



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

Case Reference : **CHI/00HC/LSC/2022/0063**

Property : **Flats 1, 3 & 4, 35 South Road,
Weston super Mare, BS23 2HD**

Applicants : **Susan Counsell, Avalon Counsell,
Style & Kelly Counsell**

Representative : **Avalon Counsell**

Respondent : **Walby Court Management Company
Ltd**

Representative : **Powells Law**

Type of Application : **Determination of liability to pay and
reasonableness of service charges**

Tribunal Member(s) : **Mr W H Gater FRICS Chair
Mr M C Woodrow MRICS**

Date of Hearing : **5 October 2022**

Date of Decision : **29 November 2022**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the following interim service charges are payable for the service charge year 6 April 2022 - 5 April 2023: -

Survey Costs

Scaffolding cost £6,000

Professional Fees £9,000

2. **Legal Fees**

1) Advice in relation to providing advice to the Respondent on the leaseholders' breach of repairing covenants within their leases, to include serving notice of breaches and in the event that leaseholders challenge matters, pursuing claims against them in the County Court - not payable.

2) £1,000 plus VAT – obtaining advice regarding repair obligations and the recovery of service charges from leaseholders.

3) Advice in relation to possible action by the Counsells to require the Respondent to transfer their shareholdings - not payable.

Background

3. The Applicants are the owners of long leasehold interests in flats at 35 South Road, Weston Super Mare (The Property). The Respondent is the Management Company of the Property. The current directors of the Respondent are Mr Geoff Slater and Langcourt Limited (which is controlled by Mr Slater).
4. The application is made under Section 27A of the Landlord and Tenant Act 1985 (“the Act”) to determine the reasonableness and payability of certain service charge costs for the year 2022, namely Survey Costs and Legal Costs.
5. The hearing was held on 5 October 2022 at Havant Justice Centre, with the parties joining remotely by video conference facility. The Tribunal expresses apologies to the parties for the delay in issuing this decision, brought about by the Chair suffering a Covid infection.
6. Two of the Applicants, Ms Avalon and Ms Susan Counsell were in attendance at the hearing, represented by Ms Imogen Dodds of Counsel. Gemma Staddon of Ebery Williams was also present.

7. For the Respondent Mr Geoffrey Slater was in attendance, represented by Mr James Fuller of Counsel. Mr Paul Addison of Powells Law was also present.
8. As a preliminary matter the Tribunal recorded the fact that Mr Slater was giving evidence from the United States with the consent of the Tribunal, having established that this was in accordance with the necessary protocol for witnesses giving evidence from abroad.
9. The parties confirmed at the commencement of the hearing that parts of the disputed Survey Costs were now agreed and that the remaining items comprised scaffolding costs of £12,400 and professional fees of £9,375.
10. The remaining issues to be determined under this heading are therefore the payability and/or reasonableness of interim service charges for the year 2022 in respect of: -

Survey Costs

Scaffolding cost £12,400
Professional Fees £9,375

Legal Fees

- 1) £19,250 plus VAT – 70 hours’ work in relation to providing advice to the Respondent on the leaseholders’ breach of repairing covenants within their leases, to include serving notice of breaches and in the event that leaseholders challenge matters, pursuing claims against them in the County Court.
 - 2) £13,750 plus VAT – 50 hours’ work in relation to providing ongoing advice to the Respondent regarding its repair obligations and the recovery of service charges from leaseholders.
 - 3) £6,875 plus VAT – 25 hours’ work in relation to possible action by the Counsellors to require the Respondent to transfer their shareholdings.
11. In accordance with Directions, the Applicants, with the assistance of the Respondent, submitted a bundle and the Tribunal was assisted by Skeleton Arguments with appended authorities submitted by both Counsel. The Respondent points out the Applicants have not submitted a separate statement of case.
 12. The Tribunal is grateful to Counsel for both parties for their clear presentation of their respective cases. Where authorities have been cited the Tribunal has considered each of these but may not recite each case in the findings below.

13. References to pages in the bundle are by reference to the PDF number thus [*].
14. At this stage the Tribunal is not concerned with whether the final charges will be reasonable. The Tribunal will determine whether it is reasonable to make these interim charges.

The Law

15. 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.
16. 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.
17. 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”).
18. The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
19. Following the decision in *Daejan Investments Ltd v Benson* [2011] EWCA Civ 38 at paragraph 86, the Upper Tribunal reiterated in *Knapper v Francis* [2017] UKUT 3 (LC) that the Tribunal can make its own assessment of the reasonable cost.
20. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in *Arnold v Britton and others* [2015] UKSC 36. Lord Neuberger found:
 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.

21. In *Carey-Morgan v De Walden* [2013] UKUT 0134 (LC), HHJ Huskinson held that an appropriate approach when considering s19(2) of the Act is two-stage – 1) are the costs recoverable under the lease and 2) if so, are those costs reasonable within the meaning of s19(2)?
22. The interim charges are based on estimates of costs. Following the decision in *Carey-Morgan*
22. the Tribunal is concerned with the principle of whether, when deciding whether the amounts estimated for the on account service charge payments for the forthcoming years were reasonable.
23. Counsel for both parties direct the Tribunal to this case and refer to (1) and (2) as The Construction Question and the Reasonableness Question.

The Property

24. The Property is a converted and extended large Victorian house in an exposed coastal location, now arranged in six flats.
 - Flat 1 is owned by Susan Counsell.
 - Flats 2 and 2a are owned by Langcourt Properties Ltd. Mr and Mrs Slater are directors of that company.
 - Flat 3 is owned by Avalon Counsell.
 - Flat 4 is owned by Style and Kelly Counsell.
 - Flat 5 is owned by Julie Harrison.

The Leases

25. The Applicants each hold a long lease of their flat which requires the Landlord to provide services and the Tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.
26. The Applicants confirm that their leases are on materially identical terms.
27. The relevant obligations of the Lessees/Applicants are contained in the Sixth Schedule, and the service charge provisions are set out at paras 18 – 20 as follows:

18. The Lessee shall contribute and shall keep the Lessor indemnified from and against the appropriate proportion (as specified in the Eighth Schedule in respect of the Premises) of all costs and expenses incurred by the Lessor in carrying out its obligations under and giving effect to the provision of the Seventh Schedule hereto including Clauses 9 to 13 inclusive of that Schedule after deducting interest if any received by the Lessor on any reserve fund pursuant to Clause 10(a) of that Schedule

19. The Lessee shall within twenty-one days after the service by the Lessor on the Lessee of a notice in writing stating the proportionate amount (certified in accordance with Clause 12 of the Seventh Schedule) due from the Lessee to the Lessor or from the Lessor to the Lessee pursuant to Clause 18 of this Schedule for the accounting period to which the notice relates pay to the Lessor or be entitled to receive from the Lessor the amount specified in the said notice and appropriate credit shall be given in respect of any sum received under Clause 20 of this Schedule.

20. The Lessee shall pay to the Lessor in advance on the Sixth day of April and the Sixth day of October in every year during the term on account of the Lessee's obligations under Clause 19 of this Schedule one-half of the sum specified by the Lessor's Surveyor or Auditor as being the estimated total amount due from the Lessee in respect of the full year and the first payment shall be a proportion to be determined by the Lessor's Surveyor or Auditor for the period between the date hereof and the Sixth day of April next the Sixth day of October next whichever shall be the sooner and the decision of the Lessor's Surveyor or Auditor shall be final in both cases.

28. Clause 15 of the Sixth Schedule envisages recovery of costs as follows:

.....Any costs or expenses incurred by the Lessor in preparing such regulations or in supplying copies of them or in doing works for the improvement of the Property or in providing services to the Lessee and other Owners of Flats or in employing porters or other servants shall be deemed to have been properly incurred by the Lessor in pursuance of its obligations under the Seventh Schedule notwithstanding the absence of any specific covenants by the Lessor to incur them and the Lessee shall keep the Lessor indemnified from and against his due proportion thereof under Clause 18 of this Schedule accordingly.

29. The relevant covenants of the Lessor/Respondent are set out in the Seventh Schedule and include:

4. The Lessor shall keep the roof and the Reserved Property and all fixtures and fittings therein and additions thereto in a good

and tenantable state of repair decoration and condition including the renewal and replacement of all work and damaged parts PROVIDED that nothing herein contained shall prejudice the Lessor's rights to recover from the Lessee or any other person the amount or value of any loss or damage suffered by or caused to the Lessor or the roof or the Reserved Property by the negligence or other wrongful act or default of the Lessee or such other person.

4(a) The Lessor shall pay a fair proportion of the expense of repairing and maintaining all party walls bounding the reserved Property.

(The Reserved Property is defined as "that part of the property not included in the Flats or Basement Units or Carports and being more properly described in Schedule II").

9. The Lessors shall employ and engage such servants and contractors as it considers necessary or desirable for the performance of its obligations under this Schedule and pay their wages commissions fees and charges notwithstanding that they may be a company firm or individual subsidiary to or associated with or having directors or partners in common associated with the Lessor who shall be entitled to charge their normal fees or charges (including profit).

11. The Lessor shall keep proper books of account of all costs and expenses incurred by it in carrying out its obligations under this Schedule and an account of all costs and expenses incurred by it in carrying out its obligations under this schedule and an account shall be taken on the Fifth day of April next and on the Fifth day of April in every subsequent year during the continuance of this demise and at the termination of this demise of the amount of those costs and expenses incurred since the commencement of this demise or the date of the last preceding account as the case may be after deducting interest if any received on any said reserve fund.

12. The account taken in pursuance of the last preceding clause shall be prepared and audited by a chartered accountant who shall certify the total amount of the said costs and expenses (including the audit fee of the account) for the period to which the account relates and the proportionate amount due from the Lessee to the Lessor pursuant to Clause 18 of the Sixth Schedule.

13. The Lessor shall within two months of the date to which the account provided for in Clause 11 of this Schedule is taken serve on the Lessee a notice in writing stating the total proportional amounts specified by and certified in accordance with the last preceding Clause.

Findings of fact and discussion.

30. Having heard evidence and submissions from the parties and considered all the documents provided, the Tribunal has made findings and determinations on the various issues as follows.
31. The application centres on a demand for interim service charges dated 6 April 2022 [162] pursuant to Clause 20 of Schedule VII of the leases.
32. The demand covers the period 6 April 2022 - 5 October 2022. The Respondent acknowledges that the demand did not comply with the requirements of Clause 20 of the lease in that the costs were not specified by the Company's surveyor or auditor. This was corrected on 1 June 2022 by the Company's surveyor Mr Matthews issuing the required certification [164] this time for the year 6 April 2022 to 5 April 2023. This has been accepted by the Applicants notwithstanding that they challenge the charges on a number of other bases.
33. The property is in poor condition and the most recent estimates indicate that approximately £1m must be spent if defects are to be remedied.
34. The Tribunal is aware of a separate dispute between the parties regarding share ownership of the management company. This is occasionally referred to in submissions. The Tribunal emphasises that this additional dispute is outside of the jurisdiction of this application and has no bearing on its decision.

Survey Costs:

Scaffolding cost £12,400
Professional Fees £9,375

35. The Applicants state that very little has been carried out in the way of maintenance over 20 years and remedial works need to be undertaken. The survey reports provide sufficient information for specialist contractors to cost the repairs, saving the leaseholders £9,375 on duplicate surveys.
36. They object to the charges on four grounds.
 - 1) There have been numerous inspections and reports undertaken and at some point, it must become unreasonable to be required to pay for further reports.
 - 2) There was a meeting of the leaseholders on 5 April 2022. Mr Slater prepared a note of the meeting which was circulated to leaseholders. Mr Kurt Williams, Avalon Counsell's partner, a Chartered

Construction Manager, was in attendance. There was a discussion about the cost and phasing of works. It was agreed that some form of market testing of costs needed to be undertaken. By issuing charges a day later the Respondent were reneging on that position.

3) The professional costs include investigation of the retaining wall at the rear which the Applicants suspect is in the ownership of Flat 2 and such investigation cost is not a relevant service charge.

4) The ICS scaffolding quote dated 15 March 2021 [262] upon which the interim charge is based is for a fully boarded working platform for a period of six weeks and not a single lift inspection platform.

37. The Respondent states that the interim service charges are based on information available on 6 April 2022.
38. The building is in very poor condition, and this has worsened over the past five years. Some issues have an immediate impact on health and safety and works need to be addressed as a matter of urgency.
39. The first stage of the Section 20 consultation process was completed in 2021 and before they could move to the second stage of producing a tender document and obtaining estimates, a further survey was commissioned to establish the full extent of the issues. That report was issued in March 2022.
40. On 6 April 2022 Mr Matthews of S J Surveyors gave an estimate [547] of costs which included the disputed professional fees and scaffolding costs. The interim service charge demand was based on these figures.
41. High level access has not yet been available, and many questions remain unanswered regarding the actual condition of several elements.
42. The interim account was issued to comply with the lease and if Mr Williams had obtained better indications of likely costs within say 30 days, these could have been considered and the demand could have been adjusted. No feedback has been received from Mr Williams.
43. The Land Registry is unable to provide the missing lease of Flat 2 and the Applicants have failed to substantiate their claim that the rear boundary wall forms part of the neighbours' property. In his statement [158] 55, Mr Slater says that the deeds of Walby Cottage are party walls and therefore a shared responsibility.
44. With regard to scaffolding, it is submitted that inspection scaffolds will be required (as set out in the estimate) in multiple locations, and some may need to go higher than the level in the ICS quote to reach chimneys and high-level elements.

Discussion.

45. Construction: The Applicants accept that charges may be made for professional and scaffolding fees under the lease but challenge the reasonableness of the charges. The Tribunal finds that the cost of professional fees with associated cost of inspection access are recoverable under the lease as necessary to discharge the Lessors covenants to repair and maintain.
46. Reasonableness. The Tribunal has considered the findings of the four reports obtained by the Respondent.
47. In July 2016 a condition survey was undertaken without the benefit of scaffolding by SJ Surveyors Ltd which reports at 6.0 [344] the need for extensive further investigation and at 5.00 [343] that it is impossible to accurately forecast costs until full detailed investigation has been carried out. That report is now six years old.
48. A structural engineer's inspection in March 2019 [399] by Mr Steve Williams, consultant of DHD Structures dealt with specific issues raised in the 2016 survey.
49. A structural inspection was carried out by Mr Steve Williams as consultant to BMR Structures [428] dated 11 March 2022, to review progress against recommended actions from earlier reports. This report was limited to structural issues.
50. The latest condition survey report was provided by SJ Surveyors Limited dated 24 March 2022 [58]. Investigation was limited to inspection from ground level or three metre ladders. The report notes that the building is in significantly worse condition than it was five years earlier.
51. Item 4.02 notes that inspection was limited, and scaffolding will be necessary to enable a detailed investigation of roofs. At 4.06 the report recommends the opening up of a GRP roof to enable a full assessment. 4.08 recommends further investigation of the chimney. 4.18 recommends a detailed specialist inspection of the Bath Stone, the staircase structure and the front elevation of the extension. 4.19 advises that the rear retaining wall needs to be assessed for stability.
52. Item 4.22 sets out a list of recommended further investigation encompassing roofs, water ingress, bath stone walls, chimneys, stairs, ceilings and boundary walls.
53. Item 7.0 provides budget costs but emphasises that there is insufficient information available to accurately predict the likely repairing costs.
54. Having received the report, Mr Slater took advice from SJ Surveyors on what was legally and practically required in the way of further

investigation. The costs advised by SJ Surveyors in that discussion formed the basis of the estimate in the service charge demand.

55. Mr Matthews' email of 6 April 2022 [506] is important given that it sets out the estimated cost of further investigations.
56. It provides for the fees of a Surveyor/Engineer (and where appropriate a stone mason) "to inspect and specify remedial works, preparation of procurement documentation for market testing or specification document for Quantity Surveyor budget cost report, market testing of price or obtaining chartered quantity surveyors cost estimates for works of prices, preparation of procurement report."
57. This work was in respect of chimney repairs, fascias, barge boards, gutters and downpipes, damaged stonework to front elevation, rake out and repoint stone walls, external staircase, flats 4 and 5 remedial works, repairs to front, side, rear retaining and party boundary walls, external staircases around property.
58. The Tribunal finds that four survey reports all clearly advise that the extent of works and accurate costing cannot be known without further investigation.
59. Given the deteriorating condition of the property, the two earliest reports were out of date as evidenced by the deterioration reported in March 2022.
60. The latest report repeats that further investigation is required before an accurate specification and costing could be obtained.
61. The Applicants suggest that specialist contractors could provide costings. Whilst specialist contractors have a role to play, it is evident that the advisors envisage additional professional investigations will be essential, for which there will be a charge. In addition to the necessary investigations, the cost allowance for professional fees of £9,375 includes the preparation of procurement reports and market testing. In contracts of this size, the Tribunal finds this is a reasonable course of action.
62. The Tribunal also finds that it is reasonable for a Lessor to choose not to rely on quotes from a specialist contractor as discussed at the meeting. The precise extent of works was yet to be properly established and this necessitated further inspections. If the existing limited reports were used as a basis, the leaseholders would be denied the opportunity to obtain competitive tender quotes for accurately defined and appropriate works.
63. The Tribunal determines that in light of the contents of the expert reports already obtained and the further investigations

recommended, it is reasonable for the Respondent to undertake investigations and to incur costs in doing so.

64. The Tribunal turns to the question of whether the estimated cost on which the on account service charges are based is reasonable.
65. The Tribunal examined the estimate of professional charges of £9,375 based on 15 chargeable days at £625. Neither party has produced evidence as to whether the daily rate or number of days is reasonable.
66. This is a substantial building in a poor state of repair requiring investigation of a number of issues. The Tribunal has examined the surveys and photographic evidence in detail. Using its' experience, the Tribunal finds that the rate of £625 per day for the level of expertise required is a reasonable sum.
67. The number of chargeable days will cover surveyors, structural engineers and specialists. The poor condition of the property, the size and age of the building, and the nature of the investigations required indicate that a number of personnel days will be required to complete the investigation process. In the absence of evidence to the contrary the Tribunal determines that the Respondent's estimate of 15 days is reasonable for the purposes of the interim account.
68. Dealing with the issue of the ownership and therefore responsibility for the cost of investigations of the rear retaining wall, this one element is not shown separately in Mr Matthews' estimate but on examination of the extent of the other issues it will apparently form only a very small part of the overall professional costs.
69. The Applicants state that they suspect that this may well fall within the demise of Flat 2. The Respondent states that it is for the Applicants to substantiate their claim and they have failed to do so.
70. The title plan referred to offers little assistance in the absence of the lease. Neither party has offered sufficient evidence to establish the responsibility here.
71. Given the likely cost of this investigation as part of the whole, the absence of evidence and the fact that this is an interim charge, the Tribunal finds that it would not be proportionate to dwell further on this element which may be defined by the time the final account is issued and corrected if necessary.
72. Accordingly, the Tribunal finds that in the absence of clear evidence, it is unreasonable to make provision for inspection of that part of the property in the interim charge. In order to make allowance for this the Tribunal deducts £375 from the amount proposed and determines that the sum of £9,000 for professional fees is a reasonable estimate and therefore payable as part of the interim

service charge. It is noted that VAT must be added to these sums where appropriate.

73. Whether the estimate for the cost of scaffolding was reasonable.
74. The Tribunal finds that provision of inspection scaffolding was a necessary adjunct to obtaining the necessary further investigations.
75. The estimate is based on the ICS scaffolding quote in March 2021 [262] for £3,100 + vat to provide “scaffold to access front of building for bath stone repairs’ and... to access chimney stack on right hand side of building for repairs.”
76. The estimate suggests that four scaffolds are needed to inspect the building on three elevations. Mr Matthews simply multiplied the ICS quote for construction, as opposed to inspection scaffolding, by four.
77. The Applicants consider that the estimate over provides for what should be lightweight scaffolding.
78. The range of estimates for use of scaffolding in various circumstances is wide. SJ Surveyors, in March 2022 were estimating full scaffolding costing between £95,000 [103] and £125,000 [494].
79. The cost of localised access scaffolding was estimated at £5,000 in 2016.
80. The Tribunal finds that there is a difference between the requirements for construction scaffolding and access/inspection scaffolding. The former will usually remain in place for some time and will need to provide safe working conditions for workers and materials of variable loads. Access scaffolding would normally be required for the period of the inspection and need to support personnel and surveying equipment only. As a result, the cost of such scaffolding is lower than for construction scaffolding.
81. The Tribunal determines that, as an interim payment estimate, the sum of £12,400 based on grossing up construction scaffolding estimates is excessive. Using the budget costs at [349] and [494] as the best available evidence of the reasonable sum, the Tribunal determines that for the interim charge the sum of £6,000 is payable.

Decision

82. In summary, the Tribunal finds that the sum of £9,000 for professional fees and £6,000 for scaffolding costs are payable.

Legal Fees

- 1) £19,250 plus VAT – re: breach of repairing covenants within their leases.
- 2) £13,750 plus VAT – re: repair obligations and the recovery of service charges.
- 3) £6,875 plus VAT – re: possible action re transfer of shareholdings.

The Applicants:

83. In submissions on construction Ms Dodds pointed out that none of the relevant parts of the lease mention recovery of legal fees and that only those costs mentioned in Schedule 7 are recoverable.
84. Referring to the authorities provided she said that the weight is that a lease must contain an express reference to legal fees.
85. The Tribunal was referred to *Kensquare Ltd v Boakye* [2021] EWCA Civ 1725 in which legal costs were not allowed as the focus of the lease was on management services rather than litigation. Newey LJ said at 54:

“... litigation costs do not fall within paragraph 5 of the seventh schedule to Ms Boakye’s lease. ...Like the FTT, though, I have concluded that, read naturally, paragraph 5 does not extend to litigation costs. While the reference to "professional advisers" is apt to apply to lawyers, they are not mentioned specifically, and nothing is said about legal proceedings. As in *No. 1 West India Quay*, the focus is on management services rather than litigation and, to adapt words of Rix LJ which Lord Neuberger quoted in *Arnold v Britton*, a decision in favour of *Kensquare* would involve "bring[ing] within the general words of a service charge clause" something "which does not clearly belong there". The fact that paragraph 5 speaks of advisers and agents being employed "in connection with" the management of the Building, not "for" its management, does not seem to me to matter.”
86. Ms Dodds submitted that this lease is narrower than that in *Kensquare*.
87. The Tribunal was also referred to *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119, and *Sella House Ltd v Mears* (1989) 21 HLR 147.
88. In referring to *Sella House*, Taylor LJ in *West India Quay* stated:

“.....Nowhere in Clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. In (j)(ii) it is with maintenance, safety and administration. On the Respondent’s argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord’s legal costs

of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties."

89. In terms of the generality of legal fee recovery, the necessary clarity is absent from the leases.
90. In terms of the specific issues:
- 1) Breach of lease costs. It was submitted that advice on the leaseholders' breach of repairing covenants within their leases was nothing to do with Schedule 7. In the case of breaches the lease contains provisions under which the lessees can enforce covenants against each other [286]9. The primary enforcement mechanism is lessee to lessee. For the Lessor to be able to sue one lessee at the cost of the other tenants there must be clear provision in the lease and the Sella House case is on point.
 - 2) Advice regarding repair obligations and the recovery of service charges. Whilst the costs touch on the landlords Schedule 7 covenants they cannot be said to be costs in carrying out those obligations or giving effect to Schedule 7. The test might be, if the legal advice was that the lease does not allow for legal fees to be recovered could they then be charged?
 - 3) Advice re possible dispute over transfer of shareholdings. The Applicants submit that the Respondent is confused between company and management matters. This is a shareholder dispute and nothing to do with the building at all. Following Sella House, the lease must be in clear and unambiguous terms if this is to be recoverable.
91. In submissions on reasonableness the Tribunal was referred to Woodfall: Landlord and Tenant, 7.194 which in summary states it does not follow that the full amount of those costs is a reasonable advance payment. The Tribunal should consider how certain the amount of those costs is, and whether it is certain that the works will in fact be carried out and paid for during the period covered by the advance payment.
92. Ms Dodds cites Tanfield Chambers: Service Charges and Management – 5th Edition, 12.29 which states that the amount of service charge must be objectively reasonable, and the onus is on the landlord to satisfy the relevant Tribunal that that is so.
93. Ms Dodds said that the costs are not reasonable in this interim charge for three reasons. Firstly, the likelihood of the costs being expended is uncertain as the Applicants do not believe they are in service charge arrears. The Respondent's solicitor acknowledges the difficulty in estimating the cost of litigation on shareholding and

there was no mention of legal costs at the meeting of 5 April 2022. The tenor is that the matters may be resolved without proceedings.

94. Secondly, the hourly rate of £275 is excessive for the work involved and in excess of the National Band 2 level of £255 for court purposes. Mr Addison is a senior solicitor, and the work is suitable for a lower level solicitor. The Applicants are not comfortable with Mr Addison in that he represents Mr Slater in a personal capacity.
95. Finally, the Respondent has not pursued the owner of Flat 5 for arrears and incurred no legal costs in this respect.

The Respondent

96. In relation to construction, the Respondent submits that the legal costs are costs incurred in carrying out its obligations and giving effect to the provisions of the Seventh Schedule.
97. The estimate of costs was assessed when the Respondent was facing litigation in relation to the liability for roof repairs to Flats 3 and 4 and issues relating to the issue of shares for those flats.
98. At the hearing Mr Fuller corrected an error in his Skeleton Argument where the word “legal” had inadvertently been added to the lease clause.
99. Referring to the authorities each case must be viewed objectively.
100. In *Assethold Ltd v Watts* [2015] L. & T.R. 15, Martin Rodger KC, the Deputy President of the Upper Tribunal, held that as a general principle a service charge should cover a particular type of expenditure but it was clear that principle should not be pushed to the point where language, which was clearly intended to encompass expenditure in a wide variety of situations which the parties have not explicitly catalogued, should be so restrictively construed as to deprive it of any real effect.
101. In this case the covenant in the Sixth Schedule para 18 must include legal fees. Clause 9 of the Seventh schedule allows the lessor to employ a range of people which should include lawyers.
102. Clause 15 of the Sixth Schedule adds to that range.
103. Regarding reasonableness there was a short time available to issue the interim charges and there were many issues to consider. The estimates were prepared in the light of what was known at the time.

Discussion

104. Legal costs generally: In considering the matter of recoverability of legal costs through the service charge, following the reasoning in

Arnold and Britton the Tribunal should have regard 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*”.

105. The property comprises only six flats in a large Victorian building. A small group of leaseholders are responsible for service charges in a relatively high maintenance property.
106. Clause 18 of the Sixth Schedule provides for service charges. Clause 9 of the Seventh Schedule lists those who may be employed or engaged. That clause alone is wide, covering servants, agents and contractors. Applying the reasoning in *Kensquare* and *West India Quay*, as it does not however specifically mention legal fees or advisors, Clause 15 of the Sixth Schedule is in effect a sweeping up clause. It does, as suggested by Ms Dodds in submissions, commence with reference to regulations. But the last part of the clause does broaden the effect.
107. The section of that clause goes beyond the ambit of the issue of regulation in the first section. The parties clearly intended to provide for the lessor to recover costs and expenses related to providing services which are not individually referred to elsewhere.
108. Where charges are made for any purpose, there is a possibility that recovery of unpaid amounts will be a necessary task. The RICS Service Charge Residential Management Code 3rd edition envisages that recovery of unpaid service charges would be a normal part of a managing agents duties acting for a Lessor. This gives an indication that such work is part of the “provision of services” referred to in Clause 15.
109. If unpaid amounts are to be recovered this may require the use of a solicitor.
110. Where the service includes repair obligations it may be considered appropriate to seek advice on the nature of and responsibility for works or whether the cost of works is recoverable under the lease. This provides protection to the other leaseholders where for example, one lessee seeks repairs to their flat through service charges which, after advice, were found not to be the lessors responsibility.
111. The Tribunal has regard to Martin Rodger KC’s judgement in *Assethold* that where there was a clear intention to encompass a wide range of situations, the absence of express wording should not be construed so restrictively to deprive Clause 15 of any real effect.

112. Examining the issues in the light of the above, the Tribunal first considered Issue 2, advice regarding Respondent’s repair obligations and the recovery of service charges.
113. The Tribunal determines that on *construction*, this element is in principle a relevant charge. Clause 15 of the Sixth Schedule provides sufficient breadth to encompass obtaining this advice, in relation to service charge issues.
114. As to whether the estimate is reasonable the Tribunal has considered the two elements of issue 2. Advice on repair obligations and recovery of service charges.
115. Regarding recovery of service charges, the Applicants assert that they are not in arrears of service charges. They point out that charges for the period up to 1 September 2021 were paid unconditionally on 24 September 2021 [243].
116. The Tribunal finds that the Respondent has provided no evidence of arrears, sufficient to establish that it was reasonable to expect a need for legal advice on recovery of arrears during the service charge year for the purposes of issue 2. It therefore determines that the interim charges are not payable for advice on recovery of service charges.
117. Regarding the second element of issue 2, cost of advice on obligations under the lease, the Tribunal has found above that the only term in the lease which points to the recovery of any legal costs is Clause 15 of the Sixth Schedule. The scope of the relevant part of that clause is restricted to matters relating to the provision of service charges. Where a landlord provides services with the benefit of Clause 15, it is reasonable for them to be able to recover a reasonable amount for relevant advice. That advice will be limited in scope to obligations under the lease.
118. The Tribunal finds that under Clause 15 the scope for recovery of costs is limited to that necessary to provide services and not sufficiently wide to cover costs of litigation. Therefore, a reasonable sum for basic advice and initial recovery steps may be part of the provision of services but no more. The Tribunal does not accept that 50 hours is a reasonable amount under this limited provision.
119. For the purposes of an interim account, and in the absence of further evidence the Tribunal finds that an interim cost of £1,000 is a reasonable sum and determines in that amount with regard to the second element of issue 2).
120. The parties will be aware that once the final account is issued based on actual expenditure, the full assessment of reasonableness may be considered in the event of a s27A application. This may result in a further charge or a credit.

121. Issue 1: advice to the Respondent on the leaseholders' breach of repairing covenants within their leases. In respect of the Construction Question, Clause 15 of the Sixth Schedule offers no support to this claim. Breach of lease is a specific issue separate from Service Charge provisions. There is no forfeiture provision in the leases and the Tribunal prefers the assertion by the Applicants that the cross covenants between the lessees are the intended route for relief in this respect. Clause 18 of the Sixth Schedule and the Seventh Schedule contain no express terms which indicate that the costs of breach of lease proceedings are covered.
122. Applying the reasoning in *West India Quay* there is no clear and unambiguous term which provides for these costs to be recovered. Furthermore, the terms in the lease relied on by the Respondent do not satisfy the assessment in *Arnold v Britton* referred to above.
123. The Tribunal finds that the legal costs in issue 1) are not payable. |
124. Issue 3: In respect of issue 3) legal advice on possible litigation re transfer of shareholding, there is again no indication that this is a necessary part of the service charge mechanism or other covenants.
125. The lease contains no express terms which clearly and unambiguously provide for such recovery. Similarly, there are no terms which satisfy an assessment as envisaged in *Arnold v Britton* referred to above.
126. The Tribunal finds that costs in issue 3) are not payable.

Summary decision.

127. The decision on each issue is summarised at 1 and 2 above.

Applications under S20C, Schedule 11, paragraph 5 and refund of fees

128. At the end of the hearing, the Tribunal directed that it will receive submissions from the parties under this heading within 28 days of the date of this Decision.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

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.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
- (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (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 court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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.

- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or 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 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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 matter of an application
under sub-paragraph (1).