



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

**Case Reference:** CHI/21UC/LSC/2020/0103

**Property:** Flat 4, Stafford House, Southfields Road,  
Eastbourne, East Sussex BN21 1BN

**Applicant:** Mr Joseph Law

**Representative:** In Person

**Respondent:** Stafford House (Eastbourne) Limited

**Representative:** Mr J Beresford of counsel

**Type of Application:** Section 27A and 20C of the Landlord and  
Tenant Act 1985 and Paragraph 5A of  
Schedule 11 Commonhold and Leasehold  
Reform Act 2002  
(Liability to pay service charges)  
Tenants application for the determination of  
reasonableness of service charges for the  
years 2015 to 2021.

**Tribunal Members:** Judge A Cresswell (Chairman)  
Mr R Brown FRICS

**Date and venue of Hearing:** 12 February 2021 by Video

**Date of Decision:** 20 March 2021

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**CORRECTED DECISION under Rule 50**  
The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Correction shown in bold in paragraph 63

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## **The Application**

1. This case arises out of the Applicant tenant's application, made on 20 October 2020, for the determination of liability to pay service charges for the years 2015 to 2021 inclusive.

## **Summary Decision**

2. The Tribunal found the contributions to the reserve fund to be reasonable and payable, but that the costs attributable to freeholder management fees be limited to £1,200 inclusive of VAT for the years 2015/16, 2016/17, 2017/18, 2018/19 and 2019/20.
3. The Tribunal allows the Applicant's application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Respondent from recovering its costs in relation to the application by way of service charge or administration charge.

## **The Issues**

4. **James Scicluna v Zippy Stitch Ltd & Ors** (2018) CA (Civ Div) (Longmore LJ, Underhill LJ, Peter Jackson LJ): Where the parties to tribunal proceedings had agreed a list of issues, the matters to be determined in the substantive hearing and on any appeal were properly to be limited to those agreed issues.
5. The raising by the Applicant of an issue regarding an administration fee for late payment was not regarded by the Tribunal as being an issue for its consideration, that issue having been raised for the first time in the Applicant's Reply to the Respondent's Statement of Case.
6. The Applicant had expressed concerns about expenditure on General Repairs in some of the years in question, but was unable to identify any particular expenses at issue during the hearing. Whilst he is free to further query relevant issues with the Respondent, he cannot again raise those issues with the Tribunal.
7. The Applicant said that he was concerned that the future costs of external works to the property would be higher as a result of historical neglect. Whilst he would be advised to seek professional guidance before making such a complicated challenge in any future proceedings, the Tribunal advised that historical neglect was not an issue which it could explore at this hearing, there being no evidence before it which would allow it properly to consider such an issue.

## **Inspection and Description of Property**

8. The Tribunal did not inspect the property, but viewed it on Street View. The property comprises a late Victorian/Edwardian brick building probably originally constructed as a commercial premises. The first, second and third floors being converted to residential units with the ground floor remaining commercial in the mid-1980s.

## **Directions**

9. Directions were issued on various dates.

10. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
11. This determination is made in the light of the documentation submitted in response to those directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by the Applicant and by Ms Mary Gray, a Director of the Respondent company, and by Mr Chris Mooney of the managing agent, Eastbourne Lettings. At the end of the hearing, the Applicant and Mr Beresford told the Tribunal that they had had an opportunity to say all that they wished and had nothing further to add.
12. The Tribunal has regard in how it has dealt with this case to its overriding objective:  
The Tribunal Procedure (First-tier Tribunal)  
(Property Chamber) Rules 2013  
  
Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.  
  
(2) Dealing with a case fairly and justly includes:  
  
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;  
  
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;  
  
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;  
  
(d) using any special expertise of the Tribunal effectively; and  
  
(e) avoiding delay, so far as compatible with proper consideration of the issues.  
  
(3) The Tribunal must seek to give effect to the overriding objective when it:  
  
. (a) exercises any power under these Rules; or  
  
. (b) interprets any rule or practice direction.  
  
(4) Parties must:  
  
. (a) help the Tribunal to further the overriding objective; and  
  
. (b) co-operate with the Tribunal generally.

### **The Law**

13. The relevant law is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold

Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.

14. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord’s costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 “the 1985 Act”). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
15. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.
16. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code (“the Code”) approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 *Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.*
17. *“Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available: **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.*
18. The lessee is obliged to identify the costs which he/she disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee’s challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord’s costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** [2015] UKUT 0333 (LC)).

19. Where a party does bear the burden of proof:  
“*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law... It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out...: the burden of proof is a last, not a first, resort.*” (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).
20. In **The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** (see below), the Tribunal was faced with a three-way choice:
- 1) To make no reduction, thereby leaving the costs as they were;
  - 2) To adjourn to allow the landlord to provide evidence, or
  - 3) To adopt the **Country Trade** “robust, commonsense approach”.

The first of these options would have been wrong in the light of the landlord’s concession that the CCTV charges included an element designed to allow the developer to recover some of its construction costs.

The second would have imposed a disproportionate burden on the parties in the light of the relatively modest sums at issue.

The Tribunal concluded that the third was the right option to have followed. It may have been unscientific, but it was proportionate and involved the application of the Tribunal’s overriding objective.

21. The Upper Tribunal reiterated in **Knapper v Francis** [2017] UKUT 3 (LC) that the Tribunal can make *its own assessment of the reasonable cost*.
22. The relevant statute law is set out in the Annex below.

### **Ownership and Management**

23. The Respondent is the owner of the leasehold of Flats 1 to 12. The property is managed for it by Eastbourne Lettings. The freeholder is Mr Clive Brunsdon, who also owns the 3 retail units also forming a part of the building.

### **The Lease**

24. The Applicant holds Flat 4 under the terms of a lease dated 17 October 1986, which was made between Corktown Properties Limited as lessor and Barbara Mary Mallett as lessee. The Tribunal understood this lease to be representative of all 12 residential leases at the property.
25. The construction of a lease is a matter of law and imposes no evidential burden on either party: ((1) **Redrow Regeneration (Barking) Ltd (2) Barking Central Management Company (No2) Ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).

26. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

**Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.

27. In the lease, “*The Maintenance Year*” is defined in the Particulars and Definitions as “*a period commencing on the 25<sup>th</sup> day of March in each year and ending on the 24<sup>th</sup> day of March in the following year*”.
28. “*The Maintenance Charge*” is defined in the Particulars and Definitions as “*the amount or amounts from time to time payable under Paragraph 1 of Part II of the Fourth Schedule and shall include any Value Added Tax payable thereon*”.
29. “*The Interim Maintenance Charge*” is defined in the Particulars and Definitions as “*the sum of £75.00 per half year or such other sums to be paid on account of the Maintenance Charge in respect of each Maintenance Year as the Landlord its managing agents or accountants from time to time and at any time shall specify at their discretion to be a fair and reasonable sum*”.
30. “*The Tenant’s Contribution to the Total Maintenance Charge*” is defined in the Particulars and Definitions as “*In respect of the Common Parts and any other services facilities and costs not attributable in whole or in part to the Retail Units 9.95%. In respect of the remainder 4.64%*”.
31. At Para. 1 of Part II of the Fourth Schedule, the tenant covenants “*To pay to the Landlord the Maintenance Charge being that percentage or those percentages specified in Paragraph 14 of the Particulars of the expenses which the Landlord shall in relation to the Estate reasonably and properly incur in each Maintenance Year in complying with the covenants on its part contained in the Fifth Schedule hereto (including the provision for future expenditure therein mentioned) the amount of such Maintenance Charge to be determined by the Landlord’s Managing Agent or Accountant acting as the case may be as an expert and not as an arbitrator as soon as conveniently possible after the expiry of each Maintenance Year and FURTHER on the Twenty-fifth day of March and*

*the Twenty-ninth day of September in each Maintenance Year or within twenty-one days of the Landlord requiring payment of the same to pay in advance on account of the Tenant's liability under this clause the Interim Maintenance Charge... PROVIDED THAT upon the Landlord's Managing Agents' or Accountants' certificate being given as aforesaid there shall forthwith be paid by the Tenant to the Landlord any shortfall between the Interim Maintenance Charge and the Maintenance Charge so certified and the Tenant shall be credited with any excess."*

32. At Para. 2 of Part II of the Fourth Schedule: "*In the event that the Landlord does not appoint Managing Agents to be responsible for the management of the Estate or the Property to pay to the Landlord in addition to the Maintenance Charge a further sum equal to 15% of the Maintenance Charge such sum to be paid and due at the same time as the Maintenance Charge as hereinbefore provided"*
33. The Fifth Schedule sets out the Landlord's covenants, which include maintenance of the property, decoration of the exterior, cleaning and lighting the common parts, insuring the property, paying rates, etc, maintaining TV and radio kit, employment of workers,
- (11) To employ a Managing Agent or Surveyor to manage the Estate and to collect the maintenance charges and rent in respect of the Demised Premises and the other demised parts of the Estate and to carry out such other duties as may from time to time be assigned to him by the Landlord or are otherwise imposed on him by the provisions of this Lease or by any statute or statutes for the time being in force*
- (12) To pay all legal and other proper costs incurred by the Landlord*
- (a) in the running and management of the Estate .....*
- (14) To accumulate such sum or sums from time to time as the Landlord or its Managing Agents shall consider desirable for the purpose of accumulating a reserve fund as a reasonable provision against the prospective costs expenses outgoings or other matters mentioned or referred to in this Schedule or any of them*

## **Reserve Fund The Applicant**

34. The Applicant was concerned about the size of the reserve fund, the sums demanded each year and the lack of relevant works. He was also concerned that the fund appeared to have been used for purposes other than major works.
35. Since 2015/16, the reserve had risen to some £70,000, which the Applicant believed was too much for intended external works at the property. He was also concerned that the price of such works would be higher due to historical neglect.
36. He did not believe that there had been any billable works to the exterior of the building since major works in 2012. He was aware only of snagging and re-working. The exterior of the building was in serious need of repair, particularly windows.

37. He was concerned to note that payments had been taken from the reserve in two years to pay freeholder management fees.

### **The Respondent**

38. The Respondent said that the sums demanded towards the reserve were reasonable in terms of the Respondent's duties under the lease. It was the Respondent's intention to use the funds for external works which are carried out by the freeholder approximately each 7 years.
39. On the last occasion of major works (2012), the total cost had been some £67,000.
40. The scope of the works was currently being discussed with a surveyor. Works had been planned for 2020, but had been delayed by the serious illness and subsequent death of a director and by Covid. The works are now planned for 2021 and there is to be consultation with leaseholders regarding the replacement of windows.

### **The Tribunal**

41. The Tribunal first makes the point, relevant to all of its findings in respect of the Reserve Fund, that it is the terms of the lease which are paramount when determining the rights and duties of the Respondent in respect of the Reserve. The lease is the contractual agreement of the parties. Nowhere else is the term "Reserve Fund" defined specifically for these parties. Whilst the RICS Code gives guidance to landlords about Reserve Funds, it is guidance only and cannot alter the clear terms of a lease. It is, however, very important that a landlord complies with law and with the RICS Code in its identification of particular items of future expenditure, their costing and the calculation of the sums required proportionately from the tenants to meet those future costs, together with the holding of the sums gathered in trust and earning interest and the regular assessment of the composition and costing of the Reserve Fund plans.
42. A Reserve Fund ensures that tenants effectively save for future costs so that there are no "nasty surprises", but also that the costs of items are shared by those who use or have the benefit of them; as an example, the cost of a roof included within a Reserve Fund will be shared proportionately by 2 tenants in proportion to the number of years of their enjoyment. That said, tenants do not want, and should not be required, to pay more into a Reserve Fund than is reasonably required.
43. The Tribunal's task here is to determine whether a reasonable value has been attributed to the likely cost of items for which the reserve is being built and whether the sums demanded each year are reasonably demanded in accordance with the terms of the lease. "*Reasonable*" means "*reasonable*", not "*precise*". See Section 19 of the 1985 Act above.
44. In reaching its current Determination, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. Of particular note to the issues here are the following extracts from the Code:

#### **7.5 Reserve funds (sinking funds)**

The lease often provides for the landlord to make provision for future expenditure by way of a 'reserve fund', or 'sinking fund'. You should have regard



to the specific provisions within the lease that may, for example, provide for a general reserve fund(s) for the replacement of specific components or equipment.

The intention of a reserve fund is to spread the costs of 'use and occupation' as evenly as possible throughout the life of the lease to prevent penalising leaseholders who happen to be in occupation at a particular moment when major expenditure occurs. Reserve funds can benefit both the landlord and leaseholder alike by ensuring monies are available when required for major works, cyclical works or replacing expensive plant.

It is, therefore, considered good practice to hold reserve funds where the leases permit. If the lease says the landlord 'must' set up a fund, then this must be done. Neglecting to have a fund when the lease requires one could be deemed to be a breach of the terms of the lease. No attempt to collect funds for a reserve fund should be made when the lease does not permit it.

Where there is no provision in the lease for reserve funds, there is no entitlement to create or hold one, and any money collected for such a purpose can be demanded back by the leaseholders. In these circumstances, or where the current provisions are likely to prove inadequate, you should make leaseholders aware and encourage them to make their own long-term saving provisions towards the estimated expenditure. You should also consider recommending to your client that consideration be given to discussing with leaseholders the benefits of a variation to the leases to allow for a reserve fund to be set up.

You should also recommend your clients to have a costed, long-term maintenance plan that reflects stock condition information and projected income streams. This should be made available to all leaseholders on request and any potential purchasers upon resale.

The level of contributions for simple schemes should be assessed with reference to the age and condition of the building and likely future cost estimates. On more complicated developments, the assessment should reference a comprehensive stock condition survey and a life-cycle costing exercise, both undertaken by appropriate professionals.

The usual method of working out how much money is to go into the fund each year, assuming the lease/tenancy agreement does not make any other provision, is to take the expected cost of future works, including an allowance for VAT and fees, and divide it by the number of years which may be expected to pass before it is incurred. The level of contributions should be reviewed annually, as part of the budget process, and the underlying survey information should be reviewed at appropriate intervals. This will vary for each scheme depending on complexity, age, condition and the relative size of funds held.

If after the termination of any lease there are no longer any contributing leaseholders, any trust fund shall be dissolved and any assets comprised in the fund immediately before dissolution shall, if the payee is the landlord, be retained by them for their own use and benefit, and in any other case, be transferred to the landlord by the payee. Again this is subject to any express terms of the lease

relating to distribution, either before or at the termination of the lease.

## **7.6 Holding service charge funds in trust**

You must hold service charge monies, and any interest accruing, by way of statutory trusts in accounts established in accordance with section 42 of the *Landlord and Tenant Act 1987*. Service charge payments must be kept separate from the landlord and managing agent's own money and must only be used to meet the expenses for which they have been collected.

They should be held in either separate client service charge bank accounts for each scheme you manage, or a universal client service charge bank account for all service charge monies but where monies for each scheme are separately accountable. If you operate one universal account it is a breach of trust to allow funds held for one scheme to be used to finance any other scheme. The accounts should include the name of the client or the property (or both) within the title of the account.

You should not commit expenditure unless you have the funds available to cover the costs in full. Some leases provide for the service charge account to borrow funds to meet required expenditure, but you cannot assume this to be the case without reference to the lease. In any event, you should ensure those funds have been made available prior to committing to the expenditure and should not allow service charge bank accounts to go into deficit.

You must hold such sums in trust for the purpose of meeting the relevant costs in relation to the property and they should not be distributed to the leaseholders when the lease is assigned/terminated, subject to any express terms of the lease relating to distribution, either before or at the termination of the lease.

Funds held for longer terms, or comprising large balances, should be held in an interest-earning account. Funds required to meet day-to-day expenditure should be immediately accessible. Where reserve funds are invested these must be invested in accordance with current regulations.

A trustee is under a duty to invest the trust funds not required to meet day-to-day expenditure. The investment must be in accordance with the terms of the trust, the *Trustee Investments Act 1961* or an order made under the *Landlord and Tenant Act 1987* (which enables funds to be deposited at interest with the Bank of England or with certain institutions under Part 4 of the *Financial Services and Markets Act 2000*, including a share or deposit account with a building society, or a European Economic Area firm mentioned in Schedule 3 to the Act). Trustees who want to take advantage of the wider powers of investment under the *Trustee Investment Act 1961* (as amended by the *Trustee Act 2000*) should have regard to the provisions of that Act, and to the various subsequently enacted statutory instruments.

If leaseholders contribute towards different costs (e.g. one group of leaseholders contributes towards the lift, whilst another group contributes towards gardening), the funds should be differentiated. This should be done by way of different service charge schedules, each schedule should total 100 per cent

although you should be aware that percentages under some leases do not add up to 100 per cent.

45. **Leicester City Council v Master** 2008 WL 5485783: Where a lease properly construed entitled the landlord to demand from the tenant payment of a proportion of estimated costs to be incurred in the future in observing repairing obligations under the lease, HHJ Huskinson accepted that the landlord was entitled to build up a reserve fund through the service charge against the cost of repairs which would be needed in due course.
46. **Knapper v Francis** [2017] UKUT 3 (LC): the reasonableness of on-account service charges is to be assessed as at the date when their payment was due. The fact that items of anticipated expenditure were not in fact subsequently incurred would not make the charges unreasonable.
47. As the Tribunal has detailed above, a Reserve Fund for Buildings as well as other aspects of an Estate is recognised as being for the benefit of both landlord and tenants (see the extract from the Code above), so that it would be difficult to criticise the Respondent for creating such a reserve if there was a need to do so.
48. The lease, in paragraph 14 of the 5<sup>th</sup> Schedule, permits the Respondent to build up a general reserve fund. The Respondent told the Tribunal that it was built up to pay for major external works.
49. The Respondent has not approached the requirements for a Reserve Fund in an approved or constructive manner. There was no evidence available to the Tribunal to show that any particular items of future expenditure that had been identified as of major significance had been costed and a calculation been made of the sums required proportionately from the tenants to meet those future costs. Nor was there any evidence to show that the tenants had been involved by the Respondent in such an exercise.
50. The Tribunal noted the poor state of the exterior of the building as evidenced by the Applicant's photographs, and the general lack of external maintenance evidenced by the bundle of documents produced by the Respondent for the hearing.
51. The Tribunal could see that this was a large and complex building requiring a substantial schedule of works. The best evidence of the likely cost being the cost of the 2012 works, the Tribunal envisaged that works in 2021 may be more expensive. It finds, accordingly, that it was reasonable for the Respondent to amass a sum of some £70,000 by way of service charge demands in the period following 2015. It follows that the demands for sums towards the reserve were reasonably demanded, save for what the Tribunal says below in respect of Freeholder management fees.
52. Whilst the Tribunal can sympathise with the Applicant, in that he was making substantial payments each year and yet, even today, there are no detailed plans for major works, the Tribunal was satisfied that, having had a real difficulty with the health of the previous director, matters are now moving ahead.

53. The Tribunal also sympathises with the Applicant's concern that monies paid towards major works had been taken as payment of Freeholder management fees. Whilst this Tribunal cannot be involved in issues of breach of trust in respect of the reserve fund, the Tribunal can assess whether payments to the reserve fund are reasonably demanded when they are to be used for another purpose. The Tribunal deals more fully with this issue below.

## **Freeholder Management Fees**

### **The Applicant**

54. The Applicant had a number of concerns about these payments. He did not believe that they were a reasonable charge. He questioned how they could be taken from the reserve and asked where were the invoices for same.

### **The Respondent**

55. The Respondent said initially that these sums were in respect of the management fees the freeholder charges the Respondent under the head lease. Until recently, the freeholder had carried out all of the functions of the managing agent himself. The Respondent was entitled to pass this on to the leaseholders under the terms of the lease.
56. The above position was repeated in Mr Beresford's skeleton argument: *Until very recently, the Freeholder did not employ a professional managing agent but carried out all of the functions of a managing agent himself. These functions include, inter alia, arranging for insurance, calculating and collecting service charges, arranging for works, and complying with legislation (e.g. by serving s.20 notices, etc...).*
57. The above position was not, however, wholly accurate because the Respondent's witnesses told the Tribunal that there had been a series of managing agents, the last of which are the current agents, Eastbourne Lettings.
58. Ms Gray was unaware of any written agreement which sets out the freeholder's role as managing agent and told the Tribunal that she did not see him as a managing agent.
59. Mr Mooney told the Tribunal that his company, Eastbourne Lettings, collects service charges, accounts for them, looks after legal compliance and manages minor and major works for the Respondent. Its agency agreement is with the Respondent in the sum of £2880 including VAT per year. This is charged on the basis of 1/12<sup>th</sup> per flat.
60. Mr Mooney told the Tribunal that the freeholder calculates what he wants to charge and sends to Eastbourne Lettings an invoice. Eastbourne Lettings does not have an agreement with the freeholder, "*he lets us know what he is doing*". He has never seen a list of duties performed by the freeholder leading to the sums he claims. He believes that the freeholder charges on the basis of the time he takes personally to manage the blocks.
61. Mr Mooney said that the freeholder is not the managing agent.

62. Mr Mooney was asked to estimate his costs were he to take over functions conducted by the freeholder and gave the figure of £1000 per annum.

### **The Tribunal**

63. The Tribunal noted that in the years ending 2016 to 2020 inclusive, sums of £3000, £3100, £3150, £3280 and **£3370** had been withdrawn from the funds in payment of the Freeholder's management fees and included in one way or another within the service charge demands for the leaseholders at the property.
64. The Tribunal struggled to understand what the freeholder had done to deserve any payments at all during those years save for arranging the insurance and having some involvement in limited minor works.
65. The Tribunal found it more than a little concerning that the Respondent should be making payments to the freeholder and allowing the freeholder to take funds from the reserve fund when it did not know what it was paying for. It cannot be reasonable to expect leaseholders to make such high payments to the freeholder in such circumstances.
66. Mr Mooney posited that £1000 per annum would be the charge he would make were he to be undertaking also the role of the freeholder in the management of the property in accordance with the terms of the lease. The Applicant had no issue with the charges made by Eastbourne Lettings and accepted that £1000 p.a. appeared to be a reasonable sum for any extra work currently undertaken by the landlord of the head lease. Mr Beresford made the point that, if the functions were all to be undertaken by Eastbourne Lettings, there would be a synergy leading to a lower rate.
67. Noting all of the above, the Tribunal finds that the Respondent has not shown the payments to the freeholder in the sums detailed above were reasonably made. It follows that they were not reasonably demanded of the Applicant, whether as freeholder management fees in their own name or as reserve funds to be used partly as freeholder management fees. He was, in any event, expected to pay a global sum, from which monies were paid to or taken by the freeholder. The Tribunal has concluded that a reasonable payment to the freeholder for management fees in the years 2015/16 to 2019/20 should be limited to £1200 inclusive of VAT per annum. That does not mean that it will not be possible in future years for the Respondent to demonstrate a greater cost, such as if the freeholder becomes properly involved with the planned major works and there is no duplication of work or cost.

### **Section 20c and Paragraph 5A Application**

68. The Applicant has made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Respondent's costs incurred in these proceedings.
69. The relevant law is detailed below:

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

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

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

## **Commonhold and Leasehold Reform Act 2002 Schedule 11**

### **Paragraph 5A Limitation of administration charges: costs of proceedings**

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

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

(3) In this paragraph—

(a) *“litigation costs”* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) *“the relevant court or tribunal”* means the court or tribunal mentioned in the table in relation to those proceedings.

### ***Proceedings to which costs relate***

First-tier Tribunal proceedings

### ***“The relevant court or tribunal”***

The First-tier Tribunal

## **Section 20C**

70. In considering an application under Section 20C, the Tribunal has a wide discretion, having regard to all relevant circumstances. It follows a similar course when considering administration charges. *“Its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them.”* *“In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.”* (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000)).

71. *“An order under section 20C interferes with the parties’ contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances.”*  
*“The scope of the order which may be made under section 20C is constrained by the terms of the application seeking that order...;*  
*“The FTT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else”.*  
**(SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)). *“In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make.”* **(Conway v Jam Factory Freehold Limited** (2013) UKUT 0592 (LC)).
72. The Applicant submitted that it had been necessary for him to apply to the Tribunal for a determination. Mr Beresford indicated that he had no instructions as to whether there was an intention to pass on the costs. He said that there would be no reason to make an order if the Respondent was successful and no reason to make a full order if the Respondent was partially successful.
73. The Tribunal has weighed up the relevant factors here. It notes that the Applicant was substantially successful in his challenge to the payability of freeholder management fees. Whilst the Tribunal has generally supported the reasonableness of the reserve fund payments, that is against the backdrop of a quite shambolic position taken by the Respondent. The Tribunal wonders whether the Respondent would have reached even its current level of very early stage planning, but for the Applicant’s application. It had been the Respondent’s case that the planned major works were to take place in 2020 but for the illness of a director and Covid, but there had clearly been no planning of the major works until very recently. The Respondent’s communication with the leaseholders could have been so much better; for instance, they could have published a plan for major works and told the leaseholders what was happening and why the sums demanded were of the size they were as notes to the service charge demands. It also became apparent, due to the application, that monies which should have been held in trust, having been paid to a reserve fund planned for major works, were being taken by the freeholder for management fees for which very little explanation was given.
74. The Tribunal is aware that any costs will fall upon the Respondent, which may try to recover them from the other tenants by way of service charge, but the other tenants are able to challenge the ability of the Respondent to do so in accordance with the terms of the lease and the reasonableness of the Respondent seeking to do so and the reasonableness of any sums sought to be charged.
75. Taking a rounded view, the Tribunal allows the application under Section 20C of the Landlord and Tenant Act 1985. It directs that the landlord’s costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

76. Whilst not relevant to its consideration of this issue, the Tribunal reflects that the involvement of a solicitor and, particularly, counsel in this matter was not warranted. Whilst there was a need to explore the facts, there were no legal issues of substance involved. The Tribunal could not see why the managing agent could not have presented the Respondent's case.

### Paragraph 5A

77. The Tribunal takes notice of the guidance in **Avon Ground Rents Ltd v Child** [2018] UKUT 02014.
78. **Avon Ground Rents Ltd v Child** [2018] UKUT 02014 (LC), Mr Justice Holgate: 58. *Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondent's contractual liability to pay the legal costs that the Appellant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters (and not simply by reference to whether costs had been incurred reasonably and were reasonable in amount). We recognise that this would have effected an alteration to the parties' contractual position, but that is the very purpose of the para. 5A jurisdiction.*
59. *In the present case there was no dispute before the FTT or before us that it was appropriate for the Appellant to incur the costs of legal representation. In other cases, this will primarily be a matter for the FTT (or a District Judge applying s.51 of the 1981 Act) to address. However, it should not be thought that we condone this practice. The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear. In many cases there will be no issue about the relevant principles to be applied, and their application will not be so difficult as to make legal representation essential or even necessary. In such cases a representative from the landlord's managing agents should be able to deal with the issues involved. After all, those agents will have been directly involved in the decisions taken pursuant to the lease to provide services, to set annual budgets and estimated charges, to incur service charge costs and to serve demands for service charges. Where that is so, a court may reach the conclusion that it was unreasonable for the costs of legal representation to be incurred, whether in whole or in part. Under CPR 44.3 to 44.5 such a conclusion would be compatible with a clause in a lease providing for the recovery of costs on an indemnity basis.*
79. For the same reasons the Tribunal allows the Applicant's application under Section 20C above, the Tribunal allows his application under Paragraph 5A, so that the costs incurred by the Respondent 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 administration charge payable by the Applicant in this or any other year.



## APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your application for permission to appeal by email to [rpsouthern@justice.gov.uk](mailto:rpsouthern@justice.gov.uk) as this will enable the First-tier Tribunal Regional Office to deal with it more efficiently.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

## ANNEX

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

### **18 Meaning of “service charge” and “relevant costs”**

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

### **19 Limitation of service charges: reasonableness**

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

### **27A Liability to pay service charges: jurisdiction**

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

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