FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UG/LIS/2019/0013**
Property	**:**	**Flats A, C, D, E, G & H, 5-7 Lansdowne Square, Northfleet, Kent DA11 9LX.**
Type of Application	**:**	**(1) Landlord and Tenant Act 1985, Section 27A**
Applicant	**:**	**Steven Newman**
Representative	**:**	**D & S Property Management**
Respondents	**:**	**(1) David Noyes (Flats A, C, E & G)** **(2) Dean John Carpenter (Flats D & H)**
Representative	**:**	**Judge & Priestley LLP**
		(2) Commonhold and Leasehold Reform Act 2002, Para 5A Schedule 11
Applicants	**:**	**David Noyes and Dean John Carpenter**
Respondent	**:**	**Steven Newman**
Tribunal Member	**:**	**Judge M Davey**
Date of Decision with reasons	**:**	**24 May 2019**

© CROWN COPYRIGHT 2019

DECISION

Landlord and Tenant Act 1985: Section 27 A

The Tribunal determines that the quarterly sums payable by the Respondents by way of Interim Charges on 25 December 2018 are those demanded in the Interim Charge demands of 7 December 2018. That is to say:

Flat A	£2,990.63
Flats C, D, E, G and H	£3,171.04 per Flat

Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

The Tribunal **does not** make an order under paragraph 5A of Schedule 11 to the 2002 Act that all or any of the costs incurred by the Landlord in connection with these proceedings shall not be treated as relevant costs for the purpose of any future service charge or administration charge demand.

REASONS

The Application

1. By an application ("the section 27A Application") dated 21 January 2019, Mr Steven Newman ("the Applicant"), being the freeholder landlord of Flats A, C, D, E, G & H 5-7 Lansdowne Square, Northfleet, Gravesend, Kent DA1 9LX ("the Flats") applied to the First-tier Tribunal (Property Chamber) ("the Tribunal"), under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to the payability and reasonableness of the interim (service) charge under the leases of the Flats in respect of the service charge year 1 January to 31 December 2019. The Respondents also (by an Application dated 9 April 2019) seek an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), for the limitation of the landlord's costs in respect of the proceedings.

2. The Respondents to the section 27A Application are the leaseholders of the Flats. Mr David Noyes is the leaseholder of Flats A, C, E & G and Mr Dean Carpenter is the leaseholder of Flats D & H. A procedural chair, Judge E Morrison, issued Directions on 20 February 2019, following which Mr D Banfield FRICS issued further Directions on 18 April 2019.

3. The parties accepted that the Application should be determined on the written submissions without a hearing in accordance with rule 31 of the First-tier Tribunal (Property Chamber) Procedure Rules 2013 ("the Rules"). Both parties made written submissions.

The subject property

4. 5-7 Lansdowne Square, Northfleet, Gravesend, Kent DA1 9LX ("the Building") is a purpose built 4 storey block of 8 self-contained flats with internal and external common parts. Flat A is on the ground floor, Flats C & D are on the first floor, Flat E is on the second floor and Flats H & H are on the third floor. Flats B (lower ground floor) and F (first floor) are not part of this Application.

The Lease

5. The leases of the Flats ("the Lease") are all in the same form and were granted in 2008 for a term of 99 years. The Respondents are the original lessees of the Flats. The Applicant landlord acquired the freehold reversion by purchase on 19 October 2018 and was registered as proprietor on 5 December 2018.

6. Clause 31 of the Fourth Schedule to the Lease obliges the Tenant "To pay to the Landlord the Interim Charge and the Service Charge at the times and in the manner provided in the Seventh Schedule….."

7. The Service Charge is contained in the Sixth Schedule to the Lease and covers the matters set out therein together with the obligations imposed on the Landlord by Clause 4 and Part II of the Fifth Schedule to the Lease .

8. The Seventh Schedule (Computation of the Service Charge) provides as follows:

1. In this Lease unless the context requires otherwise:-
   - 1.1 "Accounting Period" means a year (or part thereof) commencing on the first day of January
   - 1.2 "The Total Service Charge Cost" means the aggregate amount in each Accounting Period:-
     - 1.2.1 Incurred in connection with any of the matters referred to in the Sixth Schedule
     - 1.2.2 Considered reasonable by the Landlord as a reserve towards future expenses of a periodical or non-annually recurring nature in connection with any of the said obligations or matters
     - 1.2.3 A management charge by the Landlord of 15% of the total of the other items forming the Total Service Cost if it does not engage managing agents to manage the Building

1.3 “The Service Charge” means the Proportion of the Total Service Cost.

1.4 “The Interim Charge” means such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Landlord (or its Managing Agents or Auditors) shall reasonably specify to be a fair estimate of the Service Charge that will be payable by Tenant (sic) PROVIDED THAT

1.4.1 In the event of it being necessary for the Landlord to undertake urgent work to the Building involving major expenditure not covered by the Interim Charge the Landlord shall have the right forthwith to demand from the Tenant the Proportion of such expenditure whereupon the same shall immediately become due and payable and shall constitute a part of the Interim Charge; and

1.4.2 The Landlord may revise such estimate in respect of an Accounting Period during that period if it shall be fair and reasonable to do so in the circumstances

2. The first payment on account of the Interim Charge (on account of the Service Charge for the accounting period during which this Lease is executed) shall be paid to the Landlord on the execution hereof and thereafter shall be paid to the Landlord in advance on the Rent Repayment Days

3. If the Interim Charge paid by the Tenant in respect of any Accounting Period exceeds the Service Charge for that period then such excess shall be carried forward by the Landlord and credited to the account of the Tenant in computing the Service Charge in succeeding accounting periods (or in the case of the Accounting Period ending on the termination of this Lease) (sic) shall be refunded to the Tenant by the Landlord.

4. If the Service Charge for any accounting period exceeds the total of the Interim Charge paid by the Tenant in respect of that accounting period and any surplus brought forward from the previous accounting period brought forward (sic) then the Tenant shall pay such excess to the Landlord within fourteen days after service upon the Tenant of the certificate referred to in the following paragraph.

5. As soon as reasonably practicable after the end of each Accounting Period the Landlord or its managing agents shall supply the Tenant with a certificate containing the following information:-

5.1 The amount of the Total Service Cost for that Accounting Period

5.2 The amount of the Interim Charge paid by the Tenant in respect of that Accounting Period together with any surplus brought forward from the previous Accounting Period

5.3 The amount of the Service Charge in respect of that Accounting Period

5.4 The amount of the excess to be carried forward or to be paid pursuant to paragraph 3 and 4 above as the case may be

6. Together with the said certificate there shall be delivered to the Tenant a supporting schedule showing the amount and aggregate amounts of any reserves created pursuant to the provisions of clause 1.2.3 of this Schedule

7. The said certificate and schedules shall so far as permitted by law be conclusive and binding on the parties hereto save in relation to any patent error or omission

8. In respect of the current Accounting Period and in respect of the Accounting Period during which the Lease or any period of holding over thereunder shall determine the Service Charge shall be proportioned on a daily basis

9. The Proportion may from time to time be varied if the Landlord reasonably considers it equitable and in that event the Landlord shall give the Tenant written notice of the varied Proportion which shall thereupon be substituted for that previously in effect

The Applicant's case

9. In his statement of case dated 21 January 2019, the Applicant explained that the Application concerns notices dated 7 December 2018 and sent to the Respondents by the Applicant's managing agent, D&S Property Management. The notice letter sought (quarterly) payment of ground rent of £50 for the period 25 December 2018 to 24 March 2019. It also sought payment of £2,990.63 being "First quarterly 1/8th contribution for the landlords anticipated expenditure on the items specified on the budget enclosed herewith for the items specified as applicable to the whole building for the period 1st January 2019 to 31st December 2019."

10. The notices (save for that relating to Flat A) also sought payment of an additional £180.42 per Flat being "First quarterly 1/6th contribution for the landlords anticipated expenditure on the items specified on the budget enclosed herewith for the items specified as applicable to the internal common parts of the building for the period 1 January 2019 to 31 December 2019."

11. All of the letters stated "In addition to the Ground Rent in accordance with the terms of your lease the Interim Charge being the on-account service charge is payable on the Rent Payment days, being the usual quarter days. **This demand requires you to pay all sums demanded by 25th December 2018."**

12. The budget referred to ("the Budget") is set out below.

BUDGET FOR THE PERIOD 01/01/19 TO 31/12/19		
Entire Building – (All 8 flats)		
Gardening		£960.00
Buildings Insurance		£2,400.00
Insurance revaluation		£500.00
Window cleaning		£540.00
Accountancy		£900.00
Surveyors fees		£8,000.00
Management Fees		£2,400.00
Section 20 External Repairs		£80,000.00
		£95,700.00
Contribution per contributing leaseholder	£11,962.00	
Internal Common Parts (Flats C,D,E,F,G &H)		
Communal Cleaning		£1,500.00
Communal Electricity		£200.00
Intercom Maintenance Contract		£900.00
General Repairs		£500.00
Fire Alarm and Emergency Light Testing		£480.00
Health & Safety Risk Assessments including EICR		£750.00
		£4,330.00
Contribution per contributing Leaseholder	**£721.67**	

13. The letter informed the Respondents that a consultation would be carried out in accordance with section 20 of the 1985 Act with regard to the proposed major external repair works estimated at £80,000 and to be instructed in 2019. On 14 December 2018 the Applicant, as an act of goodwill, informed the First Respondent that he could withhold payment of the first quarterly sum of £2,500 in respect of that budgeted item subject to payment of the balance of the demand of 7 December 2018.

14. By an email dated 4 January 2019 the Respondents' representative, Sovereign Services Info, indicated that the Budget was too brief to enable them to assess its reasonableness. They sought further information on cleaning, window cleaning, intercom maintenance contract, general repairs and the surveyor's fee. On the same day the Applicant's agent replied explaining that the cleaning and window cleaning charges were based on the previous year's figures, that the intercom maintenance

contract was based on the cost for buildings of a similar size and that they believed the sum for general repairs to be reasonable. The email also confirmed that the £8,000 surveyor fee was based on 10% of the estimated cost of the section 20 works.

15. On 10 January the Respondents' agent replied that the Respondents intended to pay a quarterly service charge of £276.25 in respect of Flat A. They had factored into this calculation a surveyor's fee of £950 + VAT (based on a quote of that fee by Caxton's for drawing up a specification of section 20 works) and not the £8,000 fee set out in the budget. They proposed to pay a quarterly charge of £456.67 for Flats C,D,E, G & H with the surveyor's fee calculated on the same basis.

16. The Applicant rejected the Respondents' proposed payments and applied to the Tribunal for a determination of (a) how much was payable by the Respondents under the request for payment dated 7 December 2018 (b) the date on which the monies due from the Respondent to the Applicant under the said request fell due and (c) the Interim Charges due from the Respondents for the service charge year 1st January 2019 to 31st December 2019.

The Respondents' case

17. In their brief statement of case, dated 13 March 2019, the Respondents submitted that the Interim Charge in respect of the Service Charge for the Accounting Period 1 January to 31 December 2019 falls due on the usual quarter days in 2019 and therefore no Interim Service Charge for the year 1 January 2019 to 31 December 2019, fell due on 25 December 2018, the first payment not being due until 25 March 2019.

18. The Respondents state that without prejudice to that submission they have paid the Interim Service charge excluding the "section 20 external works" by a payment of £2,559.60 on 17 January 2019 and a payment of £2,559.60 on 1 March 2019 (being payments for all 6 flats).

19. The Respondents acknowledge that the Applicant is entitled to raise a reasonable demand in respect of the proposed external works but denied that the sum claimed is a reasonable estimated demand.

20. They state that they have requested information with regard to the proposed works but the Applicant has failed to provide any information of what works he proposes to carry out in respect of the estimated sum of £80,000 and associated surveyors costs of £8,000. The Respondents submit that in the absence of such an explanation they refute the contention that the estimated sum was a reasonable estimate.

21. The Respondents state that as a result of the lack of explanation regarding the proposed works, the Applicant and Respondents agreed to appoint Caxton's, surveyors, to provide a schedule of required works and the Applicant duly appointed Caxtons to carry out an inspection on 19 February 2019. The Respondents stated that as at 13 March 2019 (the date of their initial Statement of Case), they had not received a schedule

of condition with estimated costs of the necessary works.

The Applicant's response.

22. In his response, dated 25 March 2019, to the Respondents' statement of case, the Applicant submits that payment of the first quarterly instalment of the Interim Charge fell due on 25 December 2018. He submits that Paragraph 1.4 of the Seventh Schedule to the Lease provides that the Interim Charge is a charge to be paid on account of the Service Charge in respect of each Accounting Period being a sum reasonably specified by the landlord as a fair estimate of the Service Charge that will be payable by the Tenant. The Applicant says that Paragraph 1.4 does not provide that the Interim Charge is payable only in that Accounting Period.

23. The Applicant says that Paragraph 2 of the Seventh Schedule provides for the Interim Charge to be payable in advance on the Rent Repayment Days (being the usual quarter days). He says that paragraph 2 does not say that the first of those payments *in respect of* each Accounting period will be due on the March quarter day *in* each Accounting Period. He submits that the requirement for advance payment must mean that the first payment of the interim Charge in respect of each Accounting Period will be due on 25 December of the previous year, otherwise the first payment would always be in arrears. He says that this was the conclusion that any reasonable person having all the background knowledge, which would have been available to the parties, would have come to (See *Arnold v Britton* [2015] UKSC 36 and *Firstport Property Services Limited v Ahmet* [2017] UKUT 0036 LC).

24. The Applicant further submits that because on account Interim Charges had been demanded of the Respondents in all previous years on a quarterly basis, the first instalment having been demanded as falling due on 25 December in the previous year, it can be assumed that the parties understood at the time the document was executed that the first quarterly payment would fall due on the December quarter day prior to the start of the Accounting Period.

25. The Applicant states that if it is not correct that the Interim Charge has been demanded in accordance with the terms of the Lease then he relies on the fact that during the lifetime of the Leases the on-account payments have been demanded quarterly and on the basis that the first quarterly payment would fall due on the 25 December prior to the commencement of the service charge year (i.e. the Appropriate Period), thus giving rise to the principle of estoppel by convention (*Jetha v Basildon Court Residents Company Limited* [2017] UKUT 58 (LC)). The Applicant says that an estoppel by convention operates where parties to a transaction have assumed a state of facts or law, with the effect of preventing one party from denying a common assumption if it would be unjust to go back on that assumption.

26. The Applicant also relies on the fact that when the matter of the Interim

Charge has been before the First-tier Tribunal on previous occasions it has never been held by the Tribunal, or argued by the Respondents, that the common assumption now disputed was wrong. The Applicant makes particular reference to a decision of the Tribunal dated 26 March 2018.

27. The Applicant further relies on the doctrine of issue estoppel in so far as the Respondents are seeking to raise a point that they might have raised, but did not raise in the earlier proceedings (see *Arnold v National Westminster Bank plc* [1991] 2 AC 93).

28. With regard to the section 20 works estimate, the Applicant denies that the Respondents or their agents requested details of how the estimated figure of £80,000 had been arrived at. He says that had he received such a request he or his agents (neither of whom are qualified surveyors) would have informed the Respondents that based on their knowledge of similar buildings in a similar state of repair the following rudimentary analysis had been undertaken.

	Adjusted	Plus VAT	
Scaffolding	£20,000.00	£24,000.00	Blocks of similar size - £5,000 per elevation
Roof	£6,000.00	£7,200.00	If scaffolding is erected at a cost of around £20,000 need to undertake all that will be required for next 5 years. Provide for a PC sum of £6,000 for budgeting purposes for any works that may be required.
Walls (include repairs)	£10,000.00	£12,000.00	Significant cracks – Possible re-render-decorative feature missing-Provide replacement of decorative features, significant rendering and painting
Windows	£9,000.00	£10,800.00	Provide for some timber replacement and painting. Possible some will need more extensive overhaul
Surrounding areas	£5,000.00	£6,000.00	Front steps recovering, replacement of broken slabs, investigating dips, painting railings and walls
Preliminaries	£3000.00	£3600.00	Provided for 5% of contract sum

Fascias	£1,500.00	£1,800.00	Repairs & Redecoration
Contingency/ additional provided repairs	£10,000.00	£12,000	Would expect there to be a 10% of contract sum contingency however additional repairs maybe identified £7,000 contingency and £3,000 additional repairs
Section 20 consultation		£1,600.00	£200 per flat
		£79,000.00	Rounded up to £80,000 for budgeting purposes

29. The Applicant says that prior to preparing the Budget he attended the Building in order to assess from ground floor level what works may be required in order to comply with the Landlord's repairing covenant. He placed in evidence a copy of a selection of the photographs taken during that initial inspection and subsequent inspection which indicated some of the external disrepair.

30. With regard to the appointment of Caxtons, the Applicant says that this was not because of the Applicant's failure to provide an explanation regarding the proposed works, as alleged by the Respondents. He says that the true position is that the Applicant made an offer to the Respondents to nominate a surveyor in the hope that this would alleviate any concerns that the Respondents may have. He says however that it was always the Applicant's intention to appoint a surveyor.

31. The Applicant says that since the Budget was prepared in December 2018 matters had moved on. In February 2019, the Applicant appointed Caxtons to prepare a specification for the required external works and internal decorative works. The Applicant says that if the external works come in significantly under budget he will undertake a section 20 consultation and instruct the required internal works as well, otherwise the redecoration will be undertaken in the following year. The (uncosted) outline specification was provided by Caxtons in March 2019. By an email of 14 March 2019 to the Applicant, the surveyor confirmed that he was of the opinion that the necessary external works would be in the region of £50,000-£65,000 plus VAT. The Applicant submits that it is reasonable to take the higher figure, which when coupled with a consultation fee of £1,600, provides support for his estimated cost of the section 20 external works. The Applicant agreed the specification of works with Caxtons on 13 March 2019 and on or about the 20 March 2019 the Applicant commenced the section 20-consultation process by serving a Notice of Intention on all leaseholders in the building.

32. The Applicant says that with regard to the Respondents' statement that

they had made without prejudice payments of Interim Charges, neither payment was made without prejudice to the contention that the first quarterly payment was not due until 25 March 2019. Furthermore, the Applicant says that the Respondents have not paid 1/8th of the £950 plus VAT surveyor's fee. He says that each of the Respondents has in fact paid two quarterly instalments of 1/8 of £950 pounds plus VAT.

33. For the avoidance of doubt the Applicant submitted that it was not pre-emptive for him to have included provision for section 20 works in the Budget prior to the conclusion of a section 20 consultation (*23 Dollis Avenue (1988) Limited v Vejdani and Echgragi* [2016] UKUT 0365).

34. The Applicant says that the first time the Respondents asserted there had been a lack of explanation as to how the Budget had been made up was in their original statement of case to which the Applicant has responded in his statement in reply. Having provided an explanation the Applicant relies on *Knapper and others v Francis and Francis* [2017] UKUT 0003 LC in support of his contention that the only evidence of likely cost of the section 20 works available at the time of the demand was the rudimentary assessment detailed above and therefore it was reasonable for him to have relied on the information available to him at that time.

35. Finally, the Applicant reiterated that he had offered to the Respondents the option of withholding the payment of £2,500 per flat per quarter, being the monies proposed to be expended on the section 20 works, until unknown factors became known. However, the offer was conditional on the Respondents paying the balance of the sum demanded by way of Interim Charge. This they had refused to do and therefore the Applicant now sought to rely on his contractual entitlement to payment of the full Interim Charge for the relevant quarter(s).

36. By a letter dated 9 April 2019, the Respondents' solicitors, Judge & Priestley, submitted a further statement of case to which the Applicant replied on 1 May 2019. In their statement of case the Respondents state that "The only issue between the parties is the reasonableness of the on account demand for proposed major works in the sum of £80,000 plus £8,000 pound for surveyors fees." In his reply the Applicant considered that this meant the Respondents no longer sought to argue that the disputed quarterly payment was not due on 25 December 2018.

37. In their statement the Respondents asserted that they had entered into a dialogue with the Applicant with regard to the appointment of Caxtons to provide a costed specification of works before the Respondents paid the Interim Charge in respect of the works and the associated surveyor's costs. They state that because this had not been received by 21 January 2019, the estimated demand was in issue and therefore the Application to the Tribunal on that date was premature and the Interim Charge was accordingly unreasonable to that extent.

38. In response the Applicant's rely on their statement of case where they

explain that there had never been an agreement between the parties that the Applicant would appoint Caxton's and await their costed specification before the Respondents would be required to make the payment with regard to the disputed sums. They further assert that any dialogue with regard to the on-account payment came to an end on 17 January 2019 and therefore the application to the Tribunal was not premature.

Discussion

39. The property 5-7 Lansdowne Square ("the Building") has a chequered history. It consists of 8 self-contained flats in a four-storey building with common parts. The flats are all held on 99-year leases, which were granted to the Respondent lessees in 2008 by the then freeholder, Riverview Square Limited. The Leases are all in common form and will be referred to hereafter as "the Lease." As is common in this type of development the Lease places obligations on the Landlord to repair and maintain the structure of the building and to provide specified services, whilst the Tenant is obliged to contribute to the costs of the same by way of an annual Service Charge. The Lease makes provision for advance interim service charge payments (referred to as the "Interim Charge") with a reconciliation taking place on or after the end of an Accounting Period (1 January to 31 December each year) when any surplus of advance charge payments over the actual costs are to be credited to the Tenants or allocated to reserves or any shortfall is to be paid to the Landlord by the Tenants.

40. Unfortunately, as the new owner of the Building (the Applicant) acknowledges, there have been problems from the outset with regard to the Service Charge. These problems have led to protracted litigation over the years between the landlords for the time being and their agents and the Respondents. Those landlords and agents have changed over the years since the Leases were granted. The Respondents disputed service charge demands almost from the outset and withheld payments. In 2012, at a time when the Landlord was B M Samuels Finance Group Limited (being the mortgagee in possession of the freeholder's interest), Mr Noyes and Mr Carpenter applied to the Tribunal for a determination as to the payability of service charges, for the years 2009 to 2013, the entirety of which they disputed (CHI/29UG/LSC/2012/0079). The matter was heard in May 2013. At that time the Tribunal inspected the property and noted that externally it was in a poor condition.

41. On 6 June 2013 and 20 May 2014 the Tribunal made determinations as to the payability and reasonableness of the service charges for the years 2009, 2010, 2011 and 2012. In 2016 the Tribunal received references from the county court with regard to the payability and reasonableness of service charges over several years in respect of the Flats held by Mr Noyes and Mr Carpenter. On 26 March 2018, the Tribunal determined the charges for the years 2013, 2014 and the budgeted sums for 2015.

42. On 19 October 2018, Mr Steven Newman, who is a solicitor, acquired the freehold interest in the Building and was duly registered at HM Land Registry as freehold proprietor of the Building on 5 December 2018. Mr Newman appointed D & S Property Management ("D&S") as his managing agents. It is clear from the evidence that Mr Newman is seeking to put the management and maintenance of the Building on a fresh footing and he has sought to engage constructively with the leaseholders to bring the Building up to standard.

43. To this end, on 7 December 2018, D&S issued the disputed Interim Charge notices to the Respondents. (Flat A is a ground floor flat and does not contribute a service charge in respect of the common parts in the Building, which it does not share).

44. The proportions of 1/8 (whole building costs) and 1/6 (common parts costs) were determined by agreement of the then landlord and tenants in 2012 following a (leasehold valuation) tribunal decision with regard to another building in the development owned by the then landlord of the Building. (It will be noted that the Lease fails to define "the Proportion" and this omission had caused problems as to how the Service Charge and Interim Charge should be apportioned).

45. Although, in correspondence between the parties, the Respondents initially disputed the reasonableness of the Interim Charge requested at large they subsequently narrowed their objection to the reasonableness of sums allocated to two items in the budget for 2019. That is to say the sum of £80,000 allocated to what is described as "section 20 repairs" and the sum of £8,000 allocated to "surveyors fees". Failure to agree on these matters led to the present application to the Tribunal by Mr Newman. In their initial statement of case the Respondents raised a new issue for the first time. They argued that the first quarterly Interim Charge payment in respect of the Accounting Period 2019 was not payable until 25 March 2019. It is unclear from the Respondents' statement of case of 9 April 2019 whether this matter is still in issue and therefore for the avoidance of doubt the Tribunal deals with this matter first.

46. Clause 3 of the Lease provides that "the Tenant covenants with the Landlord to observe and perform the covenants and obligations contained in the Fourth Schedule hereto." Paragraph 31 of that Schedule contains a covenant by the Tenant "To pay to the Landlord the Interim Charge and the Service Charge at the times and in the manner provided in the Seventh Schedule both of which shall be recoverable in default as rent in arrear.

47. In summary, the Sixth Schedule specifies the items falling within the Service Charge, which include the obligations of the Landlord (in the Fifth Schedule) relating to the repair of the main structure of the Building.

48. Paragraph 1.4 of the Seventh Schedule defines the "Interim Charge" as meaning (so far as relevant to this Application) "such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Landlord (or its Managing Agents) shall reasonably specify to be a fair estimate of the Service Charge that will be payable by the Tenant…"

49. Paragraph 2 of the Seventh Schedule provides that "The first payment on account of the Interim Charge (on account of the Service Charge for the Accounting Period during which this Lease is executed) shall be paid to the Landlord on the execution hereof and thereafter shall be paid to the Landlord in advance on the Rent Repayment Days." Although the Lease does not explicitly define " the Rent Repayment Days" the particulars of the Lease provide that "The Rent" is "payable quarterly in advance on the usual quarter days."

50. The Applicant argues that on the plain wording of the Lease, Paragraph 2 of the Seventh Schedule means that the Interim Charge is payable *in advance* by four instalments, payable (save for the initial instalment on granting of the Lease) on the Rent Repayment Days (specified in the Lease as the usual quarter days). The Applicant recognises that Paragraph 2 does not specify which of the usual quarter days should be the first Rent Repayment Day in each year for the purposes of the Interim Charge. However, he argues that because paragraph 1.4 makes no reference to all the payments having to fall within an Accounting Period it is logical that the first *advance* Interim Payment for the Accounting Period 1 January to 31 December 2019 should be 25 December 2018. He says that otherwise the Landlord would be obliged to fund the Building for the first three months of the year thereby defeating the purpose of on account payments and making the Interim Charge being paid in arrear. The Applicant says that his interpretation is the meaning that a reasonable person would have assumed when entering into the Lease.

51. The Respondent's apparent argument is that the reference in paragraph 2 of Schedule 7 to payment of the Interim Charge instalments on the Rent Repayment Days must mean those Days that fall within the Accounting Period in respect of which they are paid.

52. The Tribunal finds that, whilst the Lease could have been more explicit, the interpretation advanced by the Applicant is correct. Furthermore, it is clear that from 2009 onwards invoices have been presented, accounts settled and tribunal proceedings fought and determined on the assumption by the parties to the leases (including the Respondents who have held the leases throughout) that the first quarterly payment for an Accounting Period is payable on the preceding 25 December or such later date as specified in the demand, not being earlier than the date of the demand. The Respondents have accepted this position without demur until the present case. In any event there is no doubt that four quarterly payments are required *in respect of* each Accounting Period and if the Respondents' construction of the Lease were to be accepted it would require a

disproportionately expensive unravelling of accounts over many years to very little, if any effect, in the amount payable in total.

53. The Tribunal therefore finds that the first Interim Charge payment for the Accounting Period 2019 was due on 25 December 2018.

54. That leaves the reasonableness of the Interim Charge. The only payments in the Budget challenged by the Respondents were those described as "Section 20 works" and the associated surveyors fees.

Section 19 of the 1985 Act provides that

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

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services, or the carrying out of works, only if the services or works are of a reasonable standard

and the amount payable shall be limited accordingly

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

55. The present case is covered by section 19(2) because it is dealing with an Interim Charge. The first issue is whether the Applicant was contractually entitled to make the demand in question. The Lease clearly permits the Landlord to demand payment of an Interim Charge in respect of each Accounting Period as the Landlord (or its Managing Agents) shall reasonably specify to be a fair estimate of the Service Charge that will be payable by the Tenant..." It cannot be, and indeed is not, disputed that the Building has been deteriorating over time and is in need of external repairs. Thus as a matter of contract the Landlord was entitled to seek an advance Interim Charge payment in respect of proposed expenditure on such repairs in 2009, it being anticipated on 7 December 2018 that a section 20 1985 Act consultation would be carried out in 2019 and the necessary works then instructed.

56. The Respondents do not deny that the Applicant was entitled to make a demand but they deny that the sum demanded was a reasonable estimate "in the absence of any explanation of the proposed works." They say that, "As a result of the lack of explanation of the proposed works, the Applicant and the Respondents agree (sic) to appoint Caxtons Surveyors to provide a schedule of the proposed works." The Respondents submit that because no such schedule or estimated cost had been received, the Application to the Tribunal was accordingly premature.

57. The Applicant denies that there was any such agreement and the Tribunal agrees that the evidence does not support the Respondents' claim, for the following reasons. In an email letter to the Respondents dated 14 December 2018 the Applicant made it clear that the Interim Charge was not conditional on a section 20 consultation having taken place, citing the decision of the Upper Tribunal (Lands Chamber) in *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 0365). In that case it was stated by the Upper Tribunal that

"there is no basis for the statement that a payment in advance was premature until:

....an adequate specification including satisfactory references, normal safeguards for security of funds, and supervision of the work had been successfully tended,

Such a requirement would largely emasculate the provisions for payments in advance."

58. In his email of 14 December 2018 to the Respondent, Mr Newman stated that "subject to you paying the balance of the requested monies we would have no objection to you withholding £2,500 per flat with regard to the monies due on 25th December 2018. The email made it clear that this suspension would apply until the section 20 Notice consultation was complete and if necessary the Interim Charge payments due would then be adjusted. In the same email Mr Newman afforded an opportunity to the Respondents to nominate a surveyor who would prepare a specification of the works."

59. In an email to the Respondents dated 4 January 2019, Mr Newman sought a response to his offer as a matter of urgency. Later that day the Respondents replied that they had received a quotation for preparation of the "spec of works" from Caxtons for a fee of approximately £1,000. They said that they could not "predict a cost for the surveyor to supervise the works until they have completed the spec of works." They made it clear that at that stage therefore they would only be prepared to pay Caxton's quoted sum of £950 plus VAT by way of surveyors fees in relation to the proposed works. In his reply of the same date Mr Newman stated that "with regard to the surveyors fees, as discussed with Mr Noyes, the figure of £8,000 is based on 10% of the cost of the works, thus if the cost of the works are less surveyors costs will reduce also."

60. In their emailed reply the Respondents made it clear that they would not make payment of the relevant Proportion of the works costs (i.e. £2,500 per Flat) or associated surveyor's fee (i.e. £250 per Flat). In an email letter to the Respondents, dated 10 January 2019, Mr Newman made it clear that the suspended £2,500 charge would be payable unless the Respondents paid the balance of the Interim Charge including the quarterly payment of £250 per flat in respect of the £8,000 surveyor's fee. Because the payments made by the Respondents did not include this charge or the £2,500 charge, the Applicant therefore seeks payment of

the full charge demanded on 7 December 2018, the condition of his concession with regard to the postponed payment of the £2,500 charge not having been satisfied.

61. The Tribunal therefore agrees with the Applicant's submission that there had not been any agreement between the parties that the charge should not be payable until the works had been specified and fully costed. Furthermore, the Respondents' submission that the Application to the Tribunal was premature fails to have regard to the fact that the time at which the test of reasonableness is to be applied is the earlier time of when the demanded Interim Charge payment was due and not the date when the Application was made to the Tribunal.

62. The remaining issue for the Tribunal therefore is whether the sums demanded on 7 December 2018 in respect of the works and the surveyor's fees were reasonable or not. The fact that no preliminary estimates had been prepared at that time is not in itself a determining factor. It was highly likely at that time that a contract for the section 20 works which all are agreed were necessary would be placed in 2019 and this would involve expenses in terms of surveyors fees and contractor's charges. The Applicant has disclosed – albeit as part of these proceedings - that before sending the demand he had carried out what he described as a rudimentary assessment which had led him to believe that £80,000 was a fair estimate of the likely cost of the section 20 works together with a fee of 10% thereof by way of surveyor's supervision etc. fees. His budgeted figure is supported by the opinion of the Caxton's surveyor, subsequently given on 14 March 2019, that a figure towards the upper end of a range from £50,000-65,000 plus VAT would be a fair estimate. On completion of the works and preparation of the Service Charge account for 2019 any adjustments should then be made in accordance with the terms of the Lease.

63. The Tribunal's determination is that having regard to all the circumstances as described in the preceding paragraph the sums demanded in the Interim Charge demands of 7 December 2018 were reasonable and payable on 25 December 2018.

The paragraph 5A of Schedule 11 to the 2002 Act Application

64. The Applicant having been successful in respect of the section 27A Application the Tribunal determines that it is just and equitable that the Respondents' application for an Order under paragraph 5A of Schedule 11 to the 2002 Act, preventing the Landlord from recovering under the Lease all or any costs incurred in connection with these proceedings by way of any administration charge demand, be dismissed. This is without prejudice to the quesion of whether the Lease would permit such recovery.

Right to 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, that 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.

Martin Davey
Chairman of the Tribunal

Annex: The relevant statute law

Landlord and Tenant Act 1985

Section 18(1) defines a "service charge" as:

"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."

Section 19 provides that:

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

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly".

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

"Relevant costs" are defined for these purposes by **section 18(2)** of the 1985 Act as "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.

Section 20 provides that

(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 20ZA provides that

In section 20 and this section—

“qualifying works” means works on a building or any other premises, and “qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

Section 27A provides that

(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.

Commonhold and Leasehold Reform Act 2002

Paragraph 5A of Schedule 11 provides that

(1) A tenant of a dwelling in England make 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 the kind mentioned in the table and
    (b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to these 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 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