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

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| **Case Reference** | **:** | **LON/00AZ/LSC/2019/0111** |
| **Property** | **:** | **Flat 2, 62 Campshill Road, Lewisham, SE13 6QT** |
| **Applicant** | **:** | **Ms Alice Julier** |
| **Representative** | **:** | **In person, with assistance from Mr L Sorba** |
| **Respondent** | **:** | **Assethold Ltd** |
| **Representative** | **:** | **Eagerstates Ltd** |
| **Type of Application** | **:** | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal Members** | **:** | **Tribunal Judge Prof R Percival**<br>**Mr J Barlow JP FRICS** |
| **Date and venue of Hearing** | **:** | **10 Alfred Place, London WC1E 7LR**<br>**1 July 2019** |
| **Date of Decision** | **:** | **12 August 2019**<br>**7 October 2019 (as amended)** |

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**DECISION (AS AMENDED FOLLOWING REVIEW)**

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In accordance with its decision dated 7 October 2019, the Tribunal has reviewed and amended this decision on the application of the applicant. The details of the review are set out at paragraphs [161] and [162] below.

## The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge years 2018 and 2019.

2. The relevant legal provisions are set out in the Appendix to this decision.

## The property

3. The property is a two bedroomed flat in a refurbished Victorian building containing six flats. We were told that the building had at one time been a public house, but it was not entirely clear if the conversion to flats took place immediately before the current leases were granted, or at some earlier time. The flats and common parts were refurbished throughout, however, before the new leases were let. There is a commercial unit on the ground floor.

## The lease

4. The lease grants a term of 125 years from 1 January 2017. The applicant acquired the lease on refurbishment of the building in about August 2017 from the original freeholder. The respondent acquired the freehold in May 2018.

5. The lease makes provision for a service charge and insurance rent (in terms which render that charge a service charge for the purposes of our jurisdiction).

6. The service charge year is defined as the annual accounting period relating to the services which the respondent covenants to carry out and the costs thereof, upon the basis of which the service charge paid by the applicant is calculated (clause 1.1, interpretation). It runs from 1 January every year, unless an alternative is notified.

7. The system for the demand of service charges is set out in paragraph 4 of schedule 6 to the lease. That requires the landlord, "before or as soon as possible after the start of the Service Charge year", to prepare and send the tenant an estimate of the service costs (ie the total cost recoverable from the flats) and a statement of the estimated service charge for the service charge year (schedule 6, paragraph 4.2.).

8. The landlord is thereafter obliged "as soon as reasonably practicable after the end of each Service Charge Year" to prepare and send to the tenant a certificate showing the service costs and charge for that year (schedule 6, paragraph 4.3).

9. There is provision for reconciliation after the end of the service year (schedule 4, paragraph 2.3)

10. There are separate arrangements for the demand of insurance rent (schedule 6, paragraph 2). In practice, it appears the managing agents demand the insurance rent at the same time as the service charge, as part of the same document.

11. There was, the parties informed us, an unusual feature of the leases, in that one lease, that for Flat 6, did not require the payment of the service charge, although it did pay insurance rent. This presumably explains why the proportion of service charge payable by Flat 2 is 20.5% and the proportion payable in respect of insurance rent is 16.5%.

12. Other provisions in the lease are considered where relevant below.

## The hearing and the issues

13. The applicant appeared in person, and represented herself with assistance from Mr Sorba. The respondent was represented by Mr Gurvits of the managing agents, Eagerstates Ltd. We afforded both parties some latitude in giving informal oral evidence of matters within their experience during a hearing which otherwise consisted largely of submissions.

*Preliminary: application to strike out or adjourn/postpone*

14. At the start of the hearing, Mr Gurvits applied to strike out the application, or, in the alternative, for an adjournment or postponement.

15. He argued that the applicant had failed to adhere to the directions made by Judge Dickie on 9 April 2019. His first point was that the applicant sent the Scott schedule by email, but not by post: the relevant direction states the schedule "must be sent to the landlord by post and may be sent in electronic format by email".

16. Secondly, the applicant did not deliver the hearing bundle as required by the directions on 17 June 2019. He wrote to the Tribunal, and eventually received the bundles on 19 June 2019, the Wednesday of the week before the hearing.

17. Furthermore, the bundle, when it did arrive, was not in compliance with the directions.

18. The directions specified that the bundles should contain, among other things not relevant to this application, the application, the directions, the completed Scott schedule, relevant invoices and other documents upon which it was sought to rely, and the lease. As delivered, they did not include the application, the directions, any invoices (despite a number having been supplied by the respondent to the applicant), and the Scott schedule included only the applicant's comments, not those of the respondent (which had been timeously served on the applicant). Nor was there a copy of the lease. Further, the bundles were not in a file, indexed or paginated.

19. The bundle (actually, lose documents), therefore, comprised the incomplete Scott schedule, an email exchange (which we were to decline to accept – see paragraph 35 below), an article reproduced from a website, a copy of a certificate from an accountant, Martin Heller, a print-out of entries in the register of companies and Eagerstates' demands in relation to May 2018 to December 2018 and estimated demand for 2019.

20. Accordingly, the respondent argued that the applicant should be struck out under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 9(3)(a) and (b).

21. The basis for the submission in relation to rule 9(3)(a) was that the directions state, in the notes thereto, that "if the applicant fails to comply with these direction the tribunal may strike out all or part of their case pursuant to rule 9(3)(a)". The respondent also relied on the same circumstances to justify striking out under rule 9(3)(b) as demonstrating a failure to co-operate with the Tribunal.

22. Mr Gurvits, in the alternative, relied on the same arguments to justify an adjournment or postponement.

23. The applicant said that she had not realised that service by email of the Scott schedule was not sufficient. She apologised for the inadequacy of the bundle, and said she had not understood that she was supposed to present the respondent's documents as well as her own. Provision of the Scott schedule without the respondent's comments was an oversight. She had not, she said, received the directions, which included the list of items to be included in the bundle. Mr Sorba, who had represented the applicant at the case management conference, had, however.

24. Mr Gurvits fairly and sensibly said he did not place a great deal of weight on the failure to serve the Scott schedule by post rather than email, and we agree.

25. However, as we made clear to the applicant, the timing, organisation and content of the bundle were woefully inadequate. It was no excuse that the applicant was acting in person. The Tribunal routinely relies on bundles prepared by parties who are acting as litigants in person, and (while there may be more minor problems), the vast majority are capable of following the directions and providing us with workable bundles for a hearing.

26. Nonetheless, we declined to strike out the application or adjourn or postpone the hearing.

27. Striking out under rule 9(3) is a discretion to be exercised by the Tribunal. In doing so, we take into account the overriding objective set out in rule 2, that the Tribunal deal with cases fairly and justly, which includes "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties and of the tribunal."

28. In this case, the Tribunal had the office case file, which included the Scott schedule as it had been served on the applicant by the respondent. This included both the respondent's comments and a number of invoices and other documents (the "respondent's Scott schedule bundle"). We also had a copy of the directions and the lease. The number of issues raised in the Scott schedule was limited, and neither party sought to adduce substantial written or oral evidence in addition to the material supplied to us, in one form or another.

29. There are two criteria in rule 9(3)(b). The first – that there had been a lack of adequate co-operation by the applicant with the Tribunal – was made out, even if it was a matter of incompetence rather than ill-will. However, in the light of the considerations set out above, the second – that the lack of co-operation was "such that the Tribunal cannot deal with the proceedings fairly and justly" was not made out.

30. In these circumstances, we concluded that it would also be inappropriate to exercise our discretion to strike out under rule 9(3)(a).

31. As for the adjournment/postponement application, Mr Gurvits relied on the same arguments in relation to that. Since our decision was that we considered that we could fairly and justly decide the issues on the day, and he had not argued that he needed more time to consider new material, we concluded that the same considerations applied and that application was also refused.

32. *Decision*: We refused the respondent's applications to strike out the application, or in the alternative to adjourn the hearing or postpone the fixture.

33. We should record that, in coming to this decision, we had not appreciated that neither party had brought their copies of the lease with them to the hearing. However, that was readily rectified by photocopying the copy provided to the Tribunal for both parties a little later in the morning.

*The issues*

34. Following our ruling on the preliminary issues, we considered each substantive issue in turn. At the hearing, we initially considered submissions relating to the extent to which the freeholder, the managing agents and the accountants firm were related. However, as there are distinct issues in relation to the freeholder and the managing agent on the one hand, and the freeholder and the accountant on the other, we consider them as they appear in the Scott schedule.

35. The applicant had produced an email chain that was said to be relevant to these issues. It was first produced in the bundle, and Mr Gurvits objected to its late introduction. We agreed that it should be discounted.

36. The way the Scott schedule is drafted is for the most part to give the overall figure for the respondent's costs, rather than just that amount which is attributable to the applicant's service charge. We have followed that approach in this decision (indicating where the sum concerned is, in fact, the specific charge to the applicant). However, where we state that those costs should be reduced by a certain sum, it should be clear that, strictly, we mean that they should be so reduced for the purposes of calculating the applicant's service charge. This applicant is the only leaseholder before us, and we have no jurisdiction to reduce, or uphold, the service charges payable by the other leaseholders.

*The extent to which the freeholder and the managing agents are distinct entities (Scott schedule 2018 item 1)*

37. The applicant wished to argue that the freeholder Assethold Ltd and the managing agent Eagerstates were essentially one and the same, and that this was relevant to our consideration of the items, or some of the items, on the Scott schedule.

38. The Tribunal considered it appropriate to consider, as a preliminary issue before considering the evidence, whether, on the facts of this case, it would make any difference to our consideration of the substantive issues whether or not we should conclude that the two entities were separate or effectively the same.

39. The applicant sought to rely on information from the Companies House register, which showed that both companies shared officers (members of Mr Gurvits' family) and traded from the same address.

40. The applicant also directed us to an article by Corinne Tuplin entitled "Freeholders who also operate as managing agents – unmasking the 'alter ego'" from a website called Pro-Leagle. In particular, we were referred to two brief quotations from two cases provided in the article. We were not provided with copies of the cases, described in the article as *11 Chrome Drive Breydon Park* LRX/118/2010 (*Country Trade Limited v Noakes* [2011] UKUT 407 (LC)) and *18/18a Ravenscar Road* LON/OOAX/2013/0018. The second of the two cases involved Assethold and Eagerstates, and, the article said, found that the two were "inextricably intertwined". The article also referred to *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581.

41. Mr Gurvits countered that unless there was evidence of sham, a court or Tribunal would not look behind the corporate identities concerned, citing *Skilleter v Charles* [1992] 1 EGR 73.

42. Schedule 7, part 2, paragraph 1 of the lease sets out the definition of service costs, from which the service charge is derived. Paragraph 1(b)(i) includes in that definition the "costs, fees and disbursements" of

> "managing agents employed by the Landlord for the carrying out and provision of the Services or, where managing agents are not employed, a management fee for the same"

43. Accordingly, if it were the case that Eagerstates fell to be considered as identical to Assethold, then a management fee could still be claimed by Assethold. In these circumstances, it becomes immaterial whether or not they are to be considered the same entity or not.

44. On the basis of the material before us, we concluded that it was not necessary to consider as a factual issue whether Eagerstates and Assethold should be considered the same entity.

45. Nonetheless, as stated, we were not provided with copies of the cases, and accordingly indicated to the parties that we would consider their relevance after the hearing, a course of action to which neither party objected.

46. The drafting of Schedule 7, part 2, paragraph 1(b)(i) of the lease distinguishes this case from those cited in the article referred to by the applicant (and, as it happens, that cited by the respondent). In each of those cases, it mattered whether the managing agent was the same or a different entity to the freeholder.

47. In *Finchbourne*, the managing agent was given a distinct and separate function in relation to the service charge in the lease. It is not a general authority for the proposition that "a commercial managing agent must be someone different from the freeholder", as the article claims.

48. What was said in *Country Trade Ltd* about the issue (obiter) was misleadingly dealt with in the article. The article set out in quotation marks "such arrangements may well justify a rigorous scrutiny of the fees being charged and the services provided in addition to the issue of 'reasonableness'", as though that is what the Upper Tribunal (not, as stated, the Lands Tribunal) said, importing a further level of scrutiny over and above the normal reasonableness standard. In fact, the Upper Tribunal clearly intended the opposite. The relevant passage says:

> "Whilst such arrangements may well justify a rigorous scrutiny of the fees being charged and the services provided, sight must not be lost of the fact that (a) the question is whether or not the costs are reasonable within the provisions of section 19 of the Landlord and Tenant Act 1985 and (b) there is nothing objectionable to such arrangements – unless, as I have said, which was not the case here, it is alleged they were a mere 'sham' or 'artifice'.

49. There is nothing in this case to justify the conclusion stated in the article that "[t]his, in practice, shifts the leaseholders' evidential burden of having to expose a completely sham arrangement, to one whereby such a relationship automatically incurs an additional level of scrutiny".

50. Finally, *Ravenscar Road* concerned a challenge by an RTM company to costs under Commonhold and Leasehold Reform Act 2002, section 88(2), which relates to the circumstances in which an RTM company is liable for reasonable costs of professional services provided to a landlord, another non-tenant party to a lease or a manager appointed under Landlord and Tenant Act 1987, part 2.

51. As set out in the decision, it is not immediately apparent to us what the basis of the challenge that was accepted by the Tribunal was, although clearly the Tribunal worked on the basis that it mattered whether or not Assethold and Eagerstates were the same entity or not. That is sufficient to distinguish that case from this. In any event, we note that the Tribunal did not make a finding of sham, and, as Mr Gurvits submits, we are not bound by it.

52. We conclude, following this consideration of the cases and in support of our conclusions during the hearing, as follows.

53. First, on the narrow point of whether the only possibly specific issue – whether the management fees paid by the latter to the former are recoverable in the service charge – the provision in this lease means that we do not have to decide whether Eagerstates is a sham or artifice (the correct test) of Assethold.

54. Secondly, and more broadly, we must keep the criterion of reasonableness under section 19 of the 1985 Act at the front of our

minds in considering each challenge set out in the Scott schedule, as emphasised in *Country Trade Ltd*.

55. *Decision*: It is not necessary for us to consider whether, as a matter of fact, Eagerstates is the same entity as Assethold, as in either case a reasonably management fee could be charged.

*Insurance broker's fee (Scott schedule 2018 item 2)*

56. On acquiring the freehold, the respondent charged each property £50 for insurance brokerage.

57. The applicant argued that the respondent should have just continued the insurance policy procured by the previous freeholder and therefore no broker's fee was necessary.

58. The respondent argued that it was an obligation on the freeholder to secure insurance, and it was reasonable to do so through a broker. He drew our attention to a letter in the exhibits produced by the respondent when the Scott schedule was exchanged from Kruskal Insurance Brokers confirming the charge.

59. We were not addressed on the question of whether it was in practice possible for the previous insurance to be continued.

60. The respondent covenants in the lease to provide the usual insurance. The use of a broker implies the testing of the insurance market. We consider this a reasonable step for the respondent to take on acquiring the freehold. If allowable in principle, it was not argued that the charge was unreasonable in amount, but in any event, we consider it within the reasonable range.

61. *Decision*: The charge of £50 per flat for insurance brokerage in 2018 was payable under the lease and reasonably incurred.

*Pest infestation treatment (Scott schedule 2018 item 3)*

62. The applicant originally asserted that there had been no pest infestation and therefore no need for a charge of £198 for its eradication. Mr Gurvits drew our attention to an email from another flat complaining of a rat infestation in what it was agreed were reserved parts of the building (above the ceiling). The email was attached to the respondent's reply to the Scott schedule, which had been served on the applicant. The applicant withdrew this item in the light of the email.

63. *Decision*: The charge of £198 to eradicate a rat infestation was payable under the lease and was reasonably incurred.

*Lightbulb changing (Scott schedule 2018 item 4)*

64. The applicant complained that £135 to change two light bulbs was excessive. It should have been seen as included within the management fee.

65. The respondent argued that it was necessary to outsource such repairs, and Eagerstates did so efficiently. Mr Gurvits told us that two visits had been necessary, the first in response to a complaint that the lights in the hallway and first floor stair were not working and the second to replace the light bulbs.

66. We agree with the applicant that two visits to change two light bulbs was excessive. It was, however, appropriately separately charged under the lease.

67. The invoice provided in the respondent's Scott schedule bundle did not particularise the costs by visit. To reflect our views on reasonableness, we allow the cost of the bulbs but half the rest of the cost, which leaves a reasonable total of £72.50.

68. *Decision*: It was not reasonable to charge for two separate visits to change two lightbulbs, and the relevant charge should be reduced to £72.50.

*Light investigation and minor repair (Scott schedule 2018 item 5)*

69. There was no text indicating the nature of the challenge to this item, to a charge of £118.56. Mr Gurvits drew our attention to the invoice in the respondent's Scott schedule bundle, which indicated that Propertyrun electrical contractors (a different company to that in relation to the lightbulb changing above), which indicated that the charge was for investigating a flickering light, which was changed, and the condition of the outside light by the access door. The contractor dealt with the flickering by changing the bulb, and reported that there was no electrical supply to the outside lamp. They conjectured that the supply came from a neighbouring boarded up shop. We think that Mr Gurvits explanation was that this was indeed the commercial unit under the building containing the flats.

70. The applicant responded that the flickering should have been dealt with during the first inspection (above).

71. Mr Gurvits said that they related to different complaints made at different times. We accept this explanation.

72. *Decision*: There was no particularised challenge to the charge of £118.56 on investigation of lighting and minor repairs on the Scott

schedule. In any event, the costs were within the reasonable range, and recoverable under the lease.

*Accountancy fees (Scott schedule 2018 item 6)*

73. We were provided by the applicant with a document certifying the service charge demands on the headed paper of Martin Heller, chartered accountant. The charge for the services of the accountants was £420.

74. No challenge was made to the amount of the charge per se, but the applicant argued that (as with the managing agent), Martin Heller were not independent of Assethold.

75. The position in the lease in relation to accountancy fees differs from that relating to management fees. Schedule 7, part 2, paragraph 1(b)(ii) allows the recovery of "costs, fees and disbursements … incurred" by "accountants employed by the Landlord to prepare and audit the service charge accounts".

76. The applicant relied on two matters. First, it was said that there were details at Companies House of a company of the same name, that had been dissolved in 2012. The applicant contended that as a dissolved company, it could not charge fees. Secondly, the company operated from the same address as both Eagerstates and Assethold.

77. Mr Gurvits said that the accountants Martin Heller were an accountancy partnership, and regulated as such. It was not a company and was not required to make returns to Companies House. Martin Heller did act as accountants to both Eagerstates and Assethold, but that was the only connection.

78. The address of the accountants is also used as the registered office for many – Mr Gurvits hazarded two hundred – different companies, including their clients Eagerstates and Assethold.

79. The applicant's contention comes down to the suggestion that it was suspicious that the managing agent and freeholder and the accountant all shared the same address; and that the apparent coincidence was such that we should conclude that the accountants were a sham or front for Assethold.

80. In the light of Mr Gurvits' point about the use of the accountant's office as a registered address for the two companies, we do not think the use of the same address even starts to raise a significant level of suspicion of sham. Even without this point, such suspicion that a coincidence of address might raise would not be sufficient evidence to enable us to conclude that the accountants firm was a sham.

81. *Decision*: The charge for accountancy services of £420 was payable under the lease and was reasonably incurred.

*Management fee (Scott schedule 2018 item 7)*

82. Eagerestates charged £900 for management services for about six months, from 17 May 2018 to December 2018.

83. On the Scott schedule, the only objection to this item was that it was in the form of an invoice from Eagerstates to Assethold. However, orally, the applicant asserted that the charge was simply too high.

84. Mr Gurvits said that the charge was based on a per unit cost of £125 (for the six months). He said that Eagerestates standardly charged between £230 and £275 per annum, depending on the nature of the property. He said that the cost in the first half year was somewhat higher than in the second year, as there were some start-up costs.

85. The Tribunal indicated that it would use its knowledge of per unit fees charged by managing agents in London in assessing the reasonableness of this charge. We explained that this was knowledge gained from long term acquaintance with such charges, and not identifiable and disclosable evidence. We asked both parties if they objected to this approach, and both said that they did not. We told the parties that in our view, the normal average for properties of this sort was in the region of £250 per annum, with an upper level of closer to £300.

86. We conclude that the management fee is within the reasonable range.

87. *Decision:* The charge of £900 for management from May to December 2018 was payable under the lease and was reasonably incurred.

*Health and Safety Services (Scott schedule 2018 item 8)*

88. The applicant objected to a charge of £360 from ESP Fire Alarms Ltd. They did so on the basis that it related to the replacement of a fire alarm (on the Scott schedule), or at least the replacement of one of four smoke detectors. There was no evidence the equipment was not working, and replacement should not have been necessary on what the applicant referred to as a "new build" property (actually, a newly converted and refurbished property).

89. Mr Gurvits said that the bill was for an annual fire safety inspection, carried out in November, which was nearly a year after the first leases had been let.

90. It is clear from the invoice produced by the respondent that one smoke detector was replaced, and that otherwise the charge is for conducting an inspection. A certificate was issued, dated 1 November 2018.

91. *Decision:* The charge of £360 for a fire safety inspection (and the replacement of one smoke alarm) was payable under the lease and was reasonably incurred.

*Leak investigation (Scott schedule 2018 item 9)*

92. In response to a complaint of water ingress in flat 4 when it rained, a contractor called K and M Construction Services Ltd inspected the flat and provided an invoice, dated 30 October 2018 for £132.

93. Insofar as there is a report of the investigation, it is contained in the invoice. It states that the person conduction the inspection went into a flat above, apparently to view the roof from there, and said that it appeared that the water was "coming from somewhere either from the flat roof or the parapet walkways, you cannot really tell. I can only suggest to carry out a repair in those areas and take it from there on".

94. The applicant objects that the investigation did not identify the problem and she should therefore not be responsible for the fee. The applicant contended before us that the inspection was related to the major roof works considered below.

95. The respondent states on the Scott schedule that the contractor established that it was an issue with the roof, and no further action was taken in the light of the then forthcoming roof works. In the hearing, Mr Gurvits said it had nothing to do with the roof works. He said that it was evident from the photographs attached to the invoice that the contractor did go onto the roof, contrary to the applicant's assertion.

96. This inspection was hardly of a high professional quality or good value. Nonetheless, and not without some reluctance, we accept that it was within the range of reasonable steps for a landlord to both commission and to pay for the work to be undertaken.

97. *Decision*: The charge of £132 for the investigation of water ingress into one of the flats was payable under the lease and was reasonably incurred.

*Key cutting (Scott schedule 2018 item 10)*

98. The applicant objects to a charge of £27 for key cutting, on the basis that it can be done more cheaply and that, as freeholder, the respondent should buy his own keys.

99. An invoice supports the cost; and there is nothing in the second argument.

100. *Decision*: The charge of £27 for key cutting is payable under the lease and was reasonably incurred.

*Electrical works (Scott schedule 2019 estimated service charge, item 1)*

101. The estimated service charge for 2019 included £900 for electrical works. The relevant quotation, provided by the respondent, made it clear that the work relates to the repair and re-supply of an external light by the front door of the building, the previous supply apparently having been cut (see paragraph 69 above) .

102. The applicant's original objections on the Scott schedule were based on ignorance as to the specific matters covered by this estimate. At the hearing, the applicant contended that there should have been an informal consultation, that the area was generally well lit so it may have been found unnecessary to make the repair, and that it should have been investigated whether the commercial premises were responsible for the light.

103. The repair, Mr Gurvits said, had been carried out. The light is part of the building, and the responsibility of the landlord to keep in repair under the lease. There is no requirement for consultation.

104. *Decision*: The estimated expenditure of £900 on the electrical works specified in the relevant quotation is payable under the lease and would be reasonably incurred.

*Surveyor for insurance purposes (Scott schedule 2019 estimated service charge, item 2)*

105. A sum of £1,000 was allowed for a survey of the building for insurance purposes. Mr Gurvits explained in the hearing that the purpose of the survey was to assess the cost of rebuilding the property for insurance purposes. It appears that the applicant had not previously appreciated this, and her objections largely fell away as a result.

106. The only objection directed at the now-understood purpose of the survey was the suggestion from Mr Sorba that a figure for rebuilding costs could be gleaned from data on building materials without undertaking a survey. We reject this contention. A physical survey of a building is necessary to properly assess the potential cost of rebuilding, and is general practice.

107. However, we consider that a figure of £1,000 is well in excess of what a reasonable landlord would expect to pay for such a survey. While Mr Gurvits noted in his response on the Scott schedule that "this is an estimated amount and may well be lower", we nonetheless consider that it is outside the range of reasonable estimates for such a survey. In coming to this conclusion, the Tribunal took account of its knowledge of charging for such services, knowledge based on a general acquaintance with the market and not discrete, disclosable pieces of evidence.

108. *Decision:* The estimated expenditure of £1,000 on a survey to assess rebuilding costs for insurance purposes is in principle payable under the lease, but is unreasonable in amount. A sum of £750 should be substituted.

*Cleaning of the common parts (Scott schedule 2019 estimated service charge, item 3)*

109. The estimated service charge included a sum of £1,200 for cleaning of the common parts. The applicant contested this sum on the basis that it was much higher than the actual cleaning charged for in 2018.

110. The dispute between the parties came down to the process of extrapolation from 2018 to 2019. Mr Gurvits satisfied us that there had been sporadic cleaning undertaken during 2018, so it was inaccurate to derive a per-month figure for cleaning, as the applicant had. The cost per cleaning visit by the contractor between 2018 and 2019 remained the same, at £36 per visit. The 2019 figure was based on a fortnightly clean at this rate.

111. At the hearing, the applicant questioned whether it was necessary to clean every fortnight. Mr Gurvits argued that it was within the reasonable band open to the respondent. We agree.

112. *Decision*: The estimated figure of £1,200 for cleaning of the common parts is payable under the lease and would be reasonably incurred.

*Drainage inspection (Scott schedule 2019 estimated service charge, item 4)*

113. A charge of £350 for drainage cleaning was included in the estimated service charge.

114. Mr Gurvits explained that the charge was for a CCTV inspection of the drains (it was misleading given the heading "drainage cleaning" in the Scott schedule). Such an inspection would be carried out every half year, he said.

115. Pressed as to the necessity of the inspections, he said that Eagerstates had had recent experiences of collapsed drains in other properties and had been advised that such inspections were necessary (although he said such advice was "general" and no reports to that effect had been received).

116. Mr Gurvits acknowledged that no complaints had been received about the drains.

117. We accept the applicant's argument that continuing routine CCTV inspection of drains in a property with no history of problems with the

drains and no complaints is unnecessary and unreasonable. We reject the implication of Mr Gurvits argument that such inspections were standard, or best practice.

118. *Decision:* It is not reasonable to routinely undertake CCTV inspection of the drains and the estimated charge of £350 for doing so is disallowed.

*Carpet cleaning (Scott schedule 2019 estimated service charge, item 5)*

119. An estimated charge of £300 for carpet cleaning was included in the 2019 advance service charge demand. Mr Gurvits said that Eagerstates intended to have the carpets of the communal areas steam cleaned twice a year. He confirmed that the carpets had been newly installed on conversion.

120. The applicant argued that steam cleaning was unnecessary. We agree. It is a small property, with a reasonably new carpet, and subject to a full cleaning schedule. Given the likely cost of replacement carpet in due course, steam cleaning twice a year is unnecessary and uneconomic and not within the reasonable band of decisions by a landlord.

121. *Decision*: It is not reasonable to steam clean the carpet of the common areas of this building twice a year, and the estimated charge of £300 for doing so is disallowed.

*Roof works (Scott schedule 2019 estimated service charge, item 6)*

122. This part of our decision has been amended following a review, on the application of the applicant (see below paragraphs [161] and [162].)

123. The service charge demand included major roof works, to a sum of £16,558.

124. As will become clear, this sum represents expenditure that has already been incurred. It would be entirely artificial to consider the issue as a forward looking estimate. We will, rather, treat it as what it is, an incurred cost.

125. In advance of the expenditure, the respondent conducted a consultation process under section 20 of the 1985 Act. Notices were served in September and October 2018. No complaint is made about the consultation process.

126. The work was apparently initiated by a complaint of water ingress into flat 5. The quotation from the successful contractor, LMQ, was for £12,320 plus VAT. The work was undertaken in December 2018 and January 2019. Subsequently, two additional pieces of work were identified. One further repair was identified by (apparently) the

respondent when inspecting the initial repair, described as damp party wall soldier brickwork.

127. The second element of additional work was identified as a result of further leaks in another flat, the repair of which requires work on another part of the roof.

128. At the hearing, Mr Gurvits indicated that a further section 20 process had "started" in relation to this, the second of the two further repairs. According to the applicant, at the point when this work was mooted, the leaseholders said that they would refuse to pay for this work, and as a result (the applicant said), the respondent had threatened to remove the scaffolding with the result that future work to rectify the leak would be more expensive. Our reading of the correspondence provided to us was that Mr Gurvits adverted to the possibility of the removal of the scaffolding by the contractor. It appears that, at the time of the hearing, the scaffolding was still in place.

129. It is clear from the narrative included in LMQ's quotation, and from the photographs accompanying it, that this is a complicated and awkward roof. We noted from the photographs that the roof comprised a mixture of construction types including pitched, flat roof sections and parapet walkways. We concluded that these different styles, together with the various forms of roofing material used across the building ranging from slates, asphalt, lead flashing etc, were likely to create maintenance difficulties.

130. The scope and nature of the work required had, it appears, been left to the contractor. The narrative included in the quotation was to be the basis upon which the original work was carried out. Mr Gurvits confirmed at the hearing that ascertaining what work was necessary "had been left to the roofer". It amounted to patch repairs in three areas, two of which involved repairing flat asphalt roofs.

131. In the light of the evident condition and complexity of the roof, we asked Mr Gurvits why a surveyor had not been instructed to inspect the roof and provide a specification for the repair work. His answer was that to have done so would have increased the cost to the leaseholders.

132. It was clear from the narratives in the Scott schedule and what we were told at the hearing that the repairs were not effective. Leaks continued, and appeared elsewhere, after rain.

133. In the Scott schedule, and in his initial evidence to us at the hearing, Mr Gurvits said that the roofer had returned on a number of occasions to undertake remedial work, for which no charge had been made, as a result of these complaints. This work, we therefore assume, was distinct from the further paid-for repairs. However, at a somewhat later stage

during the hearing, Mr Gurvits changed his account and said that the roofer only returned to make inspections.

134. The applicant said that some of the leaks were still occurring, an account which Mr Gurvits did not seriously contest.

135. We conclude that the repair of this difficult roof was not properly planned or conducted. Ideally, a comprehensive report should have been provided to identify a long term solution for the entire area and not to simply rely on a patchwork of repairs as has been the case in the past. We do not go so far as to find that this would have been the only reasonable course open to the respondent. But simply leaving a roofer to decide to make patch repairs to asphalt roofs, in the context of this difficult roof, was not appropriate, to the extent that we do not consider it was within the range of reasonable responses.

136. Both parties accepted that leaking continued to occur after the repair, and we accept the applicant's evidence (which was not convincingly contested by the respondent) that at least some leaks were persisting even now. In these circumstances, it cannot be said that the standard of the repairs that were undertaken was reasonable (section 19(1)(b) of the 1985 Act).

137. Section 19 of the 1985 Act provides that costs

> "shall be taken into account in determining the amount of a service charge payable …
> (b) where they are incurred in the … carrying out of works, only if he services or works are of a reasonable standard"

138. While that appears to require that all of the costs should be disallowed where the works are not carried out to a reasonable standard, the learned editors of *Woodfall's Landlord and Tenant* note that:

> "It was formerly held in relation to the similar provision in s.91A of the Housing Finance Act 1972 (now repealed) that where services are not provided to a reasonable standard, then a deduction on account of the deficiency may be made and it is not necessary that the whole of the relevant item should be disallowed, at least where the standard is unreasonable only in some aspect."

139. The authority cited is *Yorkbrook Investments v Batten* (1986) 18 H.L.R. 25, in which the Court of Appeal said that the words of that statute, which are in this respect similar to section 19 of the 1985 Act, "do not require quite so Draconian an approach".

140. The applicant argues that the repairs were wholly ineffective in her entry in the Scott schedule. Having heard from both the applicant and Mr Gurvits at the hearing, we are not prepared to accept that it was that

ineffective. Some leaking continued, but the overall effect of the evidence, in our view, was that it was not to the same extent. Having said that, we also note that if a more effective and general repair is to be carried out, then it may require further attention to be paid to the areas of patch repairs already undertaken.

141. Taking all these matters into account, the appropriate outcome is to reduce the amount chargeable of the actually incurred costs by two thirds.

142. *Decision*: In respect of the costs that have already been incurred on repairing the roof, the works were not carried out to a reasonable standard and should be reduced from £16,558 to £5,519.

143. As explained in our decision on the application to review, we had initially thought that a further sum in respect of estimated future roof repairs was in issue. Following the agreed clarification in the applicant's application for review, we appreciate that this is not the case. For the avoidance of doubt, we have made no determination on any estimate of future expenditure on roof repairs.

*Management fees (Scott schedule 2019 estimated service charge, item 7)*

144. The Scott schedule does not specify the amount of this item, but we were told that the charge was £237 per unit.

145. The principal challenge from the applicant was that there had been double counting for December. The charge for 2018 was expressed as running to December and that for this year from December 2018. The contract between Eagerstates and Assethold runs from 25 December 2018. Both contracts may therefore be loosely referred to as covering December, but there is no substantive double counting.

146. Insofar as there was also a challenge to the amount of the charge, we reject that for the same reasons as indicated in respect of the management charge for 2018.

147. *Decision:* The estimated figure of £237 per unit for management fees is payable under the lease and would be reasonably incurred

*Repair fund (Scott schedule 2019 estimated service charge, item 7)*

148. The estimated service charge for 2019 included a cost of £1000 towards a "repair fund".

149. The applicant objected that estimated costs for repairs should be itemised, and there was no need for a fund of this nature.

150. In its response on the Scott schedule, the respondent claimed that the collection of the fund was covered by paragraph 1(vi) of part 2 of the seventh schedule to the lease. This paragraph sets out the "service costs". Paragraph 1(vi) includes in that term

> "putting aside such sum as shall reasonably be considered necessary by the Landlord … to provide reserves or sinking funds for items of future expenditure to be or expected to be incurred at any time in connection with providing the Services"

151. However at the hearing, Mr Gurvits said expressly that the repair fund was not a reserve fund or a sinking fund, and did not roll over year on year. He accepted that a repair fund of this kind may not be covered by the lease.

152. We conclude that the "repair fund" is in reality an annually collected fund for miscellaneous repairs, rather than a reserve fund or sinking fund in the ordinary meaning of those terms. As such, it is not provided for in the lease.

153. *Decision:* The charge of £1,000 for a repair fund in the estimated service charge for 2019 is not payable under the lease.

## Application under section 20C of the 1985 Act

154. The Applicant seeks an order under section 20C of the 1985 Act that the costs incurred by the landlord in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the applicant.

155. We have not heard, and nor have we asked for, representations as to whether legal costs are recoverable under the lease. For the purposes of this application, we will assume that they are, but we do not decide the question, which remains open should the matter be litigated in the future.

156. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The success or failure of a party to the proceedings is not determinative. It is, however, a significant matter in weighing up what is just and equitable in the circumstances.

157. Both parties have been partially successful before us. While we found for the respondent in a larger number of individual items, in terms of value our findings have been broadly balanced between the parties, although the comparison is not strictly mathematical. In respect of

some, at least, of the items in respect of which a challenge was made and rejected, it was reasonable for the challenge to have been made.

158. We have considered whether we should take account of the inadequacy of the bundles prepared by the applicant, and concluded that we should not. Section 20C is not a penal provision.

159. On balance, we conclude that the just and equitable outcome is that we should make the order.

160. *Decision*: We order under section 20C of the 1985 Act that the costs incurred by the respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the applicant

## Application to review

161. In a letter dated 29 August 2019, the applicant applied for the Tribunal to review and amend our decision. In the original version of this decision, the Tribunal included the following at paragraph [145]:

> Note: as we have stated above, the calculation of the costs of work actually carried out, as against those which are a true future estimate, was not wholly clear to the Tribunal. The Tribunal has the power under rule 55 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and section 9 of the Tribunals, Courts and Enforcement Act 2007 to review its decisions. If either party considers that we have made an error in the calculation of these figures, that party may apply to the Tribunal to undertake such a review.

162. For the reasons set out in our decision on the application dated 7 October 2019, we allowed the application and have amended this decision accordingly.

**Name** Tribunal Judge Professor Richard Percival

**Date** 12 August 2019
7 October 2019 (as reviewed and amended)

## Appendix of relevant legislation

### Landlord and Tenant Act 1985 (as amended)

### Section 18

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

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

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

### Section 19

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

   and the amount payable shall be limited accordingly.

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

### Section 27A

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

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

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

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

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

**Section 20**

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

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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

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

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

**Section 20B**

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

**Section 20C**

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

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

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

**Commonhold and Leasehold Reform Act 2002**

**Schedule 11, paragraph 1**

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

**Schedule 11, paragraph 2**

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

**Schedule 11, paragraph 5**

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

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

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

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

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

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).