FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT MONEY CLAIMS CENTRE sitting at
Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU

Tribunal References	**:**	**BIR/41UB/LIS/2019/0034** **BIR/41UB/LIS/2019/0035** **BIR/41UB/LIS/2019/0049 &** **BIR/41UB/LIS/2019/0050**
Court claim numbers	**:**	**F80YX534 &** **F77YX662**
HMCTS (Paper, Video, Audio)	**:**	**V: SKYPEREMOTE**
Properties	**:**	**10 Ashworth House, Cannock Road, Cannock &** **12 Ashworth House, Cannock Road, Cannock**
First Applicant/ First Defendant	**:**	**Mrs Meena Kalia**
Second Applicant/ Second Defendant	**:**	**Mrs Usha Kalia**
Representative	**:**	**Mr Chand Kalia**
Respondent/Claimant	**:**	**Ashworth House Limited**
Representative	**:**	**Realty Law Limited**
Tribunal Members	**:**	**Judge Gandham** **Mr V Chadha MRICS MCI Arb FCIH MBA**
In the County Court	**:**	**Judge Gandham (sitting as a Judge of the County Court [District Judge])**
Date of Decision	**:**	**12th October 2020**

DECISION

Covid-19 Pandemic: Remote Video Hearing

This determination included a remote video hearing which had been consented to by the parties. The form of remote hearing was Video (V: SKYPEREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing/on paper. The documents referred to were contained within the parties' bundles, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal, the Tribunal directed that the hearing be held in private. The Tribunal had directed that the proceedings were to be conducted wholly as video proceedings; it was not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who were not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction was necessary to secure the proper administration of justice.

Summary of the decisions made by the First-Tier Tribunal

1. The following sums are payable by Mrs Meena Kalia to Ashworth House Limited by 9th November 2020, in respect of the property known as 10 Ashworth House:

    (i) Service charges: £9,197.07; and

    (ii) Administration charges: £270.00

2. The following sums are payable by Mrs Usha Kalia to Ashworth House Limited by 9th November 2020, in respect of the property known as 12 Ashworth House:

    (i) Service charges: £6,644.15; and

    (ii) Administration charges: £270.00

3. The Tribunal makes an order, under section 20C of the Landlord and Tenant Act 1985, that all of the costs incurred by Ashworth House Limited in connection with the proceedings before the tribunal, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mrs Meena Kalia and/or Mrs Usha Kalia.

4. The Tribunal makes an order, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, reducing Mrs Meena Kalia's liability to pay any administration charge in respect of the litigation

costs incurred or to be incurred by Ashworth House Limited in connection with the proceedings before the tribunal in this matter to £270.00 (being the Administration charges detailed in 1(ii) above).

5. The Tribunal makes an order, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, reducing Mrs Usha Kalia's liability to pay any administration charge in respect of the litigation costs incurred or to be incurred by Ashworth House Limited in connection with the proceedings before the tribunal in this matter to £270.00 (being the Administration charges detailed in 2(ii) above).

Summary of the decisions made by the County Court

6. The following sums are payable by Mrs Meena Kalia to Ashworth House Limited by 9th November 2020, in respect of 10 Ashworth House:

   (i) Ground rent: £52.50;

   (ii) Costs of £1,980.00 inclusive of VAT, counsel's fees and court fees; and

   (iii) Interest at 1% to the date of judgment: £211.57

7. The following sums are payable by Mrs Usha Kalia to Ashworth House Limited by 9th November 2020, in respect of 12 Ashworth House:

   (i) Ground rent: £17.50;

   (ii) Costs of £1,980.00 inclusive of VAT, counsel's fees and court fees; and

   (iii) Interest at 1% to the date of judgment: £175.43

8. The Court makes an order, under section 20C of the Landlord and Tenant Act 1985, that all of the costs incurred by Ashworth House Limited in connection with the proceedings before the County Court, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mrs Meena Kalia and/or Mrs Usha Kalia.

9. The Court makes an order, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, reducing Mrs Meena Kalia's liability to pay any administration charge in respect of the litigation costs incurred or to be incurred by Ashworth House Limited in connection with the proceedings before the County Court in this matter to £1,980.00 (the Costs detailed in 6(ii) above).

10. The Court makes an order, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, reducing Mrs Usha Kalia's liability to pay any administration charge in respect of the litigation costs

incurred or to be incurred by Ashworth House Limited in connection with the proceedings before the County Court in this matter to £1,980.00 (the Costs detailed in 7(ii) above).

Introduction

11. The Respondent is the freehold owner of the development known as Ashworth House, Cannock Road, Cannock, Ws11 5DZ ('the Development'), in which both 10 Ashworth House and 12 Ashworth House ('the Properties') are located. Pennycuick Collins are the managing agents of the Properties.

12. The First Applicant is the lessee of 10 Ashworth House, under a lease dated 27th February 1979 and made between (1) Presspoll Investments Limited (2) Argyle Securities Limited and (3) Raffaele Parrillo and Janet Louise Parrillo, for a term of 99 years from 25th December 1974. The Second Applicant is the lessee of 12 Ashworth House, under a lease dated 24th August 1978 and made between (1) Presspoll Investments Limited (2) Argyle Securities Limited and (3) Jean Annette Potts, for a term of 99 years from 25th December 1974. The leases to each of the Properties ('the Leases'), require the lessor to provide services and for the lessee to contribute towards their costs by way a variable service charge.

13. In July 2019, Ashworth House Limited ('the Respondent') issued proceedings in the County Court Money Claims Centre against Mrs Meena Kalia ('the First Applicant'), under claim number F80YX534, and against Mrs Usha Kalia ('the Second Applicant'), under claim number F77YX662.

    The claim against the First Applicant comprised of the following:

    (i) service charges amounting to £14,556.73;
    (ii) a demand for ground rent arrears, in the sum of £52.50;
    (iii) interest on arrears of service charges, ground rent and administration fees; and
    (iv) administration fees of £270.00 and the costs of the action.

    The claim against the Second Applicant comprised of the following:

    (i) service charges amounting to £12,003.81;
    (ii) a demand for ground rent arrears, in the sum of £17.50;
    (iii) interest on arrears of service charges, ground rent and administration fees; and
    (iv) administration fees of £270.00 and the costs of the action.

    The First Applicant and the Second Applicant ('the Applicants') each filed a Defence disputing the full amount shown on their respective claim forms.

14. On 6th September 2019, the Tribunal received applications from both Applicants for a determination of liability to pay and reasonableness of

service charges, under section 27A of the Landlord and Tenant Act 1985 ('the Act'), together with applications for the Tribunal to make orders to limit service charges payable under section 20C of the Act and orders to limit administration charges payable under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act').

15. In October 2019, upon request by the Applicants, Deputy District Judge Masters ordered that both sets of proceedings be transferred to this Tribunal. The orders transferring issues to the tribunal were in very wide terms, simply stating that all matters were to be dealt with by the tribunal.

16. All First-tier Tribunal ("FTT") judges are now judges of the County Court. Accordingly, where FTT judges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues relating to ground rent, interest or costs, that would normally not be dealt with by the tribunal.

17. The Tribunal confirmed to the parties that the two cases would be consolidated and heard together and that all the issues in the proceedings would be decided by a combination of the FTT and the Tribunal Judge member of the FTT sitting as a Judge of the County Court.

18. Accordingly, Judge Gandham presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court.

19. This decision will act as both the reasons for the Tribunal decision and the reasoned judgment of the County Court.

Directions and background to the matter

20. The Tribunal issued directions on 22nd October 2019 and the matter was listed for a case management conference ('the CMC'), which took place on 3rd December 2019. The service charges in dispute related to the years ending 31st March 2018, 31st March 2019 and 31st March 2020. Accounts had been prepared for the years 2018 and 2019 but only a budget had been prepared the year 2020. At the CMC, the Applicants admitted liability to pay the administration charges, totalling £270.00 each, and liability to pay the ground rent. The parties also agreed that the only items in dispute related to the following costs which formed part of the service charge:

    - the costs of the major building works, in particular the reasonableness of the costs for the proposed roofing works;
    - the transfer to the reserves in relation to the major building works; and
    - the costs of insurance, in particular whether the residential tenants should have to pay for the insurance of the commercial units on the ground floor and the costs for "*insurance services and claims handling*" (as detailed in page 5 of the 2019 accounts).

21. The matter was listed for an inspection and hearing to take place on 6th March 2020. The Tribunal attended the inspection; however, neither

party nor their representatives were present. The Tribunal contacted Realty Law Limited, the Respondent's Representative, who stated that the solicitor who had been dealing with the matter had since left the firm and had not made them aware of the inspection, although they were aware that a hearing was to take place in the afternoon. The Tribunal, just prior to leaving the Development, managed to make contact with Mr Chand Kalia, the Applicant's Representative. He stated that he was unwell and that neither he nor the Applicants would be able to attend the hearing that day. He had not informed the tribunal's offices of this but asked the Tribunal whether a postponement could be granted to allow him an opportunity to attend at a future date. Mr Kalia then tried to forward to the tribunal members some documentary evidence which he wished to submit on behalf of the Applicants. The Tribunal explained to Mr Kalia that any evidence needed to be formally submitted to the tribunal's offices and that it would be improper for the Tribunal to accept documents from him at the inspection. At this point, Mr Kalia became abusive and threatening towards the members of the Tribunal, so the Tribunal left.

22. The Tribunal agreed to the postponement request, as neither party had attended the inspection and the Tribunal considered that it would be in the interests of justice to allow a further opportunity for both parties to be present at an oral hearing. The Tribunal, having considered the evidence submitted, also considered that additional documentation was required for a determination to be made. On 19th March 2020, a further directions order was issued which detailed additional information required by the Tribunal. This included, from the Respondent, copies of the accounts, buildings insurance information and a witness statement from an employee of Pennycuick Collins as to why they considered that the 'Bauder System' was the only system they considered suitable for waterproofing the roof and, from the Applicants, copies of alternative roofing and buildings insurance quotations. The directions order also made it clear that discourteous behaviour towards any members of the tribunal would not be tolerated and that any documentary evidence or submissions had to be served in accordance with directions.

23. The Tribunal considered that an oral hearing, rather than a paper determination, was required and, on 1st June 2020, both parties were informed that the hearing would take place by remote videoconferencing and that the Tribunal would not be carrying out a re-inspection of the property. The hearing was scheduled to take place on 9th July 2020.

24. On the day of the rescheduled hearing, the tribunal's offices received an email, sent by Mr Kalia at 17:06 on 8th July 2020, requesting a postponement "*due to the pandemic and circumstances beyond our control*". The Tribunal noted that this was the second request made by the Applicants for a postponement at very short notice and that both parties had been notified of the hearing and had been aware of the hearing date since 2nd June 2020. In the circumstances the Tribunal considered that it was in the interests of justice to proceed with the hearing, pursuant to Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber)

Rules 2013. Mr Kalia was informed that the postponement request was refused and that, if either party failed to participate, the Skype hearing would proceed in that party's absence.

25. An oral hearing was held via Skype on 9th July 2020. The Applicants did not attend and were not represented. The Respondent was represented by Mr Luke Gibson (an advocate) and Ms Cannon-Leach, a Director of Pennycuick Collins.

26. On the evening of 9th July 2020, Mr Kalia sent an email to the tribunal's offices stating as follows:

> "*Thank you for your email.*
>
> *We had a medical emergency due to the pandemic as we are living in very turbulent times at present. I know it was last minute but my dear health should always come first regardless. Things happen so what's the big deal.*
>
> *Please request a judge to reconsider after all he is paid by the taxpayer indeed….*
>
> *Thank you.*"

27. Noting that Mr Kalia had commented that there had been a medical emergency, the Tribunal issued a further directions order on 10th July 2020. The directions order confirmed that if the Applicants wished to apply for the setting aside of the Rule 34 direction they were required to supply to the Tribunal, by 4p.m. on 27th of July 2020, medical evidence together with a witness statement explaining why neither of the Applicants nor their representative was able to attend the Skype hearing.

28. On 14th July 2020, having received the directions order, the Tribunal received a further email from Mr Kalia. This time Mr Kalia stated that his failure to attend had been "*a precautionary measure because of Covid 19*". He stated that he had not tested positive but "*was told to rest*". The Tribunal reiterated to Mr Kalia that, in order to set aside the Rule 34 direction, the Applicants must comply with the directions order and that medical evidence could include a letter from his medical practitioner or doctor's surgery confirming that he was advised to rest due to him displaying Covid-19 symptoms. The Tribunal also confirmed that any application needed to be supported by a witness statement confirming why neither he nor the Applicants were able to attend.

29. On 15th July 2020, Mr Kalia forwarded a further email, apologising for the inconvenience and stating:

> *"Luckily, I only had a mild general flu infection, thank god hence the cancellation and was told to take it very easy.*

Will not be able to get a doctor's note as it was not serious but was told to rest".

The Tribunal reiterated to Mr Kalia that the Applicants must comply with the directions order and that medical evidence could include confirmation of advice to rest. On the days that followed, the Tribunal received several further emails from Mr Kalia confirming that he would not be able to get a medical note as the advice to rest had just been a "*precautionary measure*", to which the Tribunal reiterated its previous advice.

30. The Applicants failed to provide any medical evidence or any witness statement explaining why neither they nor their representative was able to attend the Skype hearing at the time requested in the directions order. The Tribunal noted that, from the information received in the later email correspondence, there did not appear to have been any medical emergency. Mr Kalia had stated that he had a mild general flu infection and had simply been advised to rest. The Tribunal did not consider that this would have necessarily meant that Mr Kalia would have been unable to attend a hearing by Skype. In addition, the Tribunal had received no information as to why the Applicants could not have attended the hearing.

31. Having considered the email correspondence, the Tribunal confirmed to both parties, on 28th July 2020, that the Rule 34 direction would not be set aside and that the Tribunal and County Court would now proceed to make their determinations based on the written submissions previously received from the Applicants and the oral and written submissions received from the Respondent.

Inspection of 6th March 2020

32. The Tribunal carried out its inspection on 6th March 2020. The Development is located off the Cannock Road, at the junction with Church Street, in Cannock. The Development encompasses a three-storey building ('the Building') with a footpath, access road and parking at the front of the Building and a large parking area to the rear of the Building.

33. The Building is constructed in load-bearing brickwork, with concrete floors and a flat roof. The Building is mixed-use, the ground floor comprising commercial units with eight two-storey residential maisonettes located above. There is a concrete canopy covering the main footpath fronting the commercial premises and, at the rear of the Building, two external sets of stairs provide access to a first floor balcony which leads to the entrance doors to the residential units.

34. At the time of the inspection, the commercial premises comprised seven retail shops, the end restaurant comprising a double unit (located beneath the maisonettes known as 9 and 10 Ashworth House). Scaffolding had been erected to the rear of the Building (in front of the entrances to Flats 9, 10 and 11 Ashworth House) to provide access to the roof. The Tribunal was unable to inspect the roof but the eaves to the Building indicated that

it was in a poor state of repair. The remainder of the Development appeared to be in a fair state of repair.

35. Although, neither party nor their representatives attended the inspection, the written submissions indicated that the parties agreed that the roof was in a very poor state and required replacing. As the other area of dispute between the parties related to the buildings insurance, the Tribunal did not consider that a further inspection was required.

The Leases

36. The Leases are in similar terms and contain provisions relating to the lessees' obligations towards payment of the rent, maintenance and insurance of the development.

37. Under clause 3(i) of the Lease, the lessees covenant with the lessor:

> "*To pay the rent hereby reserved on the days and in the manner aforesaid*"

And under clause 3(iii) of the Leases, the lessees covenant with the lessor:

> "*To pay to the Lessor without any deduction by way of further and additional rent a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance and renewal of the said building and the insurance of the Reserved Property and the provision of services in the said building and other heads of expenditure as the same set out in the Fourth Schedule…(hereinafter called "the Service Charge")…"*

38. The "*Reserved Property*" is defined in the Leases as, firstly, the grounds, refuse stores and common parts of the building or buildings forming part of the development, secondly, the main structural parts of the building or buildings including any roofs, drains and pipes and, thirdly, any residential accommodation that might be allocated by the lessor for the use of staff. The "*Developmen*t" is defined as the lessor's property known as Ashworth House. The "*building*" is not separately defined.

39. Clause 3(e) of the Leases confirms that the amount of the Service Charge payable is based on the superficial floor area of the flats and clause 3(x)(a) confirms that the lessees are responsible:

> "*To pay to the Lessor all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Lessor incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 by the Lessor or incurred in or in contemplation of proceedings under section 146 or 147 of that Act notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."*

40. The Fourth Schedule to the Leases confirms that the lessees are to pay "*a proper proportionate part by way of Service Charge*" of, under paragraph 1:

> "*The expense of maintaining repairing redecorating and renewing… the Reserved Property…*"

under paragraph 3:

> "*The cost of insuring and keeping insured throughout the term hereby created in accordance with sub-clause 5(2) and 5(3) hereof*"

and under paragraph 4:

> "*The cost of cleaning and repairing the common parts of the Reserved Property*".

41. The lessor covenants with the lessees, in clause 5(2):

> "*To insure and keep insured the Block including the flats therein in such sums that shall represent the full replacement value…against the risk of fire and such other perils as the Lessor may require and a sum equal to the aggregate of two years' loss of ground rents…*"

And in clause 5(3) to insure against the liability of the lessor to "*third parties*".

42. In clause 5(4), the lessor covenants to maintain the "*structure of the Block*" including the roof. The "*Block*" is defined in clause 1(A)(v) as "*the block of flats (being part of the Development) of which the Flat forms part*".

The Issues & Decisions (FTT)

Service charges

Applicants' written submissions

43. The Applicants, at the CMC, confirmed that the items of expenditure in dispute related to the major building works (in particular the reasonableness of the costs of the proposed roofing works); the transfer to reserves in relation to the major building works and the costs of the buildings insurance (in particular the payment of insurance for the commercial premises on the ground floor and the costs of the Respondent for "insurance services and claims handling" in the 2019 accounts).

44. The Applicants' written submissions made no reference to the transfer of funds from or to the reserves.

45. In relation to the major works, the Applicants submissions related solely to the roof repairs. The Applicants stated that the Respondent's roofing estimates, received in early 2019 as a result of a section 20 consultation process that had started in the Spring of 2018, were overinflated when compared to those of competitors and that it was unreasonable for the costs of the repairs to be demanded immediately from the tenants.

46. The Applicants stated that service charges had been collected over several years and that the maintenance of the Building over this time had been poor. The Applicants provided copies of various photographs of the first floor balcony in front of the residential flats, which showed debris from the roof which had fallen on to the balcony.

47. The Applicants provided, within their submissions, two alternative quotations for the works to the roof. The first quotation was from Bridgetown Roofing Company, based in Cannock. Their quotation, which stated that it was for a 'flat roof in rubber' to include soffits and fascias, was for £5,200 per roof, which equated to £41,600 for the roofs to all eight flats. The second quotation was from S.F. UPVC Fitters Ltd, based in Dudley. This quotation was slightly more comprehensive than the first quotation and detailed that the costs included replacement of UPVC fascia boards and soffits to each property, together with a firestone rubber roof and re-boarding at a cost of £5,850 per property, amounting to a sum of £46,800 for all eight flats.

48. Neither of the companies had used the Pricing Schedule that had been utilised by the companies who gave tenders in the section 20 consultation process, hence it was unclear as to whether the quotations included items such as access and welfare facilities. In addition, neither quotation detailed a contingency sum and neither contractor appeared to be registered for VAT. The quotation from S.F. UPVC Fitters Ltd did confirm that any works were guaranteed for 10 years but the Bridgetown roofing quotation gave no information in this respect.

49. In relation to the buildings insurance, the Applicants stated that the Building's declared value for insurance purposes, had increased from around 1.5 million to 3.5 million in the two years from 2017 to 2019. They submitted that this led to an increase in the premiums to an extent that they were no longer affordable. In support of their submission, the Applicants provided copies of the certificates of buildings insurance in relation to the years 1st February 2017 to 1st February 2018 and 1st February 2019 to 1st February 2020. In the certificate relating to the February 2017 to 2018 year, the Building Sum Insured was £1,623,571.00, the Building Declared Value was £1,202,645.00 and the total premium (including IPT) amounted to £3,441.26. The Applicants indicated that this buildings insurance was "*normal*". In the certificate relating to the February 2019 to 2020 year the Building Sum Insured was £4,302,788.00, the Building Declared Value was £3,187,250.00 and the total premium (including IPT) amounted to £10,761.64. The Applicants indicated that this buildings insurance was "*Inflated*"" and "*Hard to afford*".

50. Despite being directed to do so twice since the CMC, the Applicants failed to provide any alternative quotations in relation to the buildings insurance and they did not provide their own valuation of the Development or Building.

51. The Applicant submitted that the service charges had, since the Respondent had purchased the Development, increased to an excessive level. The Applicant stated that many of the tenants were pensioners or individuals on low incomes and that the service charges were exorbitant, beyond the means of many of the residents and incomparable to anything in the local area. The Applicants also stated that it was their belief that the Respondent was unscrupulously increasing the service charges so that tenants of the residential flats were forced to sell their properties back to him. The Applicants provided, within their bundle of documents, a letter purportedly from the previous owner of number 13 Ashworth House, who stated that she had been left with no choice but to sell her property back to the freeholder at a huge loss due to the lack of maintenance and spiralling service charges. The Applicants also provided within their bundle, a copy of a petition which appeared to have been signed by the residents of numbers 14, 15 and 16 Ashworth House, in addition to the Applicants, stating that the service charges were "*exorbitant, unreasonable and excessive*".

Respondent's submissions

52. The Respondent, in its Statement of Case, stated that the Applicants had failed to make payments of charges which had been raised and properly demanded by the Respondent and its solicitors, after which the Respondent issued claims against each of the Applicants in the County Court. The Respondent stated that it was after the issuing court proceedings, the Applicants made an application to the Tribunal regarding the reasonableness of the service charges.

53. The Respondent referred the Tribunal to clauses 3(i) and 3(iii), of the Leases, which detailed the lessees' covenants to pay the rent and service charge. The Respondent also referred the Tribunal to clause 3(x)(a), which detailed the lessees' covenants to pay any costs incurred by the Respondent in contemplation of proceedings under section 146 the Law of Property Act 1925. The Respondent stated that the correspondence from its solicitors had made it clear that all recovery action was in contemplation of forfeiture.

54. The Respondent provided, within its documents, a copy of a roof survey ('the Survey') carried out by Pennycuick Collins in November 2017. The Survey recommended a renewal of the waterproof coverings within the next 18 to 24 months to allow for sufficient funding to be collected to pay for the works. The Survey confirmed that the condition of the existing waterproofing of the roof, which was constructed as a cold roof comprised of one layer of built-up bituminous membrane applied as an overlay above an original mastic asphalt waterproofing system, was extremely

poor. The Survey also confirmed that the thermal performance of the roof was well below current standards and that re-waterproofing the roof would not meet building regulations. The Survey recommended that the roof waterproofing be replaced and that the fascias and soffits also be replaced and extended to accommodate new insulation. It also recommended that eaves guttering be added, together with torch free zones, which it stated that the Bauder system had the capacity to facilitate. The Survey gave a budget cost for the works to be in the region of £100,000.00 plus VAT, based on standard rates for a Bauder specification, used on a similar block of flats in 2011.

55. At the hearing, Mr Gibson, on behalf of the Respondent, stated that the Respondent, following the Survey, had complied with the consultation procedure for carrying out the roofing works, in accordance with section 20 of the Act. He stated that the Applicants had not raised any challenges regarding the validity of the consultation procedure. Copies of the Notices, correspondence and tenders received were included within the Respondent's bundle. Mr Gibson stated that, although the Respondent had received a couple of nominations for Hickenbuild to be included on the tender list, they were not an approved contractor of the Bauder system so did not meet the grounds to be included.

56. In relation to the two quotations supplied by the Applicants, Mr Gibson stated that the information on the quotations was sparse, with little detail relating to the type of roof or any guarantee for the works. He submitted that, although the quotes may have seemed cheaper in the short term, there was no idea of what cost protection was included and, hence the costs may have been more expensive in the long term. He also stated that the works might not have complied with buildings regulations and that the quotations were not detailed in line with the specification upon which the tenders were given, which had been based upon the Survey recommendations. Without such details, Mr Gibson submitted that the quotations could not be relied upon to argue that the tenders received by the Respondent were not reasonable.

57. In relation to the type of roofing system chosen, Ms Cannon-Leach confirmed that the Respondent had been recommended to utilise the Bauder system by the surveyor due to the unusual construction of the roof deck. She stated that she did not consider that utilising the Bauder system was an improvement, although she stated that it was a very good system. She confirmed that the Respondent had not received quotes for other roofing systems as the Bauder system offered the best guarantee, with an approximate roof lifespan of 30 years.

58. In her written statement to the Tribunal, Ms Cannon-Leach stated that the Bauder system benefitted from a single point guarantee lasting 20 years and that the manufacturer was a reputable name across industry, renowned for addressing issues in an effective manner. She also stated that the quality of the products was renowned and respected and tended to have longer lifespan than many others products in the market. She

stated that due to the delay caused by the non-payment by the Applicants of their service charge, the lowest tender for the works to the roof was no longer available and that the Respondent had taken out a loan so that the works, which started on 16th June 2020, could be commenced as soon as possible.

59. In relation to how the sums requested on account for the works had been calculated, she confirmed that a sum of £125,000.00 had been allocated for the works to the roof. She stated that, at that time, the service charge was calculated on the basis that the residential flats were paying approximately 7.781944 % of the service charge, with the commercial units being liable for 4.7181056%. As such, Ms Cannon-Leach confirmed that a sum of £9,727.43 was demanded from each of the Applicants for the works.

60. The Tribunal queried, at the hearing, how the apportionments were calculated as Pennycuick Collins' own Reinstatement Cost Assessment ('the Assessment'), carried out for insurance purposes, had detailed the total area of the ground floor (the commercial units) at 661m² and the first and second floors (the residential units) as 345m² each (690m² combined). In a written statement provided by Ms Cannon-Leach after the hearing, she clarified that the original apportionments had been based on measurements passed to Pennycuick Collins when they began managing the Development. She stated that they had been informed that the size of each of the commercial units was 646.297ft² and the size of each of the residential units was 1066ft².

61. Ms Cannon-Leach confirmed that the service charge apportionments had subsequently been modified. She stated that the freehold of the commercial unit at 3 Ashworth House, together with the flat above (11 Ashworth House), had been sold some time ago and that there was an ongoing dispute relating to the sales of these properties as they had not been made subject to the payment of an apportionment of the service charge for the Development. As such, she stated that the apportionments of the remaining properties had been recalculated so that, having removed these two properties, the amended apportionments amounted to 100% of the service costs. The recalculated apportionments for each residential unit was 8.893651% of the service charge, with the amended apportionment for the commercial units being 5.392063%.

62. Ms Cannon-Leach confirmed that the roof above 11 Ashworth House had been replaced by the freeholder of that property. She stated that she was not sure what type of replacement roof had been used and that the new roof to be installed by the Respondent would not be replacing the roof to number 11, although there would need to be some overlapping on either side.

63. In relation to the transfer of monies to the reserves, she confirmed that the accounts were certified in each year-end and that any money held on account was shown as held in the reserve fund in the 2019 accounts.

64. In relation to the buildings insurance, Mr Gibson referred the Tribunal to the insurance certificates which had been provided for the years 1st February 2018 to 1st February 2019, 1st February 2019 to 1st February 2020 and 1st February 2020 to 1st February 2021. He stated that the increase in the sum insured was due to the fact that the Assessment, which had been carried out in October 2017, had recommended that the Development be insured for £3,050,000.00 and that the insurance sum for February 2018 reflected that valuation. He confirmed that the commercial units contributed towards the insurance.

65. In relation to the sum of £1,868.46 detailed in the 2019 accounts as relating to "*Insurance services and claims handling*", Ms Cannon-Leach stated that the managing agents handled a number of claims at the Development. She stated that an insurance manager at Pennycuick Collins would liaise with the brokers and the lessees and provided a 'hands on' service. She confirmed that Pennycuick Collins did not share any commission with the brokers.

66. Ms Cannon-Leach stated that there had been a large number of claims in 2017 and 2018 which undoubtedly had a negative effect on the renewal premium. After the hearing, in response to information requested by the Tribunal, Ms Cannon-Leach provided a copy of an email from Mr Millard, a chartered insurance broker, who confirmed that the Development had been insured for a period of five years (until 2019), within a portfolio with Zurich insurance. He stated that alternative quotes were sought on at least two occasions during this period but that because there had been nine reported incidents between 2014 and 2017, the Development was not seen as desirable by many insurers as the claims indicated an ongoing issue with the Building. He stated that in 2018, removal of cover for claims relating to water/accidental damage from the roof, was the only cover available from alternate insurers. He stated that, due to the ongoing relationship with Zurich, they provided cover for the roof, albeit with a higher excess. Ms Cannon-Leach provided a further copy email, this time from Ms Wainwright (a Senior Account Handler with insurance brokers Aston Lark), who confirmed that they had obtained terms for the February 2020 renewal from Axa at a premium of £7,070.96 and from Aviva for £7,648.18 and that they were instructed to renew cover with Axa.

67. In relation to whether commercial properties would generally have higher premiums than residential properties, especially with high-risk properties such as a restaurant, Ms Cannon-Leach said that this was not necessarily the case, as there had been a larger number of claims made from the residential tenants of the property, due to the roof. She stated that, as the roof was now being replaced, it was likely that any future insurance premiums would be lower.

68. At the hearing, the Tribunal queried why the insurance cover detailed three years' loss of rent at almost £146,500.00, when the residential leases only allowed for two years' loss of ground rents, the rent for each flat being a sum of £35.00 per annum. The Tribunal also queried why parts of the

insurance related to communal contents, as they appeared to be none, and employer's liability, as a this would relate to the commercial premises. Ms Cannon-Leach, in her written statement answering these queries, stated that she had been informed that there was no additional cost for employer's liability or the communal contents cover. For the February 2019 to 2020 insurance period, Ms Cannon-Leach confirmed that the insured commercial rent value was for £146,340.00 and the residential rent protection was for 35% of the building value, being £1,115,537.50. Ms Cannon-Leach provided no information as to why the residential insurance would need to be for 35% of the building value when the Leases clearly stated that it only needed to be two years' loss of ground rent (£70.00 per residential unit) nor did she confirm as to how much of the insurance premium related to this or to the three years' loss of rent which was attributable to the commercial rents.

The Tribunal's Deliberations and Determinations

69. The Tribunal considered all the written and oral evidence submitted and briefly summarised above.

70. The Tribunal noted that the Applicants had already confirmed at the CMC that they were liable to pay the ground rent and administration charges levied by the Respondent. The Tribunal also noted that the Applicants provided no submissions in relation to the transfer of the funds to the reserves – the Tribunal considered the Respondent's actions in this regard to be reasonable. As such, the matters remaining before the Tribunal related to the sums requested on account in relation to the major works to the roof and the reasonableness of the charges in respect of the buildings insurance.

71. In relation to the sums request on account for the works to the roof, the Tribunal noted that the service charge requested was an estimated service charge and that such a charge could be demanded under the provisions of the Leases.

72. In cases relating to estimated charges, the Tribunal noted the decision of the Upper Tribunal in *Knapper v Francis* [2017] UKUT 3(LC) and to the two-stage test, set out by Martin Roger QC, that the tribunal should consider when dealing with on account payments:

> "*28. … The starting point for its determination is the contractual position between the parties…*
>
> *30. The second stage of the determination is to consider whether the on-account payment required by the lease exceeded the statutory limit imposed by section 19(2). The effect of the statute is to modify the contractual obligation so that no greater amount than is reasonable is payable before the relevant costs are incurred. The language of the subsection suggests that the statutory ceiling applies at the time the leaseholder's liability arises. If, at that date,*

the on-account payment is greater than a reasonable sum, the leaseholder's contractual obligation is to pay only the lesser, reasonable, sum."

73. As such, the Tribunal was required to determine under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the Leases. The Tribunal was not concerned as to whether any actual costs for the repairs had been reasonably incurred.

74. It was apparent from the submissions received, that all parties considered that the roof was beyond repair and in need of complete replacement. The Tribunal, based on its limited inspection, the contents of the Survey and the photos provided by the Applicants, concurred that the life of the current roof had come to an end and required replacement. The Tribunal also noted that the Survey appeared to recommend that the Respondent utilised the Bauder felt roof system, along with replacement of the current fascias and soffits and additional installations.

75. The Respondent had carried out a section 20 consultation in relation to the proposed works and the Tribunal noted that the Applicants confirmed at the CMC that there was no dispute as to the consultation. The Tribunal also noted, based on the information provided in relation to the consultation procedure and information provided by Ms Cannon-Leach at the hearing, that the Respondent had only accepted tenders from approved contractors of the Bauder system. This was also clear from a letter that Pennycuick Collins had sent to all leaseholders, dated 6th February 2019, which stated that a couple of nominations had been made for Hickenbuild to be included on the tender list but that these were not accepted as Hickenbuild "*…are not an approved contractor of the Bauder system which is the system that will be used for the waterproofing of the roof and as such they did not meet the grounds to be included on the tender list…".*

76. The Applicants had provided two quotations for replacement of the roof with a rubber roof (also referred to as an Ethylene Propylene Diene Monomer (EPDM) roof) and for the replacement of the fascias and soffits. Both quotations were less than half of the cost of the tenders received for replacing the roof with the Bauder system (prior to the addition of VAT and Professional fees).

77. The Tribunal noted that the quotations supplied by the Applicants did not use the Pricing Schedule that had been utilised by the companies which gave tenders during the consultation. As such, the quotations did not include installation of additional items, such as guttering, and it was not clear whether the quotes included the items detailed on the Pricing Schedule as preliminaries – such as access, storage and welfare facilities. In addition, the quotes did not allow for any provisional sums or contingencies, as per the Pricing Schedule.

78. The tenders supplied in relation to the section 20 consultation included approximately £10,000.00 for preliminary matters, £1,500.00 for installation of guttering and £9,000.00 for provisional sums and contingency. Adding these three sums to the cost of seven roofs (as the Respondent had confirmed that they would not be replacing the roof to 11 Ashworth House), utilising the average of the costs of the quotations obtained by the Applicants, amounted to a sum of £59,175.00. The Tribunal noted that this was still £30,000.00 less than the lowest tender (£89,447.72) obtained in the section 20 consultation for the replacement of the roof utilising the Bauder system.

79. The Tribunal also noted that the original roof was not constructed using the Bauder system nor for that matter was it an EPDM roof. It had comprised a mastic asphalt waterproofing system. Although the Tribunal accepted that re-waterproofing the roof was unlikely to have met current building regulation standards, the Tribunal was surprised that the Respondent had failed to consider any alternate roofing systems to the Bauder system.

80. Although Ms Cannon-Leach, at the hearing, stated that she did not consider the Bauder system to be an improvement to the original roof, she did state that she considered it to be a "*very good system*" and, in her statement, she had confirmed that the quality of products was "*renowned*", and in order to achieve a "*high-quality installation*", Bauder only allowed approved contractors to use its products.

81. In considering whether insisting on the use of the Bauder system could be considered an improvement, the Tribunal noted the decisions of the Court of Appeal in *The London Borough of Hounslow v Waaler* [2017] ('*Waaler*') ECWA Civ 45 and the Upper Tribunal in the *DeHavilland Studios Ltd v Peries* [2017] UKUT 322 (LC) ('*DeHavilland*'). In *Waaler*, the lease in that matter had allowed the Council to make improvements affecting their property, which tenants were liable to pay towards. In relation to whether costs in that matter had been reasonably incurred, at paragraph 37, Lord Justice Lewison stated:

> *"In my judgement, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome. That said it must always be borne in mind that where the landlord is faced with a choice between different methods of dealing with a problem in the physical fabric of the building… there may be many outcomes each of which is reasonable. I agree with Mr Beglan that the tribunal should not simply impose its own decision. If the landlord has chosen a course of action which leads to a reasonable outcome the costs of pursuing that course of action will have been reasonably incurred, even if there was another cheaper outcome which was also reasonable."*

He made it clear that a lessor must take into account the financial impact on works to tenants and, at paragraph 45, stated:

"*However, in broad terms the landlord is likely to know what kinds of people are lessees in a particular block or on a particular estate. Lessees of flats in a luxury block of flats in Knightsbridge may find it easier to cope with a bill for £50,000 than lessees of former council flats in Isleworth.*"

He went on to refer to the view of the Upper Tribunal in Garside v RFYC Ltd [2011] UKUT 367 (LC) ('*Garside*') where, at paragraph 16, HHJ Robinson stated:

"*In many cases financial impact could no doubt be considered in broad terms by reference to the amount of service charge being demanded having regard to the nature and location of the property and as compared with the amount demanded in previous years. Reasonable people can be expected to make provision for some fluctuations in service charges but at the same time would not ordinarily be expected to plan for substantial increases at short notice.*"

HHJ Robinson went on to say, at paragraph 20 of the decision:

"It is important to make clear that liability to pay service charges cannot be avoided simply on the grounds of hardship, even if extreme. If repair work is reasonably required at a particular time, carried out at a reasonable cost and to a reasonable standard and the cost of it is recoverable pursuant to the relevant lease then the lessee cannot escape liability to pay by pleading poverty."

82. The reasoning in *Waaler* was followed in the *DeHavilland* decision, where HHJ Behrens held that, under the Act, a lessor was prevented from recovering an *unreasonable* expenditure but that a tribunal was not required to determine which of two *reasonable* alternatives was the one that should be followed – that as long as the decision was shown to be reasonable the tribunal should not intervene. In that case the decision related to whether to replace windows or repair them. An expert's report provided costings which showed that replacing the windows was much costlier than repairing them, though the repairing costs did not include glazing which, when added, did make the quotations more comparable. In his decision, HHJ Behrens' referred to the fact that: "*Neither expert suggested that a decision to repair was an unreasonable option even though both regarded replacement as the better option.*".

83. Though Ms Cannon-Leach did not consider the Bauder system to be an *improvement* to the original roof, the Tribunal did not agree. The Tribunal noted, however, that as the roof was in need of replacement, the utilisation of such a system would not in itself have been unreasonable if the Respondent could have shown that the cost of such an installation was reasonable compared to the cost of alternate roofing systems. However, the Respondent had provided no evidence to show that any alternate solutions or costs for replacing the roof with a different system

had ever been explored. In fact, the letter from Pennycuick Collins of 6th February 2019 made it clear that the Respondent did not accept any tenders other than those in respect of the Bauder System.

84. In addition to this, there was no evidence that the Respondent had any regard for the modest income of the lessees when deciding what type of roofing system to install. The difference in the quotations provided by the Applicants for an EPDM roof were significantly lower than those provided by the tenders using the Bauder system and, based on the Tribunal's own knowledge, a EPDM roof would have been similar in price to a standard mastic asphalt roof.

85. The sum budgeted for by the Respondent on account of the works to the roof was £125,000.00. This was based on the tenders received for the replacement using the Bauder system. The Respondent, consequently, requested a sum of £9,727.43 from each of the Applicants, in one lump sum, demanded on 25th March 2018. This was in addition to their usual service charges which, at the time, appeared to have been around £500.00 per annum. The Tribunal noted that the Applicants had stated that they were of low income as, they submitted, were many of the other lessees. The Tribunal also noted that the Development is located in a modest part of Cannock.

86. Taking all of the above into account, the Tribunal did not consider the sum demanded on account for the major works to the roof of £125,000.00 to be a reasonable sum. The Tribunal noted that the figure of £125,000.00 took into account VAT on the tenders received, together with a charge for professional fees of 11.5% plus VAT. The Tribunal considered that an 11.5% charge for professional fees in overseeing a replacement of a roof to be excessive. Noting that the average of the Applicants' quotations, having adjusted the same to include the cost of preliminary matters, installation of guttering, provisional sums and a contingency, amounted to £59,175.00 (as detailed above), the Tribunal determined that a sum of £75,000.00 on account for the costs of the works to the roof, to include any professional fees and all VAT, to be reasonable.

87. In relation to the apportionment of the costs, the Tribunal noted that, as the freeholder of the Development, at some point, had separately sold the freehold of numbers 3 and 11 Ashworth House but had failed to make those sales subject to the payment of service charge for the maintenance of the Development, Pennycuick Collins had revised the apportionments that they had originally been provided with to ensure that the service charges amounted to 100% of the Respondent's service costs. The Tribunal did not agree with this revision. The Leases made it clear that the amount of the service charge was based upon the floor area of the leased property in comparison to the floor area as a whole. In recalculating the figures, the lessees were being penalised for an error made by the lessor. The floor area of the flat, in comparison to the remaining properties at Ashworth House, had not changed.

88. Ms Cannon-Leach confirmed that the previous apportionments had been based on measurements passed to Pennycuick Collins when they commenced managing the Development. The Tribunal noted that there was a significant difference between the floor area measurements on which the service charges had been apportioned (646.297ft² per commercial unit, amounting to 480m² for the eight commercial units in the Building and 1066 ft² per residential unit, amounting to 792 m² for the eight residential units located in the Building) compared to the measurements for the floor area as detailed in the Assessment, being 661m² as the area of the ground floor and 690m² for the area of the residential parts (the first and second floor). Having carried out its own inspection, the Tribunal considered that the figures given in the Assessment as more likely to be accurate. Although Ms Cannon-Leach had suggested that, perhaps the Assessment had not included the walkway, this is not something that should be included when calculating the floor area of the residential flats as it is not part of the demise.

89. Based on the measurements detailed in the Assessment carried out by Pennycuick Collins, the Tribunal noted that the floor area for each residential unit would be approximately 86.25m² (taking in to account both storeys) with the floor area for a commercial unit being approximately 82.63m². As the area of the whole building amounts to 1351m², the Tribunal determined that the proper apportionment for each residential unit should be 6.384160% and for each commercial unit 6.116210%.

90. In relation to the apportionment for the costs of the works to the roof, however, the Tribunal noted that 11 Ashworth House had already replaced their roof so the costs for the new roof only related to those properties still owned by the Respondent. As such, the costs should, rightly, be apportioned between the seven residential units and the seven commercial units. The floor area for these amounted to 1182.125 m² and, consequently, the apportionment in relation to the costs of the roof for each residential unit would be 7.296183% and for each commercial unit 6.989955%.

91. As such, the Tribunal determined that the proper costs that should have been demanded on 25th March 2018 on account from each of the Applicants towards the reasonable costs for the works to the roof amounted to £5,472.14.

92. In relation to the buildings insurance, the Tribunal noted that the Applicants' applications related to the service charges for the year ending 31st March 2018, 2019 and 2020. As such, the buildings insurance in relation to all of three of these years was in dispute. In addition, the Applicants had queried the payment of the costs of the managing agents for "*insurance services and claims handling*" amounting to £1,868.46 in the 31st March 2019 accounts.

93. In relation to the insurance services and claims handling fee, under the Fourth Schedule of the Leases, the lessees are only liable for the costs of insuring the property and the fees of any managing agents for the collection of rents, general management and administration. In addition, the Tribunal noted that Pennycuick Collins instructed insurance brokers to obtain terms and did not consider an additional fee for such services to be appropriate.

94. Consequently, as the Applicants had been liable at that time for 7.781944% of the service charges, a sum of £145.40 is to be deducted from the service charges demanded from each of the Applicants for the service charge year ending 31st March 2019.

95. The Tribunal noted that the Applicants had raised no other points regarding the reasonableness of the remainder of the service charges that had been demanded on account in the years ending 31st March 2018 and 31st March 2019 and that no on demand service charge had been made for the period commencing 1st April 2020.

96. In relation to the actual costs of the buildings insurance, despite the Tribunal directing the Applicants to provide any alternative insurance quotations, the Applicants had failed to provide any quotations or any alternative valuation of the Development. In the absence of any evidence to the contrary, the Tribunal accepted that the valuation of Development, contained in the Assessment by Pennycuick Collins, to be reasonable and that, due to the problems encountered with obtaining insurance, the premiums to also be reasonable.

97. In relation to the apportionment of the premium between the commercial and residential elements, Ms Cannon-Leach appeared to suggest that, as more of the claims related to the residential element, this would balance any additional risk of cover for the commercial part. The Tribunal did not agree. The claims in relation to the residential elements appeared to relate to damage which emanated from the roof, due to its poor maintenance.

98. In relation to the cover included within the buildings insurance, the Fourth Schedule of the Leases confirms that the lessees are responsible for paying a "*proper proportionate part*" of the costs of insurance as per the provisions of clauses 5(2) and 5(3) of the Leases. Clause 5.2 confirms that the lessor must ensure the '*Block*' and that the insurance should cover "*the risk of fire and such other perils as the Lessor may require and a sum equal to the aggregate of two years' loss of the ground rents…*". Clause 5(3) relates to the liability of the lessor to any third parties, and the Tribunal considered that this would include any public liability insurance.

99. Ms Cannon-Leach confirmed that there were no additional costs added to the premium in relation to either employer's liability or communal contents cover. The Tribunal noted that two years' ground rent for all

eight residential flats would only amount to £560.00. The insurance taken out by the Respondent included commercial rent value for over £146,000.00. In addition, Ms Cannon-Leach confirmed in the February 2019 to February 2020 premium, residential rent protection of 35% of the building value (an amount of £1,115,537.50) was also covered. Ms Cannon-Leach stated that the same apportionments that had been used for the service charges had also been used for the buildings insurance; however, this did not appear to be correct, as based on the Tribunal's calculations the lessees of the residential units appeared to have been charged 9.983% of the buildings insurance premiums.

100. The Tribunal noted that the excessive cover relating to loss of residential rental value was clearly not included within clause 5(2) of the Leases. In addition, the Tribunal noted that the commercial units were not held on long leases but were subject to general commercial rents, so did not consider that the three years' loss of rent for the commercial units was something that it was reasonable and proper for the lessees of the residential parts be liable for.

101. The Tribunal did note that to obtain separate insurance in relation to the commercial element would be difficult. Consequently, in the absence of any evidence of the apportionment between those risks which would be envisaged under the provisions of the Leases and those which would not, the Tribunal considered that it would be reasonable to suggest that 20% of the premium related to those additional items and should only be payable by the Respondent or the tenants of the commercial units. The Tribunal determined that the remaining 80% of the costs of the premium were to apportioned as per the service charge apportionment figures.

102. As the reasonable and proper apportionments of the service charge costs for each of the Applicants had been determined by the Tribunal as 6.384160, each of the Applicants is liable for the following amounts in relation to each of the following insurance premiums:

- Feb 2018 - Feb 2019: 80% of £9,544.09 x 6.384160% = £487.45
- Feb 2019 - Feb 2020: 80% of £10,761.64 x 6.384160% = £549.63
- Feb 2020 - Feb 2021: 80% of £7,070.96 x 6.384160% = £361.14

103. Taking into account all of the above determinations, the Tribunal concluded that the following adjustments should be made to the Applicants' service charge accounts:

- Year ending 31st March 2018 – a reduction of £450.73 (being the Tribunal's reduction in the apportionment of the premium for the buildings insurance premium from £938.18 to £487.45); and
- Year ending 31st March 2019 – a reduction of £4,908.93 (being the Tribunal's reduction in the reasonable costs of the major works to the roof of £4,255.29, the reduction in the apportionment of the premium for the buildings insurance premium from £1,057.87 to

£549.63 and the deduction of £145.40 for the insurance claims handling fee).

104. The Tribunal noted that, at the time of the applications to the County Court and tribunal, the demand for the February 2020 insurance premium had not been made, so the costs demanded for this payment have not been taken into account in the calculation of the service charges owed by the Applicants in the court proceedings by the Respondent.

Costs of the Tribunal Proceedings

105. In considering the assessment of costs, the Tribunal had regard to the decision of Martin Rodger, Deputy Chamber President, sitting as a judge of the County Court, in *John Romans Park Homes Limited v Hancock* [2019] (unreported) ('*John Romans Park Homes*'). The costs regime for tribunal proceedings under the Tribunal Rules is quite different to the costs relating to County Court matters. It is normally (subject to Rule 13) a 'no costs jurisdiction'.

106. The Tribunal did not consider that an order for costs under Rule 13 was appropriate in this matter and awards no costs in relation to the proceedings before the Tribunal.

Section 20C and Paragraph 5A in the Tribunal Proceedings

107. The Applicants had failed to provide any submissions in relation to their applications under section 20C and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act').

108. Mr Gibson, on behalf of the Respondent, referred to the fact that the Applicants had failed to make any payments of service charge in 2019, had not contributed to the costs of the major works to the roof and had failed to make payments in relation to the buildings insurance. He stated that this had led to the Respondent having to take out a loan for the works to the roof to be commenced. He stated that in those circumstances, and in the absence of any submissions from the Applicants, no section 20C or paragraph 5A order should be made.

109. The Tribunal noted that, in relation to the matters raised by the Applicants, it had substantially reduced the amount considered reasonable for the major works to the roof, it had reduced the Applicants' contributions towards the building insurance premiums and it had determined that the demand for an insurance claims handling fee was unreasonable. Accordingly, in relation to the application under section 20C of the Act, the Tribunal considered it just and equitable in the circumstances to make an order that any relevant costs in relation to the tribunal proceedings are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

110. The Tribunal also considered it just and equitable, under paragraph 5A of Schedule 11 to the 2002 Act, to reduce the Applicants' liability to pay any administration charges in respect of the litigation costs incurred or to be incurred by the Respondent in connection with the proceedings before the tribunal in this matter to £270 each, being the charges which the Applicants had already accepted as payable at the CMC.

The Issues & Decisions (County Court)

Interest

111. The Applicants failed to provide any submissions in relation to interest payable on the amounts due. On behalf of the Respondent, Mr Gibson submitted that interest should be paid at a rate of 8%, under section 69 County Courts Act 1984.

112. Judge Gandham, sitting alone as a judge of the County Court, noted that the Tribunal had reduced some of the service charges payable (including the costs of the buildings insurance premiums) and that the Leases made no provision for interest on late payments. In addition, the demands sent to the Applicants stated that:

> "*Interest will be charged on late payment as provided under the terms of your lease.*"

113. She also noted, however, that there was no good reason for the Applicants not to have paid part of the sums demanded. The Applicants had agreed that they were liable to pay the ground rent and administration charges in full at the CMC and, in relation to the amounts demanded for the service charges, they had only raised queries regarding the level of the sum requested on account for the major works to the roof and the increase in costs of the buildings insurance. Even in relation to sums for the works to the roof, they were aware that they were liable to pay *reasonable* amounts towards the costs of the same.

114. Taking in to account all of the above, and noting that interest rates generally had been low for many years, Judge Gandham awarded interest at the rate of 1% from the dates the outstanding payments became due to the date of Judgement.

115. As such, the interest awarded against, and payable by the Applicants, (taking in to account the Tribunal's determinations as to the sums reasonably payable) are as follows:

First Applicant:

£13.14 for the service charge dated 1st February 2018 (985 days);
£0.56 for the service charge dated 24th March 2018 (934 days);
£142.87 for the service charges dated 25th March 2018 (933 days);
£0.44 for the ground rent dated 10th April 2018 (917 days);

£0.36 for the ground rent dated 29th September 2018 (745 days);
£5.45 for the service charges dated 29th September 2018 (745 days);
£9.32 for the service charge dated 1st February 2019 (620 days).
£0.27 for the ground rent dated 25th March 2019 (568 days);
£35.39 for the service charges dated 25th March 2019 (568 days);
£1.26 for the charge dated 20th May 2019 (512 days); and
£2.51 for the charge dated 22nd May 2019 (510 days).

Second Applicant:

£136.05 for the service charge dated 25th March 2018 (933 days);
£0.27 for the ground rent dated 25th March 2019 (568 days);
£35.38 for the service charge dated 25th March 2019 (568 days);
£1.26 for the charge dated 22nd May 2019 (510 days); and
£2.47 for the charge dated 31st May 2019 (501 days).

Costs of the County Court Proceedings

116. The Applicants failed to provide any submissions in relation to legal costs. The Respondent's Representative had produced a Schedule of Costs amounting to a figure of £11,598.45. This included costs before the Court and tribunal proceedings.

117. Mr Gibson referred the Court to clause 3(x)(a) of the Leases and confirmed that the actions by the Respondent, and its solicitors, were made in contemplation of forfeiture proceedings. He confirmed that both claims were issued separately but that legal costs should be halved between the two Applicants, other than in relation to the issue fee which for 10 Ashworth House was £839.27 and for 12 Ashworth House was £696.18.

118. As previously stated, Judge Gandham noted the decision in *John Romans Park Homes* and that under the County Court proceedings a claimant is only entitled to the costs relating to the County Court matters, which are governed by the CPR.

119. The first issue for the County Court is whether to award some or all of the costs. The second issue is then the qualification of such costs as are awarded.

120. In terms of the award of the costs, Judge Gandham made an order under section 51 Senior Courts Act 1981. She applied the presumption found in CPR 44.2 of the Civil Procedure Rules, namely that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. She concluded that the Respondent was the successful party, applying the test found in *Barnes v Time Talk (UK) Ltd* [2003] EWCA Civ 402

> *"In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure. [Para 28]"*

121. Judge Gandham recognised that this is a rebuttable presumption and that, in cases which have a contractual right to costs, an important factor is also the contractual provision. She took into account the decision in *Church Commissioners v Ibrahim* [1997] EGLR 13 but recognised that an order to pay costs is discretionary and that the Court retains that discretion (see *Forcelux v Martyn Ewan Binnie* [2009] EWCA Civ 1077). Judge Gandham concluded that the provision for contractual costs carries considerable weight but does not displace the Court's overall discretion

122. In relation to the decision in *Chaplair Limited v Kumari* [2015] ECWA Civ 798, referred to by the Respondent in its written submissions, she noted that further guidance regarding costs incurred in tribunal proceedings had recently been given in the *John Romans Park Homes* decision and did not consider that the issues before the tribunal, which were lengthy, could be considered incidental to the County Court proceeding.

123. In this matter, the original claim against each of the Applicants had been for outstanding ground rent, late payment and referral administration charges, on account service charges (including those for the major works to the roof) and the payments of the apportionment of the insurance premiums (being part of the service charge). The Applicants had at the CMC admitted liability for the ground rent and administration charges detailed in the claim and the matters in dispute were clarified at the CMC.

124. Although, as detailed above, the Applicants had succeeded in the tribunal proceedings in having the costs payable by them reduced, it was clear from their submissions that they were aware that they were responsible under their Leases for payments of reasonable sums for both the insurance premiums and towards the costs of replacing the roof. The Applicants' own quotations identified that each of the Applicants would have been responsible to contribute at least £2,600.00 towards the costs for the roofing works, yet they had, for over 12 months, failed to make any payment towards the same. The Applicants had also failed to make any payments towards the buildings insurance or for other sums demanded on account, the reasonableness of which they had not queried.

125. In addition, the Applicants had twice, at very short notice (once on the day of the hearing and, secondly, on the day before the rescheduled hearing) requested an adjournment of the hearing – the second request having been denied by the Tribunal on the grounds that the Applicants had been given ample notice and had failed to provide a reasonable excuse for non-attendance.

126. Having weighed up all of the evidence, Judge Gandham decided that the appropriate order was that the Applicants should pay 66% of the Respondent's costs.

127. Judge Gandham decided that the costs were to be assessed on the standard basis applying the principles of proportionality prescribed in

Part 44 rule 4 and also the principles governing the assessment of costs in contractual entitlement cases set out in Part 44 rule 5 and made the following observations.

128. The Respondent's claim for costs amounted to a sum of £11,598.45. As Judge Gandham could also only consider those items that related to the costs before the County Court, she reduced the sums detailed on the 'Schedule of work done on documents' in the Respondent's Schedule of Costs to £1,919.50, having removed those items which she considered related to the tribunal proceedings. In addition, she removed any costs relating to the instruction of/attendance fees for an advocate at the CMC, as she did not consider that this would have required an advocate's presence, the identification of the matters in dispute being a relatively straight forward procedure. This left a sum of £5,977.60 for which she considered each of the Applicants was responsible for a half share of. In addition to this figure, each of the Applicants was also responsible for their respective court fee (£839.27 for 10 Ashworth House and £696.18 for 12 Ashworth House), so the costs for the First Applicant amounted to £3,828.07 and the costs for the second Applicant amounted to £3,694.98.

129. Having regard to the provisions of CPR 44.3(5), Judge Gandham was not satisfied that these sums were proportionate based on the value of the claim and the issues involved. She, therefore, substituted the sum of £3,000, to be payable by each of the Applicants, such sum to be inclusive of VAT and court fees.

130. As the Applicants are only liable to pay 66% of the costs, as detailed above, the Court finds the sum of £1,980.00, inclusive of VAT and court fees, is payable by each of the Applicants in respect of costs.

Section 20C and Paragraph 5A in the County Court Proceedings

131. As previously stated, the Applicants had failed to provide any submissions in relation to their applications under section 20C and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'). The Respondent's submissions were the same as detailed in paragraph 108 above.

132. Judge Gandham noted that the main reason for the Applicants' withholding their service costs, including the insurance payments, appeared to relate to the rate at which such costs had increased and that court costs could have been avoided had either party made an application to the tribunal to determine whether such service costs were reasonable.

133. Taking into account all of the circumstances of the case, Judge Gandham was satisfied that it was just and equitable for an order to be made under section 20C of the Act, that all of the costs incurred in connection with the proceedings before the County Court should not be regarded as relevant costs to be taken into account when determining the amount of any service charge payable by the Respondents.

134. Judge Gandham also considered it to be just and equitable, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, that each of the Applicants' liability to pay any administration charges in respect of the litigation costs incurred or to be incurred by the Applicant in connection with the proceedings before the County Court in this matter to be reduced to £1,980.00 each, the costs detailed at paragraph 130 above.

Name: Judge Gandham **Date:** 12th October 2020

Rights of appeal

Appeals in respect of decisions made by the FTT

A written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court

An application for permission to appeal may be made to the Tribunal Judge who dealt with your case or to an appeal judge in the County Court.

Please note: you must in any event lodge your appeal notice within 21 days of the date of the decision against which you wish to appeal.

Further information can be found at the County Court offices (not the tribunal offices) or on-line.

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court and in respect the decisions made by the FTT

You must follow **both** routes of appeal indicated above raising the FTT issues with the Tribunal Judge and County Court issues with either the Tribunal Judge or proceeding directly to the County Court.