant will win on every point which it advances on an application; and it might be said that it is to the Applicant's credit that she has withdrawn a number of items rather than pursue them unreasonably to the end.

94. For similar reasons, the Tribunal exercises its discretion under rule 13(2) of the Tribunal Procedure (First tier Tribunal)(Property Chamber) Rules 2013 to order the Respondent to reimburse the Applicant her application fee of £100 and the hearing fee of £200.

95. The Tribunal does not have jurisdiction to order that those fees be offset against any sums owing to the Respondent. The parties are encouraged to come to a sensible arrangement in that regard.

96. For the avoidance of doubt, the Tribunal has no jurisdiction to decide any issue in relation to costs arising from the County Court proceedings.

97. The Tribunal would like to conclude by thanking the parties for the civil way in which the hearings were conducted, notwithstanding that the matters in dispute were forcefully contested.

Judge: _____
S J Evans

Date:
20/5/21

ANNEX – RIGHTS OF APPEAL

1. If a Party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written Application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The Application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the Application.
3. If the Application is not made within the 28-day time limit, such Application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the Application for permission to appeal to proceed despite not being within the time limit.
4. The Application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the Party making the Application is seeking.

Appendix 1

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as Part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or Part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

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

Section 27A

(1) An Application may be made to the appropriate Tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

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

(3) An Application may also be made to the appropriate Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No Application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a Party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.

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