FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/00HH/LSC/2022/0049 & 0050
Property:	Apartments 2 and 4 Marine Palms, Warren Road, Torquay TQ2 5TT
Applicants:	Janet Roddy David O'Connor as Attorney for Maura Mary O'Connor and as Executor for Lionel Martin O'Connor
Representative:	Mr B Leb of counsel for Beers LLP
Respondent:	McCarthy Contractors SW Limited
Representative:	Mr S Gallagher of counsel
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Tenants' application for the determination of reasonableness of service charges for the years 2016, 2019, 2020 and 2021.
Tribunal Members:	Judge A Cresswell Mr S Hodges FRICS
Date and venue of Hearing:	25 October 2022 by Video
Date of Decision:	28 October 2022

DECISION

The Application

1. This case arises out of the Applicant tenants' applications, made on 22 and 23 February 2022, for the determination of liability to pay service charges for the years 2016, 2019, 2020 and 2021. They also apply for an order under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, precluding the Respondent from recovering its costs in relation to the application by way of service charge or administration charge, such order to include also Martin Massey, Apartment 3, and Beata Cybulska and Tony Young, Apartment 7.

Summary Decision

2. The Tribunal has determined that the Applicants' challenges to the payability of the sums relating to the basement and terrace works are all refused, save for the conceded element of the "legal fees" of £162.92 for Flat 4
3. The Tribunal refuses the Applicants' applications under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus not precluding the Respondent from recovering its costs in relation to the application by way of service charge or administration charge.

Preliminary Issues

4. At the commencement of the hearing, the Tribunal clarified with Mr Leb the basis of the applications, it being not at all clear that there was any legal basis shown in the papers submitted for the hearing. He told the Tribunal that it was accepted that the landlord was required to repair the terraces. However, because the landlord poorly converted the property, some liability should attach to the landlord. Further, a term should be implied in the lease of a duty to maintain; lack of maintenance over a period of time should result in a lesser amount being due from leaseholders than the full cost of the replacement of the terraces.
5. He confirmed that the sums in issue were the costs associated with the replacement of the terraces and works to the basement and "legal fees".

Inspection and Description of Property

6. The Tribunal did not inspect the property. The property is said to be a former hotel converted to 13 self-contained flats.

Directions

7. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
8. This determination is made in the light of the documentation submitted in response to those directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by Mr J K Marshall, Mr D O'Connor and Mr D Stocks orally and by Mrs J Roddy and Mr M McCarthy in written form.
9. The Tribunal has regard in how it has dealt with this case to its overriding objective:

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must:

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Ownership and Management

10. The Respondent is the owner of the freehold. The property is managed for it by Darren Stocks t/a Crown Property Management ("CPM").

The Leases

11. Janet Elizabeth Roddy holds Flat 2 under the terms of a lease dated 20 November 2008, which was made between the Respondent as lessor and her as lessee. Lionel Martin O'Connor & Maura Mary O'Connor held Flat 4 under the terms of a lease dated 24 June 2010, which was made between the Respondent as lessor and them as lessees.
12. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
13. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

> **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:
>
> 15. *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn*

at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

14. *Clause 2.2 of the lease of Flat 2:*

2.2 "THE Property" is the flat on the garden and basement floor of the Building and shown edged red on Plan 2 and Plan 3 ("the Flat") and the storage area (""The Storage Area") edged red on Plan 3 which are described in more detail in the Sixth Schedule and parking space edged yellow on Plan 4 ("the Parking Space").
Together the Flat and the Storage Area and the Parking Space comprise the Property
SIXTH SCHEDULE
The Flat and Storage Area include:
(i) the internal non-load bearing walls
(ii) the doors (excluding the exterior doors and door frames of the Flat and the Storage Area), door frames and the glass in the doors and windows
(iii) the inner half severed medially of all internal non-load bearing walls shared with any other flat in the Building or with the Common Parts or with the storage areas of other flats in the Building
(iv) the ceiling of the Flat and of the Storage Area (if appropriate) up to but not including the structure suspending the ceiling and any structure above and not including the roof of the Storage Area
(v) the surface of the floor of the Flat (including that of any balcony terrace or roof terrace) and the Storage Area but excluding the foundations or the structures supporting the floors (as appropriate)
(vi) the interior plaster of load bearing walls within the Flat up to and down to the levels referred to in sub-paragraphs (iv) and (v)
(vii) all sewers drains pipes wires and cables that exclusively serve the Flat and that exclusively serve the Storage Area (if any) but excluding the balcony rails and balcony surround of any balcony terrace or roof terrace

Clause 2.2 of the lease of Flat 4:

*2.2 "THE Property" is the flat on the Basement and Garden floor of the Building and shown edged red on Plan 2 and Plan 3 ("the Flat") and the storage area ("The Storage Area") edged red on Plan 2 which are described in more detail in the Sixth Schedule and parking space t edged yellow on Plan 4 (*the Parking Space"). Together the Flat and the Storage Area and the Parking Space comprise the Property*

15. *Clause 3 of the lease:*

3. THE Tenant agrees with the Landlord:

3.1 TO pay the basic rent by equal yearly instalments in advance on 1st December each year

3.2 TO pay the service charge calculated in accordance with the Third Schedule on the dates stated there

3.3 NOT to reduce any payment of rent by making any deduction from it or by setting any sum off against it

3.4 TO pay Interest on any rent paid more than fourteen days after it falls due

3.5 TO pay promptly to the authorities to whom they are due all rates taxes and outgoings relating to the Property, including any which are imposed after the date of this lease (even if of a novel nature)

THIRD SCHEDULE

Service Charge

1. "Service costs" means the amount the Landlord spends in carrying out all the obligations imposed by this lease (other than the covenants for quiet enjoyment) and not reimbursed in any other way including the cost of borrowing money and any bank charges incurred for that purpose

16. *FOURTH SCHEDULE*

Services to be provided

1. Repairing and when appropriate replacing the roof, external walls, main structure foundations and other parts of the outside of the Building (excluding any windows window frames doors and door frames included in the demise of any flat in the Building) and those structures in the Building supporting the floors or from which the ceilings are suspended

6. Repairing and whenever necessary decorating and furnishing the Common Parts

7. Lighting heating and cleaning the Common Parts where appropriate

8. Lighting the Storage Area and the storage areas of the other flats in the Building where appropriate

The Law

17. The relevant law is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.

18. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

19. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.

20. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee's challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord's costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds)**

Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh [2015] UKUT 0333 (LC)).

21. The relevant statute law is set out in the Annex below.

Set Off

22. **The Leasehold Association says this:**

Is a structural survey recommended?

If a flat is being purchased in a newly developed block the condition should be covered by the National House Building Council (NHBC) warranty or a warranty provided by a similar organisation. These warranties provide some cover in relation to defects arising from construction, for a limited period, but leaseholders will still be responsible for maintenance costs from day one. A prospective buyer would still be advised to have a survey, as these warranties are rarely comprehensive. In most cases they cover all defects for the first two years but only cover defects relating to the load-bearing structure for the next eight years.

23. **Continental Property Ventures v White** (2016) 1EGLR 85:

Held, dismissing the appeal, that (1) breach of a landlord's covenant to repair would give rise to a claim in damages by the tenant. If the breach resulted in further disrepair imposing a liability on the tenant to pay service charge, that was part of what might be claimed by way of damages, and to the extent that it would give rise to an equitable set off, as such it constituted a defence. Accordingly, the costs incurred by a landlord for a breach of a repairing covenant that resulted in further disrepair imposing a liability on the tenant to pay a service charge were not costs reasonably incurred and the tenant therefore had a defence to their recovery, Loria v Hammer [1989] 2 E.G.L.R. 249, [1989] 7 WLUK 404 and Filross Securities Ltd v Midgeley (1999) 31 H.L.R. 465, [1998] 7 WLUK 421 considered. The "relevant costs" that by s.19(1)(a) were limited to what was "reasonably incurred" were defined by s.18(2) as the costs incurred by the landlord in connection with the matters for which the service charge was payable. Those matters included repairs maintenance. The question of what the costs of repairs was did not depend upon whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for the remedy could not, as a matter of natural meaning, depend upon how the need to remedy had arisen. The tribunal was engaged upon a determination of whether the costs were payable within the meaning of s.27A, and held that they

were not because they had not been reasonably incurred. That was a mistaken reason. However, the conclusion at which the tribunal had arrived, upon the findings of fact, was none the less correct.

24. The most recent guidance available to the Tribunal was that given by the Upper Tribunal in ***Daejan Properties Ltd v (1) Griffin (2) Mathew*** **[2014] UKUT 0206 (LC).** The Upper Tribunal gave the following guidance on historic neglect: "*A leaseholder could not set off a claim to damages for a breach of covenant which had occurred before the leaseholder acquired his or her interest.*"

25. It is clear from the above decisions of the Tribunal that the Applicants do bear the burden of proof insofar as it has been "*shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided.*"

26. **Ravenseft Properties v Davestone (Holdings) Ltd** [1978] EWHC QB 1: there is no doctrine of law which can excuse tenants from having to contribute to the costs of remedying something that can be described as an "inherent defect".

27. **The Incorporated Trustees of the Dulwich Estate v Kaye** [2006] EWLands LRX_137_2005, HH Judge Huskinson: "*there is no doctrine of inherent defect such as automatically to excuse the lessee ..... from having to pay for the Appellant's costs of remedying disrepair which had arisen because of inadequate original construction.*"

28. **Quick v Taff-Ely BC** [1986] QB 809: Keeping the premises in repair does not extend to the rectification of an inherent defect in the property's design.

29. **ALDRIDGE on Leasehold Law**:

Notice of defect

4.229 It is a condition precedent to the liability of a landlord under a covenant to repair demised premises, whether express or implied, that he has notice of the defect (**Torrens v Walker** [1906] 2 Ch. 166 Ch.D; **McCarrick v Liverpool Corp** [1947] A.C. 219 HL (statutory obligation to keep fit for human habitation); **O'Brien v Robinson [1973] A.C. 912 HL** (statutory covenant implied in short leases of residential accommodation).).

The result is that the landlord is under no liability if the defect was latent until the damage occurred, or if by the time he received notice the work needed on the

premises went beyond an obligation to repair and involved rebuilding (**O'Brien v Robinson** [1973] A.C. 912 HL).

The landlord has no obligation to inspect to see whether repairs need to be done, even though he may have expressly reserved the right to do so (**McCarrick v Liverpool Corp** [1947] A.C. 219).

30. **O'Brien v Robinson** [1973] A.C. 912 HL per Lord Diplock: *the landlord's obligation to start carrying out any works of repair did not arise until he had information about the existence of a defect in the premises such as would put a reasonable man upon enquiry as to whether works of repair were needed.*

31. **Lee v Leeds City Council Ratcliffe & Ors v Sandwell Metropolitan Borough Council** [2002] EWCA Civ 06:

*60. A term will not be implied at common law unless it satisfies the requirement of certainty – see **Lister v Romford Ice and Cold Storage Co Ltd** [1957] AC 555, at page 574 (where Viscount Simonds referred to "the general principle that an implication must be precise and obvious) and **Shell UK Ltd v Lostock Garage Limited** [1976] 1 WLR 1187, 1197B, 1201A. The submission in the present case is that the term to be implied is a term that the landlord keep the dwelling in good condition;*

*61. In **Welsh v Greenwich London Borough Council** [2000] 3 EGLR 41, this Court held that an express covenant to "maintain the dwelling in good condition and repair" did impose on the landlord an obligation to remedy the underlying cause of excessive condensation which had resulted in mould. The Court found, in that context, that the words "good condition" were "intended to mark a separate concept and to make a significant addition to what is conveyed by the word 'repair'" – see, in the judgment of Lord Justice Robert Walker, at page 43M, and, also, in the judgment of Lord Justice Latham, at page 44D.*

62. It must follow that to imply an obligation to keep the dwelling in good condition in a tenancy agreement which contains only an express term to keep the structure in repair (as in the Lee appeal) or which contains no express repairing obligation on the landlord, so that the repairing obligations are those implied under section 11(1) of the 1985 Act (as in the Ratcliffe appeal) is to invite the criticism that the court is seeking to make for the parties a bargain which they

have not themselves made. The term would impose on the landlord obligations which, on a proper understanding of the law as explained by this Court in the ***Quick*** *case, the landlord could not have intended to undertake. Nor, viewed objectively, could the tenant have thought that the landlord did intend to undertake those obligations – see the observations of Lord Hoffmann in* ***Southwark London Borough Council v Tanner*** *[2001] 1 AC 1, at page 12D:*
"In the grant of a tenancy it is fundamental to the common understanding of the parties, objectively determined, that the landlord gives no implied warranty as to the condition or fitness of the premises."
Lord Millett explained the position in the following passage, at pages 17G-18A:
"It [the principle that a tenant takes the property as he finds it] is simply a consequence of the general rule of English law which accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order as they see fit. The principle applies whether the complaint relates to the state and condition of the demised premises themselves or, as in the cases cited, of other parts of the building in which the demised premises are located. Of course, the tenants of local authority housing do not negotiate the terms of their tenancy agreements. They take what they are offered on terms set by the local authority. But the meaning and effect of contractual arrangements cannot be made to depend on the parties' relative bargaining power. If it is thought right to redress any imbalance by importing terms in favour of the weaker party, this is a matter for Parliament."

The Sums in Issue

The Applicant, Ms Roddy

32. The Applicant for the year 2020 challenges: Surveyors' Fees 7.85% of £3000.00 being £235.50, Further Balcony Works 7.85% of £10,000.00 being £785.00 and Section 20 Balcony Works 7.85% of £60,000.00 being £4,710.00.

33. The Applicant for the year 2021 challenges: Surveyors' Fees 7.85% of £3000.00 being £235.50, Balcony Works (to Apartment 3) 7.85% of £3000.00 being £392.50 (sic) and Store Room Works 7.85% of £45000.00 being £353.25 (sic).

34. She says that the above service charges that have been raised by the Landlord's Managing Agent have been caused as a result of the Landlord's poor conversion/original build and/or historical maintenance neglect of Marine Palms.
35. She records cracking of tiles and water seepage in 2010 and 2011 and 2012 and 2013. Some of the water issues were not resolved until the balcony works in 2020.
36. In August 2020 the Environmental Health Officer from Torbay Council reported that the construction of the balconies and terraces of Apartments 2, 4 & 7 was unsafe and she received notification from CPM that she should not use either her lower level terrace or upper balcony for that reason. The terrace of Flat 7 is over her bedroom and upper level balcony. Acrow props were installed to support the soffit of that part of the terrace which overlaps her upper level balcony.
37. Scaffold towers were erected in order to gain access from ground level to her terrace and from hers to Flat 7 with a connecting walkway across. The contractor, unsupervised by CPM, had to be reminded that the scaffold had to be supported on the ground below her terrace not on the surface of the terrace. This unsightly and obstructive structure remained outside her sitting room and the Acrows outside her bedroom until 2021.
38. In addition to the remedial work required to make the terraces safe, the store room is very damp. The result being a heavy growth of mould on the possessions that she had in there.
39. The Developer/Freeholder and CPM have been well aware of this issue for several years but again seek to charge the leaseholders to remedy the defects,
40. The report of Mr KJ Marshall dated 12 February 2021 evidences the defects in the terraces original construction and the issues with the store room and thereafter the failure to have in place any or any suitable system of inspection and maintenance.
41. Instead of taking responsibility for their poor build the Developer protected the defects in the building which have been exacerbated by the complete lack of a maintenance programme.
42. She has paid the service charges promptly on demand after deducting only those items relating to remedial building work,
43. For the reasons as set out above the service charge amounts for the years 2020 and 2021 which are charged for the works to the terraces and store room and as set out in the Application Form are contested.

The Applicant, Mr O'Connor

44. The Applicant for the year 2016 challenges 02/03/16 Repair roof /balcony area leaking into Flat 6; 5.97% of £1452 = £86.69, 04/05/16 Repair water damaged ceiling; 5.97% of £230 = £13.73, 16/03/16 Redress and fit 2 sections of lead flashing; 5.97% of £132 = £7.88 and 03/12/15 Leak from shower tray Flat 6 seal tray 5.97% of £42 = £2.51
45. The Applicant for the year 2019 challenges Works carried out as detailed with estimate 5.97% of £3,585.60 = £214.07, External terrace works carried out 5.97% of £1,500 = £89.55, Internal repairs to Flat 12 & Communal stairs 5.97% of £1,134 = £67.70, Property projects investigate roof terrace no 7 and exploratory roof repairs 5.97% of £2,010 = £120, Scaffold to access roof terraces 5.97% of £673.20 = £40.20, Inspection of flat roofs 5.97% of £378 = £22.57, Balcony ceiling removal 5.97% of £258 = £15.40, Cash call for terraces and other estate works 5.97% of £14,000 = £835.80. Total challenged = £569.49 + cash call of £835.80 = £1405.29
46. The Applicant for the year 2020 challenges Legal fees - No explanation of what they relate to; 5.97% of £2729 = £162.92, 15/11/21 T J Smith 19/10/21 Balcony works; 5.97% of £40192 = £2399.46, 05/05/21 TJ Smith 21/04/21 Apt 4 Main balcony; 5.97% of £12000 = £716.40, 29/03/21 Lydon Brothers 20/03/21 Middle balcony repairs; 5.97% of £2748 = £164.05, 18/01/21 TJ Smith 21/10/20 Leak repair Apt 10; 5.97% of £1032 = £61.61, 19/01/21 TJ Smith 21/10/20 Leak repair Apt 10; 5.97% of £1032 = £61.61, 18/01/21 TJ Smith 21/10/20 Repair perished timber Apt 4; 5.97% of £984 = £58.74, 19/01/21 TJ Smith 21/10/20 Repair perished timber Apt 4; 5.97% of £984 = £58.74, 29/03/21 TJ Smith 19/03/21 Replace decking terrace; 5.97% of £816 = £48.72, 18/01/21 TJ Smith 25/09/20 to open areas of building; 5.97% of £168 = £10.03, Service charge demand. Survey fees; 5.97% of £3,000 = £179.10, Further Balcony Works; 5.97% of £10,000 = £597, McCarthy Contractors completion of works; 5.97% of £1,560 = £93.14, Lynden Bros roofing 07/09 Temp repairs of roof; 5.97% of £384 = £22.91, TJ Smith installing acros 26/08 to support flats 2/3; 5.97% of £624 = £37.25, Property Projects-Secure cover of roof terrace; 5.97% of £54 = £3.23, TJ Smith 26.08 moving furniture damaged balcony; 5.97% of £48 = £2.87

    Total = £4,677.78
47. The Applicant for the year 2021 challenges General maintenance 5.97% of £4,000 = £238.80, Surveyor Fees - 5.97% of £3,000 = 179.10, Balcony works (Apt 3) - 5.97% of £5,000 = £298.50, Store room works 5.97% of £4,500 = £268.65

Total = £985.05

48. He says his liability to pay the above service charges that have been raised by the Landlord/the Landlord's Managing Agent have been caused as a result of the Landlord's poor conversion/original build and/or historical maintenance neglect of Marine Palms.

49. His parents bought their flat in 2008. There followed a series of issues with the flat, including 6 instances of water escape. The most significant was in 2017 and was due to unconnected plumbing, which required the whole flat to be stripped out. Upon strip out, a number of other significant defects became apparent, including a complete lack of fire protection and compartmentalisation, inadequate floor joists, chasing into load-bearing walls and the discovery of an underfloor heating system that was deemed to have never been fit for purpose.

50. In 2017 his parents and his sister had also been in discussion with CPM (the managing agents for Marine Palms) about the 'perilous' condition of the main terrace of Flat 4. The decking on the terrace had lifted, the structure felt unstable and was hazardous. The two other terraces showed significant signs of decay, but remedial works didn't appear to be as much of a priority. Those discussions were formalised in writing in early 2018 when his sister was assured (by Angela Gregory, Property Manager) that the matter would be treated as a matter of urgency. His parents had been forced to move out of their home into temporary accommodation and it seemed to his sister and him to be an ideal time to get the terrace repaired.

51. It was not until January 2019, despite a number of chase ups, that they received a written report from CPM that confirmed that the main terrace was beyond repair. At that point they were advised by Angela Gregory that the terrace should not be used for reasons of safety.

52. There was an impasse of about 10 months during which rebuilding works on Flat 4 were halted because of faults found upon strip out. The insurers refused to provide funds for a defective build and the developer/freeholder was refusing to accept any liability or take any responsibility.

53. In the summer of 2019, Darren Stocks sent an email to residents advising that approximately £90,000 of works were required to the terraces of Marine Palms. There had, for a number of years, been issues with the roof terraces of Marine Palms and a number of claims had been made for water ingress from those terraces. The claims made drastically raised insurance premiums and the building now has no

cover for escape of water. In his opinion, at least some of those claims should have been made on the architect's certificate, rather than claim on the block insurance.

54. In mid-October 2019, works recommenced on Flat 4 meaning that his parents could move back into their flat at the end of February 2020.

55. It was not until the following month that CPM issued a Section 20 notice for repairs to the terraces of Flat 4, 6 and 7. CPM initially refused to specify works. The contractor rebuilding Flat 4 had told him that all three terraces needed to be replaced and his engineer Mr Faraj had submitted a report advising that the main terrace had been poorly built and with inadequately treated materials.

56. He had no idea on receipt of CPM's Section 20 notice as to what their intended works were and how many terraces were included for repair. Eventually, after exerting a lot of pressure, he was sent details of the proposed works which confirmed that they planned only to replace the main terrace. CPM had clearly ignored his comments about all three terraces needing replacing which was fairly typical. All Section 20 notices were challenged on the basis that, in their opinion, the works were needed because of poor initial construction. In addition, there had been a complete failure on behalf of the Landlord to have any [suitable] system of inspection and maintenance in place for the terraces.

57. After being away for two years, he contacted Torbay Council and Senior Environmental Health Officer Carole Knapp subsequently attended and examined the terraces. As a result of her findings, a structural engineer (Mr Jones/TDA) attended on behalf of the council and closed down a number of terraces within Marine Palms for reasons of health and safety. He also advised that Flat 4's mid terrace (that his parents had been advised to use) was in a more dangerous condition than their main terrace.

58. Subsequently in September 2020, Carole Knapp issued an Improvement Notice on the freeholder of Marine Palms as the terraces inspected had been classed as Category 1 hazards. The Notice encompassed the whole building's terraces. It was only then that CPM agreed to repair all three of Flat 4's terraces.

59. It was not until the middle of December 2020 (23 months after the main terrace had been condemned) that works commenced in ripping out the terraces of Flat 4. His frail and elderly mother and father were left with a very dangerous drop of at least 6 feet directly outside their lounge doors. Works did not commence to replace the main terrace until early February 2021.

60. To the best of his knowledge, the terrace works under the improvement notice for Marine Palms have still not been signed off by the Council.
61. The storage area of Marine Palms was noted to be damp from a very early stage. His parents complained to Sean McCarthy of this within months of moving in and supplied him with receipts for damaged goods that included some very good clothing and electrical items.
62. Similar to the terraces, the residents of Marine Palms (emails from 2011 onwards) complained about damp and water ingress in the storage area and underground car park from an early stage. He had previously believed that those matters should have been rectified under the architect's certificate. He has recently realized, however, that the building was not converted as per the original plans. Building controls were so ineffective that they did not even prevent the building of an additional flat in the area of the building originally set aside for the storage area. Accordingly, the storage area was located underground as a late alternative, apparently at the whim of the developer.
63. Following complaints from residents, on 24 April 2013 Danielle Romeo of McCarthy's wrote an email to Sam Secker at CPM advising that - '*Extractor fan would have been put in originally but was not specified by architects or picked up by building control. When moisture content occurred due to no ventilation constructing in to the cliff face, we then sourced advice and the extractor fan was the only solution at our own cost so no contribution will be made from ourselves'*.
64. So, believed to be in 2012, McCarthy's installed a ventilation system in the storage area because of damp problems. The running of that system to be paid for by the leaseholders. Damp spores and staining are mentioned in a number of professional reports about Marine Palms and there has been a pungent smell of damp in the communal areas pretty much from the outset. The post development ventilation system was an afterthought and has now been shown to be ineffective. There has been a constant smell of damp in the building for a number of years. The storage area is part of the lease and has never been fit for purpose. Despite previous denials of damp, CPM (Angela Gregory) finally advised in September 2021 that the storage area should not be used.
65. The concept of Marine Palms was a good one. Unfortunately, the conversion by the freeholder/developer was not as per the plans and clearly corners were cut during construction. When Flat 4 was stripped out, it revealed a plethora of defects

originating from the original build. The storage area was relocated to an unventilated area below a garage and terraces that had drainage issues. The terraces were not built with the marine environment in mind. Untreated soft wood was used and tied together with inadequate joist hangers.

66. The reports, including expert report of Mr K J Marshall dated 12 February 2021, evidence the defects in the property's original construction. Rather than take responsibility for their poor build the developer, protected by their managing agent, has tried to get the leaseholders to pay for their failings. The issue with the defects in the building has been exacerbated by the complete lack of a maintenance programme. It should be noted that had a regular NHBC warranty been supplied at the time of purchase, every single issue referred to in this claim would have been dealt with under that warranty.

67. For the reasons as set out above the service charges amounts for the years 2016, 2019, 2020 and 2021 as set out in the Application Notice are contested.

The Expert Witness, Mr K Marshall

68. Mr Marshall, BSc (Hons) MRICS, a chartered building surveyor, gave evidence. In his written report, he said, amongst other things, the following in answer to specific questions asked of him:

69. Q. Is there any evidence of any of the terraces having undergone any regular system of inspection and maintenance in accordance with the Defendant's responsibilities under the lease/s?

Response to question: can see no evidence of any regime of regular inspection and maintenance having been undertaken. In the area below the terrace serving the bedroom of flat 4 it appears that some ad hoc local remedial work has been undertaken but this is wholly inadequate in the context of the long-term disrepair now evident.

In respect of the leak to the waterproof membranes below the terrace of flat 7, it is my understanding that the residents may have been reporting this to the managing agents for the building over some considerable time.

If the above understanding is correct, and no meaningful investigation and attempts at remedial measures were undertaken, then there would appear to have been a failure to mitigate the damage on the part of the Defendant or their managing agents.

70. It is further my opinion that the structures have been installed in a manner which does not facilitate ready access for regular inspection and preventative treatments.

71. It would be expected that at least annually the underside of such structures should be accessed and inspected via the void below. The inspection should look to identify any local areas of decay requiring isolated running repairs with treated timbers and corrosion proof fixings. Where practical it would also be preferable to have applications of preservative treatments where practical to apply them.

72. Q. Had the original terraces been constructed, inspected, and maintained in accordance with your answer at (6) ante, when would the terraces have needed to be replaced in their entirety (as is required now), if at all?
Response to question: I believe that given the age of the development being somewhere in the order of 10 years these structures should not yet need substantial repair or replacement.
The lowest life expectancy reasonable to adopt for a structure of this type should be in the region of 20 years or more and it is my opinion that in this instance the structures have failed considerably earlier than normally expected due to their use of inadequate materials and lack of poor site practice during construction.

73. The fundamental issues concerning these terraces relates to the poor standard or original materials and the poor site practice during construction. The lack of access to facilitate adequate regular inspection of the areas has clearly exacerbated the disrepair.

74. The basement storage areas are suffering from extensive condensation and mould growth due to inadequate design provision for ventilation at the time of construction.

75. The retrospective attempts to improve ventilation by installing fans and ducting through compartment walls appears to have potentially compromised building fire safety provisions and these matters require urgent investigation and remedy if required.

76. Q. Is there any evidence of any of the basement/internal storage area having undergone any regular system of inspection and maintenance in accordance with the Defendant's responsibilities under the lease/s?
Response to question: It is clear that there has been some form of ad hoc inspections of these areas resulting in the instruction of contractors to attend to the cutting of the door vents and the installation of the fan unit.

Latterly, if any inspections have been occurring to this area, they have failed to result in any suitable further actions to address the ongoing issues described.

77. In oral evidence, he told the Tribunal that, “as constructed”, he would have expected the terrace to have a life span of 10 years, rising to 15 years if properly maintained.

78. He said that even covered wood should have been treated wood as the terrace was not vapour-proof. The metal fixings should have been stainless steel so as to cope with the marine environment. The cut ends of the treated timbers were not themselves treated. It would have been clear to a purchaser that the storage area was not heated; the lack of heating would mean that condensation likely from the construction materials of the walls would not be removed.

The Respondent

79. The Respondent says that many of the issues complained of have no relevance to service charges and were treated as insurance issues and claims were made.

80. The stripping out of Flat 4 occurred in 2017. The leaseholder stripped the property at that time without landlord consent. As a result of this, they also took away any ability the landlord had to investigate the matter.

81. The works were completely blown out of scale. The strip out included stripping out beyond the demise of the lease and by the time the Respondent became aware of the issue it was too late for the landlord to be able to properly carry out its own investigations. The photos show the extent of the strip out of the flat.

82. It is correct that discussions with the leaseholder of Flat 4 concerning the state of the terrace started in or around 2017/2018. However, the Respondent needed and awaited reports for all terraces before it could undertake statutory consultation with the leaseholders.

83. Statutory consultation was carried out as the sums are payable as service charge under the leases.

84. The works are completed and so are ready to be signed off any moment.

85. The building control certificate relating to the works and the email from Mr Jim Beer (Senior Building Control Surveyor) confirms that *the joists satisfy current generic timber span tables and satisfy Building Regulations accordingly. The calculation sheet no. 06187-200, demonstrates that 47 X 147 c24 ground floor joists at 400mm centres are adequate for a clear span of 3300mm.*

86. A more specific email from Jim Beer states "*On the basis of the above commentary I cannot therefore categorically state the in-situ floor in Flat 4 hasn't satisfied the*

actual Building Regulation Requirement A1 (Structure). He states that there were no breaches of Building Control issues.

87. The development was undertaken in 2007 and for some 10 years or so the leaseholders enjoyed the balconies with no issues. The Respondent is not aware as to what enquiries any of the leaseholders made when they bought their flats. However, as far as it is aware, no issues have been flagged up on any homebuyers reports or surveys carried out.
88. Upon being notified by Apartment 4 of the concerns to the balcony, the Respondent commissioned reports and attended to the works following statutory consultation.
89. A report from Nichols Basker & Partners dated 2020 (which is 13 years after construction) only has a suggestion of deterioration and does not mention anywhere about faulty workmanship etc.
90. The works were required under the landlord's repairing obligation within the Lease.
91. A report from TDA states that a lot of the issues are due to water ingress which largely emanated from Flat 4. All of the issues started when pipework underneath Flat 4's bath became dislodged. If it was the case that the pipework was never connected, then the Respondent would have seen evidence of escape water within weeks not several years later.
92. Matthew Mc Carthy, a Director of the Respondent company, was involved in the redevelopment of the building and lives in a flat there and the company owns 2 further flats.
93. The building was purchased in around 2006. The conversion was completed under the supervision of Building Control. Torbay Council issued its Completion Certificate on 4 November 2008.
94. In respect of the 2017 water issue, the leaseholder notified the insurer of the claim directly. Before the leak even came to the Respondent’s knowledge the entire bathroom had been stripped out, the floor was taken up, the plasterboard on the ceilings was lifted exposing gaps in the ceiling. This caused a fire protection issue as a result of which the fire safety guidance in the Building was changed from a “stay put" policy to "get out". The ceilings were timber walls plastered on either side. There were no fire safety issues until the ceiling was ripped apart. Building Control signed off the conversion works with no fire safety concerns at the time of the build.
95. He refers to sales particulars from 2017 which shows the immaculate condition of Apartment 4 at that time.

96. One of the issues the Company had in being able to progress works is that particularly Apartment 4 would continuously fail to contribute towards the service charge to allow maintenance works to take place. The service charge statements show the arrears to date.
97. The external balconies of the Apartments are suspended elevated areas and are facing the sea. It is only the balconies relating to Apartments 2, 4 and 4 that have had any issues over the years.
98. The balcony to Apartment 3 suffered due to a water leak from a down pipe resulting in some of the joists being replaced there.
99. Apartment 2 had some of the decking replaced. This was not structural it was works due to wear and tear and some joists were added.
100. The balconies comprise of composite deck on top. The carcass and timber underneath the balconies were all treated timber. In the Applicant's expert report what he appears to be looking at is the element of timber under a soffit under a protected roof. There is no requirement to treat enclosed timber. The report makes many unfounded assumptions about the quality of the workmanship during construction of the properties in 2008 and the quality of the materials used at that time.
101. The report exhibits a photo number 2 of an untreated joist assuming all joists to be untreated. That joist is situated in an area not exposed to the elements. It was exposed due to other repairs being carried out in October 2020 when Mr Marshall inspected the property. It would ordinarily be sealed above and below and has nothing to do with the terrace repairs.
102. The company definitely used treated timber joists on Apartment 4's garden terrace. At the time of construction 2007/8 it used products available not those now available 15 years later.
103. All building works were signed off by building control. Galvanised joist hanger brackets were used as standard practice. Apartment 4 was on the market for sale in 2017 and no issues were complained of then and having had use and enjoyment of the balcony/terrace since its construction with no issues.
104. It is important to recognise that the Garden Terrace decking areas were "external garden terraces" not roof top terraces. There was no requirement to do anything more than what was required.

105. The building has been managed and maintained. When CPM were notified of issues it acted as any managing agent would do and gathered reports and quotations to maintain and repair.
106. Over time, it is no question that joists will need to be replaced. Some terraces have aged quicker than the Respondent would have hoped. Exposure to elements and water damage may have sped up the process of deterioration for some of the terraces. It is not the case that the building was not built properly, it was built to the standard expected at that time and was signed off by Building Control.
107. With regard to the storage areas, the building is built on hillside. There was a big void at the back of the development. Rather than losing the space there, the Respondent decided to put in some storage units which back onto the retaining wall.
108. Whilst there is no requirement to ventilate unoccupied spaces (as confirmed in the email from Kentexe), due to some complaints by leaseholders, the company did put in some ventilation/extractor system to assist the problem. The company always attends to any issues or problems that leaseholders raise. Some of the leaseholders have notified the management company that the ventilation has not assisted, and the management company is investigating what further measures could be put in place.
109. The sheds/storage units which have had issues, it was found, were over loaded, some filled to the brim which is not advisable. This space was formed to store things such as paints, tools etc, not clothing items (soft materials).

The Tribunal

110. The Tribunal must be guided by the legal principles detailed in the caselaw above under the heading Set Off. It should stress that that term was not used by either party to describe this case, but there is relevant guidance there.
111. The Tribunal was told that no survey report had been obtained by the Applicants prior to purchase in respect of either Flat 2 or Flat 4. This case demonstrates starkly why such a report is so important, particularly as the caselaw advises that no warranty is given on purchase in a situation such as this. The Applicants criticize the Respondent for not undertaking in-depth inspections of the terraces when there was no such inspection conducted for them prior to purchase. It was suggested on behalf of Ms Roddy that if something was purchased from a shop which was not fit for purpose, the item could be returned, but that is to confuse the protections given to sales of goods and the quite different regime applying to real property.

112. As Mr Gallagher pointed out in closing, to illustrate why there could be no claim here based upon poor building practices leading to a latent defect, if the Respondent had sold the property to a new landlord, what possible claim could there be against that new landlord for latent defect which could provide a defence to otherwise lawfully demanded service charges for repair?
113. The Tribunal is clear, on the basis of the caselaw, that latent defect presents no form of defence here either in respect of the terraces or basement. Nothing more needs to be said about the basement. The terms of the lease required the landlord to repair and entitled it to charge the reasonable costs thereof to the leaseholders.
114. Nor, the Tribunal finds, does a lack of maintenance avail the Applicants. The covenant here is to repair the terraces. Unlike other covenants within the lease (Fourth Schedule), which specifically require the landlord to inspect, the covenants relating to the terraces and the basement area require only "*repairing and when appropriate replacing*" the former and "*repairing and if applicable decorating*" the latter.
115. It is clear from the caselaw that the Tribunal would be in error if it was to find an implied term, as the Applicants suggested it should, of a duty to maintain the terraces.
116. It was suggested to the Tribunal that the Respondent came under a duty to conduct a thorough and detailed inspection of the terraces because of various issues, including water leaks, in 2013.
117. By emails of 29 and 30 September 2013, leaseholders brought to the attention of the Respondent some maintenance issues, including a car park leak, damp in the building and apartment specific issues. So far as apartments 2 and 4 were concerned, the issues raised were flooring for both and internal water leaks for the latter. The only reference to a leak from a terrace was in respect of one above Flat 6 and it was reported that this had been rectified by the leaseholder.
118. The emails also said: "*Please be aware that we are progressing with the appointment of an independent RICS surveyor to assess the level of the damp problem; the leaks within the building which have previously caused issues for certain residents and the individual apartment issues – and to produce a report.*" There is no evidence to the effect that any such report was shared with the Respondent.
119. An email of 20 October 2013 reports to the Respondent:

Leaking Terraces

Lastly, several apartments have leaks coming from above. Apt.2 has leaks coming into the terrace, we at no. 11 now have water stains on our ceiling and I believe that Mr. and Mrs. Prack have the same problem. This will also need to be investigated. Steve fixed the problem himself after making no progress with yourselves.

120. Mr Stocks told the Tribunal that the complaints had led to the involvement of the insurance company and an assessment by the Loss Adjustor and that following that involvement, no recurring complaints were raised in the following years. There is nothing here to suggest that there was cause for the Respondent to conduct an in-depth study of the terraces, the leaks having been, apparently, dealt with to the satisfaction of the leaseholders. There is nothing to suggest that the landlord *had information about the existence of a defect in the premises such as would put a reasonable man upon enquiry as to whether works of repair were needed* in respect of the structure of the terraces.

121. The next reference to the terraces was when, in 2017, Mr O'Connor says his parents raised the "perilous" condition of their main terrace with the Respondent. Although Mr Stocks said that this would have resulted in reports being obtained, the Tribunal believes that these reports should have formed a part of the bundle if they existed, so that their date could be seen.

122. Whether or not the term "perilous" can be described as accurate is open to serious question because Stags sales particulars for Flat 4 in 2017 include 1 terrace and 2 balconies as key features of the property. The property is described as being "*built to a high specification*". "*The sitting room is a light, bright room with patio doors that lead out to the decked terrace where there is plenty of room for a table and chairs and from where you can admire the fabulous views across the bay." "Both bedrooms have balconies and built-in wardrobes." "There are two balconies, one on each bedroom, plus a decked terrace off the sitting room, all with power points, from where you can sit and admire the stunning views over the bay towards Brixham.*" There is no mention at all of the perilous state of the main terrace or concerns about the other 2 terraces.

123. The Respondent identified the need for works to the terraces in 2019. A Section 20 consultation notice was issued in 2020; the works on the terraces were completed in January 2022.

124. The Tribunal cannot see that the Respondent acted otherwise than as required by the covenant to repair in the lease until a period between 2017 and 2019 when made aware of the "perilous" condition of the main terrace of Flat 4. Before that period, there was nothing to suggest that the terraces were rotting away and reports of issues raised had apparently been satisfactorily resolved. There is nothing to suggest that the landlord, before that time, *had information about the existence of a defect in the premises such as would put a reasonable man upon enquiry as to whether works of repair were needed* in respect of the structure of the terraces.
125. Even for the period 2017 to 2019, there is nothing to suggest that if there was a breach of covenant to repair by the Respondent it led to loss for the Applicants. First of all, that period is truncated by the date in 2017 when Mr O'Connor's parents made the Respondent aware of the condition of the main terrace (unknown) and also by the date of the study of the issue by the Respondent (unknown) leading to the issue of the Section 20 notice in 2020.
126. Mr Marshall gave a lifespan of the terraces, as constructed, of 10 years, meaning that they would require replacement in about 2017/18. It is inconceivable, therefore, that any delay between the reporting of their condition by the O'Connors in 2017 and the Respondent's first steps to replace them could have led to any further loss to the Applicants. Certainly, there was no evidence from the Applicants' expert witness to the effect that treatment at that time could have cured such a latent defect as he described so as to obviate the need for their replacement.
127. Nor was there evidence, in any event, that anything short of replacement of the terraces could have been curative of the latent defect.
128. Mr Marshall's evidence was to the effect that the hangers were of insufficient quality; some of the timbers required treatment; some of the timbers would need to be removed to treat their ends; the inspection facility was inadequate. He gave no costs for such work and the added costs of the regular inspections he recommended. It was simply not possible, on the basis of the evidence presented, for the Tribunal to reach the conclusions that the Applicants wished it to reach, even had it found that there should have been regular inspections.
129. The "legal fees" of £162.92 for Flat 4 turned out to be rather a structural engineer's fee. Quite properly, to avoid further expense, the Respondent conceded this sum, so that the Tribunal finds that it is not reasonable to demand it.

Section 20c and Paragraph 5A Application

130. The Applicants have made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Respondent's costs incurred in these proceedings.

131. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a … … leasehold valuation tribunal, ….are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

132. *The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Commonhold and Leasehold Reform Act 2002 Schedule 11 Paragraph 5A Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

Rules 13 and 3 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"):

Section 20C

133. In considering an application under Section 20C, the Tribunal has a wide discretion, having regard to all relevant circumstances. It follows a similar course when considering administration charges. *"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." "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."* (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000).

134. "*An order under Section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances."*
"The scope of the order which may be made under Section 20C is constrained by the terms of the application seeking that order…;
"The FTT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else".
(**SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)). *"In any application under Section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the*

order, and to bear those consequences in mind when deciding on the just and equitable order to make." (**Conway v Jam Factory Freehold Limited** (2013) UKUT 0592 (LC)).

135. The Applicants submitted that it had been necessary for them to apply to the Tribunal for a determination.

136. The Tribunal has weighed up the relevant factors here. It notes that the Applicants were wholly unsuccessful in their challenge to the payability of the service charge costs of substance, succeeding only in respect of the "legal fees" in relation to which the Respondent took the pragmatic and laudable decision to waive its entitlement to the minor sum involved.

137. The Tribunal has considerable sympathy with the Applicants here. What was purchased was not what had been hoped for, with the result that there were substantial costs for the replacement of the terraces much sooner down the line than had been anticipated. The fact remains, however, that, at considerable expense to themselves, the Applicants have followed a path to a dead end. The Tribunal is not privy to the legal advice they were given before embarking on that journey, but would venture that if the journey was on the basis of legal advice, it was legal advice that went against the clear legal position. The fact remains, however, that the Respondent has been substantially successful and should not have to pay their own costs when the case against them was without legal foundation.

138. The Tribunal, accordingly, refuses the applications under Section 20C of the Landlord and Tenant Act 1985. It directs that the landlord's reasonable costs in relation to this application may be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

Paragraph 5A

139. For the same reasons that the Tribunal refuses the Applicants' applications under Section 20C above, the Tribunal refuses their applications under Paragraph 5A, so that the reasonable costs incurred by the Respondent in connection with the proceedings before the Tribunal may be regarded as relevant costs to be taken into account in determining the amount of any administration charge payable by the Applicants in this or any other year.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(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.

19 Limitation of service charges: reasonableness

(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 provision 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.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 postdispute 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration
agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.