FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/18UB/LSC/2019/0042**
Property	**:**	**Flat 3, Aliston House, 58 Salterton Road, Exmouth EX8 2EQ**
Applicant	**:**	**Mr Pierre Henck & Mrs Judith Henck**
Applicant's Representatives	**:**	**Charles Shwenn, Counsel, *Instructed by:* Kitsons LLP**
Respondent	**:**	**AM Braddick (1)** **Aliston House Management Co Ltd (2)**
Agents:	**:**	**Eco Architects Ltd**
Type of Application	**:**	**Determination of liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge Professor David Clarke** **Mr Rob Brown**
Dated	**:**	**10 October 2019**

DETERMINATION AND STATEMENT OF REASONS

DETERMINATION

The Tribunal determines that it has jurisdiction to hear the application in respect of the financial year 2016-17.

In respect of the 2016-2017 accounting year, the following charges are determined to be unreasonable:

- **£390 of the charges in relation to window cleaning.**
- **£155.33 in respect of electricity charges not incurred or paid in this year**
- **£100 in respect of broken pots**
- **£262.56 in respect of a RIBA annual report and competent person check**
- **£1,235 in respect of a weekly fire risk assessment charge**

The amount determined to be unreasonable totals £2,142.89, resulting in the Applicants not having to pay 9% of that amount; the Tribunal therefore determines that £192.86 of the service charge levied for the Financial Year 2016-17 is not payable by the Applicants.

In respect of the 2017-18 accounting year, the following charges are determined to be unreasonable:

- **£262.56 in respect of a RIBA annual report and competent person check**
- **£1,235 in respect of a weekly fire risk assessment charge**
- **£57.74 in respect of water charges**
- **£390 of the total charge made for pressure washing**
- **£1,482 of the total management charge of £4,940**
- **£3,040 for incidental costs**

The amount determined to be unreasonable totals £6,467.30, resulting in the Applicants not having to pay 9% of that amount; the Tribunal therefore determines that £582.06 of the service charge levied for the Financial Year 2017-18 is not payable by the Applicants.

Unless a good explanation is forthcoming to the satisfaction of the Applicants that it is reasonable to undertake a RIBA and competent person report and such a charge falls within the terms of the Lease, the Tribunal determines under section 27A of the Act that a charge for a RIBA report is not payable in any future service charge years.

The Tribunal determines that any future fire risk assessment charge must be reasonably incurred within the parameters of the Regulatory Reform (Fire Safety) Order 2005 and in the light of the risk within a recently constructed block of 11 interlinked flats.

STATEMENT OF REASONS

The Application

1. This is an application ("the Application") made on 15 March 2019 by Pierre Henck and Judith Henck ("the Applicants") for a determination of liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ("the Act"). It is made in respect of the property known as Flat 3, Aliston House, 58 Salterton Road, Exmouth, Devon EX8 2EQ ("the Property"). The Property is one of 11 flats in Aliston House ("the Building"). The application is made against Anna-Marie Braddick ("the First Respondent") who is the freehold proprietor of the Building (with its gardens) and against the Aliston House Management Company Limited ("the Second Respondent"). The Application asks for a determination for the past years 2016-17 and 2017-18 and for the current year 2018-19.

2. The hearing took place on 9 October 2019 at Exeter Magistrates Court. Appearing for the Applicant was Charles Shwenn, of Counsel, with his instructing solicitor, Lauren Baber from Kitsons, Solicitors. The Applicants were also present. The Respondents were not present nor were they represented. The Tribunal had the benefit of the bundle of documents prepared in accordance with Directions and a skeleton argument supplied by Mr. Shwenn which was the basis of his oral submissions.

The Property and the Lease

3. The Tribunal did not inspect the Property but, from the papers submitted, the following salient facts can be briefly stated. The Building stands on a relatively large corner plot and was constructed as interlinked two storey blocks, containing eleven flats in total, described as luxury apartments, in about 2015. The Property, Flat 3, is a two bedroomed apartment on the ground floor of one of the blocks (defined in the Lease as 'the Premises'). It is owned by the Applicants as leaseholders under a Lease ("the Lease") granted on a date in 2016 (the copy was undated) for a term of 999 years from 1 September 2010 at a rent of one peppercorn, if demanded, although the relevant insurance premium is reserved as the an insurance rent and the sums payable by way of service change are also reserved as rent. It is relevant to record that the First Respondent is also resident in the Building and resides in Flat 11.

4. The Lease has three parties, the First Respondent, the Second Respondent and the Applicants. The Applicants as leaseholders (described in the Lease as the Tenant) covenant with both Respondents. Each party has covenants to both of the others, the key point being that the Management Company has the responsibility to both the freeholder as Landlord and to the leaseholder as Tenant to perform the services listed in the Third Schedule. The Applicants are required to pay 9% of the annual expenditure under the service charge provisions to the Second Respondent. The Tribunal was not told the nature of the corporate structure of the Second Respondent but the Lease does contain provisions for the Management Company 'not to object to the Tenant acquiring the Share' defined as the 'Tenant's interest in the Management Company'. However, the Applicants do not (it seems) have a share or say in the running of the Second Respondent.

The Respondents and their agent or representative

5. The First Respondent has paid no part in these proceedings; it is the Second Respondent and its agent (or representative) that have responded to the Application. Though both Respondents have obligations under the Lease, it is the Management Company that is designated to provide the services. However, the Respondent's statement of case (and repeated elsewhere in the paperwork) contains the assertion that the Second Respondent is a 'dormant company'. Whether or not this assertion is correct is not a matter for the Tribunal to decide or comment upon as it does not impact on the issues that we have to determine. Suffice to say that the (or a) Director of the Second Respondent is Mr Robert Braddick, the husband of the First Respondent. Robert Braddick completed a witness statement. The Second Respondent has also corresponded with solicitors for the Applicant.

6. The responsibility for managing and delivering the services under the Lease has been partly devolved to a firm called Eco Architects Ltd. The Tribunal uses the term 'partly' because it is unclear whether Eco Architects are formally acting as managing agents, though the firm claims this status in a letter of 28 September 2018 and this was repeated in the letter from the Second Respondent dated 27 September 2019 considered more fully below. A request by the Applicant's solicitor for details of the agency agreement and its length was not answered in the correspondence before the Tribunal. Eco Architects is a firm based in Taunton and it appears that the son of the First Respondent, Jonathan Braddick, is or was an employee or director of that firm. Mr Jonathan Braddick has been the person at Eco Architects who has conducted some correspondence with the Applicant, Mr Henck, and has corresponded with the tribunal office in these proceedings. But it is clear that neither Jonathan Braddick nor Eco Architects operate as managing agents in the way that the Tribunal would expect of firms of managing agents, nor do they do appear to act as agents for property other than Aliston House. Thus it is also clear from the papers that some invoices, such as utility bills and for window cleaning are addressed to the First Respondent at Flat 11; others are addressed to the Second Respondent at its registered office, 44A Waverley Road in Exmouth, such as those for garden maintenance; but none are addressed to Eco Architects. The Tribunal had some, but not all, of the correspondence between the parties (apparently, the rest is marked 'Without Prejudice') and some of that material involves exchanges between the Applicant's solicitors and the Second Respondent and some between the Applicant and Eco Architects. The letters are signed 'for and on behalf of' the Second Respondent and Eco Architects respectively so it is not possible to know if the persons writing the letters are the same (which is what the Applicant's solicitor suspected at one point), or were written by Robert Braddick and Jonathan Braddick respectively, or indeed by some other person or persons.

7. Unfortunately, as set out below, the Tribunal only had the written statement of case and supporting documentation from the Respondents, since they did not attend the hearing, so the Tribunal was unable to enquire into the missing details.

Previous proceedings between the parties

8. Prior to the issue of this application, there had been an earlier application brought before the First-tier Tribunal. This was also an application under section 27A of the Act (CHI/18UB/LSC/2018/0054) made by the Applicants against the same two respondents.

It sought a determination in relation to service charges for the financial year 2017 (stated in the application to be from 1 January to 31 December 2017) in relation to budgeted costs and for the period 3 August 2016 to 2 August 2017 in relation to actual costs. Mediation was agreed by the parties and a mediation agreement drawn up and signed by the parties on 17 July 2018. Reference is made to the terms of that agreement below. As a consequence of that agreement, the tribunal office marked that application as withdrawn and communications were sent to the parties accordingly.

The history of this application prior to the hearing

9. Following the issue of this Application, a case management hearing took place on 27 June 2019, which was attended, by telephone, by Ms Baber of Kitsons, Solicitors, for the Applicants and by Mr Robert Braddick. The relevant points emerging from that case management hearing, recorded in the background commentary set out in Directions of the same date, are:

(1) The parties' readings of the mediation agreement of 17 July 2019 were slightly different and the parties differed as to whether accounts had been agreed for '2017/18' – but the Tribunal considers that this was a typographical error for '2016-17';

(2) Mr Braddick confirmed that letters charged out at £95 each were charged to the service charge and were not administration charges;

(3) Ms Baber for the Applicants considered an oral hearing would be required whereas Mr Braddick thought a paper determination would suffice;

(4) It was agreed that invoices had not been supplied for all itemised expenditure, with the Tribunal Member observing that an absence of an invoice did not render expenditure irrecoverable though a paper invoice did provide good evidence;

(5) Mr Braddick asked (the Directions, seemingly incorrectly, say 'Ms Baber said') that all correspondence should be sent to the managing agents, Eco Architects Ltd.

10. The Directions of 27 June 2019, issued by Mr D Banfield FRICS, provided for an oral determination 'in a period of six weeks commencing three weeks after the receipt of the bundles'. There followed directions in a usual form requiring the landlord to serve on the tenant by 12 July copies of all invoices held for the two years 2016-17 and 2017-18; for the tenant's statement of case and supporting witness statements to be served by 26 July; for the Landlord's statement of case and witness statements to be served by 9 August; for any tenant's brief reply by 16 August; and for the Applicants to prepare the bundle of documents and send them to the Tribunal by 30 August 2019. This timetable meant that it was clear on 27 June that the oral hearing of this case would be in the six week period after receipt of the bundles and so the hearing would be in September or early October 2019.

11. In early September 2019, the tribunal office arranged for the hearing in this case to be on 9 October at Exeter Magistrates Court, sending a communication giving the date and venue to Eco Architects which arrived at their offices on 6 September. On 17 September, Jonathan Braddick sent a letter requesting an adjournment of the hearing fixed for 9 October. He said he had only just received the letter on 17 September following his return from annual leave. This request was considered by the procedural judge the same day and an adjournment refused. Following a formal application to adjourn made on 18 September, the adjournment request was considered by Judge D Agnew on 19 September

2019. Judge Agnew refused to vacate the hearing. He set out all the points made by Jonathan Braddick in the application to adjourn. He gave his reasons for declining the application. He pointed out that:

(1) No reasons had been given as to why the prior appointment could not be rearranged, nor was it said that there was no-one else at Eco Architects who could attend the hearing on behalf of the Respondents;

(2) The window for the hearing had been known in late June but no indication had been given of unavailability until 17 September;

(3) The Tribunal was not to be pressurised by the indication in the application that if no adjournment was granted, the Respondents would instruct lawyers to appeal; and

(4) There was adequate time for another representative or lawyer to be instructed to attend the hearing.

12. On 27 September, a letter was received at the Tribunal office, written on the Second Respondents Notepaper, and signed by Robert Braddick, saying that no-one would be attending the hearing on behalf of the Respondents. He considered that, in the absence of the managing agent, Eco Architects, the Respondents would be unable to add to the submissions made and documentation supplied to the Tribunal. The Tribunal was asked to note that the Applicants had refused an offer of a meeting to resolve concerns; had not accepted the offer of a £197.03 reduction in the service charge; and had not accepted the Tribunal's offer of mediation. Mr Braddick repeated his view that a hearing was unnecessary; and reliance was placed on the mediation award. He added that the First Respondent was a retired lady not involved with management and that the Second Respondent was a dormant company. In those circumstances, the Respondents reserved all rights specifically and generally, including the right of appeal, since their professional managing agent was 'denied the ability to attend the hearing'. The letter concluded by referring to the unruly deportment of the Applicant 'which may constitute harassment', and suggested that the appointment of legal professionals and the insistence upon a hearing did not serve the requirement of good faith, was contrary to the interests of justice, was vexatious and was an abuse of process.

13. This letter is summarised in some detail as it was not copied to the Applicants and it also contained a request to read it out at the commencement of the hearing. It was so read.

14. Finally, it should be noted that the Tribunal notified all parties that it would hear argument at the commencement of the hearing on the issue of jurisdiction in the light of the concluded mediation agreement of 17 July 2018.

The preliminary point – an issue of jurisdiction

15. The hearing began with consideration of the preliminary point – did the Tribunal have jurisdiction to hear the Application as it related to the year 2016-17? Does the existence of the Mediation Agreement remove the jurisdiction that would otherwise exist?

16. The first point to note is the ascertainment of the service charge periods in question. The earlier application was made in respect of 1 January to 31 December 2017. This Application is made in respect of 2016-2017 and 2017-2018. The Lease provides for the Financial Year to mean 'the period from 1 April to 31 March in each year or such other

yearly period as the Landlord shall determine form time to time'. The accounts or 'Annual Expenditure and Actual Costs of Landlord', as supplied to the Tribunal, are for the periods 3 August 2016 to 2 August 2017 and from 3 August 2017 to 2 August 2018. These dates has been accepted by the Applicants as the relevant charging period, and Financial Years as defined by the Lease, to which this Application relates.

17. The Mediation Agreement, signed by all parties to this Application, contains the confirmation of the parties that they commit to its terms. The Agreement is written out (in capital letters), not typed. It provides:

(i) Management of the Property will be compliant with the current RICS Service Charge Residential Code – including the creation of a separate bank account
(ii) The Managing Agents agree to review for the year from 3/8/18 with a view to charging the median of charges from three quotes from 3 local managing agents
(iii) There will be no charges to the service charge account re Aliston House Man. Co. Ltd whilst the company remains dormant
(iv) Copies of invoices in respect of year 3.8.16 – 2.8.17 will be provided to Mr and Mrs Henck within 14 days at cost of copying only
(v) Any keys in respect of Flat 3, held by the Landlord shall be returned to Mr and Mrs Henck also key to post box or informed otherwise
(vi) The Landlord will establish a sinking fund with effect from 3.8.2019
(vii) Mr and Mrs Henck accept the certified accounts for the year 3.8.16- 2.8.17 [and*] as certified by MP George FCA as the basis for the demand for the provisional charge in respect of year 3.8.18 – 2.8.19

The agreement then concluded by the parties agreeing to withdraw the application and authorised the Tribunal to discontinue the proceedings.

18. The Applicants contend that the Respondents have not met the terms of the agreement (by not complying with the RICS Code, not seeking quotes from local agents and not supplying the invoices at the cost of copying). The Respondents, in their Statement of Case, contend they had complied with each and every one of their obligations under the agreement. However, the issue of the extent to which the terms have been complied with is not relevant either to the issue of jurisdiction or to the reasonableness of service charges.

19. The starting point for the Tribunal's consideration of the issue of jurisdiction should be that the agreement, as a contract, determines the issues at stake between the parties and that the interpretation of the contract is a matter for the court. This is the stance of the Respondents, who in their statement of case, submit that the Tribunal does not have jurisdiction and that the terms and conditions of the settlement agreement are a matter for the court. The burden of proof of jurisdiction is on the Applicants.

20. Mr Charles Shwenn, for the Applicants, and in accordance with his submitted skeleton argument, contended that the Applicants had not agreed the 2016-17 figures. Since it was clearly agreed, in paragraph (iv), that the relevant invoices should be supplied, then paragraph (vii) must be read not, as the Respondents contended in their statement of case, as an unconditional agreement of the 2016-17 accounts but only as an agreement that those accounts should be the basis for the next provisional service change payable in advance. The Applicants wished to see whether the charges proposed were reasonable and

required sight of the invoices. The Tribunal agrees with this contention on the narrow point of what paragraph (vii) means, since this is the natural reading of the terms of the agreement. Therefore, the Tribunal does accept that, on this reading of the mediation agreement, the figures for 2016-17 have not been agreed or admitted by the Applicants within section 27A(4) of the Act so as to prevent a further application to the Tribunal.

21. However, the Tribunal suggested to Mr Shwenn that he had to overcome a more significant hurdle. The previous proceedings were settled by mediation and the earlier application was withdrawn and discontinued, as requested by the parties. The Application before this Tribunal covered some matters which were the subject of that earlier application – namely the 2016-17 year. The issues between the parties had therefore been settled, by a contract, and any dispute about the meaning or fulfilment of the terms of that contract were a matter for a court, not the Tribunal.

22. Mr Shwenn responded by referring the Tribunal to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"), and to rule 9. Rule 9(2) refers to two situations where the Tribunal must strike out the proceedings. One is where the Tribunal does not have jurisdiction. But that cannot apply in this case because the Tribunal does have jurisdiction to hear a service charge dispute. Mr Shwenn submitted that the relevant clause was rule 9(3)(c) which provides:

> (3) The Tribunal may strike out the whole or any part of the proceedings or case if:
>
> > (c) the proceedings or case are between the same parties and arise out of facts that are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal.

The submission was also that the decision had been by a mediator not the Tribunal so the Tribunal had jurisdiction; but if it had been by the Tribunal, the use of the verb 'may', as contrasted with 'must' in rule 9(2), gave the Tribunal discretion as to whether or not to hear the Application as it relates to the 2016-17 year. Mr Shwenn urged the Tribunal to exercise its discretion under rule 9(3). He referred to the overriding objective in the Rules to deal with a case 'fairly and justly' (rule 3) and pointed out that the figures for 2016-17 had never been examined. He submitted that mediation was to be encouraged and if every such agreement, even those which did not cover all the aspects in dispute, was to exclude future Tribunal oversight, and Tribunals were denied the power to hear an application on the merits of the case, then there would be a reluctance to accept mediation as a way of trying to resolve disputes. Moreover, at the time, the Applicants were faced with figures which were apparently certified by a qualified accountant; but it was now clear that there was a substantial possibility that that was not the case as the person who signed the certification is now under professional investigation. Finally, the terms of the mediation agreement are such that the issue of the validity of the 2016-17 accounts was not concluded in the mediation process.

23. The Tribunal decided that, if there has been a decision of a Tribunal that is covered by Rule 9(3)(c), then it did have a discretion whether or not to strike out the application in relation to 2016-17. So if the mediation agreement can be seen as a decision of a Tribunal, then the Tribunal would wish to exercise its discretion in favour of the Applicants and hear the evidence in relation to year 2016-17 as well as 2017-18 and would do so for all the reasons advanced by Mr Shwenn.

24. However, the better view must be that a concluded mediation agreement, made before any hearing of the matter by the Tribunal, cannot reasonably be described as a decision of the Tribunal within Rule 9(3)(c). If that is the case, the Tribunal still determines that it has jurisdiction. This is an application to determine the reasonableness of service charges, clearly within the jurisdiction of a tribunal, and the Tribunal is satisfied that the agreement of the Applicants to the amount of service charges levied in 2016-17 was not given in the mediation agreement. Therefore section 27A (4)(a) of the Act does not prevent an application by the Applicants in respect of the 2016-17 service charge year. Certainly, any dispute about what was clearly agreed and covered by the mediation agreement is within the contractual agreement and any dispute is therefore a matter for the court. But if, as in this case, the Tribunal is satisfied that the reasonableness of the service charges for that year was not settled by the mediation agreement, then its jurisdiction to hear this application is not taken away.

Contentions of the parties

25. At the hearing, in the absence of the Respondents, it was the Applicants, with the benefit of legal representation, who took the Tribunal through each of their concerns about the service charges. They were able to deal with questions from the Tribunal and give clarification where requested. The Respondent's written statement of case, and witness statement, did not always provide a clear response to many of the issues raised. To ensure that the Respondents' position is as fully considered as possible, the Tribunal begins by summarising the case for the Respondents, as set out in the paperwork before it, to enable the Tribunal to carefully consider the Applicants' detailed contentions in the light of the Respondents' position. The Tribunal has sought to glean all that is possible to support the submissions of the Respondents from what is said in the papers, but the failure of the Respondents to send a representative to the hearing is regrettable for many of the detailed points raised by the Applicants are not mentioned in the Respondents' statement of case.

The Respondents' Case

26. In the absence of any representation at the hearing, the Respondents' case is to be found in two documents – their statement of case (signed by the First Respondent and Robert Braddick) and a witness statement by Mr Robert Braddick. The starting point set out is one already noted – that the Second Respondent has been dormant since incorporation (and it is said that this fact was disclosed to the Applicants on their purchase in 2016) and it is the Landlord as defined in the Lease, namely the First Respondent, who is responsible for the performance of the services. The Lease certainly provides (clause 4.3.1) that if the Management Company fails to perform the services and if notice is given of that failure, then the Landlord shall perform the services; and in such circumstances, the Landlord may direct payment of the service charge to the Landlord – but the Tribunal is not aware of any such notice and payments by the Applicant are to be made to a Management Company account. The Tribunal comments that, though the Respondents say here that the First Respondent, as Landlord, is responsible for the performance of the services, in their letter of 25 September 2019 to the Tribunal, Mr Robert Braddick, writing on Management Company paper, avers that the First Respondent is a retired lady and plays no part in management (though an early letter of

12 July 2017 is signed by her). It is also clear from the correspondence before the Tribunal that the Management Company is active in corresponding about management matters.

27. However, the statement continues by saying that the Respondents have since appointed Eco Architects as their Managing Agent. They state that it is Jonathan Braddick who is the principal member and person with significant control of that firm and note his professional qualifications. Their submission is that he is well qualified and well placed to act in two roles, namely as Managing Agent and Surveyor.

28. After setting out the basic definitions relating to rent and service charge within the Lease, the Respondents note that paragraph 2 of the Fourth Schedule of the Lease confers on the Management Company the following obligation:

> 2. The Management Company shall as soon as convenient after the end of each Financial Year prepare an account showing the Annual Expenditure for the Financial Year and containing a fair summary of the expenditure referred to in it and upon such account being certified by a qualified accountant appointed by the Management Company it shall be conclusive evidence for the purposes of the this lease of all matters of fact referred to in the account.

29. They then submit that an account has been prepared for each of the Financial Years 2016-2017 and 2017-2018 and certified by a qualified accountant; and that each account has been accepted by all other lessees – they exhibit three signed agreements to that effect from Lessees of Flats 1, 2 and 4, signed in September 2018. The submission is that the accounts are a fair and true summary, in accordance with costs accepted by the Applicants in the mediation agreement, except the incidental costs that have arisen as a direct consequence of responding to the Applicant's 'unfounded assertions'.

30. It is contended that the Applicants are in arrears with what is due for 2017-18, owing £597.03; and have failed to pay the 'Provisional Sum', being service charge in advance, of £1,376, for 2019-20 by bank transfer to a deposit account in the name of Aliston House Annual Expenditure account. Under the Lease, the Provisional Sum is an estimate of what expenditure is likely to be – made by 'the Surveyor', who is Jonathan Braddick.

31. It is not necessary for the Tribunal to set out in any detail what is later said in the witness statement of Robert Braddick. This is primarily because much of the detailed comment is taken up with responses to matters that the Applicants did not pursue at the hearing. These related to a claim by the Applicants that gates were faulty, the issue of whether a gate entry system was needed, a fault on the door entry system (rectified) and a question as to whether the Applicants should repair that surface of the patio included in their Lease. Apart from the rectified door entry system, none of these matters fall within the jurisdiction of the Tribunal in this Application and were sensibly not raised at the hearing.

32. The witness statement does contain comments about the Hebe bush in front of the Applicants' bedroom window, an issue which will be briefly covered below. It also records that the Applicants did not take up their offer to reduce the service charge by the sum of £197.03.

33. There is some detail in the witness statement covering the earlier disagreement about whether, how and where invoices should be made available for inspection but as these invoices have now been provided for the hearing, it is not for the Tribunal to comment further.

34. The Tribunal records a final paragraph in the witness statement that makes significant criticism of the Applicants' solicitor. It would be inappropriate for the Tribunal to comment upon this, save to say that the Tribunal could see no justification for the sentiments expressed.

The Applicants' case

The issue of reasonableness

35. The case as presented on behalf of the Applicants rightly focussed on the service charge items that had been included in the 'Actual Costs' statement for the two financial years in question, with particular reference to the question of reasonableness. Section 19 of the Act provides:

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

36. The issue of reasonableness is highlighted in the Lease which in its definition of 'Annual Expenditure' says:

> 1.1.1 All costs and expenses and outgoings whatsoever reasonably and properly incurred by the Landlord or the Management Company . . . during a Financial Year or incidental to providing all or any of the services and
>
> 1.1.2 All incidental costs whatsoever reasonably and properly incurred . . .

37. The 'Actual Costs' statements made by the Respondents for the two years in question need to be considered in the light of the provisions in the Lease. In the schedule of services (Schedule 3, paragraph 14) that the Second Respondent covenants with the Tenant to perform, the management and administration of the Building includes:

> "the keeping of proper books of account and the preparation of statements or certificates of the expenses incurred and the auditing of such expenses".

The Tribunal also needs to bear in mind the service charge provisions in the Lease contained in the Fourth Schedule, paragraph 2, set out in paragraph 28 above.

Accounts of actual expenditure

38. The documents supplied by the Respondents to the Applicants for each of the two years in question are headed 'Annual Expenditure', 'Actual costs of Landlord (AM Braddick)'. There follows a list of items of expenditure, for garden maintenance, window cleaning, utility costs, repairs and renewals, fire risk assessments, and incidental costs. A Mr MP George, FCA Chartered Accountant, then adds the signed certification 'I confirm the account above represents a fair and true summary of the actual costs incurred in the period by the Landlord (AM Braddick) based upon the information and documentation provided to me'.

39. The final point to be made concerns that certification. The Applicants informed the Tribunal, and provided evidence to that effect, that Mr George is being investigated by his professional body in relation to that certification. That is not a matter for the Tribunal to comment upon save to say it raises a question mark about the validity of the certification. But what is perhaps more relevant is that the Respondents have now sought to waive the requirement of certification by an accountant in relation to the 2017-18 accounts. Exhibited to their Statement of Case were three identical documents signed by three of the leaseholders, of Flats 1, 2 and 4. By these documents, those leaseholders agreed the actual costs of as a fair summary of the Annual Expenditure; and, in consideration of the sum of £197.03 accepted that the account was conclusive evidence for the purposes of the Lease and did not require certification by a qualified accountant. Given that the 2017-18 expenditure had already been certified by Mr George, the Tribunal comments that this could be taken as acceptance by the Respondents that Mr George's certification was not a valid one. The Applicants (as recorded in Mr Robert Braddick's witness statement) declined an offer to sign a similar statement in return for a saving of £197.03.

40. Mr Shwenn's submission is that the statements of account provided by the Respondent are appalling and fall a long way short of both what the Lease requires and the standard of management expected of a competent manager under the Service Charge Residential Management Code, 3rd Edition, (prepared by the RICS) ("the RICS Code") and approved under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993. Mr Shwenn further submitted that this goes to the issue of reasonableness directly. The Tribunal accepts both submissions. The document headed 'Actual Costs Incurred' is just that – a list of costs incurred. It is not an account which is what a Tribunal would expect to see. Such an account would follow the technical guidance set out in TECH 03/11, Residential Service Charge Accounts (prepared by the ICAEW). It would contain an account of income received from the tenants, expenditure incurred, any reserve or sinking funds held (we were told one had been established), and clarity on any excess of income, or balance due to complete the service charge payments for the year. The amounts received by way of insurance rent are not mentioned at all. The Tribunal cannot imagine that any person holding themselves out as competent managing agents of leasehold property would submit that what the Respondents have supplied are acceptable management accounts. It also goes almost without saying that the fact that three leaseholders have waived their right to have certified and properly drawn up accounts does not mean that the Applicants have no right to contend in this Application that it is unreasonable for this not to be done, as the Lease requires and to the standards of a competent person following the guidance provided.

The burden of proof

41. In response to this Application, a considerable number of invoices have been submitted to the Tribunal in relation to expenditure incurred, but evidence of items such as common area cleaning, vermin boxes, annual report and the RIBA architect check and garden consumables are missing. Before considering the reasonableness of each piece of itemised expenditure, the Tribunal considers Mr Shwenn's submission on the burden of proof where no invoices have been submitted to support claimed expenditure. While it is clear, and accepted by the Applicant, that the absence of invoices is not determinative that

the charges have been reasonably incurred, their absence raises an evidential burden on the Respondents to adduce some evidence that they are reasonable; (*Schilling v Canary Riverside Developments*, LRX /65/2005, per HHJ Rich QC). Thus the submission made is that where no evidence has been submitted, and the Respondents are not present or represented to give oral testimony, then there is no evidence to prove that they were reasonably incurred and the amounts should not be payable. This is a submission with some merit and is accepted by the Tribunal as a starting point; but Mr Shwenn accepted that if there is some evidence that something is needed, or a service has been performed or exists, then the Tribunal can use its expertise to assess the charge made and determine whether it is reasonable. It is to the credit of Mr Henck that on at least two occasions he himself supplied the evidence that work had been incurred so as to enable the Tribunal to accept that a charge should be made and determine whether that charge was reasonable.

Issues in the year 2016-17

42. *External Lighting:* The Applicants withdrew their claim that the external lighting charge made for this accounting year was unreasonable.

43. *External water:* A charge of £198.34 had been made but no invoices supplied. Mr Henck confirmed that there is an external water supply. Mr Shwenn submitted that without an invoice, this charge should be disallowed. The Tribunal disagrees; and it determines that the amount is reasonable.

44. *Window cleaning:* This charge consisted of three invoices, all purportedly from a firm called Busy Bees. However, Mr Henck told us that the cleaning took place just twice a year. When the Tribunal examined the invoices, two were dated, properly typed and receipted with the firm's bank details; whereas the third, for £390, was undated, and seemingly consisted of something photocopied on top of another document and showing different bank account details. Perhaps this could have been explained if the Respondents had attended the hearing. But without further explanation or evidence, this invoice was questionable. The Tribunal therefore determines that the charge of £390 is unreasonable.

45. *Electricity charges:* The Applicants had requested invoices and these had been supplied. Only one group was questioned by the Applicants, namely those issued on 26 July 2016, one for each of the three blocks, and paid (according to the note written thereon) on 1 August 2016. Since these relate to an earlier accounting period, they should not have been included in the 2016-17 accounting year. The Tribunal determines that the sum of £24.03 + £36.32 + £66.64 = £28.34, total £155.33 has not been incurred in the accounting year as Actual Expenditure and should be not be payable.

46. *Repairs and renewal charges:* The repairs and renewals charges include £200 for vermin boxes. No invoices were supplied. But, again, Mr Henck volunteered that vermin boxes had been placed. The Tribunal determines that the amount charged to deal with vermin was not unreasonable. A further charge was made for replacement of broken pots. No invoice or other evidence about this was supplied and Mr Henck said he was not aware of any such work. In the absence of evidence, the Tribunal determines the charge of £100 was unreasonable.

47. *Work in the gardens:* A significant annual charge totalling £3,649.50 for garden maintenance is made for the year 2016-17. The Applicant had not queried this sum in their submission and the Tribunal was unwilling to consider the issue as the Respondent was not able to respond. However, the case had raised two further issues. The first additional issue was the failure to trim a Hebe bush that blocks light into the Applicant's bedroom. The Respondent justifies its refusal to trim it to a lower level on the basis of planning requirements, that it is not overgrown or blocking light, and that it was at that height by the time the Applicants purchased the Property. The Tribunal was supplied with photographs which demonstrated that the bush is indeed blocking light and the view from the window. The Tribunal declines to reduce the charge for garden maintenance on such a trivial matter and urges the parties to agree a suitable height for the bush. It notes however that a failure to reduce the height of the bush might mean that a future Tribunal determines that the standard of garden maintenance is unreasonable and should be reduced accordingly.

48. The second challenge was to a flat sum in relation to garden consumables, to include, but not limited, to a long list of items for an amount rounded down to £250. There was an invoice from the contractors, Hurfords, for this amount. Mr Shwenn said it looked unreasonable and should be reduced. The Tribunal disagrees. It is in the nature of the work that a contractor buys soil, compost, weed killer (and so forth) in bulk and apportions a charge to their clients. The amount does not seem unreasonable to the Tribunal given the amount of work involved.

49. *RIBA annual report and check:* A charge of £262.56 was made for what was described on the Annual Expenditure statement as 'Annual Report and Competent Person RIBA Architect check'. No invoice was supplied nor did the Tribunal receive a copy of the report. It is not obvious to the Tribunal what such a report is and why it would be necessary in respect of this property which the Tribunal understands is a building little more than 5 or 6 years old. It is also unclear as a result how and why it could be properly charged as part of the service charge under the Lease. It may be that the Respondents could have answered these questions satisfactorily but there was no-one at the hearing to do so. In the circumstances, the Tribunal determines that this charge of £262.56 is improperly or at least unreasonably incurred.

50. *Fire Risk Assessment:* An amount of £1,235 is made in the service charge for a Fire Risk Assessment, described as 'On a get on with it' basis; Weekly RCB; 15 Mins per week x £95 per hour'. There is no further information supplied. Mr Shwenn questions what a 'get-on-with-it' basis might be. The Applicants were not aware of a weekly assessment being needed or done, especially as there is very little by way of common parts in the Building. The Tribunal notes the initials RCB have no meaning but might mean that the assessment was undertaken by Mr Robert Braddick. The Tribunal is aware of the Regulatory Reform (Fire Safety) Order 2005 which would apply and justify a risk assessment by a person who has control over the premises, who could be a professional but could equally be undertaken by Robert Braddick on behalf of the Respondents. However, such an assessment is done once and then reviewed periodically, perhaps, in the case of a modern building, every two to four years. Among other matters such an assessment must consider: who may be at risk, whether a risk should be got rid of or

reduced, provide general fire precautions, create a plan and keep a record. There appears to be no justification offered for a weekly inspection charged out at the high rate of £95 per hour but with no evidence that this was done by the person who invoiced for the work done. The Tribunal therefore determines that the charge of £1,235 is unreasonable.

Issues in the year 2017-18

51. *Window Cleaning:* A charge of £1,575 was made in respect of Busy Bees window cleaning. The invoices included in the bundle of documents were for £375 for window cleaning, £640 for pressure washing and another £200 for pressure washing. There was no invoice for the second window clean that was listed at £360. But Mr Henck candidly accepted that the windows were washed twice a year and the Tribunal considers that even without the missing invoice, there was evidence that the windows were washed that second time. The two amounts of £375 and £360 for window cleaning are reasonable. The Applicants did however question the need for pressure washing and submitted the burden of justification was on the respondents. Moreover, why were two treatments necessary? The first invoice for £640 includes pressure washing of driveway, pathway and edging stones; the second was for pathways alone. The Tribunal considers that such work should be more clearly justified, and quotations obtained. On the limited evidence presented by the Respondents, the Tribunal determines that the second £200 cannot be justified and a reasonable charge for pressure washing would be £450, reducing the total charge for pressure washing by £390. An overall reasonable charge for the year would be £1,575 less £390, or £1,185.

52. *Garden Maintenance:* Unlike the year 16-17, the sum of £3,608.50 had been objected to in the paperwork accompanying the Application. The submission was that, looked at in the round, the sums being charged were disproportionate. The time taken up was unreasonable in terms of the time taken and the extent of the garden. Mr Henck also said the work was not of a reasonable standard but produced no evidence to that effect, except to say that in his opinion it was not a beautiful garden. There is, it was acknowledged, a full invoice record. The Tribunal was told that the gardener supplies and brings all his own equipment (particularly, the mower and hedge trimmer). The Tribunal could only operate on the Applicant's estimate of the hours spent for each visit which was estimated at 2-3 hours, perhaps a bit more in the summer and much less in the winter. This might equate to about £35 per hour. After due consideration, the Tribunal considered that the charges were not clearly unreasonable on the evidence presented to it.

53. *Garden Consumables:* Here there was an invoice for £229.75, plus £46.25 for plants in pots, rounded down to £275. For the reasons given in paragraph 48 above, the Tribunal does not consider this charge unreasonable but comments that it may be better, when the contract is renegotiated, to agree a price for an hourly charge that includes regularly used consumables.

54. *RIBA annual report and check:* A charge of £262.56 was again made for what was described on the Annual Expenditure statement as 'Annual Report and Competent Person RIBA Architect check'. Once again, no invoice was supplied nor a copy of the report. For the reasons given in paragraph 49 above, the Tribunal determines that this charge of £262.56 is improperly or at least unreasonably incurred.

55. *Fire Risk Assessment:* An amount of £1,235, exactly the same sum as in the previous year, is made in the service charge for a Fire Risk Assessment, described in the same way as 'on a get on with it' basis; Weekly RCB; 15 Mins per week x £95 per hour' just as in the previous year. For the same reasons as set out in paragraph 50 above, the Tribunal therefore determines that the charge of £1,235 is unreasonable.

56. *Water Charges:* The water charges are set out in the annual expenditure statement as four accounts in the year of £16.56, £27.56, £34.53 and £29.88 making £108.53 in all. But only two invoices were supplied. One is for the charge of £16.56. The other is dated 8 August 2018, and therefore outside the financial year 2017-18. It shows however that £10.56 was overdue from the previous account rendered (copy not supplied) within the financial year and £19.42 was for the period ending on 8 August 2018 – hence the total figure of £29.88 in all. There are no invoices for the claimed sums of £27.56 or £34.53 and without any evidence these sums cannot be justified. However, in their statement of case, the Applicants contend that the correct figure for the missing periods is £23.77. Accepting that contention, the Tribunal therefore determines that a total of £16.56, £23.77 and £10.56, total £50.79 is properly chargeable and that the balance of (£108.53 - £50.79) £57.74 of the charges made are unreasonable. No doubt the sum of £19.42 will be in the 2018-19 accounts.

57. *Management Charge:* The Annual Expenditure for 2017-18 includes two major charges, one described as carrying out the role of managing agent (£4,940 in total) and secondly what described as incidental costs calculated as £3,040 for 32 letters priced at £95 each. The management charge details read as follows:

> 'In respect of normal general management of the Estate including preparation of this account and all stationery, printing, postage and sundry items. Time expended all rounded down to say 1 hour per week x £95'.

The submission was that the methodology for computing a suitable management charge was flawed. It was certified as actual expenditure but in reality it was just a charge of £95 per week multiplied to cover 52 weeks. This, it was claimed, is not an acceptable way of calculating a reasonable management charge. It was also pointed out that in the mediation agreement, the Respondent had agreed to obtain a quote from three local managing agents (for year 18-19) but there was no evidence yet that that had been done.

58. The Tribunal accepts the submission that the way of computing the managing charge is unacceptable. Adherence to the RICS code (specifically paragraphs 3.3, 3.4, 3.5, and 3.6) would be appropriate. The Tribunal would expect to see a contract (paragraph 3.2 of that Code) with the agent whereby the agent agrees a basic fee to cover all administrative work, with a list of any extra charges that could be made, for example, commonly for a percentage to be added to the cost of overseeing any major repair work to the property. It is for that reason, particularly where the managing agent has a family connection with the First Respondent and to the director of the Second Respondent, that it would be wise to obtain quotations for manging the property from local agents and to charge a sum not in excess of that. Applying its expertise, the Tribunal considers that a charge of £4,940, or an annual charge of just under £450 per flat, though perhaps on the high side, would not be unreasonable if there was a high standard of management. But in the Tribunal's

judgement, the competent or reasonably minimum standard had not been achieved, especially in respect of the preparation, presentation, certification and audit of the accounts. Nor is it reasonable to require payment by bank transfer into a deposit account, even in these times when it is becoming increasingly common. Payment by cheque is still an acceptable means of payment. There is also no evidence of a proper trust account (section 42 of the Landlord and Tenant Act 1987 – RICS Code paragraph 6.2) for receiving and holding payments from the leaseholders. For these reasons, the Tribunal determines that the charge of £4,940 is unreasonable and makes a 30% reduction, namely £1,482, making an allowed charge of £3,458.

59. *Incidental costs:* These costs are priced at 32 letters at £95 per letter, and the date of each letter is listed on the Annual Expenditure account. Mr Shwenn challenged this charge in a number of ways. He attempted to show that the charge of £95 per hour was excessive given his claim that the average hourly pay per hour rate in 2017 was only £11.31. But when challenged on this submission, Mr Shwenn provided the evidence for his claim of £11.31 per hour buried in what was a government ethnicity survey of facts and figures. The Tribunal did not find that analogy helpful. He was on stronger ground submitting simply that £95 per hour could not be a true reflection of management time for what are administrative functions. He further sought to analyse the nature of the 32 letters, in an attempt to show that some were in relation to general management and some related to this dispute. Given that the Respondents were compiling accounts for all the eleven properties, and not seeking to charge the Applicants alone for matters in dispute, the Tribunal did not find it of assistance to undertake a detailed analysis of each letter. Finally, Mr Shwenn submitted that it was unreasonable to make both a management charge and then add in an incidental charge at the excessive rate of £95 per letter.

60. The Tribunal determines that the incidental charge amounting to £3,040 is unreasonable. The cost of letters is properly to be included in a general management charge, which has been made. It is not appropriate to charge an additional sum for letters over and above a reasonable management charge except where the Lease and the law permit this as an additional charge; and, even then, it should be set out in a managing agent's contract as to when such additional charges are appropriate. If it had not been of the opinion that no charges for the letters should be made, the Tribunal would have determined that charging letters at the rate of £95 per hour is excessive.

Issues for the year 2018-19

61. The Application asks for a determination by the Tribunal in respect of the year 2018-19, which was the current year when the Application was made. No specific evidence was submitted. The Tribunal merely sets out, for the benefit of the parties, the consequences for 2018-19 arising from the above determinations.

62. Unless a good explanation is forthcoming to the satisfaction of the Applicants that it is reasonable to undertake an 'Annual Report RIBA competent person check' and such a charge falls within the terms of the Lease, the Tribunal determines under section 27A of the Act that a charge for a RIBA report is not payable in future service charge years.

63. The Tribunal determines that any future fire risk assessment charge must be reasonably incurred within the parameters of the Regulatory Reform (Fire Safety) Order 2005 and in the light of the risk within a recently constructed block of 11 interlinked flats.

64. A method of calculation of an appropriate management charge is required and the Respondents may be well advised to consult and take advice from the RICS Code (paragraphs 3.3- 3.6).

Application under section 20C of the Act

65. An application was made in the application for an order under section 20C of the Act. In the light of its determinations, the Tribunal considers such an order is appropriate and makes the order. Any costs incurred by the Respondents in connection with the proceedings in this case are not to be included in the amount of any service charge payable by the Applicants as Tenant under the Lease.

Additional Application

66. The application included under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 202 was not pursued and no order is made.

Costs

67. At the hearing, Mr Shwenn made an application for costs against the Respondents under Rule 13(1)(b)(ii) of the Rules. The summary of the costs claimed had only been compiled two days prior to the hearing and would have only been received by the Respondents on the day before the hearing.

68. In those circumstances, the Tribunal determined that the application for costs and the Applicant's reasoned case that an order for costs be made should be put in a written submission with the Respondents having time to respond to that application. The Tribunal issued Directions to that effect. The issue of costs will be determined in due course on the papers submitted.

Closing Remarks

69. Without the benefit of the presence of the Respondents at the hearing, or of a representative, the Tribunal did not have the benefit of a history of Aliston House. The site of the Building may or may not have been in the Braddick family for a long time; and the Tribunal was not told how many of the 11 flats have been let on long leases - there is a hint in the paperwork that it may be a minority - in which case the Respondents perhaps feel justified in keeping control of the Management Company. But whatever the position, the impression given is that the approach to management by the Respondents has been one of 'keeping it within the family'. The Tribunal hopes that its determinations will enable the Respondents to adopt a sufficiently professional approach so that management in future can be in accordance with the terms of the Lease and good management practice.

Right of Appeal

70. 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.

71. 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.

72. 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.

73. 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 that the party who is making the application for permission to appeal is seeking.

Judge Professor David Clarke
21 October 2019