



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &**

**IN THE COUNTY COURT at
Wandsworth, sitting at 10 Alfred
Place, London WC1E 7LR**

Tribunal reference : **LON/00BA/LSC/2019/0366**

Court claim number : **FoAY907N**

Property : **Flat 4, 16 Arterberry Road, London,
SW20 8AJ**

Applicant/Claimant : **Paul Anthony Cleaver, Tribunal
Appointed Manager**

Representative : **In Person**

Respondent/Defendant : **Mrs Marbeth Gorden**

Representative : **In Person**

Tribunal members : **(1) Judge Amran Vance
(2) Mr S Mason, BSc FRICS
(3) Mr L Packer**

In the county court : **Judge Vance**

Date of Hearing : **16 March 2020**

Date of decision : **9 April 2020**

DECISION

NB: Documents in bold and in square brackets below refer to pages in the hearing bundle provided by the applicant.

Summary of the decisions made by the Tribunal

1. We determine that the following sums are payable by Mrs Gorden to Mr Cleaver, by way of service charge, for the **2017/18 Service Charge Year**, broken down as specified in the table below. Credit must be given to Mrs Gorden for payments made in respect of the budgeted costs, when identifying her liability in respect of the actual costs for this year:
 - (a) **£9,260.50** in respect of the budgeted sum for that year, being her 25% apportioned contribution of the total sum of £37,042.00; and
 - (b) **£9,222.24** in respect of the actual costs incurred in that year, being her 25% apportioned contribution of the total sum of £36,888.95, including the cost of major works.

Item	Budgeted Amount	Budgeted Amount Payable - FTT Determination	Actual Amount	Actual Amount Payable -FTT Determination
General Repairs & Maintenance	£3,500.00	£3,500.00	£4,435.20	£4,435.20
Gutter Cleaning	£1,200.00	£1,200.00	£0.00	£0.00
General Cleaning	£2,000.00	£2,000.00	£95.00	£95.00
Refuse & Bin Costs	£300.00	£300.00	£0.00	£0.00
Garden Grounds & Maintenance	£1,872.00	£1,872.00	£225.00	£225.00
Electricity	£220.00	£220.00	£201.43	£201.43
Accountancy Fees	£650.00	£650.00	£650.00	£650.00
Health & Safety	£1,200.00	£1,200.00	£1,029.14	£1,029.14
Buildings Insurance Premium	£4,000.00	£4,000.00	£3,256.10	£3,256.10
Contingency	£0.00	£0.00	£2,850.00	£2,695.00
Reserve Fund	£20,000.00	£20,000.00	£19,052.08	£19,052.08
Management Services	£2,100.00	£2,100.00	£2,100.00	£2,100.00
Major Works	£0.00	£0.00	£3,150.00	£3,150.00
Totals	£37,042.00	£37,042.00	£37,043.95	£36,888.95

2. We determine that the following sums are payable by Mrs Gorden to Mr Cleaver, by way of service charge, for the **2018/19 Service Charge Year**, broken down as specified in the table below. Again, credit must be given to Mrs Gorden for payments made in respect of the budgeted costs, when identifying her liability in respect of the actual costs for this year:
- (a) **£4,183** in respect of the budgeted sum for that year, being her 25% apportioned contribution of the total sum of £16,732.00; and
- (b) **£5,135.50** in respect of the actual costs incurred in that year, being her 25% apportioned contribution of the total sum of £20,542.00.

Item	Budgeted Amount	Budgeted Amount Payable - FTT Determination	Actual Amount	Actual Amount Payable - FTT Determination
General Repairs & Maintenance	£3,000.00	£3,000.00	£6,024.70	£6,024.70
Plumbing Heating & Drain Maintenance	£1,200.00	£1,200.00	£1,764.60	£1,764.60
General Cleaning	£2,100.00	£2,100.00	£390.00	£390.00
Garden Grounds & Maintenance	£1,872.00	£1,872.00	£3,876.00	£3,876.00
Electricity	£220.00	£220.00	£315.18	£315.18
Accountancy Fees	£650.00	£650.00	£650.00	£650.00
Land Registry	£50.00	£50.00	£0.00	£0.00
Health & Safety	£540.00	£540.00	£240.00	£0.00
Buildings Insurance Premium	£5,000.00	£5,000.00	£5,079.52	£5,079.52
Contingency	£0.00	£0.00	£342.00	£342.00
Management Services	£2,250.00	£2,100.00	£2,250.00	£2,100.00
Totals	£16,882.00	£16,732.00	£20,932.00	£20,542.00

3. Credit also needs to be given to Mrs Gorden in respect of the two payments made to Mr Cleaver in the total sum of £2,288.88 (on 18 May 2017 and 10 July 2017).

4. The sum of £16,591.51, claimed by Mr Cleaver for the period 1 June 2004 to 31 March 2017, prior to his appointment as manager, is not payable by Mrs Gorden to him.

Background

1. In a decision dated 13 March 2017, in application LON/00BA/LAM/2016/0015, the applicant, Mr Cleaver, of Urang Property Management Limited (“Urang”), was appointed by the tribunal as the manager of 16 Arterberry Road, Wimbledon, London, SW20 8AJ (“the Building”) under the provisions of s.24 of the Landlord and Tenant Act 1987. His appointment commenced on 13 March 2017 and was for a three-year term. A separate application to extend his appointment has been made (LON/BA/LVM/2019/0019) and his appointment has been extended by the tribunal until final determination of that application.
2. The Building is a converted Victorian detached house, built circa 1890, containing five flats. Mrs Gorden is the long leaseholder of Flat 4, a 2-bedroom flat on the first floor of the Building (“the Flat”). She has the benefit of the remaining term of a lease dated 24 March 1961, entered into between (1) Thurloe Developments Limited and (2) Dennis Ball (“the Lease”). She was registered as the leasehold owner on 3 January 1995 [92]. The freeholder is Mrs Cynthia Diana Rowley. Prior to Mr Cleaver’s appointment the Building was managed by Salter Rex, property agents, on behalf of Mrs Rowley. At the hearing of this application Mrs Gorden stated that she believed Salter Rex’s appointment pre-dated her purchase of the Flat.
3. In its decision of 13 March 2017, the tribunal (“the 2017 tribunal”) recorded at paragraph 9, amongst other matters, that:
 - (a) there appeared to be a complete absence of any management of the by the landlord’s then agents, Salter Rex, in circumstances where proper management was urgently required;
 - (b) the condition of the Building was poor, with evidence of significant cracking to the front elevation, as well as water ingress, causing significant damp and damage to the structure of the building and other disrepair;
 - (c) there is confusion between the terms of the leases held by the long leaseholders in the Building. Mrs Gorden appeared to have an older form of lease compared to the other leaseholders. The leases gave leaseholders the option of delegating their repairing obligations to a firm of managing agents, whose terms of appointment are to be determined by a majority view of the covenanting leaseholders. However, the tribunal was told that nobody was sure if Salter Rex were

ever validly appointed, and that this was why it stopped doing anything in 2013; and

(d) at paragraph 10, the tribunal determined that given the multitude of apparently intractable problems bedevilling the Building, including serious disrepair, badly drafted leases, unworkable voting procedures, ineffective management, and issues relating to insurance, as well as other factors, that it was just and convenient to appoint Mr Cleaver as the manager of the Building.

4. On about 18 February 2019, Mr Cleaver issued a claim against Mrs Gorden in the County Court Business Centre (Claim Number FoAY907N) (“the County Court Claim”) in which he claimed the sum of £42,354.12 for arrears of service charge and ground rent, together with interest and contractual costs (said at that point to amount to £5,697.88).
5. Mrs Gorden filed a defence, but no counterclaim, to the County Court Claim. In her defence, she raised the following issues:
 - (e) despite her requests, she had not received an explanation from Salter Rex, or from Urang, as to how service charges demanded had been calculated;
 - (f) disrepair was affecting her flat, which a judge in Kingston County Court had said, in 2004/5, should be remedied, but which had not been addressed;
 - (g) damage to her flat had been caused by ‘changes’ to the flat below;
 - (h) an inappropriate apportionment of service charge liability had occurred following changes made at the Building.
6. The claim was transferred to the County Court at Wandsworth, and then to this tribunal, by order of District Judge Parker, dated 12 September 2019. Following this transfer, the tribunal is required to make a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable by Mrs Gorden.
7. An oral case management hearing (“CMH”) took place at the tribunal on 24 October 2019, before Judge Vance. Mrs Gorden attended that hearing, as did Mr Joe Roberts, a property manager at Urang, engaged by Mr Cleaver.
8. At the CMH, Mr Roberts stated that:

- (a) the sum of £42,354.12 claimed in the County Court claim included the sum of £16,591.51 for the period prior to Mr Cleaver's appointment as manager. Salter Rex had provided Urang with a Statement of Account covering a period 1 June 2004 to 2 March 2017, that showed no payments at all being made by Mrs Gorden towards service charges for the whole of that 13-year period. The remainder of the sum claimed in the County Court Claim concerned the period after Mr Cleaver's appointment, including costs incurred in respect of major works to the exterior of the Building ("the Major Works");
- (b) Salter Rex had not, however, provided Urang with service charge accounts covering the period prior to Mr Cleaver's appointment, nor invoices, or copies of service charge demands sent to Mrs Gorden. He acknowledged, that this may give rise to potential problems in proving Mrs Gorden's liability to pay service charge arrears prior to Mr Cleaver's appointment, including potential limitation issues, but Mr Cleaver considered he had a responsibility to all leaseholders to try to recover these arrears;
- (c) the last time major works had been carried out at the Building was in about 1996/7, and the poor condition of the Building led to Mr Cleaver carrying out a statutory consultation under s.20 Landlord and Tenant Act 1985, prior to commencing Major Works about two months before the CMH.

9. Mrs Gorden's position at the CMH was:

- (a) she accepted that it was possible that she had paid nothing towards service charges for the 13-year period prior to Mr Cleaver's appointment, but argued that that this was because Salter Rex had not provided her with copies of the service charge demands, nor a breakdown of the costs claimed;
- (b) there had previously been County Court claims against her seeking arrears of service charges;
- (c) following Mr Cleaver's appointment, she made two payments of £2,288.88 (on 18 May 2017 and 10 July 2017) but that she has since withheld payment because of lack of repairs to her Flat. She said that her Flat suffers from water penetration due to the deteriorating condition of the external wall and cracks in the ceilings in her Flat.

10. Mr Roberts confirmed that the amount claimed in the County Court Claim for the service years ending 31 March 2018, and 31 March 2019, were estimated (budgeted sums) but that final accounts for those years are now available. Both parties agreed to the tribunal determining Mrs Gorden's liability not only for the estimated costs for those two years, but also her liability in respect of the actual costs incurred.
11. At the CMH, the parties were notified that as the County Court has transferred the whole of this claim to the tribunal, the judge who was to eventually hear the case would deal with all the issues in the claim, including ground rent, interest and contractual costs. The judge is empowered to do so as a result of amendments made to the County Courts Act 1984, by which judges of the First-tier Tribunal are now also judges of the County Court. This means that, in a suitable case, the judge can also sit separately as a District Judge of the County Court, and can decide issues that would otherwise have to be separately decided in the County Court; and this might result in savings in time, costs and resources. The parties agreed for this matter to be dealt with in this way.
12. At the CMH, Judge Vance informed Mrs Gorden that she should seek to obtain legal advice concerning this claim as it gives rise to quite complex legal issues and because the sum in issue is large. She was directed to the tribunal's reception desk to obtain details of legal advice agencies that might be able to provide her with free legal advice.
13. Directions were issued on 24 October 2019, which identified the issues requiring determination by the **tribunal** as:
 - (a) Mrs Gorden's liability to pay towards service charges for the service charge years 2003/4 to 2018/19 inclusive (for the years 2017/18 and 2018/19, the tribunal will determine her liability to pay both the estimated costs and the actual costs payable by her);
 - (b) whether, for the years in dispute, service charges have been properly demanded from Mrs Gorden and whether the limitation provisions of section 20B of the 1985 Act apply in respect of any of the costs claimed;
 - (c) whether any of the costs claimed have already been the subject of a determination by the county court that would deprive this tribunal of jurisdiction;
 - (d) whether the sums said to be demanded from Mrs Gorden have been apportioned in accordance with the provisions of her lease, and if that apportionment is reasonable;

- (e) whether sums demanded from her towards a reserve fund are payable by her, including whether they are reasonable in amount;
- (f) whether Mr Cleaver has complied with the consultation requirement under section 20 of the 1985 Act in respect of the Major Works;
- (g) whether the sum demanded from her towards the estimated costs of the Major Works is payable by her, including whether the apportionment of that sum is reasonable;
- (h) whether Mrs Gorden has a defence of set off to the s.27A application, for breach of covenant of the freeholder's repairing obligations; and
- (i) whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made in Mrs Gorden's favour.

14. The issues requiring determination by the judge, sitting as a County Court judge, were identified as Mrs Gorden's liability to pay:

- (a) ground rent;
- (b) interest; and
- (c) contractual legal costs; and
- (d) whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made in Mrs Gorden's favour.

15. The directions of 24 October 2019 required Mrs Gorden to set out her case in the form of a Scott Schedule, to be accompanied by any alternative quotes or documents relied upon, and a statement containing any legal submissions relied upon. Mr Cleaver was then to respond, and Mrs Gorden was permitted to send a reply by 14 February 2020, including any witness statements relied upon.

16. Although Mrs Gorden set out her initial case in a Scott Schedule **[52-63]**, her representations only covered the 2017/18 and 2018/19 service charge years. She did not refer to the sums claimed for the years 2003/4 to 2016/17, and nor did she make any representations regarding: the limitation provisions of section 20B of the 1985 Act; whether Mr Cleaver had complied with the consultation requirement

under section 20 of the 1985 Act in respect of the Major Works; or whether she has a defence of set off to the s.27A application.

17. Nor did she serve a reply, despite Judge Vance extending the deadline for her to do so to 6 March 2020. Her explanation for this was that she had been unable to do so as, despite her efforts, she had been unable to obtain legal advice concerning the application.
18. Mr Cleaver has included copies of service charge demands sent to Mrs Gorden in the hearing Bundle [242-257]. As Mrs Gorden has not contended otherwise, we proceed on the basis that these costs were properly demanded from her. She also confirmed at the hearing of the application that she was not contending that the s.20 consultation in respect of the Major Works was defective. Although she had concerns about s.20 consultation notices issued by Mr Cleaver in respect of Intercom Works [357-358], those works are not included in the costs under consideration in this application. We address the question of set-off, and the question of apportionment, below.

The hearing

19. At the hearing of the application on 16 March 2020, the applicant was represented by Mr Roberts. We were informed that Mr Cleaver was unable to attend as he was self-isolating as a result of the Covid-19 pandemic. Also present on behalf of the applicant was Mr Daniel Wand of counsel, but he was briefed to attend in relation to the question of costs only. Mrs Gorden appeared in person. Mr Alistair Stewart, the leaseholder of Flat 2 was present as an observer. Mrs Gorden's objection to his presence on the basis that he was not a party to the claim was rejected by the tribunal, and by Judge Vance, because this was a public hearing and there was no reason to depart from the usual principle of open justice that entitled members of the public to be present.
20. Neither party requested an inspection of the Building; nor did the tribunal or Judge Vance consider that one was necessary, or that one would have been proportionate to the issues in dispute.

TRIBUNAL ISSUES

Decisions and reasons

Historic arrears prior to Mr Cleaver's appointment

21. The tribunal first considered the amount of £16,591.51 claimed by Mr Cleaver for the period 1 June 2004 to 31 March 2017.

22. Mr Robert's position was that paragraph (iii) of Service Charge section of the Schedule of Functions and Services in the Management Order empowered Mr Cleaver to "*instruct solicitors to recover unpaid rents and service charges and any other monies due to the Respondent and/or the Manager*". Reference to "the Respondent" was, of course, a reference to Mrs Rowley, the freeholder. We were told that Mr Cleaver considered he was obliged, by virtue of this provision, to seek to recover pre-appointment arrears of ground rent and service charge from the respondent. The sum of £16,591.51 claimed was, said Mr Roberts, the opening balance recorded on Mrs Gorden's account, on handover to Mr Cleaver [297].
23. Mr Roberts drew our attention to a Statement of Account for Mrs Gorden [274], provided by Salter Rex, that shows arrears of ground rent and service charge rising from £3.75 on 28 September 2004 to £17,336.14 on 2 March 2017. Not a single payment from Mrs Gorden is recorded in that statement. In response to the directions issued at the CMH, Mrs Gorden provided the applicant with copies of service charge demands she had received from Salter Rex. No payments from her are recorded in balances shown in those demands.
24. As stated above, Mrs Gorden did not address the payability of these historic arrears in her Scott Schedule. Her position at the hearing was that she withheld payments to Salter Rex because she believed it had apportioned service charges incorrectly to her, and because she considered she was being charged for costs incurred prior to her purchase of her Flat.

Tribunal's Decision on historic arrears

25. We are satisfied, on the evidence before us, that Mrs Gorden did not pay any sums of ground rent or service charge to Salter Rex between 1 June 2004 to 31 March 2017. This is the stark indication on the Statement of Account provided and the lack of payments shown on the demands disclosed by Mrs Gorden following the CMH. Indeed, she herself accepted that she may not have made a payment during this period. Despite this, in our determination, Mr Cleaver is not entitled to recover the sum of £16,591.51 from Mrs Gorden for the reasons that now follow.
26. The copy of Mrs Gorden's Lease in the bundle [14] is, in part, illegible, but a copy of the lease for Flat 3 has been provided [105] which assists in reading the terms. The lease for Flat 3, whilst not identical, appears to be in substantially the same terms as Mrs Gorden's lease.
27. The service charge mechanism is not set out in the main body of the Lease. It is instead, set out in an Estate Deed of Covenant, located at Schedule Four of the Lease. At clause 3(g) of the Lease, Mrs Gorden covenants:

“To execute and comply in all respects with the provisions of the Estate Deed of Covenant and to keep the Lessor fully and effectually indemnified from and against all or any breach or non-performance of the same thereof”.

28. Clause 6 of the Lease contains a lessor’s covenant to insure the Building, and to maintain, repair and redecorate its main structure, gas and water pipes and other service media, and the common parts of the Building. However, clause 7 provides that once all the leaseholders in the Building have entered into the Estate Deed of Covenant the lessor’s covenants in Clause 6 are substituted by the mutual covenants given by the leaseholders in the Deed, with the lessor released from any further obligation under the former covenants. The applicant asserts, and Mrs Gorden did not disagree, that all leaseholders entered into the Deed of Covenant prior to the service charge years included in the County Court claim.

29. Paragraph 1 of the Deed of Covenant contains a covenant by the Covenantee Parties (the leaseholders) to:

“observe and perform the covenants hereinafter appearing and to keep the Lessor fully and effectually indemnified from and against all or any breach non-performance or non-observance of the same and subject the joint and several liability hereof to contribute and pay in the proportion set out in the Fifth Schedule hereto such sums as are equal to the entirety of the costs outgoings and matters hereinafter contained and arising within fourteen days of the same being due and payable.....out of which fund so far as the same permits the costs and expenses as in this Deed provided shall be met PROVIDED ALWAYS that the Covenantee Parties shall be responsible in the proportions as aforesaid for the actual costs and expenses....”

30. The proportion that Mrs Gorden must pay towards these costs (defined in the Estate Deed as the “Maintenance Charge”) is specified in the Fifth Schedule as being one quarter, in other words, 25%.

31. Paragraph 2 of the Deed of Covenant contains a covenant by the leaseholders *“with each other and as a separate covenant with the Lessor that they will at their own expense...”* maintain, repair and renew the structure of the Building, insure it, and maintain, redecorate etc. the common parts of the Building, the front lawns and front flowerbeds, hedges, shrubs trees and gardens adjoining the front of the Building and the front footpaths, drives and standings.

32. Paragraph 3 allows the Covenantee Parties to delegate their obligations under the Deed to a firm of managing agents, *“whose management fees are shall be met and the appointment and terms of*

appointment of whom shall be determined by the majority view of the Covenanting Parties (but in the event of there being no majority decision the Lessor shall have a casting vote).....”.

33. In summary therefore, once all leaseholders entered into the Deed of Covenant, they, as the Covenanting Parties, became obliged to maintain, repair etc. the Building, and its common parts, in place of Mrs Rowley. They also agreed to contribute towards the costs of doing so in the proportions set out in the Fifth Schedule to the Lease, and to indemnify Mrs Rowley in respect of any non-performance of those obligations. The leaseholders have the option of appointing a managing agent to carry out their obligations, but such appointment requires a majority of them to agree to the appointment, with, in the event of deadlock, Mrs Rowley having the casting vote.
34. There is no evidence at all before us to indicate that Salter Rex was appointed by the leaseholders to manage the Building and to carry out the leaseholders’ obligations under the Lease and Deed of Covenant. On the contrary, the evidence before the 2017 tribunal, led it to indicate that there was considerable doubt as to whether Salter Rex were properly appointed. If that is correct, then Salter Rex had no authority to demand service charges from Mrs Gorden.
35. At paragraph 9 of its decision, the 2017 tribunal described how four leaseholders, but not Mrs Gorden, had entered into a new Estate Deed of Covenant, in substantially the same terms as the previous Deed, when extending their leases under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993. The tribunal then said as follows:

“We were told that Salter Rex, the current managing agents, were ostensibly appointed by a majority of lessees, but no one is sure, including Salter Rex, that they have ever been validly appointed. It was largely for this reason, we were told, that they stopped doing anything in 2013. When, in or about March 2016, a majority of lessees did indicate that they wished to appoint new agents, Salter Rex replied as follows: “Mrs Rowley is the client and you will need to seek her agreement to this. The procedure once a termination is agreed, will be for us to prepare a closing account and any deficit in the account, including our management fees paid before all documents can be handed over.”

36. In our determination, Mr Cleaver is not entitled to an order in respect of the historic arrears for the following reasons:
- (a) although paragraph (iii) of the Management Order empowers him to collect service charges due to Mrs Rowley prior to his appointment, it appears that, at all relevant times, it was the

leaseholders who were obliged to comply with the repairing, maintenance, insuring and other obligations set out in clause 2 of the Deed of Covenant, and not Mrs Rowley. The cost of doing so was at the leaseholders “own cost and expense” and the costs incurred were not incurred by, or on behalf of the landlord, and therefore do not fall within the definition of ‘relevant costs’ in section 18(2) Landlord and Tenant Act 1985; and

(b) the available evidence does not establish that Salter Rex was authorised by a majority of leaseholders to manage the Building and collect in service charges. In addition, even if it was properly instructed, the costs incurred fall outside the remit of the Management Order, which only provides for Mr Cleaver to recover service charges and monies payable to him, or to Mrs Rowley, not to Mrs Gorden’s co-leaseholders.

37. The sum of £16,591.51 claimed by Mr Cleaver for the period 1 June 2004 to 31 March 2017 is therefore not payable by Mrs Gorden to him. It may well be that Mrs Gorden is liable to reimburse her co-leaseholders for some or all such costs, but that is not a matter for us to determine in this application.

38. It is worth noting that Mrs Rowley’s lack of standing to pursue service charge arrears for costs incurred by Salter Rex was raised in previous county court proceedings. Documents provided by Mrs Gorden indicate that on 26 November 2007 her solicitors, Howard Kennedy, wrote to Hertford County Court [377] referring: to (a) a default judgment obtained by Mrs Rowley against Mrs Gorden on 13 September 2016, in Claim 6HF01577, in the sum of £4,888.44 [375]; and (b) Claim 7HF0074, in which Mrs Rowley was seeking an order for payment by Mrs Gorden of £4,625.06. The solicitors point out that the default judgment was improperly obtained because under the terms of the Lease, Mrs Rowley was not entitled to recover service charge from Mrs Gorden. Rather, any claim would have to be brought by the other leaseholders of the Building.

39. Following that letter, Mrs Rowley discontinued claim 7HF0074 on 27 June 2018 [390] and an application to set aside the default judgment [393] was stayed on 25 March 2009, for settlement negotiations to take place [397]. Given that the order sought in Claim 6HF01577 covered the period 29 September 2002 to 7 April 2006 [373] and that Claim 7HF0074 appears to have been issued on 22 May 2007 [377] some of the arrears of £16,591.51 claimed by Mr Cleaver were clearly the subject of this earlier litigation, with the ultimate outcome of Claim 7HF0074 uncertain from the documents before us. It is therefore possible that issues of estoppel may arise that prevent Mrs Rowley from seeking to claim that some, or all, of that sum is payable by Ms Gorden, but that is not a question that we need to consider, given our above

determination that the sum is not payable by Mrs Gorden to Mr Cleaver.

Apportionment

40. It is clear from Mrs Gorden's comments on her Scott Schedule that the question of apportionment was the main, or only, issue raised by her in respect of many of the heads of expenditure for the two relevant service charge years. As stated above, under the Deed of Covenant, her apportioned share is 25%. That same apportionment of 25% is specified at paragraph (ii) of the Service Charge section of the Schedule of Functions and Services in the Management Order.
41. In Ms Gorden's submission, her apportioned share should only be 20%. Her reasoning is not explained in her Scott Schedule, but it would appear to be that she considers it is unreasonable for her to have to pay 25%, given that there are five flats in the Building. However, for those years prior to Mr Cleaver's appointment she was contractually bound to pay 25% of the costs for which she was liable pursuant to the terms of her Lease, and the Deed of Covenant. After his appointment, the same percentage was specified in the Management Order, which is a binding determination as to her apportioned contribution. If Mrs Gorden considers the apportionment under the Management Order to be unfair, she is entitled to apply to the tribunal to seek a variation in the terms of the Order, but unless and until the Order is varied, that is the percentage that she is liable to pay.

2017/18 Service Charge Year

42. The service charge accounts for the 2017/18 year identify that the budgeted amount for that year was £37,042, including a reserve fund contribution of £20,000, with an actual spend of £33,893.95, plus £3,150 in respect of the Major Works [284]. Eleven heads of general expenditure are listed in the accounts, all of which were queried by Mrs Gorden in her Scott Schedule. However, during the course of the hearing, after receiving an explanation from Mr Roberts as how the costs were incurred, Mrs Gorden stated that she no longer wished to pursue a challenge to the following heads of expenditure: refuse and bin costs; electricity; accountancy fees; health and safety; buildings insurance premium; and management services.
43. She also agreed that the reserve set in the sum of £20,000 was appropriate. We concur, given that Major Works in the sum of approximately £100,000 have been identified as being required. However, once those works are complete, we would expect the reserve fund contributions demanded to reduce significantly.

44. That left the following costs in issue: (a) general repairs and maintenance; (b) gutter clearing; (c) general cleaning; (d) garden and grounds maintenance; (e) contingency costs; and (f) costs of major works.

General repairs and maintenance - budgeted sum £3,500, and actual cost, £4,435.20.

45. The only comment made by Mrs Gorden in her Scott Schedule in respect of this cost was “*I have no way of identifying items which contribute to this spend [sic] amount. It is impossible to comment further*”. Mr Cleaver has completed the Scott Schedule, with his comments in response, and states that Mrs Gorden has never asked for a breakdown of these costs, nor copies of the invoices in question. He goes on to list each invoice and describes the works undertaken, for example repairs to the intercom system and a callout to service the communal drains. Copies of the invoices were included in the hearing bundle [132-146].

46. We do not consider Mrs Gorden has raised a *prima facie* defence to the payability of these costs. She has asked for an explanation, and she has received it. We see no reason to question the sums identified in the invoices provided, and in the absence of any substantive challenge from Mrs Gorden, we determine that both the budgeted costs and the actual costs incurred are reasonable in amount and payable by her.

Gutter clearing - budgeted sum £1,200, and actual cost, nil.

47. Mr Roberts explained that when the budget was set, Mr Cleaver assumed a cost of £1,200 for gutter clearing based on his experience of managing properties of a similar size and build. In the event, however, no gutter clearing was required, and therefore the actual spend was nil. Mrs Gorden’s only comment in her Scott Schedule was that she could not comment further until she knew why the budget was set.

48. In our determination, it was reasonable for Mr Cleaver to set a budget in this amount, based on his experience of managing similar properties. It is clear from the photographs in the condition report provided in the bundle [541] that the Building is of a substantial size, with significant amounts of guttering present.

General cleaning - budgeted sum £2,000, and actual cost, £95.

49. Mrs Gorden did not challenge the actual spend of £95, but queried the budgeted amount, which she considered excessive for a property of this size and nature.

50. It appears from the Lease plan for the Building [25] that there are corridors, a stairwell and a hallway in the communal parts. As mentioned above, the Building is of a substantial size, and in our determination, it was reasonable for Mr Cleaver, as an incoming

manager, to set a budget in the amount of £2,000, which equates to approximately £9.60 per week to Mrs Gorden.

Garden and grounds maintenance - budgeted sum £1,872, and actual cost, £225.

51. In her Scott Schedule, Mrs Gorden states that there is no garden area to maintain as it was “*appropriated by Flat 1 for car parking in contravention of the lease*”. Mr Cleaver’s response is that there are sizable gardens at the front and rear of the Building for the use of all leaseholders, and that a professional gardener was employed to maintain these areas. He did not understand Mrs Gorden’s reference to appropriation.
52. At the hearing Mr Roberts explained that whilst the rear garden areas are demised to the leaseholders of Flats 1 and 2, there are communal planted garden areas at the front of the Building and along its side, with bushes at the front and trees to maintain. The copy invoice provided [149] indicates that only one visit took place between March and August 2017. The sum billed was £150 for supply of plants and labour and £75 for removal of ivy from the wall, cleaning around the gas meter and the removal of cuttings.
53. It is evident from the lease plan [25] and the photographs in the condition report provided in the bundle [541] that there is a small garden area at the front of the Building, facing Arterberry Road with a pathway to the left hand side (facing) of the Building leading to a rear court area and garages. At the hearing Mrs Gorden accepted that there were bushes at the front of the Building and plants and trees along the side pathway, but she considered this required minimal attention. However, the photographs and plan suggest that whilst not a large garden area, it is significant. In our assessment as an expert tribunal, maintaining the ivy and verges, as well weeding and, maintaining the trees and bushes, would require about four to five hours gardening time per fortnight.
54. In our determination, the budgeted sum was reasonable, given that Mr Cleaver was an incoming manager, and given the difficulties he states he experienced in obtaining accounting information for previous service charge years from Salter Rex. As to the invoice of £225, we consider the amount reasonable for the work carried out, especially given that this was the only maintenance carried out over an approximately five-month period.

Contingency costs - budgeted sum £nil, and actual cost, £2,850.

55. These actual costs break down as £216 for carpet cleaning, £330 for Land Registry costs, and £2,304 for surveyors’ costs. Invoices for the

surveyors' costs indicate that the costs concerned an external and structural survey in the sum of £1,440 [163] and preparation of a specification for external works amounting to £864 [164] At the hearing, Mrs Gorden accepted these costs were payable by her.

56. Mr Cleaver's position is that the carpet in the communal areas of the Building was cleaned in December 2017, at a cost of £216. We do not agree with Mrs Gorden's contention that it was unreasonable to do so in December as it would quickly result in the carpet becoming dirty again. The timing was not unreasonable. Mrs Gorden made no substantive challenge to amount incurred and we determine the sum payable by her.
57. We were not provided with an invoice for the Land Registry fees, but Mr Cleaver's position was that in order to manage the Building he needed to obtain copies of the flat leases from the Land Registry. Mr Roberts explained at the hearing that the cost broke down as a £220 administration charge for a legal administrative assistant, and about £10 per flat for the actual charges. These had, he said, been requested from Salter Rex, but he did not believe they were provided.
58. Mrs Gorden's only substantive challenge to the Land Registry fees was that if the work was necessary, she should only have to pay 20% of the cost. However, as noted above, she is liable to contribute 25% of the cost payable. We consider that obtaining a copy of the lease, register and title plan online should cost about £10 for each of the five flats, but that this should take no more than an hour of administrative time, at the property manager's rate of £125 per hour allowed by paragraph (i) of the Fees Section of the Schedule to the Management Order. We therefore consider the amount payable by Mrs Gorden is her apportioned share of £175, making the total sum payable under this head of expenditure £2,695.

Major works – Actual Cost, £3,150.

59. At paragraph 4.0 of the condition report obtained by Mr Cleaver from a building surveyor, Mr Theakstone, dated 16 May 2017 [541] Mr Theakstone recommends that major external works to the Building be carried out, preferably by no later than summer 2018, at an estimated cost of £100,000.
60. Mr Roberts explained that the costs concerned fees incurred by Mr Cleaver in preparation for such works, billed as per the provision in (ii) of the Fees section of the Schedule to the Management Order, that allows him to charge for matters such as the preparation of a specification of works, obtaining competitive tenders, serving required notices on leaseholders and the supervision, and administration of works. The sum breaks down as £600 for sending section 20 consultation notices to leaseholders, £2,400 for dealing with the

second stage of the consultation process including sending out notice of estimates to leaseholders [169] and dealing with the tendering process, and £100 addressing observations received from Mrs Gorden [170].

61. Mrs Gorden agreed that these major works were required and raised no substantive challenge to the payability of these costs other than to question the apportionment between the leaseholders.
62. In our determination, the costs were reasonably incurred in accordance with the provisions of the Management Order. Although, overall, the Order limits his fees to 10% of the cost of the works, we consider it appropriate for Mr Cleaver to bill for such work in stages, and that the amounts billed are not unreasonable for the work carried out. The sum is payable by Mrs Gorden in her 25% apportioned share, as specified in the Management Order.

2018/19 Service Charge Year

63. The service charge accounts for the 2018/19 year identify that the budgeted amount for that year was £16,882, with an actual spend of £14,682 [297]. Again, all heads of expenditure listed in the accounts were queried by Mrs Gorden in her Scott Schedule, but during the course of the hearing, and after receiving an explanation from Mr Roberts as how the costs were incurred, she stated that she no longer wished to pursue a challenge to the following heads of expenditure: electricity; accountancy fees; and management services (Mr Roberts agreeing to limit these to £2,100 as provided for in the Management Order, as opposed to the sum of £2,250 specified in the accounts).
64. That left the following costs in issue: (a) general repairs and maintenance; (b) plumbing, heating and drain maintenance; (c) general cleaning; (d) garden and grounds maintenance; (e) Land Registry charges; (f) health and safety; (g) buildings insurance premium; and contingency costs.

General repairs and maintenance - budgeted sum £3,000, and actual cost, £6,024.70

65. Again, the only comment made by Mrs Gorden in her Scott Schedule in respect of this cost was “*I have no way of identifying items which contribute to this spend [sic] amount. It is impossible to comment further*”. Mr Cleaver, in his comments in response, lists each invoice and describes the works undertaken, for example repairs to the porch lighting. Copies of the invoices were included in the hearing bundle [171-188].

66. The first four of those invoices concerns the installation of an overhead door closer to the front door of the Building, and to Flats 2, 3 and 5 (at a cost of £168 per flat). An invoice for the same work appears at **[177]**. Mr Roberts assumed that these works were required following a fire risk assessment but could not explain why a closer was not fitted to the front door of Mrs Gorden's Flat.
67. Mrs Gorden suggested that these costs should be borne by the individual leaseholders. However, if she wanted to pursue that argument, she should have raised it before the hearing, so that Mr Cleaver had the opportunity to respond. In any event, the powers granted to Mr Cleaver in the Management Order regarding maintenance are extensive and include: dealing with routine repair and maintenance issues; instructing contractors to attend and rectify problems; dealing with all building maintenance relating to the services and structure of the Building; and works considered to be in the interest of good estate management. Under paragraph (iv) of the Service Charge provisions of the Management Order, he is entitled to place contracts for services and equipment supplied for the benefit of the Building and include them within the service charge budget.
68. In our determination, carrying out these works fall within the remit of Mr Cleaver's powers under the Order, and he is entitled to recover the costs incurred through the service charge. The costs incurred are, in our view, reasonable and payable by Mrs Gorden. There seems to be no satisfactory explanation as to why Mrs Gorden's flat was omitted from the door closure works and, if, as Mr Roberts suggested this was because of a fire risk assessment, the work should obviously be carried out to her Flat. Equally obviously, Mrs Gorden should now pay the sum we determine to be payable by her by towards her service charge liability.
69. In the absence of any substantive challenge to the remaining costs under this head of expenditure, we consider the budgeted sum, and the actual costs, to be reasonably incurred and payable by Mrs Gorden, in her apportioned share.

Plumbing, heating and drain maintenance - budgeted sum £1,200, and actual cost, £1,764.60.

70. The only challenge raised to this head of expenditure by Mrs Gorden in her Scott Schedule was that "At least some, if not all, of this work was on drains Thames Water are responsible for, therefore there should be no charge". At the hearing she agreed that Thames Water were not responsible for maintenance of the drains in the grounds of the Building, but she believed that these ran into a shared drain located in the neighbouring property at 16A Arterberry Road. This contention is only relevant to one of the five invoices that make up these costs **[189-193]**, namely an invoice from Drain Patrol(South) Ltd for £360 **[191]** which references a CCTV camera survey of the communal drainage

system serving numbers 16 and 16A, and the provision of a report, and recommendations for remedial work.

71. In our determination, the evidence does not support the contention that the costs of the CCTV survey were unreasonably incurred. There is no documentary evidence in the bundle from Thames Water to say that the drain in question is a public sewer, or that the problem investigated arose outside the property boundary of the Building. The invoice records that the investigation was needed to investigate the underground drainage system following blockages and flooding. Mrs Gorden acknowledged that there had been a flooding problem affecting the ground floor and basement flat in the Building, (Flat 2), and, on balance, the available evidence satisfies us that it was reasonable for the applicant to incur these costs of investigation.
72. There was no substantive challenge from Mrs Gorden to the costs evidenced in the remaining invoices which concerned investigations into leaks into the basement flat, works to a leaking downpipe, construction of a brick upstand around a gully to stop flooding, and the costs of a drainage maintenance contract. That contract, said Mr Roberts, covered the regular clearing of drains and not call outs for leaks and repairs. He believed it was taken out to address the recurring problem of blockages. In our determination these costs were all reasonably incurred and are payable by Mrs Gorden.
73. Although there appears to us to be some merit in Mrs Gorden's suggestion that the costs of building the brick upstand (£480.60) [190], which she said consisted of about eight bricks, were excessively high, this was not a point that she raised until the hearing. As such, the applicant has not had the opportunity to adduce evidence in response. It is a point she should have argued in a Reply, and it was too late to do so at the hearing. In any event, whilst high, the cost of £340 for labour, and £60.50 for materials, do not appear to us to be unreasonable.

General cleaning- budgeted sum £2,100, and actual cost, £390

74. Mrs Gorden did not challenge the actual costs incurred of £390 for carpet cleaning but argued that the budget of £2,000 was unreasonably high. For the reasons stated above in respect of the 2017/18 year, we disagree. We determine the budgeted and actual costs to be payable by her in her apportioned share.

Garden and grounds maintenance- budgeted sum £1,872, and actual cost, £3,876.

75. Mrs Gorden argued that the amount of the actual costs incurred was excessive, given the much lower budgeted sum, and the lack of garden area. Mr Cleaver explained that the sum of £2,508 concerned

gardening services provided between August 2017 to June 2018, but which were not billed until the 2018/19 financial year.

76. As explained above, in our assessment of the available evidence, maintaining the garden areas would probably take about four to five hours per fortnight. The invoices provided show a spend of £684 per quarter which equates to approximately £105 per fortnight. Mr Roberts could not say how long the gardener spent on each visit, but if he spent four to five hours, this would equate to about between £21 to £26.25 per hour. We do not have the benefit of any alternative gardening quotes provided by Mrs Gorden, and in the absence of such evidence, whilst at the higher range of what we might expect, we do not consider these rates to be unreasonable, bearing in mind that they include overheads and any VAT payable. We determine the sums to be payable by Mrs Gorden.

Land Registry charges – budgeted sum, £50, and actual cost, nil.

77. Mr Roberts explained that this modest amount was budgeted for in case additional Land Registry charges were incurred, which did not turn out to be the case. We do not consider it unreasonable to do so, despite Mrs Gorden's comment that she did not understand why it was required.

Health and safety – budgeted sum, £540, and actual cost, £240.

78. As with many of the other heads of expenditure in both service charge years in issue, the invoice for the £240 actual cost incurred, was billed by a company within the Urang Group, a company for which Mr Cleaver is the Property Management Director. The amount was billed by Urang Cleaning and Maintenance Limited and is stated as being for entry into a fire detection system maintenance contract.

79. Mr Roberts confirmed that the only fire detection system in operation are standard household smoke alarms, which are tested by a simple press of a button. We do not consider it reasonable to enter into a maintenance contract for the testing of such smoke alarms. This is a simple task that can be carried out by Mr Cleaver, or one of his associates, on their periodic inspections of the Building, and as part of their standard management fee. Replacement of batteries or alarms, if required, can be billed for as part of general maintenance of the Building. We determine that both the budgeted and actual costs incurred to be unreasonable and not payable by Mrs Gorden.

Buildings insurance premium – budgeted sum, £5,000, and actual cost, £5,079.52

80. In her Scott Schedule, Mrs Gorden argued that the substantial increase in premium from the 2017/18 premium of £3,526.10 was unreasonable.
81. Mr Roberts stated that the premium had been sourced by Landsdown Insurance Brokers [215] and that the substantial increase was likely to be due to several claims having been made in the previous year.
82. Mrs Gorden informed us that she had obtained details of the claims history of the Building from Urang, but decided not to seek alternative quotes for buildings insurance, as she saw no point, given that the Management Order provides for Mr Cleaver to insure the building.
83. Although this is a considerable increase in premium it was secured by a broker that Mrs Gorden agreed had been instructed in relation to the Building since about 2011 or 2012, and with insurance placed with the same insurer. In the absence of any alternative like for like insurance quotes from Mrs Gorden, we have no evidence before us that lower premiums for similar cover could have been obtained elsewhere in the market. We do not consider the premium to be so obviously excessive, and there is no evidence that satisfies us that the cost was unreasonably incurred. We determine the amounts are payable by Mrs Gorden.

Contingency costs – budgeted sum, £nil, and actual cost, £342

84. Mrs Gorden did not pursue her challenge to bank charges of £30. However, she disputed liability to pay £312 in respect of solicitor's costs billed by Fairweather Law. The narrative to the solicitors' invoice [217] and covering letter [216] refers to the preparation of a draft letter before action to Mrs Gorden in relation to service charge arrears that was not ultimately sent to her. Mrs Gorden argued that incurring these costs was unreasonable, when no letter was, in fact, sent to her.
85. Mr Roberts argued that it was still reasonable to secure legal advice, even if a letter was ultimately not sent, and we agree. Paragraph (iii) of the Service Charge section of the Management Order allows Mr Cleaver to instruct solicitors to recover unpaid rents and service charges, which was clearly the purpose behind his instructions to Fairweather Law. Given, the very large amount of arrears owed by Mrs Gorden, he was entitled to pursue such action. The narrative to the solicitors' bill indicates that the solicitor considered the terms of the lease, and the tribunal's decision appointing Mr Cleaver, and the advice subsequently provided, and the draft letter, would have been of assistance to Mr Cleaver prior to his issue of this County Court Claim in February 2019. The amount billed is reasonable, being one hour of the solicitor's time at an hourly rate of £250 plus VAT, and a £12 disbursement for Land Registry fees. We determine that the sum is payable by Mrs Gorden in her apportioned share.

Historic Neglect – Damage to Ms Gorden’s Flat4

86. Although Ms Gorden reference disrepair and damage affecting her flat in her Defence to the County Court Claim, she did not expand on this in her Scott Schedule or in a statement of case. At the hearing she stated that she was unable to use her front room and middle box room because of large cracks in the walls. In response, Mr Roberts told us that a large crack to the front of the Building had been repaired during the course of the Major Works programme, but that further work is needed to remedy cracking to the rear and right hand side of the Building. These external works are, he said, to be completed prior to commencement of intended internal major works of repair and redecoration.

87. The presence of significant affecting the structure of the Building is evident from Mr Theakstone’s report [541]. He confirms, at page 8 of his report, that a number of cracks are present to the walls and ceiling coving of Mrs Gorden’s Flat. It is clear from reading the decision of the 2017 tribunal that the poor condition of the Building, including the presence of significant cracking to the front elevation, and other disrepair, was major reason why it considered it appropriate to appoint Mr Cleaver to manage the Building.

88. However, the presence of this disrepair does not provide Mrs Gorden with a set-off defence to this County Court claim. This is because prior to his appointment, responsibility for carrying out repairs lay with the leaseholders themselves, by virtue of the provisions of the Deed of Covenant. Mr Cleaver cannot be fixed with any liability for historic neglect prior to his appointment.

89. For the period after his appointment there is no evidence that he has unreasonably delayed in carrying out repairs to the Building. On the contrary, he has embarked upon an ongoing programme of Major Works, despite Mrs Gorden’s non-payment of the contribution payable by her towards the costs of those works.

Section 20C of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act

90. Separate directions concerning whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made in Mrs Gorden’s favour (in respect of the period after transfer of this claim by the County Court to the tribunal) will be issued by the tribunal and will be the subject of a separate determination, by the tribunal, on the papers.

91. At the hearing of this application, the tribunal indicated its intention to issue those directions at the same time as this decision. However, due

to the current Covid-19 pandemic the London regional office is closed, and all current directions in existing cases have been suspended until after 29 May 2020. Directions will therefore be issued once the tribunal is able to do so.

COUNTY COURT ISSUES

Ground Rent

92. At the hearing, Mrs Gorden admitted liability to pay the sum of £202.50 in respect of ground rent to Mr Cleaver, so no determination is required from Judge Vance on that issue.

Interest, claimant's claim for costs, and Mrs Gorden's application for an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act

93. Again, given the closure of the London regional office, separate directions concerning the question of costs, including costs of proceedings under s.51 Senior Courts Act 1981, and contractual legal costs, and whether an order under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the 2002 Act should be made in Mrs Gorden's favour, will be issued once the tribunal is able to do so. These issues will be the subject of a separate determination by Judge Vance alone, on the papers.

94. The amount of interest payable by Mrs Gorden to the claimant, if any, will also be the subject of that determination.

Name: Judge Amran Vance

Date: 9 April 2020

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal 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 date this decision is sent to the parties.
3. If the application is not made within the 28-day time limit, such application must include a request for 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 state the grounds of appeal, and state the result the party making the application is seeking.