FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/45UD/LSC/2017/0099
Property	**:**	1 Budgenor Lodge, Dodsley Lane, Easeborne, Midhurst, West Sussex Gu29 0AD ("the property")
Applicants	**:**	(1) Mr. William John Cooper (2) Mrs. Susan Cooper
Representative	**:**	None
Respondent	**:**	(1) Budgenor Lodge Limited (2) Mrs Carole Moller (38 Budgenor Lodge) (3) Mr Mitchell Burman (39 Budgenor Lodge) (4) Mrs J Halpin (37 Budgenor Lodge) (5) Mr RKD Slade (27 Budgenor Lodge) (6) Mr Douglas Shakespeare (18 Budgenor Lodge)
Representative	**:**	None
Type of Application	**:**	For the determination of the liability to pay a service charge
Tribunal Member(s)	**:**	Tribunal Judge H Lederman Tribunal Member Roger Wilkey JP FRICS
Date of Determination	**:**	20 February 2019
Date of Decision	**:**	25th February 2019

FINAL DECISION

Summary of Decision

1. The costs incurred for repairs to or renewal of conservatory roofs at Budgenor Lodge in the service charge years 2016/2017 and 2017/2018 are not payable as service charges under the Leases of Budgenor Lodge on the evidence presented to the Tribunal.

2. The £1788.30 claimed as service charges in a written demand addressed to Mr. and Mrs. Cooper as lessees of 1 Budgenor Lodge dated 31 10 2017 is not payable as a service charge under the terms of their Lease.

3. The Tribunal is unable to determine whether if costs were incurred in the future for repair, maintenance or renewal of conservatory roofs in Budgenor Lodge, such costs would be recoverable as service charges under paragraphs 7 or 10 of the First Schedule and clauses 2.2 and the Seventh Schedule to the Lease, as it does not have specific proposals or costs which it is asked to rule upon.

4. None of the costs of these Tribunal proceedings or management costs relating to these Tribunal proceedings are relevant costs for the purpose of service charges, under section 20C of the Landlord and Tenant Act 1985.

5. The Tribunal makes no order for reimbursement of application or hearing fees incurred by the Applicants.

Reasons for the Final Decision

Scope of the Final Decision

6. Broadly, the conclusions reached in the Interim Decision of 24th May 2018 hold good. This Final Decision should not be read or understood as concluding that works to conservatory roofs could never be charged to service charge under the Lease. This Final Decision concludes that upon the particular evidence put before the Tribunal and the service charge demands made available after the Interim Decision, the costs of conservatory works claimed in the Service Charges Demands at pages 252-262 of the Hearing Bundle, are not payable as service charge by any of the Lessees who are parties to this application.

7. This Final Decision does not act as a binding precedent. It does not determine whether costs of conservatory works can or cannot be charged to service charge in the future for the reasons given below. Nor is this Final Decision, a decision upon whether in other service charge years, the costs of conservatory works were properly charged to service charge. The Tribunal has not been asked to determine that issue.

8. If there is doubt about whether such costs could be properly charged to service charge, an application to the Tribunal could be made in advance of the costs being incurred and before the service charge demand is issued under section 27A(3) of the Landlord and Tenant Act 1985 ("the Act"). That has not been done in this case.

9. To clarify. The Tribunal does not have jurisdiction to decide whether the conservatory owners such as 1 Budgenor Lodge are liable for those costs or some other cost of works to the conservatories, unless those costs are claimed as service charges. There may be other legal grounds upon which conservatory owners are liable for those costs, assuming the costs have been incurred by the First Respondent. The issue of what that liability might be is not within the Tribunal's jurisdiction to determine.

The application

10. The Applicants seek a determination pursuant to Section 27A(1) of the Act as to the amount of service charges payable by the Applicants in respect of the service charge years 2016/2017 and 2017/2018 for repairs to conservatory roofs at 1 Budgenor Lodge. This application was taken in addition to refer to the cost of renewal of the conservatory roof.

11. At the hearing on 20th February 2019, it became apparent that the application was also intended to seek guidance generally for all Lessees at Budgenor Lodge whether the costs of repairs to conservatory roofs would be payable as service charges under the terms of the Leases if such costs were incurred in addition to the question whether the cost incurred in the specified service charge years. The application had not been drafted with professional assistance. All parties treated the hearing as dealing with the wider question of whether the costs of repairs to conservatory roofs would be payable as service charges under the terms of the Leases. The Tribunal accordingly treated the application as addressing that issue under section 27A(3) of the Act as well as the question of whether the costs incurred for such works in the service charge years 2016/2017 and 2017/2018 were payable.

12. The Tribunal's decision is only binding upon those lessees who were parties to this application.

13. No specific costs or proposals were available for future works to conservatory roofs. Accordingly the Tribunal has been unable to determine the question whether the future costs of repairs to conservatory roofs would be payable as service charges under the terms of the Lease. The provision of section 27A (3) of the Act require the Tribunal to make a determination upon specific costs: see *Jarowicki v Freehold Managers (Nominees) Limited v Prokhorov* [2016] UKUT 435 (LC). However the Tribunal considered argument on this issue in

the context of the costs incurred for service charge years 2016/2017 and 2017/2018 and its conclusions are recorded in these reasons.

14. The relevant legal provisions are set out in Appendix A to this decision.

Procedure

15. The Tribunal issued directions on 10th November 2017 ("the Initial Directions") indicating this application was to be determined without a hearing in accordance with rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169 ("the 2013 Rules"), unless any party objected to that procedure within 28 days of receipt of the Initial Directions.

16. The Initial Directions recorded that the Applicants consented to a determination without a hearing by e-mail of 20th October 2017. No party indicated that a hearing was required.

17. At that stage the statements and letters from other lessees included within the Determination bundle at section 4 (Colin Sanderson and Enny Sanderson of 10th December 2017, Jacob GP Roell of 5th December 2017, Kate Henderson of 5th December 2017, TS Manns of 12th December 2017) did not indicate that a hearing was requested or required.

18. The Tribunal reached an Interim Decision 24th May 2018 and in that Decision issued directions requiring further evidence to be provided to the Tribunal for its Final Decision. Those directions invited the Respondent Budgenor Lodge Limited (then the only Respondent) to provide that copies of the Interim Decision to each lessee at Budgenor Lodge and to seek their consent to being bound by the final decision of the Tribunal. That consent was not forthcoming.

19. On 31st October 2018 the Tribunal ordered Mrs Carole Moller, Mr Mitchell Burman, Mrs J Halpin, Mr R Slade and Mr Douglas Shakespeare to be joined as Respondents to the application. It appeared to the Tribunal Judge at that stage that it was appropriate to do so in the light of correspondence from them commenting upon the Interim Decision.

20. On 15th November 2018 earlier directions were varied at their request to enable the Second, Third, Fifth and Sixth Respondents to seek professional advice.

21. On 3rd January 2019 the Tribunal Judge considered that the letters and documents that had been filed meant that the application was not suitable for determination without a hearing. The hearing on 20th February 2019 ("the hearing") was then arranged.

Attendance at hearing on 20th February 2019

22. At the hearing Mr Deadman director attended and represented the First Respondent Budgenor Lodge Limited. He was assisted by Mr Barrett, the lessee of 26 Budgenor Lodge. Each of the other Respondents attended save for Mrs Jenni Halpin who was said to have been absent abroad. No request to adjourn the hearing was made by her or on her behalf and she was not represented at the hearing but, had sent a written statement at page 263 of the Hearing Bundle which the Tribunal takes into account.

23. In addition, Mr Peter Moller the joint lessee of 38 Budgenor Lodge and a director of the First Respondent until his resignation about a year ago, attended and spoke in support of his wife's (Carole Moller) position. Mrs Rosalind Davies of 2 Budgenor Lodge and Miss Kathryn Henderson of 30 Budgenor Lodge also attended.

The Hearing bundle

24. The Hearing Bundle consisted of 303 pages and was considerably larger than the Determination Bundle utilised for the Interim Decision. The Hearing Bundle was supplemented by coloured copies of plans designated as plans A, B, C and D in the Lease (monochrome copies of which were at pages 66-70 of the hearing bundle). Service charge accounts for Budgenor Lodge for the year ending 31 January 2017 dated September 207 and draft service accounts for the year ended 31 January 2018 dated March 2018 were, at the request of the Tribunal, also introduced into evidence.

Terminology

25. References to page numbers in these Reasons are to the Hearing Bundle. Some of the correspondence and statements in the Hearing bundle contains use of terminology which might give rise to confusion. In these Reasons references to lessees include lessees who have 125 year leases and 999 leases. References to "freehold owners" or freeholders are to those owners who are not lessees. References to "shareholders" in this Decision or the Interim Decision are to those members of the First Respondent who have rights as members of that company, which is a company limited by guarantee without shares. As Mr Moller correctly noted, the members are not shareholders in the legal sense.

Status of these reasons

26. Many of the issues were the subject of extended debate. These reasons summarise the key points which the Tribunal thought were of relevance. They do not rehearse every single argument or piece of evidence.

The background - Budgenor Lodge

27. All parties agreed Budgenor Lodge is a Grade II Listed building in Easeborne built in the late 18th century as a workhouse (Midhurst Union workhouse). In 2007 it was redeveloped into private residential dwellings together with other buildings now known as Budgenor Lodge. The main building ("the Main Lodge") faces east and has a hipped tiled roof. The First Respondent landlord is a company whose members are restricted to those who are leasehold owners and whose directors are also members. The First Respondent appears to have acquired the freehold of Budgenor Lodge (as defined below) in 2015. The First Respondent was not the original landlord at the time of the redevelopment in 2007. The original landlord appears to have been a commercial entity.

28. Budgenor Lodge consists of 42 dwellings, some of which were added as "new build" at the time of the redevelopment in 2007. At the relevant times the development comprised 21 apartments in the Main Lodge Building, 11 houses and 3 apartments in two wings, 4 apartments in a separate building and 3 "freehold" new build cottages. This was common ground.

29. There are only 39 leasehold properties governed by the relevant Lease, although the freehold owners (that is those who are not lessees) also contribute to the costs of the Budgenor Lodge estate. Some 12 of the lessees at Budgenor Lodge hold 125 year leases and are not members or officers of Budgenor Lodge Limited the landlord. The remaining lessees are members of Budgenor Lodge Limited the landlord.

30. A schematic representation of the development known as Budgenor Lodge can be found in the plans incorporate into the Lease labelled A, B, C, D and E at pages 66 - 70. The Tribunal has assumed these plans are the same as the supplemental plans referred to in the official copy of the freehold title held by Budgenor Lodge. None of the parties took issue with the validity or authenticity of the plans, colour copies of which were provided to the parties who attended the hearing.

The topography of the conservatories

31. A colour photograph of Unit 1's "conservatory" is at page 14 and at the far left of the photographs at pages 14A and 14B. Six of the conservatories are on the southern external elevation of the Budgenor Lodge (to the left of page [66]) and are depicted on page [14C]. It was not disputed that the "conservatory" for each of the 11 apartments was not a later addition but an integral structure to the conversion of Budgenor Lodge with a brick partition wall between the dwellings and the conservatories. The letter of 14 December 2017 from William Cooper the First Applicant makes this clear.

32. The photographs show that the conservatories are a ground floor structure with a sloping glass roof. It was asserted and the Tribunal finds, that the only glass roofs in Budgenor Lodge at the date of the hearing are the conservatory roofs. Skylights in the development were said to be perspex. The Tribunal finds that photographs and description to be typical of the layout of the conservatories at Budgenor Lodge.

33. Plans A, B and C (pages 66-68) incorporated into the specimen Lease depict the conservatory as a ground floor structure named as "Garden Room" in the legend to the plans. Mr Deadman at the hearing agreed that garden room on the plans represented the location of the conservatories. None of the parties disagreed with this.

34. Plan B (the first floor plan) depicts the conservatory roofs. It is unclear from the red edging in Plans A and Plan B whether those roofs were intended to fall within the demise (the grant) to the Lessees of the units with the conservatory. The red edging is expressed to be "for the purpose of identification only" in the definition of "the Unit" in clause 1.1 on page 5 of the Lease. Accordingly, the presence or absence of red edging around the conservatory roofs is not conclusive of whether the roofs are part of the structure demised for the reasons given below.

The leasehold structure

35. In the light of documents supplied since the Interim Decision it is clear the Applicants hold a long lease of the property for a term of 999 years from 25th March 2015 and the Lease described in the Interim Decision had been surrendered and replaced by a new Lease granted on 11th June 2015: see pages 97-101. All parties agreed the material provisions of the 125 year and 999 year leases are the same. The Lease requires the First Respondent Landlord to provide services and the Lessee to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

36. All parties agreed that all the leases (including those dwellings which do not have a conservatory) are in substantially the same form as the Lease at pages 26-70 except that the percentage contributions for various categories of service charges at pages 9- 12 of the Lease varied between leases. Some lessees placed emphasis upon the fact that the percentage in their Lease for the "Conservatory Charge Percentage" at page 11 said "nil". Mr Deadman noted that the percentages as between various conservatory owners for the Conservatory Charge varied according to square footage. This was illustrated by the photograph at page 14A where it was apparent that the eastern most conservatory was smaller than other conservatories in that photograph.

37. Clause 1.1 of the Lease contains a large number of definitions. One of the key definitions for the purpose of understanding the service charge provisions of the Lease is "the Units". This phrase is defined on page 12 of the Lease to mean:

> "the Premises and all the other units contained in the Building and sold or intended to be sold on long leases and "Unit" shall mean any one of them".

The phrase "the Building" is defined on page 6 of the Lease in clause 1.1 to mean:

> "all that the land and buildings (including the Units the Internal Common Parts and the Main Structure) intended to be known as Budgenor Lodge Dodsley Lane Easebourne Midhurst West Sussex as the same are shown *for the purpose of identification only* coloured brown mauve and red on Plan D" (emphasis added)

The significance of this definition is that "the Units" for this purpose do not include any freehold units or units not coloured brown mauve and red on Plan D ("the Estate plan") (page 69). It has been long settled that emphasised words *"for the purpose of identification only"* mean that the plan is not determinative or conclusive of whether a piece of land is within a "parcels clause" (a clause defining what is transferred or conveyed) or demise but the plan may be looked at provided it does not contradict an explicit verbal description. *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 1 W.L.R. 1462 is an example of an application of this principle.

The scope of the Tribunal's jurisdiction

38. The Tribunal's jurisdiction under the Act does not extend to considering the payability or interpretation of any covenants or other obligations imposed upon freehold owners in respect of any contribution to the costs under consideration in this Decision. Nothing in this Final Decision should be read as determining that issue directly or indirectly. As some of the owners of the dwellings might be freeholders, the Tribunal occasionally uses the words owner or dwelling owners where it is not necessary to distinguish between lessees and such owners for the purpose of ascertaining the significance of apportionment of costs of the Budgenor Lodge development.

39. The Tribunal is required to determine the answer to the statutory question posed by section 27A(1)(c) of the Act (the amount payable) by determining the amounts payable as service charges for conservatory roofs as service charges: see *Jarowicki v Freehold Managers (Nominees) Limited v Prokhorova*. Alternatively, if the costs have not yet been incurred, the Tribunal is able to determine whether those costs would be payable under the analogous provisions of section 27A(3) of the Act. The Tribunal is not empowered to decide those issues "in principle" or without providing a determination upon specific amounts payable by the Applicants.

Legal principles governing interpretation of Leases (and other contracts)

40. The Tribunal adopts and incorporates into these reasons, the reasons given in paragraphs 29 -38 of the Interim Decision.

Definition and extent of the conservatory within the Lease

41. The Tribunal adopts and incorporates into these reasons, the reasons given in paragraphs 39 -45 of the Interim Decision.

The service charge provisions in the Lease – initial allocations of contribution and percentages

42. The Tribunal adopts and incorporates into this Decision the reasons given in paragraphs 46-55 of the Interim Decision.

The "Conservatory Charge"

43. The Tribunal adopts and incorporates into this Decision, the reasons given in paragraphs 56-62 of the Interim Decision.

Are repairs to conservatory roofs within the scope of "the Building Charge"?

44. The Tribunal addressed this issue in paragraphs 62 -63 of the Interim Decision. It is a key issue for deciding whether repairs to conservatory roofs can be recovered under Schedule 1 of the Lease.

45. The "Building Services" which are the subject of "the Building Charge" are defined by reference to "the Annual Building Expenditure" and the First Schedule to the Lease: see the definitions of those terms in clause 1.1 on page 8 of the Lease (page 35). "Annual Building Expenditure" in clause 1.1 is defined to mean:

> "(a) all costs expenses and outgoings whatever incurred by the Landlord during a Financial Year in or incidental to the provision of all or any of the Building Services and
> (b) any VAT payable on such sums costs expenses and outgoings
>
> *but excluding any expenditure in respect of any part of the Building for which the Tenant or any other tenant is wholly responsible* and excluding any Annual Building Expenditure that the Landlord recovers under any policy of insurance maintained by the Landlord pursuant to its obligations in this Lease"
>
> (emphasis added)

46. As far as relevant to conservatory roof repairs, the "Building Services" are defined by the First Schedule to the Lease (at pages 60-61) as the Landlord's obligations (subject to the terms of clause 4.3) to mean:

> 1. "To maintain in good and substantial repair and condition and renew or replace the Main Structure *in compliance with any statutory requirement* provided that the Landlord shall not be liable for any disrepair until the Landlord has had written notice of it from the Tenant and a reasonable time to remedy it
> 2. When necessary but not more often than every 3 years and not less often than every 5 years to decorate in a good and workmanlike manner the external parts of the Building
> 3. As and when the Landlord shall consider it necessary to clean the windows of the Building (where such windows are not included in this demise or in the demise to another tenant)
> 4. To pay and discharge any rates (including water rates) taxes duties assessments charges impositions and outgoings assessed charged or imposed on the Building as distinct from any assessment made in respect of any Unit
> 5. ……
> 6. ……
> 7. To do or cause to be done all works installations acts matters and things as in the discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Building including without limitation to the generality of the foregoing the provision of security fire safety and fire prevention equipment
> 8. …….
> 9. ……
> 10. To do all further acts as the Landlord in its discretion may consider necessary or advisable for the proper maintenance safety amenity and administration of the Building" (emphasis added)

47. To understand the scope of the landlord's duty to provide "Building Services" it is necessary to return to the definition of "the Building" in clause 1.1 on page 6 of the Lease which provides that term means:

> "all that the land and buildings (including the Units the Internal Common Parts and the Main Structure) intended to be known as Budgenor Lodge Dodsley Lane Easebourne Midhurst West Sussex as the same are shown for the purpose of identification only coloured brown mauve and red on Plan D"

48. Plan D (on page 69) shows the Units and the conservatories (as well as other parts) to be shaded brown. That colouring is consistent with the conservatories falling within the meaning of the term “the Building” as defined in clause 1.1 of the Lease.

49. The phrase “the Units” is defined by clause 1.1 on page 12 of the Lease to mean “the Premises and all the other units contained in the Building and sold or intended to be sold on long leases and "Unit" shall mean any one of them”. The term “the Premises” is defined by clause 1.1 on page 6 of the Lease to mean “the Unit”.

50. The phrase “the Unit” is further defined in clause 1.1 on page 5 of the Lease as follows:

> “all that ground, first and second floor Unit in the Building shown for the purpose of identification only edged red on Plans A, B and C includes:
>
> (a) the internal non-structural walls within the Unit
> (b) the inner half severed medially of all internal non¬ structural walls shared with any other Unit or with the Common Parts
> (c) the floors (including the floor screeds and floor finishes but not any floor joists or slabs) of the Unit
> (d) the ceilings and ceiling finishes but not the beams joists or slabs above or forming any part of the ceilings
> (e) the doors door frames windows window frames and the glass in the doors and windows
> (f) the plaster work of all structural walls within or bounding the Unit
> (g) all Pipes that exclusively serve the Unit
> (h) all the Landlord's fixtures and fittings and fixtures of every kind that shall from time to time be in or on the Unit (whether originally affixed or fastened to or upon the Unit or otherwise) including (without limitation) all central heating and air conditioning and water ventilation and sanitary plant equipment and apparatus exclusively serving the Unit
> (i) all additions and improvements made to the Unit other than Tenant's fixtures and fittings therein at any time during the Term
> (j) All stairs and staircases situated within the Unit and all other internal surf aces and partitions therein
> (k) The tiles and surface finishes and boundaries of the roof terrace or balcony (if any) forming part of the Unit
> *(l) The conservatory (if any) and the garden (if any) appurtenant to the Unit”* (emphasis added)

51. As indicated above, the use of the term "for identification purpose only" relegates the red markings on plans A, B and C, in importance to give priority to the verbal description of the Unit.

52. During the course of the hearing the debate also focused upon the meaning of "the Main Structure" in paragraph 1 of the First Schedule to the Lease. That phrase is defined in clause 1.1 of the Lease at page 33 to mean

> "....the whole of the Building excluding the Units and the Internal Common Parts which shall for the avoidance of doubt but without limitation to the generality of the foregoing include a(l roofs at all levels of the Building (including all glass roofs or skylights) and the foundations of the Building and its main walls (including party walls) and timbers and the joists beams and floor slabs supporting the floors in the Building and all other structural parts together with all alterations and additions thereto from time to time"

Submissions

53. The submissions made by or on behalf of Mrs Moller and other Respondents who opposed the repairs to conservatory roofs being paid for out of service charge can be summarised, in legal terms, in the following ways:

a. The roofs to the conservatories were an integral part of the conservatories;
b. The conservatory roofs were glass;
c. The roofse to the conservatories were not shared with other parts of the building or development unlike other roofs; each glass roof only served the individual conservatory
d. The roofs were part of the demise of 1 Budgenor Lodge as indicated by the red edging of Unit 1 in Plan A at page 66; accordingly they were not part of the main structure within the landlord's repairing covenant in paragraph 4.3 and paragraph 1 of the First Schedule and the corresponding service charge liability of the lessee
e. If paragraph 1 of the First Schedule is unclear about whether the landlord has an obligation to undertake repair, renewal or replacement of the glass roof of the conservatory it should be read in a way which does not impose a liability on the lessee that would not ordinarily be expected. As the conservatories are for the exclusive use and benefit of the individual lessees unlike items such as shared roofs or other items clearer words would have been expected to impose such an obligation; that is reflected in the separate apportionment of a conservatory charge for lessees with a conservatory on the Fifth Schedule to the Lease.

f. If an obligation to undertake a repair, renewal or replacement of the glass roof of the conservatory had been imposed on the landlord, the obvious place where such an obligation would have been expected would have been in the Fifth Schedule and not by a strained reading of paragraph 1 of the First Schedule or in other paragraphs of that Schedule;
g. As the lessees reviewing the Leases of non-conservatory units would have no obvious means of ascertaining potential liability for conservatory units, it would have been far from obvious unlike shared roofs or gardens that such a liability would be shared and service charge liability and clearer words would have been expected;

54. Mr Cooper the only lessee with a conservatory before the Tribunal adopted a neutral stance to all of these contentions. Very fairly and with an admirable desire to avoid or minimise confrontation, he stated that the Applicants simply wanted clarity so that if there for example was a sale of a lease with a conservatory all parties and purchasers and mortgagees would know where they stood on this issue.

55. Some of the arguments suggesting that the conservatory roofs fell within paragraph 1 of The First Schedule were canvassed in the Interim Decision. In addition the following point emerged at the hearing about paragraph 1 of the First Schedule:

a. as the conservatories were the only structure in the development with a glass roof (at least at the time of the hearing) to give effect to the meaning of "the Main Structure" as defined on page 6 of the Lease at page 33, the landlord's obligation in paragraph 1 of the First Schedule must extend to the conservatory roofs;

b. that obligation could be interpreted to that the phrase "in compliance with any statutory requirement" is read as qualifying the manner in which the repairing renewal and replacing obligations should be carried out, particularly as the building was the subject of listed building legislation.

56. The submissions made by or on behalf of Mrs Moller and other Respondents who opposed the repairs to conservatory roofs being paid for out of service charge in relation to paragraphs 7 and 10 of the First Schedule to the Lease (the discretionary power to incur such costs) can be summarised, in legal terms in the following ways:

a. The potential obligation of non-conservatory owners to contribute to conservatory costs was far from obvious or clear particularly when Schedule 5 (the conservatory charge) was considered;
b. The existence of Schedule 5 should be an important factor in deciding whether paragraphs 7 and 10 of the Frist Schedule should be interpreted in a way in which all owners would be liable for conservatory repair/renewal costs;

c. There was a high burden on a landlord to establish that given the absence of a clear obligation for all lessees to contribute to such costs, they could be utilised on a routine or regular basis to include all of the costs of conservatory maintenance and repair in service charge even if in an exceptional or intermittent case, such a decision might be made;
d. That paragraphs 7 and 10 of the First Schedule were "sweeper" clauses which should be construed against the background of other services and items for which specific provision had been made in the Lease such as conservatory costs in the Fifth Schedule;
e. Even if repairs for conservatory roofs fell within the First Schedule (such as paragraphs 7 or 10) it was manifestly unfair and unreasonable to for the First Respondent landlord to impose that liability on lessees who were not conservatory owners. In legal terms this was an argument that the First Respondent had exercised a contractual discretion unreasonably within either of the two limbs of the test in *Wednesbury* decision referred to in *Victory Place Management Company Limited v Kuehn* at [2018] EWHC 132.

Interpretation of the Building Charge and the Building Services

57. The provisions of the First Schedule were intended to provide an exhaustive code for Building Services. Paragraphs 2-10 of the First Schedule were intended to be additional to paragraph 1. Taking the definition of the Unit in clause 1.1 as including the conservatory, it is likely that the glass roof referred to as part of "the Main Structure" was intended to refer to something else other than the conservatory. No evidence was adduced as to the existence of glass roofs at the date of the grant of the lease. The Tribunal concludes that it was unlikely that of all the parts of the conservatory only the roof would not be part of the unit demised within the definition in clause 1.1. The Tribunal concludes that conservatory roof repairs could not properly have been charged to service charges as they were not part of the Main Structure in paragraph 1 of the First Schedule to the Lease.

58. The First Respondent landlord could have carried out works of repair or renewal to conservatory roofs on the basis that they were part of the Building Services defined in paragraphs 7 or 10 of the First Schedule to the Lease, whether or not the conservatory roofs were demised to the lessees. Paragraphs 7 and 10 of the First Schedule empower the landlord:

> "7. To do or cause to be done all works installations acts matters and things as in the discretion of the Landlord may be considered necessary or desirable for the proper *maintenance safety amenity and administration of the Building* including without limitation to the generality of

the foregoing the provision of security fire safety and fire prevention equipment"

.....

10. To do all further acts as the Landlord in its discretion may consider necessary or advisable for the proper maintenance safety amenity and administration of the Building"

(emphasis added)

59. For the reasons given in paragraphs 71 - 78 of the Interim Decision, the Tribunal does not accept the reasoning advanced in letters from solicitors consulted by the Landlord or its managing agents Scott Bailey (letter 04 April 2017) and MacDonald Oates LLP (20 February 2017) (pages 85-91).

60. Although much was made at the hearing and in written submissions by the Respondents who opposed the conservatory repairs costs being charged to service charge, concerning poor administration or inadequate consultation by the First Respondent or the Residents Association, as explained, these issues have no bearing upon the issue of interpretation of the Lease.

The costs incurred for the conservatory roof repairs to 1 Budgenor Lodge in 2016/2017 and 2018/2018

61. Following the Interim Decision, the Tribunal has been provided with evidence about what works were carried out and the costs incurred. Disrepair to the conservatory roof of this unit leading to leaks had been noted for some time. Various attempts had been made to solve the problem by repairs. Ultimately a quotation for a new glass roof (the recommended solution) was obtained from Kalglass on 14 03 2016 for a total of £7200: see pages [197-198]. There is some question whether the £600 additional cost of self-cleaning glass would be paid by the lessees Mr and Mrs Cooper but that is not material. The cost agreed was £6600 inclusive of VAT: see the Kalglass letter at page 203 and the invoice at page 204.

62. Initially Mr Deadman of the First Respondent expressed the view that the renewal works fell within "the Building Services Schedule" for Service Charges: see his e-mail of 29 03 2016 at page 201.

63. Subsequently in his letter to Lessees of 31 10 2017 at page 217 Mr Deadman indicated that the decision had been made to allocate those costs to what was described as "Schedule 4". After much questioning and some confusion Mr Deadman said that the reference in the letter to Schedule 2 was to Schedule 4 of the Lease and the reference to Schedule 4 in the letter was to Schedule 1 of the Lease. He said that

those references in the letter referred to the basis upon which the service charge accounts had been prepared historically.

64. Along the same lines the Tribunal examined the service charge accounts for year ended 31 01 2017 where a total cost of £7716.62 was allocated to what was described on page 4b of those accounts as Schedule 4 Conservatory expenses ("general maintenance") Mr Deadman and Mrs Barrett both confirmed that the reference in those accounts to "Schedule 4" was to Schedule 1 of the Lease.

65. The Tribunal found this part of the evidence tendered by the First Respondent to be deeply unsatisfactory. There were no notes or explanations in the accounts or in the letters to the lessees explaining why the reference to Schedules in the account of the letter to lessees differed from the Schedules to the Lease. Mr Deadman was unable to point to any confirmation or independent support for his understanding of the references to the schedules, apart from what he said he had been told by the accountants and what he said had been historical way of preparing the accounts. This is not necessarily a criticism of Mr Deadman or of the First Respondent, as the Tribunal does not know what (if any) advice the First Respondent had received from the managing agents or the accountants about presentation of the accounts.

66. The poor quality of this evidence does however mean that the Tribunal was not satisfied how or on what basis conservatory repair cost incurred in 2016/2017 were allocated apparently to service charge under the First Schedule to the Lease.

67. The Board meetings of the First Respondent in the Bundle at pages 220 - 234 provided no further detail as to how the decision to allocate cost or to carry out the works to 1 Budgenor Lodge was made.

68. Ultimately the Tribunal cannot be satisfied on the available evidence that a decision was made to carry out the works to the conservatory roofs of 1 Budgenor Lodge for the purposes set out in paragraphs 7 or 10 of the First Schedule to the Lease. There was simply no evidence to support such a conclusion. Mr Deadman was unable to provide any further clarification about this and the documents produced did not confirm the reasoning for the decision.

69. Mr Deadman explained that the service charge demands at pages 252 – 262 of the Bundle had been based upon an apportionment of conservatory costs between the various conservatory owners at 1 Budgenor Lodge. The service charge demand for 1 Budgenor Lodge at page 252 was £1788.30 presumably based upon a percentage of costs incurred for such works in the service charge year ending 31 01 2017. Mr Deadman explained that the demands included in the bundle were incomplete and there was another page to each demand. Directions had been given as long ago as the Interim Decision of 24 May 2018 for

production of the demands and the Tribunal was concerned that full copies had not been provided. On the available evidence, no justification under the Lease was advanced for the apportionments of those costs *as service charges* solely between the conservatory owners.

70. In the absence of such a justification or satisfactory explanation, the Tribunal cannot find that the sums claimed from the Applicant in the invoice at page 252 is payable as a service charge. It is unclear whether the invoices for conservatory works at pages 206- 214 have been included within the service charge accounts for 2016/2017. Even if they have been so included, the Tribunal has not been provided with a demand which might justify their payability as service charges under Schedule 1 of the Lease.

71. The Tribunal is also asked to determine whether costs incurred for conservatory works in the 2017/2018 service charge year are payable as service charge. It appears from the 2017/2018 service charge draft accounts that a total of £831.66 has been incurred for such works for that service charge year. The Tribunal has not been provided with any service charge demands for those works and or invoices in respect of those works. On the basis of that evidence available the Tribunal concludes that none of the works to conservatories in 2017/2018 are payable as service charge by any of the parties to these proceedings.

72. None of the above conclusions affect or are intended to affect the payability of service charge demands which include costs of cleaning the external glazed surfaces of the conservatories or other services which are addressed by the Fifth Schedule to the Lease. That issue is not before the Tribunal in this application.

Conclusion

73. The costs incurred for repairs to conservatory roofs at Budgenor Lodge in the service charge years 2016/2017 and 2017/2018 are not payable as service charges under the Leases of Budgenor Lodge on the evidence presented to the Tribunal.

74. The £1788.30 claimed as service charges in a written demand addressed to Mrs and Mrs Cooper as lessees of 1 Budgenor Lodge dated 31 10 2017 is not payable as a service charge under the terms of their Lease.

Name: Tribunal Judge H Lederman

Date: 25th February 2019

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

Appendix A: relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
  (a) complied with in relation to the works or agreement, or
  (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 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.