FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LAC/2022/0007** **LON/00AG/LSC/2022/0135**
Property	**:**	**Flat B 19 Camden Park Road NW1 9AX**
Applicant	**:**	**Mr Ruaidhri Gissane**
Representative	**:**	**Mr Christopher Green (Counsel)**
Respondent	**:**	**Java Properties International Ltd**
Representative	**:**	**Mr Ashraf Borghol (Director)**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay service charges and administration charges**
Tribunal members	**:**	**Judge N Rushton KC** **Ms J Mann MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**03 October 2022**
Date of decision	**:**	**31 October 2022**

DECISION

Decisions of the tribunal

(1) The tribunal determines that:

a. Interim service charge demands for the following half-yearly periods were validly served on the Applicant, Mr Gissane: March-September 2018; September 2018-March 2019; March-September 2019; September 2019-March 2020; March-September 2020; September 2020-March 2021 and March-September 2021.

b. Any interim service charges in respect of expenses incurred prior to 10 July 2019 are however time-barred and irrecoverable under s.20B(1) of the Landlord and Tenant Act 1985.

c. The following sums are reasonable and payable by the Applicant, Mr Gissane, in respect of interim service charges for the following periods (credit should be given for any sums already paid for these periods):

i. From 25 March 2019 – 24 March 2020: £329.06

ii. From 25 March 2020 – 24 March 2021: £411.56

iii. From 25 March 2021 – 24 September 2021: £228.80

d. There are no sums which are payable by way of administration charges. In particular the Respondent freeholder has no power to charge "late payment fees" under the lease.

(2) The tribunal makes the further determinations as set out under the various headings in this Decision.

(3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs in determining the amount of any service charges to be paid by the Applicant, insofar as these might otherwise have been payable under his lease.

(4) The Tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability of the Applicant to pay any administration charges in respect of the litigation costs of this Application insofar as these might otherwise have been payable under his lease.

(5) The Tribunal makes an order pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that the Respondent freeholder shall reimburse to the Applicant tenant the fees for the two applications and hearing which he has paid, within 28 days of the date of this Decision.

The applications

1. The Applicant tenant ("**Mr Gissane**") issued an application on 19 April 2022 against the Respondent landlord, Java Properties International Ltd ("**Java**") for a determination under s.27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") of the payability and reasonableness of service charges for the years 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022 and on account charges for the current year 2022-2023 (LON/00AG/LSC/2022/0135; "**the Service Charge Application**"). The Applicant, Mr Ruaidhri Gissane, is referred to in the papers as Mr Rory Gissane.

2. In addition, Mr Gissane issued an application on 25 April 2022 against Java for a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") as to whether certain late payment charges and/or interest claimed by Java against him are payable as administration charges, and if so the reasonableness of such charges ("**the Administration Charge Application**").

3. Insofar as Java's legal costs in connection with these or previous proceedings in the County Court would otherwise be payable by Mr Gissane under the terms of his lease as an administration charge or service charge (which he denies), Mr Gissane has also applied, in both applications, for orders under paragraph 5A of Schedule 11 to the 2002 Act and/or section 20C of the 1985 Act (as appropriate) reducing or extinguishing his liability to pay any such charges.

4. Both applications relate to the property at Flat B, 19 Camden Park Road NW1 9AX ("**the Flat**"), of which Mr Gissane is the long-leaseholder. Java has been the freeholder and so Mr Gissane's landlord since about 2 November 2017, having bought the freehold at auction. 19 Camden Park Road ("**Number 19**") is a four storey townhouse which has been converted into four self-contained flats. The Flat is on the ground floor. The common parts consist of an entrance hall, staircase and small landing. The Flat is currently sub-let by Mr Gissane.

5. The lease of the Flat is dated 4 July 1983 and is stated to be for 99 years from 25 March 1983 ("**the Lease**"). The Lease includes provisions requiring the landlord to provide services and the tenant to contribute to the cost of those services by way of a variable service charge. Each of the four flat owners, including Mr Gissane, is required to contribute one quarter of the service charges. The precise terms of the Lease are referred to in more detail below as relevant.

6. The Lease states, and the parties agree, that the service charge year starts on 25 March (clause 2(m)(ii)).

7. Java acts by its director, Mr Ashraf (or Achraf) Borghol ("**Mr Borghol**"). Java is a landlord company which was described by Mr Borghol in evidence as being responsible for about 40 to 50 flats in various different properties.

8. Extracts of relevant legislation are set out in an appendix to this decision.

Procedural matters

9. Directions were issued on 9 May 2022 by Tribunal Chair Jagger. Mr Gissane complied with the directions which applied to him, but Java did not comply with the directions which applied to it.

10. On 3 August 2022 Mr Borghol disclosed a large quantity of documents, including many emails, to Mr Gissane. On the same day Mr Borghol wrote to the tribunal seeking to have the applications struck out, on the basis that evidence supporting the service charge accounts had now been provided. On 11 August 2022 Judge Carr noted that the provision of disclosure was 2 months late and ruled that it would be inappropriate to strike out the applications on the basis of the documents alone and without Ms Gissane having had the opportunity to make his case. Judge Carr also issued further directions, including for Java to explain why it had failed to comply with directions or seek an extension for compliance.

11. On 24 August 2022 Tribunal Chair Bowers made an order extending the original deadlines in the directions, and decided that there should be an oral hearing. She also noted (having received from Mr Gissane the relevant statements of case) that a separate County Court claim which Mr Gissane has also recently issued against Java does not relate to the same issues as these applications, so it was not necessary for the tribunal proceedings to be stayed pending determination of that other claim.

12. Mr Gissane has prepared a schedule of disputed service charge items, in the form required by the tribunal ("**the Schedule**"). Mr Borghol has completed that schedule with comments in response on behalf of Java. A copy of the completed Schedule was in the hearing bundle and Mr Gissane and Mr Borghol confirmed that it contained their respective cases.

13. In accordance with the revised directions, Mr Gissane (who is a solicitor, although he does not practise in property litigation) prepared the electronic bundle for the hearing. (References in square brackets in this Decision are to page numbers of that bundle.) Mr Gissane told the tribunal that he had included such of Java's disclosed documents as appeared to him to be relevant, including any buildings insurance

certificates, and the demands, budgets and accounts relied upon by Java (although Mr Gissane disputes that these are valid as demands or accounts). Mr Gissane had not included insurance quotes or many of the large number of emails disclosed. Java has never provided a statement of its case, including its legal submissions (contrary to paragraph 6 of the Directions, as amended), so no such statement was in the bundle.

14. On 26 September 2022, Mr Gissane sent his bundle to the tribunal and Mr Borghol, saying he had asked Mr Borghol if he agreed the contents but had received no response. The case officer replied on 27 September 2022 saying that if the parties were unable to agree a bundle, each party should submit a separate bundle. On 28 September 2022 Mr Borghol emailed the tribunal saying he agreed to use Mr Gissane's bundle as he did not know how to make an electronic bundle. The bundle which was used by the tribunal for the hearing was therefore the one provided by Mr Gissane (and Mr Borghol was given the use of a hard copy of it at the hearing).

15. The bundle included a witness statement from Mr Gissane, signed with a statement of truth. No witness statement was filed on behalf of Java. Java's case has been treated as being as set out in the Schedule and in Mr Borghol's letters to the tribunal, in particular of 3 and 31 August 2022, which were in the bundle, as expanded by Mr Borghol orally. The tribunal considers that it was sufficiently clear from the Schedule and those letters what Java's case was for it to be fair to proceed on that basis.

The hearing

16. Mr Gissane was represented at the hearing by Mr Christopher Green of counsel. Mr Gissane was also accompanied by a Mr Chris Davies. Mr Borghol attended on behalf of Java and was accompanied and assisted by his daughter Ms Badiya Borghol. The hearing started just after 10am.

17. Mr Green and Mr Borghol told the tribunal what they considered were the matters in dispute. Mr Gissane gave oral evidence and was cross examined by Mr Borghol and also answered questions from the tribunal. Mr Borghol also gave oral evidence, explaining to the tribunal what his case was, and was cross examined by Mr Green. Mr Borghol also answered questions from the tribunal.

18. The tribunal finally invited submissions from both parties. Mr Borghol read a statement to the tribunal. Mr Green then made submissions on behalf of Mr Gissane, during which Mr Borghol said he wanted to leave as he was very tired. The tribunal encouraged him (or his daughter on his behalf) to stay, although it said he did not have to. However Mr Borghol insisted he had had enough, and he and his daughter left at about 4.20pm. The tribunal therefore heard the remainder of Mr Green's submissions in the absence of Mr Borghol and the hearing ended at 4.50pm. In all the circumstances, the tribunal considers that both sides

had a full opportunity to put their case, bearing in mind in particular that Mr Borghol made it clear before he left that he had said everything that he wished to say, and did not wish to hear any more, and volunteered just before he left that he was content for the tribunal to proceed to make a decision.

19. The tribunal sets out below the submissions of each side in relation to each issue, and also its conclusions in relation to both the oral evidence of the parties where relevant, and on the documents, in particular the contemporaneous documents, insofar as factual matters were in dispute.

20. Number 19 is managed on behalf of Java by Frognal Estates Limited ("**Frognal**"), but as Mr Borghol made clear during the hearing, he is the sole director of, and represents, both Java and Frognal. Their office and registered addresses are next door to each other at 181 and 183 Finchley Road NW3 6ND. Mr Borghol said the two companies do not have the same staff, but he said he "wore the hats" of each company as required.

Issues

21. On the basis of the way in which Mr Gissane's and Java's cases were presented at the hearing, the issues between the parties were as follows:

    (i) Has Java complied with the service charge mechanism in the lease in making demands for any of the years in issue, and if so, which years?

    (ii) Where service charge demands attached what was said to be a statement of tenant's rights in relation to service (or administration) charges in accordance with s.21B of the 1985 Act, was the statement valid?

    (iii) If a valid demand has been made in relation to any year, are all or any of the service charges demanded in any case irrecoverable by reason of the 18 month time limit in s.20B of the 1985 Act?

    (iv) Are the items in the service charge budgets (or final accounts) valid expenditure under the Lease and are the amounts reasonable under s.19 of the 1985 Act if not agreed by the parties?

    (v) Is Java entitled to claim legal costs of its earlier County Court proceedings, or late payment charges, as administration charges under the Lease? If so, have they been properly demanded?

22. Having considered the oral evidence and submissions on behalf of the parties, and the documents which were in the bundle or which were

produced during the hearing as detailed further below, the tribunal has made determinations on these issues as follows.

Compliance with the service charge mechanism in the Lease

23. Where a lease sets out a mechanism for raising and demanding variable service charges for functions which the landlord is obliged to carry out, the tenant will not be liable to pay any service charges unless the landlord has complied with the service charge mechanism in the lease. However, such provisions are not to be construed in a legalistic or technical way, but a business-like approach should be adopted – it should be possible to work out from the lease and the documents sent by the landlord whether a sum is payable, without recourse to lawyers. Further, where a landlord has failed to comply with the contractual mechanism in a lease in sending a demand, this will not generally prevent it from rectifying the position by sending a compliant demand (subject to compliance with any relevant time limits as considered further below). All these points are confirmed by the Upper Tribunal ("**UT**") decision in *Southwark v. Woelke* [2013] UKUT 349 (LC), applying in a residential context the Court of Appeal decision in *Leonora Investment Co Ltd v. Mott MacDonald Ltd* [2008] EWCA Civ 857.

24. The service charge mechanism is set out in clause 2(m) of the Lease, which provides as follows so far as relevant:

"2. The Lessee [now Mr Gissane] hereby covenants with the Lessor [now Java] as follows:…

(m) to contribute and pay to [Java] one-quarter of the costs expenses outgoings and matters incurred by [Java] and referred to in the Second Schedule hereto (such contributions being hereinafter referred to as "the Contribution") and the costs expenses outgoings and matters incurred by [Java] being hereinafter referred to as "the Second Schedule Matters"…

(ii) prior to… the twenty-fifth March in every subsequent year of this demise [Java] shall deliver to [Mr Gissane] an estimate of the cost of the Second Schedule Matters for the calendar year then commencing and the proportion thereof attributable to [the Flat] and [Mr Gissane] shall pay to [Java] the contribution so resulting by equal half yearly payments in advance on the 25th day of March and the 25th day of September in such calendar year.

(iii) such account… shall show the amounts actually expended in respect of the Second Schedule Matters in the year then ending and any under-payment or (subject as hereinafter mentioned) over-payment in the monies received by the Lessor during such

year shall be taken into account by the Lessor in assessing the contribution for the year then next ensuing.

(iv) the assessment of all sums payable under these provisions shall be certified by [Java] its agents or surveyors whose decision shall be final and binding on the parties hereto and any arrears of any payments or instalments shall be recoverable from [Mr Gissane] as rent in arrear."

25. As to the obligations on the Lessor to perform services which might incur costs, these include the following under the Lease, so far as relevant:

(i) Clause 3(b): to maintain in good and substantial repair condition order and decoration the various parts of Number 19 described in sub-clauses (i) to (iv), which included in particular *"(iv) the common parts leading from street level to the entrance of [the Flat]"*;

(ii) Clause 3(e): "*… at all times during the term [to] insure and keep insured [Number 19] in the full reinstatement value thereof for the time being against loss or damage by fire and explosion and such other risks as [Java] shall from time to time think fit and also against two years loss of rents… and also against Property Owners Liability in the sum of £100,000 at least and will make all payments necessary… and will produce on demand to [Mr Gissane] the policy or policies of such insurance and the receipt for the current premium for such insurance…*";

(iii) Clause 3(d)(ii): to "*carry out any other matters which may be deemed advisable in the discretion of [Java] for the good running administration and maintenance of [Number 19]*";

(iv) Clause 3(f): to pay all costs expenses and outgoings and carry out all of the Second Schedule Matters insofar as they have not been expressly covered by preceding provisions of clause 3.

26. The Second Schedule to the Lease set out what are described as the "*Costs expenses outgoings and matters in respect of which [Mr Gissane] has to contribute pursuant to Clause 2(m) of this Lease."* It then lists among others the following:

(i) Paragraph 1 refers to the description of the parts of Number 19 which Java has the obligation to repair in clause 3(b).

(ii) Paragraph 3 refers to "*The cost of cleaning and lighting the common parts.*"

(iii) Paragraph 5 refers to the cost of insuring Number 19, referring back to the scope of the insuring obligation in clause 3(e).

(iv) Paragraph 6 states: "*A management fee of not more than 10% of the total of [Java's] expenditure in respect of the matters referred to in this Schedule herein.*"

(v) Paragraph 7 states: "*Any further costs paid and discharged by [Java] pursuant to Clause 3(d)(ii) of this Lease.*

(vi) Paragraph 8 states: "*The provision of a reserve for the foregoing expenses*".

27. The service charge mechanism in clause 2(m) is simple (as one would expect from a lease relating to a house divided into just four flats), but it is poorly expressed. It is clear that by sub-clause 2(m)(ii) Java is to deliver to Mr Gissane an estimate of the costs for the forthcoming year, and that this is to be done before 25 March, when the new year starts. Then Mr Gissane is obliged to pay interim service charges based on that estimate, in two tranches each of 50% of his share of the estimate, on 25 March and 25 September.

28. The tribunal considers, from the language of this sub-clause, that Mr Gissane has this obligation to pay the two 50% interim tranches so long as this estimate and a statement of Mr Gissane's 25% contribution has been delivered, regardless of whether a final account for earlier years has been served or what other sums may be payable or outstanding. It considers that the only thing which must be delivered in addition to the demand itself for these interim charges to become payable, is the estimate or budget for the forthcoming year.

29. However the process by which the final costs are to be calculated and balanced off against the interim charges, and the net balance demanded or credited, is far from clear. Also obscure is how the amount to be finally demanded is affected by any non-payment of earlier interim (or final) payments. Clause 2(m)(iii) starts by referring to "such account" but clause 2 does not define the account being referred to, or how or when it is to be prepared (except that sub-clause 2(m)(iv) provides that the assessment is to be by Java or its agent). The reference in sub-clause 2(m)(iii) to that account showing "*the amounts actually expended in respect of the Second Schedule matters in the year then ending*" indicates that this is a final account, setting out what has actually been spent by Java in the year which is ending. But logically it would be difficult to do this before the year has actually ended, although this is such a simple account that it may often be possible.

30. Furthermore, the reference to "under-payment" and "over-payment" in sub-clause 2(m)(iii) clearly indicates that Java should compare the

amount it has actually spent in the year with the amount estimated at the start of the previous year and then calculate the amount by which the actual expenditure differed from the estimate. However the reference to underpayment or overpayment "*in the monies received by [Java]*" appears to mix up amounts which were receivable based on the estimate, with amounts actually received. The two will only be the same if all four tenants have actually paid all of their 25% interim service charges, which has not been true here because Mr Gissane did not make payment in some years, at least originally. Furthermore, the sub-clause goes on to say that the amount of the under or over-payment is then to be taken into account in assessing the contribution for the next year, and it is very unclear how this is supposed to be applied in practice.

31. The tribunal has concluded that the reference to "monies received" in this sub-clause must be interpreted as "monies receivable" and not as being literally the money received. In other words, when calculating the final account, Java should assume that the sums estimated a year earlier have been received, regardless of whether they actually have been. Otherwise the effect of clause 2(m)(iii) would be that if one tenant failed to pay their estimated 25% in one year, that unpaid sum would be loaded onto the other tenants in the next year. This would be an obviously unfair outcome and one which the tribunal has concluded the original parties to the Lease cannot sensibly have intended. If any interim contributions have not been paid on time, the tribunal considers they should be pursued separately against the defaulting tenant, not taken into account in assessing the service charges of all the tenants for future years.

32. The tribunal has therefore also concluded that the reference to taking into account any under or over-payment in assessing the contribution for the next year must mean that having calculated the difference between the previous year's estimate and the actual costs in the previous year, the resultant under or over-payment should then be either credited to or debited from the estimated sums requested for the forthcoming year.

33. Sub-clause 2(m)(iii) does not expressly state any time period within which this final account is to be calculated and notified to the tenant, and in those circumstances the tribunal does not consider that there is any contractual time limit for doing this (subject to the effects of statutory regulation under s.20B considered further below). However the Lease assumes it will be done swiftly at the year-end so the balance can be added to or deducted from the advance contribution assessed for the forthcoming year, and the tenant then asked to pay the net amount due.

34. Therefore, in the tribunal's view, the process which Java should follow is that:

    (i) Before 25 March it should estimate the costs for the coming year ("Year 2") and send the tenant that estimate, stating the 25% proportion payable by the tenant and the two half-yearly

payments which should be paid. Half will then become due as an advance payment on 25 March and the other half as a further advance payment on 25 September.

(ii) At the end of Year 1, around 25 March, Java should prepare an account of the actual costs in Year 1, compare this with the estimate and advance costs notified a year earlier for Year 1, and calculate the difference between the two. If the actual costs were more than the estimate, there will be a balancing payment due for Year 1. If the actual costs were less than the estimate, there will be a credit due for Year 1.

(iii) Java should then either add the balancing payment or deduct the credit for Year 1 to the total advance estimate for Year 2, and calculate a total netted off contribution to be paid, combining the two. 25% of the net total will then be payable by the tenant in two tranches, one as close as possible to 25 March and one on 25 September.

(iv) Ideally, Java should carry out steps (ii) and (iii) before 25 March, so that it can notify the tenant of the balancing payment for Year 1 at the same time of the estimate for Year 2, and so the net amount payable taking account of both. This should in practice be possible because the account for Number 19 is sufficiently simple that it will often be possible to finalise it before the year end on 25 March.

(v) However, if the final account has not been calculated by 25 March, then it will be necessary for Java first to send the estimate for Year 2, stating the advance payments required, before 25 March, and then separately, once the final account for Year 1 has been calculated, send a revised contribution request which takes into account both the Year 2 advance payments and the Year 1 balancing payment.

(vi) However, if the final account has not been calculated and netted off, this will not prevent the interim payments for the new year becoming payable, under 2(m)(ii).

(vii) Nothing in clause 2(m)(iii) sets any time limit for undertaking the final account calculation. However, until a final account is calculated, the only sums payable will be the on-account payments for the forthcoming year (if properly demanded).

35. In terms of deciding whether Java has complied with the service charge mechanism in the Lease, there are therefore two questions in relation to any year (except 2022/23): (1) has Java complied with sub-clause 2(m)(ii) in demanding the advance service charges; and (2) has Java

complied with sub-clause 2(m)(iii) of the Lease in notifying and demanding a contribution which takes into account any balancing credit/charge from the previous year? For 2022/23, only (1) applies.

36. In addition, there is an issue as to whether an acceptable mode of service was used by Java. Some demands and documents have been sent by registered/ recorded post; some by normal post, but many (and everything before March 2020) by email.

37. Clause 4(d) of the Lease provides "*that the provisions of Section 196 of the Law of Property Act 1925 (as amended or replaced from time to time) shall apply mutatis mutandis to any notice required to be served pursuant to any of the provisions of this Lease*."

38. Sub-sections 196(1), (3) and (4) of the Law of Property Act 1925 ("**the 1925 Act**") are the potentially relevant provisions, which state so far as material:

> 196 (1) Any notice required or authorised to be served or given by this Act shall be in writing.
>
> (3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor… or other person to be served, or, in case of a notice required or authorised to be served on a lessee… is affixed or left for him on the land or any house or building comprised in the lease…
>
> (4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor… or other person to be served, by name, at the aforesaid place of abode… and if that letter is not returned by the postal operator… undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

39. "Notice" under clause 4(d) of the Lease would in the tribunal's view include any notification which is required to be given under the Lease. In particular this would extend to (i) the estimate of the coming year's costs, and the demands for the advance payments, which are to be made under sub-clause 2(m)(ii); and (ii) the account of the final costs for the year, plus also any revised notification and demand for the tenant's contribution which takes into account any consequent over or under-payment, under sub-clause 2(m)(iii).

40. Under section 196, any such notice, demand or document will therefore have been validly served on Mr Gissane if it was either:

(i) Delivered by hand/courier to Mr Gissane's last known address (ss. 196(3));

(ii) Delivered by hand/courier to the Flat (ss.196(3)); or

(iii) Sent by post to Mr Gissane's last known address (ss.196(4)). Sub-section 196(4) refers to "registered post", but there is authority that if s.196 has been incorporated, s.7 of the Interpretation Act 1978 has the effect of extending this to ordinary post if the landlord can prove that (1) the notice was placed in a properly addressed envelope; (2) the correct postage was paid; and (3) the notice was posted (see *London Borough of Southwark v Akhtar* [2017] UKUT 0150 (LC) at [69]). No distinction is made between first and second class post.

41. There is also authority that where s.196 has been incorporated, sending a notice by email will not amount to valid service (*E.ON UK Plc v Gilesports Ltd* [2012] EWHC 2172 (Ch)) at [54], provided to the parties during the hearing). Therefore, unless Mr Gissane stated that he was willing to accept service by email, service by email of any demand, estimate or other document was not valid service. With one exception, there is no evidence that Mr Gissane said that he was prepared to accept service of documents by email. (The exception was an email from Mr Gissane of 10 January 2021 [94] relating to specified documents.)

42. Java cannot rely on the convenience of serving by email if a tenant under a lease in these terms is not willing to accept service by email. Mr Borghol referred to the fact that all or most of the rest of Java's tenants were happy to accept documents by email. However, the fact that most tenants were willing to agree to this, or to waive any breach of their leases, does not mean that where a tenant like Mr Gissane makes it clear that he will not accept service by email, Java can still do this. Mr Borghol and Mr Gissane both said that Mr Gissane had expressly required all demands to be sent by post from (at least) March 2020.

Service of on-account demands

43. On 11 March 2021, Java arranged for the budget/estimate for 2021/2022 and demand for the first advance payment of service charges to be sent to Mr Gissane's residential address by registered post. There was an email in the bundle of 25 March 2021 from Mr Borghol, said to attach proof of delivery on 11 March 2021, to which Mr Gissane responded on the same day confirming he had received that demand [92]. In a letter of 22 March 2021 to Java [100] Mr Gissane also accepted that he had received a letter enclosing that half-yearly demand. Mr Gissane in evidence, and Mr Green in submissions, accepted that this demand had been served in accordance with the Lease.

44. Accordingly, in relation to the demand for the first advance payment on account of service charges for 2021/2022, the tribunal finds that a demand and budget/estimate were served by registered post on Mr Gissane, in accordance with the s.196 requirements, on about 11 March 2021. A copy of this budget was in the bundle at [196]. It totalled £3,430.42, so Mr Gissane's 25% share for the year would have been £857.60. Although the demand from March 2021 was not in the bundle, the tribunal accepts (given that it is accepted that it was served) that that demand was for the same sum as the second on-account demand, dated 2 September 2021. That stated that Mr Gissane's 25% share was £857.60 and the half-yearly service charge due was £428.80. The tribunal understands that the March 2021 demand was paid by Mr Gissane, although reserving all his rights as to whether it was payable.

45. However, Mr Green invited the tribunal to conclude that there was no evidence that any other demands, estimates/budgets or relevant documents had been served on Mr Gissane for any other sum or period, in accordance with the terms of the Lease.

46. As to whether there is evidence that any other on-account demands were correctly served, by post (with an estimate/budget), the tribunal notes the following from the documents, and from undisputed matters:

    (i) There was a tranche of demands in the bundle all with the date 4 December 2020, although they related to a number of periods: March-September 2018; September 2018-March 2019; March-September 2019; September 2019-March 2020; March-September 2020; and September 2020-March 2021.

    (ii) The circumstances in which this tranche of demands came to be produced all at once were tolerably clear from the witness evidence and contemporaneous letters. Java had instructed solicitors, PDC Law, who issued a County Court claim against Mr Gissane for unpaid service charges in early 2020 and obtained a judgment in default. Mr Gissane applied for this to be set aside on the basis that the claim had not been served on him. This application was ultimately successful and the claim was eventually discontinued in about December 2020. It appears to have been accepted that there was an issue as to whether valid service charge demands had been served. This resulted in PDC giving Java advice on preparing and serving service charge demands, resulting in all the demands dated 4 December 2020 being produced, for all the service charge periods to date at that time.

    (iii) The tribunal has not seen evidence of any valid and properly served service charge demands *pre-dating* 4 December 2020. (Although Mr Borghol produced a Royal Mail receipt dated 20 March 2020, saying this was when he started sending the

demands by post, there was no evidence as to what was sent, and in particular whether it was a demand which complied with the Lease or included a budget/estimate.) Mr Borghol confirmed in evidence that prior to March 2020, he had only sent demands by email, so there could have been no validly served demands before that date.

(iv) By an email of 3 December 2020, Mr Gissane requested a correct demand for service charges, and notified Java of his then current address (330 Finchley Road, London NW3 7AW). On 7 December 2020, Mr Borghol replied saying they were preparing service charge demands which would be sent very soon.

(v) On 29 December 2020 Frognal (most probably Mr Borghol) emailed Mr Gissane saying that the demands and a letter had been posted to him on 11 December 2020 [98]. He also provided a tracking number. He then said "*It seems that it get lost in the post as no further updates. In this case I have attached everything we sent it [sic]*". On 3 January 2021 Mr Gissane replied acknowledging receipt of the email and attachments, but reiterating that he did not accept service by email, although he provided a corrected email address.

(vi) On 4 January 2021 Mr Borghol replied further saying "*We have sent you the demands by post as you requested which has been delivered on 30th December 2020 and signed by you. The reason we send [sic] it to you by email was that it was taking too long to be delivered by post but according to royal mail it was delivered.*" He also said he had taken legal advice and the demands had been checked by Java's solicitors for compliance with the Lease.

(vii) In a long response dated 6 January 2021, Mr Gissane said he had not signed for any letter delivered around 30 December 2020 and that the statement Java made was untrue. He agreed he had received the demands by email, but said he was not waiving his rights to be properly served. He also requested the budgets and copies of the insurance policies relating to each of the years where a demand had been sent.

(viii) Then on 10 January 2021 Mr Gissane acknowledged receipt of the relevant budgets by recorded post [94], and said he was happy to receive by email the further information he was requesting.

(ix) Unfortunately, in that it did not promote good relations between the parties, Mr Borghol's response on 11 January 2021 was to accuse Mr Gissane of sending "*long and boring emails asking for more and more*" and to say all future correspondence should be through their solicitors [94].

(x) In evidence Mr Gissane said that he believed all the late demands were served in 2020. He said that when they were remedied on the advice of PDC Law, he believed he received a copy by post and a copy by email, sent by post to the place he was living. He identified these as being the demands all dated 4 December 2020.

(xi) More generally, the bundle included:

(a) copies of further demands for all further periods up to September 2022 (save for March-September 2021, as mentioned above);

(b) budgets for all the years 2018/19, 2019/20, 2020/21, 2021/22 and 2022/23; and

(c) a "Service Charge Income and Expenditure Account" for each of the years ending March 2019, 2020 and 2021 (only).

The bundle did not include copies of any covering letters said to have enclosed these demands, budgets or accounts.

47. On the basis of this evidence, the tribunal is satisfied on the balance of probabilities that (i) the bundle of demands dated 4 December 2020 was sent by recorded/ registered post on 11 December 2020, since Mr Borghol provided a tracking number; (ii) it was probably sent to Mr Gissane's correct home address, because Mr Gissane had provided that by email on 3 December 2020; and (iii) there was a long delay by Royal Mail in effecting delivery, but it probably was delivered and signed for by somebody on 30 December 2020. Since Mr Borghol had provided a tracking number, the tribunal considers it is unlikely he was lying on 4 January 2021 when he said Royal Mail had confirmed delivery, since he must have known that this was something Mr Gissane could very easily have checked from the tracking number. Certainly Mr Gissane did not respond that he had checked the tracking number and there had been no delivery: he only said he had not signed for it.

48. In the tribunal's view, this was service which complied with s.196(4) of the 1925 Act, without needing to resort to the Interpretation Act 1978, because registered/ recorded post rather than ordinary post was used on that occasion. In those circumstances, the tribunal considers that it is not necessary for Java additionally to produce evidence of the matters set out at paragraph 40(iii) above (which it has not done), as it would have had to do if this had been ordinary post.

49. Importantly, the tribunal considers it is not necessary for Java to prove that Mr Gissane received that letter, only that it was delivered – as

confirmed by the Upper Tribunal in *38/41 CHG Residents Co Ltd v Hyslop* [2020] UKUT 21 (LC) at [26 – 31] (referred to in Mr Gissane's skeleton argument at [125]).

50. Therefore the fact that Mr Gissane denied (in his email of 6 January 2021) signing for that letter is not critical. What matters is the evidence of delivery. The tribunal has concluded on the basis of all the evidence that this particular letter, enclosing the tranche of demands dated 4 December 2020, probably was delivered, by registered/ recorded post, to Mr Gissane's then residential address, on 30 December 2020, whether or not he signed for it - and indeed he acknowledged in evidence that he had received it. Mr Gissane did also receive the demands by email, which is probably why he moved on to responding substantively.

51. Furthermore, since Mr Gissane also requested and acknowledged receipt by registered/ recorded post on 10 January 2021 of the relevant budgets, the tribunal has concluded on the evidence that delivery to his address and so service took place of the demands and also the related budgets/estimates for the years 2018/2019, 2019/2020 and 2020/2021.

52. Therefore the tribunal has concluded that the contractual requirements of the Lease for the service of demands for *interim* service charges for the years 2018/2019, 2019/2020 and 2020/2021 were satisfied. This is in addition to the interim demand for the first 6 months of 2021/2022, service of which he admitted as set out above.

53. The tribunal has seen no sufficient evidence that any of the subsequent demands for advance service charges were served in accordance with the Lease (that is, September 2021-March 2022, March-September 2022 or September 2022-March 2023).

54. Mr Borghol said in evidence that after the first demand was sent by recorded post, Java used normal second class post after that. In order to rely on any such service, Java would have had to produce positive evidence that the documents were placed in an envelope, that the correct postage was paid and the envelope was correctly addressed and posted (see paragraph 40 above). No such evidence was produced and Mr Gissane said that although the position was unclear, he only recalled receiving them by email. As already noted, this was not valid service. Mr Gissane said he had nevertheless paid these interim demands (while disputing his liability to do so) because he was concerned Java might again sue him and fail to notify him of the proceedings.

Service of demands including balancing charges from final accounts

55. Java has never purported to serve any final balancing calculation (and consequent amendment of the contribution due), following preparation of final accounts. Given the opacity and difficulties with clause 2(m)(iii)

if read literally, it is not surprising that Java has not followed the precise process which the tribunal has concluded should be followed for a final account, as set out at paragraph 34 above, but the truth is that Java has only really sought payment of advance payments of service charges.

56. Although the bundle includes what are said to be final sets of service charge accounts for the years ending March 2019, 2020 and 2021, there is no evidence that any of these were served in accordance with s.196. Further, no demand for any balancing sum based on these accounts has ever been served or is in the bundle.

57. In any event, these accounts have clearly not been prepared on the basis of setting out the interim charges demanded, setting out the sums expended and then calculating the difference (as explained at sub-paragraphs 34(ii) and (iii) above.) Rather the income section has apparently been prepared on the basis of the service charges *actually received* in the relevant year, because the total service charge income for 2019 and 2020 is 75% of the budgeted sum (i.e. it equates to the service charges received from the other 3 tenants). The service charge figure for 2021 is a much higher figure, of £2,777.78. Allowing £1,309.67 for the sums probably received from the other 3 tenants, it appears this includes £1,468.11 received from Mr Gissane. This was the year Mr Gissane paid a significant amount of service charges (under protest and without prejudice to his disputing liability) following the County Court proceedings against him.

58. Given the reference in clause 2(m)(iii) to setting off the "*monies received by the Lessor during such year*" it is hardly surprising that Java (probably on advice from PDC) has taken this approach. However, for the reasons set out above, the tribunal considers that it must be wrong in principle and not what the original parties to the Lease intended, for the final accounts to be approached in this way. In addition, the accounts wrongly included ground rent received.

59. It will be necessary for final accounts to be redrawn in line with the guidance given in paragraph 34 above. Only then will it be possible for Java to carry out a reconciliation for each of the relevant years (and in theory raise an amended demand for any outstanding balance). However, as considered below, insofar as there was an under-budgeting in any these years, the earlier balancing charges will now be time-barred if the costs were incurred more than 18 months ago.

60. Accordingly, no valid demands have been served in relation to any final accounts or consequent balancing charges (if any).

61. Given these findings as to compliance with the contractual requirements of the Lease, it is only necessary to go on to consider the further issues in relation to the demands for interim charges for the following periods:

(i) March-September 2018 and September 2018-March 2019;

(ii) March-September 2019 and September 2019-March 2020;

(iii) March-September 2020 and September 2020-March 2021;

(iv) March-September 2021.

Was a valid statement of tenants' rights attached to those demands which were served in accordance with contractual requirements?

62. The service charge demands which were in the bundle included what was headed a "*Summary of tenants' rights and obligations – Service Charges*", which is required to be served with the demand, by s.21B of the 1985 Act. Section 21B(3) provides that a tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

63. Mr Gissane disputed that the summaries attached to the demands complied with the terms of s.21B, because he said they contained inaccuracies.

64. The required contents of such a summary of tenants' rights, as applicable at the date of all the relevant demands, are set out in the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007/1257. Regulation 3 provides that where the Regulations apply, the summary of rights and obligations which must accompany a demand for the payment of a service charge must be legible, in a typewritten or printed form of at least 10 point, must contain the title "Service Charges – Summary of tenants' rights and obligations" and must include the statement set out in regulation 3(b).

65. The summaries attached to the relevant demands do have the correct title (albeit with "Service Charges" at the end rather than the beginning), are printed and legible and are in a sufficiently large font. They also correctly refer to the First-tier Tribunal (unlike the summary attached to an earlier demand of 30 August 2019, which referred to the "leasehold valuation tribunal").

66. Mr Green relied on the following differences between the summary and the text in the statutory instrument: "a" rather than "the" First-tier Tribunal; omitting the word "such" before "application" and adding the word "also" before "have to pay" in the final sentence of paragraph (5), which it is said changes its sense; and a large gap before the word "arbitration" (no words having been omitted).

67. The tribunal does not accept these submissions. It considers that this case is on all fours with the decision in *Roberts v Countryside Residential (South West) Ltd* [2017] UKUT 386 (LC), in which HHJ Alice Robinson rejected the submission that defects including changing the order of the Welsh and English statements and omitting a paragraph number and renumbering the remaining paragraphs did not render the summary invalid. She noted that, applying guidance from the Court of Appeal in *Elim Court RTM Company Ltd v. Avon Freeholds Ltd* [2017] 2 P&CR 8 (relating to service of right to manage notices), the purpose of the requirement in s.21(b)(1) is to inform the tenant what his rights are and what action he may take to protect them, and to inform him of his obligations (at [47]). She concluded that the errors were trivial ones which were of no significance in the context of the statutory scheme.

68. The tribunal has reached the same conclusion in this case. It considers that the drafting differences relied on by Mr Gissane and Mr Green are trivial and would not in truth have affected the understanding of a tenant of their rights and obligations, objectively considered.

69. Accordingly, it has concluded that insofar as demands were served which were contractually compliant, Mr Gissane was not entitled to withhold payment by reason of section 21B(3) of the 1985 Act on the grounds that the summaries of tenants' rights were non-compliant.

70. The demands also attached a summary headed "Summary of tenants' rights and obligations – Administration Charges", intended to comply with similar requirements as regards administration charges, as set out in the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007/1258. In addition to also referring to "a" rather than "the" FTT, this summary contained a more substantive defect in that the two separate clauses in sub-paragraph (2) "*for or in connection with the provision of information or documents*;" and "*in respect of your failure to make any due under your lease*" had been run together to make the single clause: "*for or in connection with the provision of information or documents in respect of your failure to make any due under your lease*", thereby changing the meaning.

71. For the reasons set out below, the tribunal has concluded that there are no administration charges which would be payable in principle in any event. It does not consider it necessary therefore to determine whether this defect is sufficiently serious to invalidate the summary in relation to administration charges. However it would be wise for Java to correct this error in any future summaries which it may serve.

Are any service charges time-barred under s.20B of the 1985 Act?

72. Sub-paragraph 20B of the 1985 Act provides that:

"*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*."

73. Sub-section (2) provides an exception in the following terms:

"*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*."

74. In *Skelton v. DBS Homes (Kings Hill) Ltd* [2017] EWCA Civ 1139; [2018] 1 WLR 362 the Court of Appeal confirmed that s.20B can apply in the case of demands for advance service charges (not just demands for final service charges) where a valid demand for the interim charges is not served until more than 18 months after the costs were incurred. The UT in that case had also held (and there was no appeal on this point) that where the lease required both an estimate and a demand to be served for a valid demand for interim charges to have been made, and the estimate was originally omitted, the demand only became valid once the estimate was also served. Both points are relevant to the present case.

75. The tribunal has held that no valid demand was served in accordance with the terms of the lease until the demands dated 4 December 2020 were served, and the estimates/budgets which related to them were also served. This was not until 10 January 2021. Like in *Skelton*, this was more than 18 months after the costs which some of the earlier demands related to, had actually been incurred.

76. Accordingly, as submitted by Mr Gissane (as a secondary case), any service charges which were incurred before 10 July 2019 are now time-barred under s.20B.

77. This will include all of the service charges included in the interim demands relating to the year ending 24 March 2019. Accordingly the tribunal finds that the service charges in the interim demands for the periods 25 March 2018 – 28 September 2019 for £177.02 [159] and 29 September 2019 to 24 March 2019 for £177.02 [163] are not payable by Mr Gissane. He has never accepted liability for these, even if he has paid them, so they must be re-credited to him if he has paid them.

78. This will also include any service charges relating to the year ending 24 March 2020 insofar as the costs were incurred prior to 10 July 2019.

79. In *Burr v. OM Property Management Ltd* [2013] EWCA Civ 479; [2013] HLR 29 the Court of Appeal held that "incurred" means either, when an invoice for the goods or services is presented or when it is paid, and it was not necessary in that case to decide which. Here there is no bank statement evidence as to when any payments have actually been made, so the tribunal has considered the invoice date, where available.

80. The accounts for the year ending March 2020 allow total expenditure of £1,602.49, and include four items:

(i) Building insurance of **£772.01**. This was incepted on 2 November 2019, so the invoice must have been well after 10 July 2019. This is not time-barred.

(ii) Electricity common parts of £545.48. (There was also a dispute as to the reasonableness of these costs.) The invoices for electricity in the bundle record £98.63 was incurred for the period from 21 March to 19 June 2019 [232]; £119.76 from 20 June to 18 September 2019 [234]; £160.61 for 19 September - 18 December 2019 [236] and £166.48 for 19 December 2019 – 18 March 2020 [237]. These add up to £545.48. Dividing the June – September bill pro rata, this means **£420.24** related to the period from 10 July 2019 and £125.24 to the period before that date.

(iii) "Repairs" of £100. In the Schedule, Mr Borghol said this related to a problem with the timer switch for the lights in the common parts, and that he had had to engage an electrician to replace this and also test the fire alarm, which cost £100. He was asked in cross examination why he had disclosed no invoices relating to this cost, and he replied that this was an error on his part and he could not recall if there was an invoice. In the absence of any copy invoice and of any evidence at all as to when these works were carried out, the tribunal is not prepared to find that the cost was incurred after 10 July 2019. This cost is therefore treated as time-barred.

(iv) Accountancy fees of **£185**. Insofar as these are payable at all, which is considered further below, they will have been incurred at the year end, and so would not be time-barred.

81. The budget for the year ending March 2020 was £1,416.23, so there was an over-spend that year of £186.26. This will now be irrecoverable by reason of s.20B(1) (even assuming the expenditure was reasonable).

82. As calculated above, only £1,377.25 of the expenditure in this year was incurred from 10 July 2019 onwards. 25% of this, or £344.31 related to Mr Gissane. Therefore the maximum interim service charge which could

be recoverable from Mr Gissane for the year ending March 2020, as not time-barred, is £**344.31** (and not the £354.04 demanded in total for that year), subject to the reasonableness of those interim charges.

Are the items in the budgets valid expenditure under the Lease and are the amounts claimed reasonable?

83. Since the tribunal has determined that all of the demands which were validly served were for interim service charges, the question of whether the sums demanded were reasonable falls to be determined under s.19(2) of the 1985 Act.

84. Where a tribunal is assessing reasonableness of interim charges in a case where (as here) the actual expenditure is known, reasonableness is nevertheless assessed by reference to the position when the tenant's liability arose, not by reference to actual expenses known later – *Knapper v. Francis* [2017] UKUT 3 (LC); [2017] L&TR 20 at [36]. However, information which becomes apparent about cost may nevertheless inform the decision about what would be a reasonable cost [38]. Having said that, none of the interim demands for the years ending March 2020 and March 2021 were validly served until 10 January 2021, so Mr Gissane did not become liable for those interim charges until that date, which is therefore the relevant date for assessing reasonableness. As to the March 2021 demand, the relevant date is 25 March 2021.

85. We are only concerned with the budgets for the years 2019/2020, 2020/2021 and 2021/2022 (the interim demands for the other years being either time-barred or not validly served).

86. All of these demands relate to interim service charges payable in advance. Accordingly, any determination of the interim charges does not prejudge the final calculation of service charges for that year, nor Mr Gissane's right to challenge the payability or reasonableness of any such final assessment under section 27A of the 1985 Act.

87. Many of the points about the costs challenged are repeated by Mr Gissane for each year. The tribunal will therefore address the issues of both payability under the Lease and reasonableness on a head-by-head basis.

88. For 2019/2020, the sums claimed on account were 25% of:

(i)	Buildings insurance	£696.23
(ii)	Electricity common parts	£120
(iii)	Accountancy fees	£100

(iv) Reserve fund £500

89. For 2020/2021, the sums claimed on account were 25% of:

(i) Buildings insurance £696.23

(ii) Electricity common parts £150

(iii) Accountancy fees £100

(iv) Reserve fund £500

(v) Repairs and maintenance £300

90. For 2021/2022, the sums claimed on account were 25% of:

(i) Buildings insurance £780.42

(ii) Electricity common parts £250

(iii) Accountancy fees £100

(iv) Reserve fund for future repairs £1,000

(v) Repairs and maintenance £300

(vi) Management fees £1,000

91. The Schedule sets out both the actual and budgeted costs, and so includes the parties' comments on both.

Building insurance

92. Java's obligation to insure is found in clause 3(e) and the costs of this are payable under paragraph 5 of the Second Schedule. The only issue is reasonableness.

93. For the 2021/2022 budget, the sum budgeted of £780.42 was the actual invoiced cost for 2020/2021 [201]. In principle, basing the budget for the coming year on the past year would be reasonable, albeit it will probably understate the cost as the figure will be a year old.

94. Mr Gissane's complaint was that Number 19 was over-insured and therefore the cost was too high. He said the £165,000 limit for loss of rent/temporary accommodation for owner occupiers was too high. He

also complained that it included landlord's contents insurance when there was very little such contents.

95. Mr Borghol said that he used a broker to obtain the building insurance and the matters covered reflected what the insurance was to cover under clause 3(e). In particular it was required to cover two years loss of rent and Property Owners liability in the sum of at least £100,000, although he had requested 3 years loss of rent/temporary accommodation cover as he thought this right. He said he thought the contents cover was thrown in and added very little to the cost.

96. Mr Gissane produced no comparable evidence of insurance premium costs for any of the years in dispute. Mr Green accepted that this made it very difficult for him to challenge the reasonableness of the sums demanded under this head.

97. The tribunal considers that in the absence of any comparable evidence and in circumstances where the heads of cover included in the insurance policies disclosed do relate in general terms to the heads of insurance required under the Lease, and do relate to heads which on the face of it, it would have been reasonable to include as a matter of discretion, and given that this is only an interim charge, the sums claimed on account for insurance in each of the 3 years are reasonable. In each case, the amount payable by Mr Gissane will be 25% of the total for the year, in two equal instalments, i.e.:

    (i) **£174.06** as two instalments for 2019/2020;

    (ii) **£174.06** as two instalments for 2020/2021;

    (iii) **£195.11** for 2021/2022, of which only the first instalment of **£97.55** has been validly demanded on account and so is presently payable.

98. Clause 3(e) requires Java to produce a copy of the insurance policy to the tenant, Mr Gissane on demand, along with the receipt for the current premium. There have been difficulties in the past with Java/Frognal delaying in providing these copies to Mr Gissane when requested. Payment of the service charges is not conditional upon production of these documents, and the tribunal does not consider that Java is obliged to serve these by post since this is not a notice under the Lease, but can email them. However, Java will be in breach of the Lease if it does not produce copies of these documents on demand by Mr Gissane.

Electricity common parts

99. Mr Gissane's main complaint under this head was that the actual electricity costs appeared extremely high for electricity which was only supplying two lights in a hallway and very occasional vacuuming.

100. In fact it is notable that the actual costs claimed for electricity in 2019/2020 and 2020/21 were far higher than the budgeted costs, actuals being £545.48 and £747.34 respectively for the two years.

101. In the Schedule Mr Gissane offered £105.60 for the year ending 2020 and £114.40 for the year ending 2021, in respect of his share of the final costs of electricity, on the basis that it is extremely difficult to understand why the actual electricity costs are so high. In his oral evidence Mr Borghol said he accepted the sums offered by Mr Gissane for these years.

102. A significant amount of time in the hearing was devoted to considering the electricity bills. The tribunal considers the actual costs are surprisingly high for the nature of the property, but insofar as bills were produced, they appeared genuine, if difficult to explain.

103. The tribunal is only required to determine whether the *interim* charges for electricity are reasonable. Against the background of the incurred costs, it considers that the on-account charges of **£30** for 2019/2020 in total and **£37.50** for 2020/2021 in total are reasonable.

104. Since the correct final accounts and balancing charges for the years ending March 2020 and March 2021 have not yet been produced, it would be premature to consider if the final costs are reasonable, but it is anyway noted that the figures for final costs offered by Mr Gissane have been accepted by Mr Borghol.

105. For the year 2021/2022, Mr Gissane has agreed to pay a final sum in respect of electricity of £123.20 (Schedule at [145]), and this has also been accepted by Mr Borghol. This greatly exceeds his share of the on-account amount, which would be £62.50, and the tribunal therefore determines that £62.50 was reasonable as an on-account figure. Only the first 50% or **£31.25** has been validly demanded however.

Accountancy fees

106. Mr Borghol made it clear in his evidence that the service charge accounts and budgets were prepared by him wearing his Java "hat", and were not prepared by any third party accountants. This is not surprising given their simplicity.

107. However, the tribunal agrees with Mr Green and Mr Gissane that the description of the claimed costs under this head as "accountancy fees" in the budgets is misleading, since this obviously suggests the task is being out-sourced to professional accountants (or at least bookkeepers). As such, this intended charge is not reasonable because it was never intended by Java that the work would be undertaken by an accountant.

108. Furthermore, the tribunal agrees that preparing the budget and final account is a matter which should be included in the management fee which Java is permitted to charge under paragraph 6 of the Second Schedule and cannot be separately charged by Java under any other head.

109. In particular, while clause 2(d)(ii) does permit Java to "*carry out any other matters which may be deemed advisable in the discretion of [Java[for the good running administration and maintenance of the Building*", and paragraph 7 of the Second Schedule permits Java to include the costs of any such matters in the service charge, the tribunal does not consider that Java can claim under this clause for ordinary management activities like preparing the budget and final account.

110. Accordingly the tribunal allows no sum on account under the head of "accountancy fees".

111. Mr Borghol complained that the amount allowed for management costs by paragraph 6 of the Second Schedule, which was no more than 10% of the total of Java's expenditure, was much lower than was usual in the market. However, the fact the amount is low compared to the market is irrelevant to determining what Java is permitted to charge by the Lease where this is specified. The Lease limits Java to 10% of total expenditure by way of a management charge, and so Java has no power to charge the tenants any greater sum than this, however unreasonably low and below market rates this may seem.

112. In any event, it is noted that, except for 2021/2022, the budgets do not allow anything for the management charge. Therefore the sums demanded on account in the earlier years are not intended to cover any management charge. If Java wishes to claim its 10% on the expenditure finally incurred, it will need to prepare correct final accounts, and serve them properly with a correct final service charge demand (for those years which are not yet time barred under s.20B of the 1985 Act).

Reserve fund

113. Mr Gissane agreed (in the Schedule and at the hearing) that a figure of £125 for a reserve fund was reasonable for 2019/2020 and 2020/2021, but he objected to the figure doubling in 2021/2022 when there had been no expenditure from the reserves nor was there any planned future need.

114. It was not disputed that none of the funds collected so far through the reserve fund have actually been needed or expended on any works. In those circumstances, the tribunal considers that Java has failed to provide any justification for increasing the reserve to £1,000 in 2021/2022. While Mr Borghol referred in general terms to the need to carry out e.g. roof repairs in due course, there was no evidence of any plan or survey suggesting any particular works might be required.

115. Therefore the tribunal considers that a reasonable sum for an interim charge under this head in 2021/2022 would also be £500 in total or **£125** for the year for Mr Gissane (half of which is presently payable). This is in addition to the same sum of £125 in each of 2019/2020 and 2020/2021.

Repairs and maintenance

116. Mr Gissane objects that in view of the fact that none of the reserve fund has been spent on any repair works, it is unnecessary for Java to demand any sum under this head as well.

117. In principle it would be reasonable to provide an annual sum for small ongoing maintenance matters. This is different from a reserve fund for potential larger expenses. Since this is an interim charge, the tribunal considers that it was reasonable for Java to charge an on-account sum of £300 in total, or **£75** for Mr Gissane, for each the years 2020/2021 and 2021/2022 under this head (half only being currently payable for the latter). No interim charge was made under this head in 2019/2020.

PDC Law's legal fees

118. No sum in respect of PDC's legal costs has been included in any budget. However, the accounts for the year ending March 2021 included the sum of £1,400 for fees for PDC Law, as a service charge.

119. Invoices within the bundle showed that this was made up of:

    (i) £980 said to be for legal advice in relation to ground rent demands and statutory compliance and lease requirements related to service charges and related demands. Since this included £200 Court fees, it appears this included the abortive County Court claim for service charge recovery against Mr Gissane.

    (ii) £180 for legal advice in relation to service charge demands for the Flat.

    (iii) £240 debt collection fees for collecting arrears.

120. The only provision under which Java might argue that it is entitled to charge legal costs as service charges would be 2(d)(ii), quoted above. However, the tribunal does not consider that the phrase "*matters… for the good running administration and maintenance of the Building*" is capable of extending to legal fees for debt recovery for unpaid service charges.

121. In any event, the proceedings against Mr Gissane were abortive because the service charge demands had not been properly served. Accordingly the tribunal considers that it would be wholly unreasonable for any such fees to be demanded from the tenants as a whole (including Mr Gissane) by way of service charges.

122. As to legal advice on compliance with its obligations as a landlord, the tribunal considers that this is also not a matter which could fall under clause 2(d)(ii), but in any event it is unreasonable for Java as a landlord to seek to recharge to its tenants the costs of obtaining any such advice. Such advice is for its own benefit as freeholder and landlord, not for the benefit of the tenants.

123. While this sum has not yet been validly demanded from Mr Gissane, the tribunal gives an indication that it does not consider that any of PDC's legal costs should be recoverable from any tenant.

Total amounts payable by way of interim service charges

124. Accordingly, the tribunal determines that the following total amounts are payable by Mr Gissane by way of interim service charges for the following years:

(i) For 2019-2020 in total: **£329.06** (which is less than the maximum amount not time-barred of £344.31)

(ii) For 2020/2021 in total: **£411.56**

(iii) For 2021/2022 (first 6 month payment only): **£228.80**

Validity and reasonableness of any administration charges

125. Clause 2(e) of the Lease obliges Mr Gissane to pay "*all costs charges and expenses (including solicitors costs and surveyors fees) incurred by the Lessor in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture may be avoided otherwise than relief granted by the Court*".

126. This provision could potentially extend to legal costs incurred in obtaining a finding of breach of the Lease by reason of failure to pay

properly demanded service charges, which would be a necessary preliminary step to any claim to forfeit the lease for such non-payment (see *Kensquare Ltd v Boakye* [2021] EWCA Civ 1725 at [39] – [44]).

127. However, it appears that the County Court proceedings were simply a claim for arrears of service charges, and so could not be regarded as being in contemplation of forfeiture proceedings. In any event, the claim was misconceived and abortive because no valid demand had been served, and ultimately had to be discontinued. It cannot therefore be reasonable for Mr Gissane to be required to pay any part of PDC Law's costs of those proceedings as an administration charge either.

128. There is no express provision under the Lease permitting Java to charge any fee for collection of late payments of service charges. In the absence of any express power to charge any late payment fee, Java is not entitled to demand that Mr Gissane pay any such fee (and the reasonableness issue does not therefore arise).

129. Accordingly the tribunal has concluded that there are no administration charges which are payable by Mr Gissane.

Application under s.20C/Schedule 11 and refund of fees

130. For the reasons set out above, the tribunal has concluded that there is no power under this Lease for Java to recharge its costs of legal proceedings, including any costs of these tribunal proceedings or the PDC costs, to Mr Gissane by way of any service charge or administration charge.

131. However in the event the tribunal is wrong about that, then in any case it makes an order under section 20C of the 1985 Act that the costs incurred by the Java in connection with these proceedings are not to be regarded as relevant costs in determining the amount of any service charges to be paid by Mr Gissane, insofar as these might otherwise have been payable under the Lease.

132. The tribunal also makes an order under paragraph 5A of Schedule 11 to the 2002 Act extinguishing any liability of Mr Gissane to pay any administration charges in respect of the litigation costs of these Applications insofar as these might otherwise have been payable under the Lease.

133. Further, on the application of Mr Gissane the tribunal makes an order pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 that Java shall reimburse to Mr Gissane the fees for the two applications and the hearing which Mr Gissane has paid, within 28 days of the date of this Decision.

134. The reason for all of these orders is that Mr Gissane has been substantially successful in his challenges to the service charge (and administration charge) demands on which Java has relied. In addition, Java failed to comply to a significant extent with the orders of the tribunal for the progression of this matter, causing delay and increased inconvenience in a matter which should have been capable of resolution by agreement.

Name: Judge Nicola Rushton KC **Date:** 31 October 2022

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination –

(a) in a particular manner; or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on [the appropriate 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.]

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).

Schedule 11, paragraph 5A

(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	"The relevant court or tribunal"
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.