



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

Case reference : **CAM/26UF/LSC/2019/0077**

**HMCTS code
(audio, video,
paper)** : **A:BTMMREMOTE**

Property : **59 Haygarth, London Road, Knebworth,
Hertfordshire SG3 6HF**

Applicant : **Hightown Housing Association Limited**

Respondent : **Paul Clark**

Type of application : **Liability to pay service charges**

Tribunal members : **Judge David Wyatt
Judge Wayte**

Date of decision : **6 August 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote audio hearing. The form of remote hearing was A:BTMMREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that we were referred to are in a bundle of 139 pages (together with the supplemental statement with Appendices 1-3 provided by the Applicant on 11 June 2020), the contents of which we have noted.

Decisions of the tribunal

- (1) The tribunal determines that the following sums are payable by the Respondent as service charges:
 - a. £1,861.02 for unpaid charges for major works carried out to the Building (Block D, 57-68, as explained below) in 2017;
 - b. the following sums for 2018:
 - i. £186.55 for buildings insurance;
 - ii. £225 for management fees; and
 - iii. £202.46 for caretaking, electricity, ground and tree maintenance, refuse, repairs and maintenance (“**General Services**”);
 - c. the following sums (as estimated costs) for 2019:
 - i. £190.85 for buildings insurance;
 - ii. £230 for management fees; and
 - iii. £240 for General Services; and
 - d. the claim to ground rent is struck out for lack of jurisdiction, without prejudice to any right of the Applicant to seek such ground rent in the County Court or otherwise.
- (2) These determinations are explained in detail below.

Application and hearing

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (the “**1985 Act**”) of certain service charges payable by the Respondent for the service charge years 2017, 2018 and 2019.
2. The relevant legal provisions are set out in the Appendix to this decision.
3. The case management directions given by the tribunal on 18 December 2019 required the parties to notify the tribunal if they felt an inspection was necessary. Neither party did so and we are satisfied that an inspection is not necessary to determine the issues in this case.
4. At the hearing on 16 July 2020, the Applicant was represented by Ms Fenn (Home Ownership Team Manager) and Ms Connors (Home Ownership Officer). The Respondent, Mr Clark, represented himself.

Background

5. The Respondent holds a long Lease of the Property which requires the Applicant landlord to provide services and the Respondent leaseholder to contribute towards their costs by way of a variable service charge. The specific provisions of the Lease will be referred to below.
6. Different tribunals in this jurisdiction have, most recently on 18 May 2017, inspected the Estate and made determinations of service charges for previous years. In directions given on 31 March 2020, the tribunal noted that it had been referred by the Respondent to, and would take as agreed by the parties, the factual contents of the decisions of the tribunal in case numbers CAM/26UF/LSC/2017/0018, CAM/26UF/LSC/2014/0050, CAM/26UF/LSC/2013/0127 and CAM CAM/26UF/LSC/2012/0059 unless either party produced a statement explaining otherwise. Neither party did so and we proceed accordingly.
7. Based on the basic details provided by the parties and supplemented by the details in these previous decisions:
 - (i) the Estate, known as Haygarth, was constructed in the 1960s, with:
 - (a) five residential blocks of varying sizes, of standard brick construction with pitched tiled roofs, accommodating a mix of 68 units;
 - (b) single-storey garage blocks, cheaply built with flat felted roofs, accommodating 68 lock-up garages; and
 - (c) grounds with roadways (some main parts of which have been adopted by the local authority) and some additional parking spaces, and grounds including mature trees which were said to be subject to tree preservation orders;
 - (ii) the Building is one of those five residential blocks on the Estate, referred to by the Applicant as Block D. It is a block of 12 flats (Nos. 57 to 68), with no internal common parts. The ground floor flats are accessed at ground level. The upper floor flats are accessed using external staircases (which were replaced in 2009) leading directly to the front door;
 - (iii) the Property the subject of this application is a two-bedroom maisonette (No. 59) in the Building, together with a lock-up garage (No. 29, not 59) in a single-storey block (Nos. 23-44);

- (iv) 42 of the 68 residential units on the Estate, including the Property, have been sold on long leases granted to leaseholders exercising the right to buy, and the remainder are let out. The 42 long leases are described by the Applicant as the “*leasehold estate*” and the 26 other units rented to occupiers are described by the Applicant as the “*let estate*”.

The issues

- 8. The application by the Applicant landlord identified the relevant issues for determination as:
 - (i) the payability of service charges for 2018 and 2019 relating to buildings insurance, management fees, other services and a deficit from major works carried out in 2017; and
 - (ii) ground rent.
- 9. As explained in the case management directions given on 18 December 2019 and at the hearing, the tribunal does not have jurisdiction over ground rent, so cannot determine the latter issue.
- 10. Having considered all the documents provided and heard from the parties, the tribunal has made determinations of the other issues as follows, in the sequence claimed by the Applicant in its application, after summarising the relevant provisions of the Lease.

The Lease

- 11. The Lease was granted on 25 June 1982 and has a remaining unexpired term of about 86 years.
- 12. In paragraph 4 of the Third Schedule to the Lease, the leaseholder covenants to pay the Service Charge in the manner directed by the Fifth Schedule, where:
 - (i) the service charge year (“*Year of Account*”) is the calendar year;
 - (ii) after the end of each year, the landlord is to prepare:
 - (a) a list of the sums expended by the landlord in respect of performance of its obligations under the Fourth Schedule (which include covenants to keep the Building and the relevant parts of the Estate in good repair, clean, decorated and insured against loss or damage “...*by fire tempest flood or by such other cause as the Landlord may from time to time decide...*”); the relevant costs may

include fees of accountants, architects, surveyors, solicitors or others and, in relation to the Estate, all fees of auditors and managing agents) for: (i) the Building; and (ii) other parts of the Estate; and

- (b) an estimate or budget of the amount reasonably estimated to be needed on account to enable the performance of those obligations in the current year or “*some future Year of Account*”;
- (iii) following preparation of the list, the accounts are to be audited by an accountant;
- (iv) on the face of it, the managing agent is then to certify what in their opinion is the proportion of the total actual and estimated estate costs “...*fairly attributable to the [Property] or otherwise fairly payable by the Tenant.*” As we explained at the hearing, by Section 27A(6) of the 1985 Act, this provision for determination by the managing agent is void and accordingly if the parties had not agreed the proportion it would be determined by the tribunal;
- (v) the Service Charge under the Lease is:
 - (a) 9.31% of the expenditure and estimated expenditure shown in the audited list in respect of the Building; and
 - (b) the fairly attributable/payable proportion, as described above, in respect of the Estate. The previous decisions confirm that the proportion which has been adopted for years is:
 - (1) 1/68th (1.47%) in respect of general estate costs; and
 - (2) 1/42nd (2.38%) in respect of any estate costs which relate separately to the 42 long leases. The previous decisions noted that management and insurance costs were allocated separately between the rented and leasehold estates, because those estates involved different costs.

In the case management directions issued on 31 March 2020, the tribunal notified the parties that it would take it that these proportions had been agreed unless either party produced a statement explaining otherwise. Neither party did so and accordingly the tribunal takes these proportions as agreed.

- (vi) the landlord is then to send the leaseholder true copies of the audited list (and, on the face of it, the certificate) and a written notice requiring payment of the amount due. That amount would then become payable within 28 days of receipt of the notice and documents, although the previous decision of the tribunal notes that the Applicant accepts monthly payments on account where the tenant prefers that.

General

- 13. The Respondent did not provide any detailed grounds of challenge in advance of the hearing. Instead, he made general allegations of breach of the Lease, asked the tribunal to refer to the earlier decisions mentioned above and accused the Applicant of harassment and/or attempting to rewrite the terms of the Lease. Despite the case management directions, the Respondent did not provide details, or any evidence in support, of his allegations. He did (days before the hearing) ask for an adjournment to give him more time to produce evidence, saying that he had been unable to copy documents because of the Covid-19 pandemic. That request was refused, because he had been given ample time to prepare even taking that into account.
- 14. However, at the hearing, the Respondent engaged constructively with the issues and raised relevant points. In accordance with the overriding objective, and since these were all matters which the Applicant was able to answer at the hearing and/or reasonable questions to put to the Respondent to clarify or test their case, we allowed him to put these points to the Applicant's representatives. Helpfully, they were willing to deal with these points there and then, without asking for more time, and we arranged the hearing to give time for Ms Connors to confer with her colleagues about our questions and revert later in the hearing while Ms Fenn dealt with other questions. As it turned out, the questions the Applicant struggled to answer were all questions asked by the tribunal.
- 15. We have considered each of the points made by the Respondent carefully. Generally, we only mention below those points which are critical to our decisions on the relevant issues, but we should make the following general observations before we move on to examine each item claimed.
- 16. In relation to the Respondent's allegations of harassment and lack of transparency, we note the correspondence from the Applicant threatening recovery action and referring to the risk of repossession. However, the Respondent seems to have refused to make any payments for a long period of time. He confirmed at the hearing that he knows he has to pay his service charges. We do not advise him, but the reasonable and safer approach would normally be to make appropriate payments on account of disputed service charges, making it clear that these are paid under protest and, if agreement cannot be reached, applying to the

tribunal (as the Respondent has in the past) to determine the relevant service charges. That would avoid such threats and risks.

17. That said, we can quite understand why leaseholders would be confused or frustrated. Some of the Applicant's documents are difficult or impossible to understand without explanation. Even at the hearing, the Applicant's representatives struggled to explain, or could not explain, how the sums they were claiming had been calculated. We also discovered from the Respondent that in May 2018 leaseholders had been sent a breakdown of the major works charges which was, we gathered, substantially wrong. The Applicant's representatives said at the hearing that this incorrect statement had been prepared by their home ownership team; they said that the version produced to the tribunal (as Appendix 3 to the Applicant's supplemental statement) was reliable because it had been prepared by their finance team. However, they did not dispute the Respondent's assertion that this revised version had not been provided to leaseholders. The Applicant's representatives talked about leaseholder engagement webinars and willingness to provide more information to leaseholders on request, but the Applicant must work harder to provide clear and accurate information in future.
18. Further, it emerged for the first time at the hearing that the Applicant was claiming the estimated service charges for each year. We will in this decision determine the actual charges where copies of the accounts have been provided and the estimated charges for 2019, since the accounts for 2019 have not been provided.

Buildings insurance

19. The service charge list/statement for 2018, audited by BDO LLP chartered accountants, states that the cost of buildings insurance was £9,733.03 and that £7,838.04 of this was allocated to the leasehold estate (of 42 long leases, as described above). 1.47% of the former would be £143.08 and 2.38% of the latter would be £186.55.
20. In the service charge estimate/budget for 2019, the Applicant estimated buildings insurance costs of £10,038.28. It seems likely that this was the total cost rather than the amount said to relate to the leasehold estate. 1.47% of this would be £147.56 and 2.38% would be £238.91.
21. The Applicant claimed different figures, of £186.64 for 2018 and £190.85 for 2019. At the hearing, they could not explain how these figures were calculated. The 2018 figure seems to have been intended to be 2.38% of the insurance cost attributed to the leasehold estate. It seems likely that it was intended to be the same proportion of whatever part of the 2019 insurance cost figure was attributed to the leasehold estate, but we have not been told what that was.

22. In the most recent previous decision (CAM/26UF/LSC/2017/0018), the relevant tribunal determined that a 2.38% share of leasehold estate insurance costs, calculated at £165.71 for 2015 and £178.24 for 2016, was payable by the Respondent. As explained above, we are proceeding on the basis that this proportion has been agreed, but - as we warned the Applicant at the start of the hearing - their failure in their documents and even at the hearing to explain their calculations and to explain how they have assessed their costs to allocate what seems to be a greater proportion to the leasehold estate in the first place, means that we cannot give them the benefit of the doubt on these matters.
23. The previous decisions note that the Applicant insures through a “block” policy (covering its entire property portfolio) that is put out to tender on a regular basis and that previous increases in insurance costs were explained because insurance charges had from 2013 increased faster than the general rate of inflation and the claims history of the Applicant’s portfolio had been a factor. At the hearing, the Respondent referred to that claims history, saying that a major property in Hemel Hempstead, built over a sink hole, had collapsed and this had seriously increased insurance costs at Haygarth.
24. The Applicant’s representatives said this had happened in 2014 and the claim had been expensive because two properties had to be demolished and rebuilt, but insurers had claimed against the architect and reached a settlement with them. They said that, since then, the portfolio had gone out to the market and the premia had reduced. They said that the Applicant tests the market every three years and Zurich were the selected insurer for the relevant years. The annual figures were slightly different because the insurance year under each policy was different from the simple annual service charge year.

The Tribunal’s decision

25. We are cautious about the allocation between the leasehold and let (rented) estates. Based on the information provided it seems likely that this will at least largely be justified by the additional risks and interests involved for insurers with leasehold compared to rented estates, but this is something which might be open to question in future service charge years. For this service charge year, we are satisfied that the actual costs claimed from the Respondent are reasonable.
26. Doing the best we can with the material provided and taking into account all the points made by the parties, we determine that the service charges payable by the Respondent for buildings insurance are £186.55 for 2018 and £190.85 (estimated) for 2019.

Management fee

27. The audited service charge statements for 2018 state that the total management fee was £11,795.28 and that £11,112.36 of this related to the leasehold estate. 1.47% of the former would be £173.39 and 2.38% of the latter would be £264.47.
28. In the service charge estimate/budget for the year ending 31 December 2019, the Applicant estimated a management fee of £12,110.34. 1.47% of this would be £178.02 and 2.38% would be £288.23.
29. Again, the Applicant claimed different figures, of £264.58 for 2018 and £273.33 for 2019. Again, at the hearing, they could not explain how these figures were calculated. We refer to our comments above, in relation to building insurance, about this. They did (candidly) disclose that a flat fee was charged for each leasehold property and they did not dispute that this approach was not permitted under the Lease.
30. The earlier tribunal decisions considered the Applicant's management charges. They observed that the Estate should be relatively easy to manage, that it is not appropriate to (in effect) recover administration charges properly payable by individual tenants through the general annual service charge, and that it is not appropriate to recover major works supervision charges generally from all estates rather than the relevant estates individually. Those earlier tribunal decisions determined reasonable management charges of £200 per unit for 2013 and £240 per unit for 2014. The most recent Tribunal decision determined reasonable management charges of £247.58 for 2015 and £249.66 for 2016, noting that these seemed high on the face of it but had been said to include other services which might have been the subject of a separate charge by other landlords.
31. Ms Fenn said that the Applicant had tested the market for management fees three or four years ago and based on its findings had reduced its management fees. She said that the fee was now comparable with other housing associations and the private sector, observing that it was an inclusive fee in the sense that the Applicant did not charge extra for audit or accounting expenses, bank charges and so on.
32. The Respondent noted this but pointed to the attempt to charge a 15% management fee on top of the major works examined below. He said that based on his experience the figures were very high. He referred to the mix of rented and leasehold/shared ownership properties and felt the way costs were allocated here involved smoke and mirrors. Again, the Applicant's representatives could not explain the allocation of costs to the leasehold estate beyond repeating that the same flat fee was charged for each property (in effect, regardless of what the Lease said). That is plainly wrong.

The Tribunal's decision

33. Again, we are cautious about the unexplained allocation of costs between the leasehold estate and the let (rented) estate. It may be that other management costs are charged directly to rented occupiers or otherwise, but the Applicant said nothing about that. We have been asked to make our determination based on the points made by the parties and the service charge statements which suggest that a disproportionately high amount has been allocated to the leasehold estate. Further, it seems appropriate to look at lower levels of management fees than those determined by the previous decisions because it appears that the standard of management, at least in terms of provision of information and accuracy, has not been good.
34. Doing the best we can with the material provided and taking into account all the points made by the parties, we determine that reasonable amounts for the service charges payable by the Respondent for management fees are £225 for 2018 and £230 (estimated) for 2019.

General Services

35. The audited service charge statements for 2018 (as described above) set out general costs of the Estate, describing:
- (i) costs which appear to relate solely to the Building, of £350.40 for general repairs and maintenance of equipment;
 - (ii) costs which do not appear to be chargeable to the Respondent, for general repairs and maintenance to the other blocks on the Estate and for work on the lift (which, Ms Fenn confirmed at the hearing, is used only by the rented part of the Estate); and
 - (iii) costs which appear to relate to the rest of the Estate, of £1,160.08 for caretaking, £595.68 for electricity, £7,755.40 for grounds maintenance, tree maintenance and refuse and £2,042.53 for general repairs and maintenance, a total sum of £11,553.69.
36. The relevant proportions of these sums for 2018 (9.31% of the £350.40 in respect of the Building and 1.47% of the £11,553.69 in respect of the rest of the Estate) would equate to £202.46 (£32.62 plus £169.84).
37. In the service charge estimate/budget for 2019, the Applicant estimated £1,299.94 for caretaking, £789 for electricity, £9,376 for grounds maintenance, tree maintenance and refuse and £7,246.73 for general repairs and maintenance, a total sum of £18,711.67. It sought a total contribution from the Applicant of £265.66 towards these costs.

38. Instead, the Applicant has in its application claimed £257.87 for each of 2018 and 2019. At the hearing, it emerged that this was in fact about 1.47% of the estimated charge for 2018.
39. The most recent previous tribunal decision noted and determined as payable claims to similar Estate costs for General Services of £192.16 for 2016 (estimated) and £78.83 for 2015 (actual, explaining that this was lower because of interruption of grounds maintenance services, the main part of these general costs, in 2015).
40. The Applicant said that the estimated costs for these services in 2019 were higher than previous years because a survey had been carried out which identified the need for specialist work on trees on the Estate which are subject to preservation orders. Ms Fenn said at the hearing that she had seen the 2019 accounts and these confirm these additional costs were incurred.
41. The Respondent did not dispute that, but referred to the lack of transparency and engagement with leaseholders about these charges. He challenged the costs of the on-site caretaker/scheme manager (which he believed was a hidden management cost), refuse collection (which he felt was high) and maintenance of equipment (when there was no real equipment to maintain).
42. Ms Fenn answered that caretaking was not management and involved tasks such as litter picking, sweeping, removing dumped items and day to day upkeep. She said that this was a large estate which was prone to items being dumped. The caretaking work was, she said, an essential service to keep the Estate in condition. There was no scheme manager; that was just a heading. Ms Fenn admitted that the “refuse” heading was “*not the clearest*” because pest control was included under that heading. The reference to equipment was part of the overall heading for general repairs and maintenance; there was no equipment to maintain, except perhaps TV aerials. The Respondent pointed out that this was all unclear from the documents provided. Ms Fenn said that further information would be provided if people asked for it and the “refuse” heading was being changed to make this clearer in future.

The Tribunal’s decision

43. Based on the information provided and points made by the parties, it seems to us that the actual cost for 2018 of £202.46 for these General Services (caretaking, electricity, ground and tree maintenance, refuse, repairs and maintenance) was reasonably incurred and that is the sum we determine for that year. Assessed in the same way but taking into account the additional tree work costs and other matters for 2019, we determine that the service charge payable as an estimated figure for General Services for 2019 is £240.

Remaining charge for major works carried out in 2017

44. The last tribunal decision notes that major works had been planned, involving guttering and downpipe renewals and replacements for the residential blocks and garage blocks. It observes that, for this reason, amounts estimated and demanded in 2015, 2016 and 2017 by way of a reserve fund for expenditure in future service charge years had been much higher than in previous years.
45. In its application to the tribunal, the Applicant sought £2,226.25 as an “*actualisation deficit applied for 2017 following major works carried out to the block and estate*”. In the Applicant’s demand dated 18 June 2018 for this sum, it was described as a “balancing charge”. The demand described this sum as having been calculated by deducting from a trust fund shortfall of £2,259.55 a block surplus of £2.24 and an estate surplus of £31.06, but gave no useful explanation of how those figures had been calculated.
46. The relevant works were to replace the block soffits, fascia and guttering, and to carry out work on the garage roofs, fascia, lighting and guttering. The documents produced include, apparently pursuant to the consultation requirements under section 20 of the 1985 Act:
- (i) a basic notice to leaseholders, dated 25 April 2016, of the Applicant’s intention to carry out works, inviting written observations and nomination of any person from whom the Applicant should try to obtain an estimate for the carrying out of the proposed works; and
 - (ii) a notice of estimates dated 29 March 2017 (mistakes having been identified in an earlier notice of estimates following a meeting on site between the Applicant’s representatives and leaseholders) giving prices (inclusive of VAT) from three tenders, of £189,765.29 from Sustainable Building Services, £249,029.11 from Bell Group and £281,964.58 from AD Construction.
47. The notice of estimates indicated that following review of the tenders the Applicant intended to appoint Sustainable Building Services to carry out the works. It enclosed a breakdown of their price and estimated costs for the Respondent of:
- (i) those relating to the Building (said wrongly to be 9.32% of the overall price of £16,118.61, calculated at £1,501.80); and
 - (ii) those relating to the garage (1.47% of the overall price of £114,241.98, said to be £1,680.03), less a discount of £21,174.65 (1.47% of which was said to amount to £311.39) because some of

the garage roofs had only been re-covered some three years previously; and

(iii) a management fee of 15% of expenditure (1.47% of which amounted to £430.57), a total estimated contribution of £3,301.

48. The notice indicated that it was expected that the accumulated trust (reserve) fund would be sufficient to cover the cost of the work. It invited submission of any observations by 30 April 2017, provided details for arranging inspection of the estimates and summarised observations made by leaseholders in response to the earlier notices.
49. In view of the lack of explanation for the balancing charge, the tribunal gave case management directions for the Applicant to provide more information about this. With the supplemental statement it sent to the tribunal and the Respondent pursuant to those directions, the Applicant produced copy invoices indicating total certified costs payable to the building contractor (Sustainable Building Services) of £273,078.46 plus VAT, substantially higher than the original tender price/estimate of £189,765.29 including VAT. It also produced a breakdown (Appendix 3 to its supplemental statement) indicating that £248,260.92 plus VAT of these costs was being charged.
50. At the hearing, the Applicant's representatives said that the previous major works (in 2015) largely involved external decorations and windows. Ms Connors initially said that the garage roofs had not been re-covered in 2015. When this was queried, Ms Fenn confirmed that the works in 2015 were mainly decorative but that a "*small number*" of the garage roofs had been re-covered at that time. She could not say how many and could not explain how the discount of £21,174.65 for this, referred to in the notice of estimates, had been calculated. She said that the final discount, to take into account the duplication of work in respect of the garage roofs, was the reason for the difference between the total price of £273,078.46 plus VAT and the £248,260.92 plus VAT charged.
51. The Applicant confirmed that the 15% management fee which had been canvassed in the consultation documents had, following representations from leaseholders, not been charged.
52. The Applicant said that the reason for the increased costs was that, when work began, rotten rafters and rotten felt to the lower section of the roofs were uncovered, broken tiles had to be replaced, it was necessary to lift the roof (which necessitated additional scaffolding), and other works were needed which could not be seen on inspection. It was said that any delays would have increased scaffolding costs, although this was not quantified.

53. The Respondent took the point about rotten timbers not being obvious until they were uncovered, but said this did not apply to some of the items in the breakdown at Appendix 3 to the Applicant's supplemental statement. He pointed to additional costs of moss removal, pointing for the garages, engineering reports and a drainage survey. Ms Fenn said that they had not planned to remove the moss, but had to when they found that they needed to remove and re-lay tiles to carry out the other additional work. She accepted that the pointing for the garages should have been included in the original specification. She said that the engineering reports were necessary during the works because it was not until areas were uncovered that cracking was identified. In relation to the drainage survey, she said that when the gutters were replaced they were not draining properly, so a drainage survey was needed to identify the blockage.
54. The Respondent observed that it will not be possible to secure such a good price if items are not included in the original specification. The Applicant's explanations suggested that the management of the contract had been left to the Applicant's asset management team, who had not taken advice from an external architect or surveyor. The tribunal put it to the Applicant's representatives that they were giving the impression that the Applicant may not have worked effectively to limit the overspend. They answered that the Applicant had negotiated with the contactor and that reasonable costs had been agreed for the additional work with advice from the asset management team, which included surveyors.
55. The Applicant's breakdown (their Appendix 3) of the costs of £248,260.92 plus VAT indicated that £34,803.76 (£41,764.51 including VAT) of this sum was attributed to the relevant Building (Block D (57-68) Haygarth) and £36,402.77 (£43,683.32 including VAT) was attributed to the relevant garage block (23-44). The Applicant's representatives confirmed at the hearing that the works in relation to the garage block were covered by the sums in the Estate reserve fund. We were not asked to make a determination about that.
56. The Applicant's representatives could not tell us how the £41,764.51 attributed to the Building had been calculated. At the hearing, the Applicant's representative explained that Appendix 1 to their supplemental statement showed that they had calculated the Respondent's share of this £41,674.51 as follows:
- (i) £21,798.07 had been allocated to the leaseholders, being 52.18% (the total of the Building service charge proportions of the leaseholders of the Building) of the £41,764.51;
 - (ii) £3,889.32 of that £21,798.07 had been allocated to the Respondent, being the proportion (17.84%) his Building service charge proportion (9.31%) bore to that 52.18%. Ms Fenn accepted

at the hearing that if calculated as a simple percentage (i.e. 9.31% of £41,764.51) the figure would be slightly less. It would be £3,888.28;

(iii) deducting the Respondent's share (£1,630.89, calculated in the same way) of the Building reserve fund balance (£9,140.50), from the Applicant's cost figure of £3,889.32 left the balance of £2,259.55 sought by the Applicant (before their credit for surpluses) as the Applicant's share of the shortfall of £12,657.57.

57. The Respondent referred to points made before previous tribunals about service charge proportions having been originally based on rateable values and said that on this Estate there were three different types of lease with three different ways of calculating the service charge. This, he said, was not equitable. Ms Fenn answered that some leaseholders were paying lower proportions but since those were the proportions specified by their leases the Applicant was bearing the shortfall.
58. The Respondent said that there was no provision in the Lease for the Applicant to make this balancing charge for the major works. He referred to the year of account and the service charge machinery in the Fifth Schedule to the Lease. The Applicant left it to the tribunal to determine this, saying that it had changed its practice in the past to comply with the service charge year of account specified by the Lease following findings in previous court or tribunal cases.

The Tribunal's decision

59. For the purposes of these major works charges in respect of the Building, the service charge proportion of 9.31% is fixed by the Lease and (in this application for determination of service charges) we have no jurisdiction to change it.
60. The Respondent is correct that the Lease does not contain a provision specifically referring to a balancing charge. It was also unfortunate that the demand (and the application to the tribunal) did not explain in any real way how the sum demanded had been calculated, necessitating the supplemental statement from the Applicant. However, it appears that the Applicant did by their demand letter of 18 June 2018 comply with the provisions of the Fifth Schedule to the Lease. They produced audited service charge statements for 2017 including details of the reserve fund and the relevant cost allocation of £21,798.07 (which has now been explained), showing that the shortfall of £12,657.57 was not covered by the reserve fund. They also produced their estimate for 2018 and demanded £2,935.34, comprised of £2,226.25 for 2017 (as the balance of the shortfall after surpluses, as set out above) and £709.09 as the estimated figure for 2018, saying that the Respondent was liable to pay his service charges within 28 days. The provision for certification of the service charge proportions by the managing agent does not survive

Section 27A(6) of the 1985 Act, as explained above. Accordingly, it appears that the Applicant has complied with the relevant provisions and the sum we determine below is payable by the Applicant under paragraph 6 of the Fifth Schedule to the Lease.

61. It appears that the costs of the major works are within the scope of the repairing covenant and the corresponding liability for those costs as service charges under the Lease. The Respondent did not dispute that (except for the point examined above) and did not raise any issue in relation to the consultation requirements (generally or in respect of the additional costs).
62. However, there is some force in the Respondent's points about the additional costs above the tendered price/estimate. The Applicant has left us with the impression that the Applicant may have accepted an unrealistically low tender (£189,765.29 compared to £249,029.11 and £281,964.58) without sufficient prior investigation or a sufficiently robust specification/contract, then (when on the hook for increased scaffolding costs for any delays) sought to negotiate through or with advice from its asset management team to minimise the additional costs, ending up with a bill (including VAT) of over £327,000, of which it is seeking to recover £297,913.10 (or the parts of that sum it attributes to the leaseholders). The costs in relation to the garages may not be directly relevant to the remaining Building charges we have been asked to determine because the garage costs were taken from the Estate reserve fund. It may be that all the additional costs were matters which could not practicably have been specified in advance and ultimately represent reasonable value because they all needed to be done and simply had not been included in the original prices. We cannot make firm findings about any of these matters because so little information has been provided by the Applicant, despite the further opportunity it was given in the case management directions. However, it is striking that the final costs in relation to the Building appear to be about double the tender price for that element of the works.
63. Further, in view of the lack of explanation and the other concerns mentioned above, we treat the Applicant's allocation of £41,764.51 of the total major works costs to the Building, and all the Applicant's calculations, with some caution. We warned the Applicant's representatives at the hearing that unless they had better answers we could not give them the benefit of the doubt about these matters. They could not provide better answers and did not ask for more time.
64. Taking into account all the points made by the parties and based on the information provided, we have decided that we should make a simple deduction of 10% from the Applicant's figure of £41,674.51 for the costs attributable to the Building, to give an adequate margin for error in relation to these matters. That reduces the costs figure for the Building

to £37,507.06 and the Respondent's 9.31% of those costs would be £3,491.91.

65. The Applicant has already confirmed (as above) that £1,630.89 from the reserve fund for the Building was attributed to the Respondent. This leaves a balance of £1,861.02. Stepping back and considering the nature and scope of the works described and the other costs taken by the Applicant from the Building and Estate reserve funds, we are satisfied that this appears to be an appropriate figure.
66. Accordingly, the tribunal determines that the service charge payable by the Respondent for the remaining major works charges for 2017 in respect of the Building is £1,861.02.

Costs of the proceedings

67. At the end of the hearing, the Applicant undertook through its representatives not to seek to claim any of the costs incurred in connection with these proceedings before the tribunal through the service charge.

Name: Judge David Wyatt **Date:** 6 August 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier 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).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary

adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (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).