FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00LC/LSC/2019/0054
Property	:	Spembly Works, 13 New Road Avenue, Chatham, Kent ME4 6AZ
Applicant	:	Mr Atta Shaeri Flat 1 Mr Darren Johnson Flat 2 Mr Singh Flat 4 Mr Andrew Christie Flat 5 Mr Paul Kendrick Flat 9 Mr Shoel Ahmed Flat 15 Mr Olu Olufote Flat 26
Representative	:	Mrs Carol Ings
Respondent	:	Spembly Works Residents Association Ltd
Representative	:	Mr Andrew Wicking
Type of Application	:	To determine liability to pay service charges section 27A of the Landlord and Tenant Act 1985
Tribunal Member(s)	:	Judge Tildesley OBE
Date and Venue of Hearing	:	5 February 2020 Havant Justice Centre
Date of Decision	:	29 March 2020

DECISION

Decisions of the Tribunal

1. The Respondent had the authority under the lease to recover the legal costs and professional costs for the years ended 24 March 2017, 2018 and 2019 and the on account charges for the year ended 24 March 2020.

2. The Respondent had the authority under the lease to allocate service charge monies to reserves for the years ended 24 March 2018 and 2019 and to the budget for the year ended 24 March 2020. As there was no challenge to the reasonableness of the amount the allocated, the Tribunal finds that the said amounts are payable.

3. The Applicants' defence of historic neglect was flawed and not thought out.

4. The legal costs and professional costs for the years ended 24 March 2017, 2018 and 2019 and the on account charges for the year ended 24 March 2020 had been reasonably incurred and were payable.

5. The Tribunal finds against the Applicants and confirms the service charges as set out in the accounts of £66,255 for the year ended 24 March 2017, £422,089 for the year ended 24 March 2018, £428,591 for the year ended 24 March 2019, and an on account charge of £579,608 for the year ended 24 March 2020. The Applicants are each liable to pay a contribution of 1/33 of the charges.

6. The Tribunal does not make orders under Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002.

The Application

7. The Applicants seek a determination of whether service charges are payable for the years 2016/17, 2017/2018, 2018/19 and 2019/20. The property known as Spembly Works was originally an industrial building which had been converted into 33 residential flats.

8. On 8 May 2019 the Tribunal received the Application. On 2 August 2019 the Tribunal directed the parties to exchange their statements of case and fixed a hearing for the 4 and 5 November 2019. On 1 October 2019 the Tribunal heard the Respondent's application to stay the proceedings and vacate the hearing on 4 and 5 November 2020.

9. On 1 October 2019 the Tribunal refused the application for stay but agreed to vacate the hearing on 4 and 5 November 2019. The Tribunal explored the possibility of mediation but rejected it. The

Tribunal directed that the dispute was limited to whether the service charges for the years in question were reasonable and payable.

10. Mrs Ings was directed to provide the Tribunal and the Respondent's solicitors with further and better particulars of the Applicant's case. Mrs Ings was required to identify which charges were disputed, and why. If Mrs Ings said they were not authorised by the lease she must state why with reference to the specific clause of the clause. If Mrs Ings said they were unreasonable she must state why and supply evidence to support her assertion.

11. Mr Dann for the Respondent was required to provide a witness statement to the Tribunal and to Mrs Ings on any factual matters raised by Mrs Ings in her further and better particulars.

12. A further case management hearing was fixed for 4 November 2019 at which the Tribunal directed a hearing on 5 February 2020 to determine

    a. Whether the Respondent is entitled under the terms of the lease to recover legal costs and establish a reserve through a service charge payable by the leaseholders?

    b. Whether the Applicants' case for historic neglect has any reasonable prospect of success, and if not, to consider striking out that part of the Application.

    c. To decide in the light of the overriding objective how best to progress the application including the possibility of striking out the Application in its entirety.

The Hearing on 5 February 2020

13. The Applicant's representative, Mrs Carol Ings, is the mother-in-law of Mr D Johnson, the leaseholder of Flat 2. Mrs Ings has represented Mr Johnson at a previous Tribunal hearing on 13 October 2014 which determined the service charges in respect of Flat 2 for the years 2011, 2012 and 2013 [CHI/00LC/LIS/2014/0026]. The Applicants have authorised Mrs Ings in writing to represent them in these proceedings.

14. The Respondent, Spembly Works Residents Association, is the Head Lessor of Spembly Works and the immediate landlord of the Applicants. The shareholders of the Respondent company are the 33 leaseholders. Each Applicant is a shareholder of the Company.

15. In these proceedings the Respondent was initially represented by KDL Law solicitors and Mr Warren Dann of Omnicroft Limited, the Managing Agents. During the course of the proceedings KDL Law

and Omnicroft Limited had to step down because of the Respondent's precarious financial position. Mr Andrew Wicking was then appointed to represent the Respondent at the hearing on 5 February 2020.

16. Mrs Ings suggested that Mr Wicking was not entitled to represent the Respondent. At the hearing on 5 February 2020 Mr Wicking explained that on 3 December 2019 he was appointed as a director of the Respondent Company by proxy for Spembly 6 Limited which is the leaseholder of Flat 6. Mr Wicking produced a copy of a Directors' meeting on 23 January 2020 at which Mr Poole and Mr Wicking attended. The minutes of the meeting recorded that Mr Wicking had submitted a witness statement and that he would attend the Tribunal hearing on 5 February 2020 on behalf of the Respondent. Mr Wicking informed the Tribunal that the quorum for a directors' meeting was two. Mrs Ings did not challenge this.

17. On the 5 February 2020 Mrs Ings presented the case for the Applicants. Mr Atta Shaeri of Flat 1 was also in attendance and the Tribunal permitted him to speak. Mr Wicking appeared for the Respondent and he was assisted by his employee Ms Sophie Brett.

18. The Tribunal had before it the following documents which were admitted in evidence:

- The Application of Mr Johnson dated 8 May 2019. The question posed in the Application for each service charge year was: *"Whether the accounts in question should be charged through the service charge and were they reasonably incurred and in accordance with the lease".*

- The Applicant's statement of case dated 28 August 2019 signed by Mrs Ings. The relevant part of the statement comprised two pages and focussed on the background to the dispute rather than the specific charges under dispute.

- The Applicant's further and better particulars dated 18 October 2019 which was based on the invoices and service charge accounts provided by the Respondent. Mrs Ings included "Scott Schedules" for each year in dispute and a bundle explaining "Historic Neglect".

- A witness statement of Mr Warren Dann of Omnicroft Limited, the Managing Agent, dated 31 October 2019. Mr Dann supplied the Respondent's response to Mrs Ings' challenges to the service charges.

- Mrs Ings statement of 13 December 2019 where she set out the Applicant's case on four issues: Water Charges, Legal Charges, Reserves and "Historic Neglect".

- A witness statement of Mr Wicking dated 20 January 2020 asking that the Application be struck out.

- Mrs Ings' response to Mr Wicking's witness statement.

- The service charge accounts for the years ended 24 March 2017, 2018 and 2019 and the service charge budget for the year ended 24 March 2020[1].

The Lease

19. Mrs Ings supplied a copy of the lease for Flat 2[2] made between Construction Link Limited of the one part and Darren Andrew Johnson of the other part. The term of the lease was 125 years from 1 June 2003 in return for a rent of £75 per annum. The Tribunal understands that the lease for Flat 2 was representative of the leases for the other Applicants' flats.

20. The relevant lease provisions are as follows:

> **By Clause 1:**
>
> The Service Charge" means 1/33rd of the expenditure incurred by the Landlord in performance of its obligations in this lease (1.10).
> The Services means the services set out in the Fourth Schedule (1.11).
>
> **By Clause 4:**
>
> The Tenant covenants with the Landlord:
>
> "To pay all expenses including Solicitors costs and Surveyors fees properly incurred by the Landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under section 146 and 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court (4.7)".
>
> "To be responsible for and to keep the Landlord fully indemnified against all damage damages losses cost expenses actions demands proceedings claims and liabilities made against or suffered or incurred by the Landlord arising directly or indirectly out of
>
> 4.9.1 .....
> 4.9.2 any breach or not observance by the Tenant of the covenants conditions or other provisions of this Lease"

[1] The Tribunal requested the accounts at the end of the hearing on 5 February 2020.
[2] The lease referred to Flat 32 but the Tribunal was informed "32" was a typographical mistake.

By Clause 5

"To pay to the Landlord on the date hereof a proportionate sum on account of Service Charge to the next following 24th March or 28th September and thereafter on 25th March and 29th September in each year such sum as the Landlord shall consider is fair and reasonable on account of the Service Charge and forthwith on receipt of the Certificate (as hereinafter defined) to pay to the Landlord any balance of the Service Charge then found to be owing Provided Always that any overdue Service Charge may be recovered by the Landlord as if the same were rent in arrears."

By Clause 6

The Landlord covenants with the Tenant

6.1 To provide and perform the services Provided Always that:-

6.1.1 (the employment of managing agents)

6.1.2 the Landlord shall not be liable to the Tenant in respect of:-

6.1.2.1 (interruption of services)

6.1.2.2 any failure on the part of the Landlord to provide any of the Services or discharge any of its obligations hereunder unless and until the Tenant shall have notified the Landlord in writing of the facts giving rise to the failure and the Landlord shall thereafter have failed within a reasonable length of time to remedy the same and then in such a case the Landlord shall be liable to compensate the Tenant only for the loss or damage sustained by the Tenant after such reasonable time has elapsed.

The Fourth Schedule

Services to be provided and obligations to be discharged by the Landlord;

1. To maintain renew replace and keep in good and substantial repair and condition the Common Parts .....

4.To comply with all orders notices regulations or requirements of any competent authority pursuant to Statute requiring any alteration addition modification or other work in respect of the Common Parts.

10 To provide such other services and discharge such other obligations or functions as the Landlord shall reasonably from time to time consider necessary or expedient for the use and occupation of the apartments in the Buildings.

14 To take reasonable steps to enforce a proper contribution to the Landlord expenses by all persons required to contribute.

15 Such other services or functions as the Landlord shall think fit for the upkeep and enhancement of the Estate or for the benefit of the apartments erected thereon.

Provided always that the Landlord so far as is permitted by the law shall be entitled to delegate such obligations or employ

such contractors or as it shall think fit for the proper performance of the covenants contained in the Schedule and discharge all proper fees and expenses payable to such contractors or agents **Provided** further the expenditure and outgoings properly incurred by the Landlord (and included in the service charge) in any financial year shall include:

> (b) Provision for such anticipated future expenditure of a periodic or recurring nature as the Landlord shall allocate to the financial year in question as being fair and reasonable in the circumstances.

21. Mr Wicking supplied a copy of the lease of Spembly Works between Hillrun Limited of the one part and Spembly Works Residents' Association Limited of the other part dated 20 February 2012 ("The Head lease"). The term of the lease is for 125 years from and including 1 June 2003. This lease operated as a grant of reversion upon the earlier term and entitled Spembly Works Residents Association to the benefit of the rents and covenants of the leases granted to the leaseholders of the flats.

22. Under the Head Lease the Respondent is responsible to keep the Premises at all times in good and substantial repair. The Respondent is also required to comply with all Legal Obligations relating to the premises, in particular observe and comply with all Legal Obligations of any appropriate authority relating to health, safety, means of escape in case of fire and the protection and preservation of life and property.

Background

23. Spembly Works was originally an industrial building but planning permission was granted in about 2000 to convert it into 33 Flats. The first 20 Flats were sold on long leases in 2004 but the building was not completed. Construction Limited, the then freeholder, got into financial difficulty and failed to manage the block properly with the result that some leaseholders incorporated the Respondent company for the purposes of taking over the management. The Tribunal understands that the Respondent Company on incorporation had one director and one shareholding, later increased to two in February 2010. An application for the Right to Manage was made by the Respondent Company in 2009.

24. In 2009 receivers were appointed for Construction Link Limited and they granted 13 new leases to Wigmore Homes (UK) Limited ("Wigmore"). In July 2009 Building Control Officers of Medway Council inspected the property with the receivers and reported that it was evident that the property had not been constructed to satisfy minimum standards of building regulations. The receivers appointed approved inspectors to carry out a survey to determine what needed to be carried out to bring the building to standard. In October 2009 the Council arranged meetings with the Chair and

representatives of the residents group to advise on the problems with the building. The Council informed the auctioneers instructed to sell the freehold that there were health and safety issues including fire safety concerns with the building and that formal action was likely.

25. In 2010 the freehold of the building was purchased at auction by Hillrun Limited. In the course of the Right to Manage action Hillrun offered to grant the Respondent Company a Head lease of the development on the basis that the Respondent would take over the management and maintenance of the development. The Head-lease was agreed in 2010 but due to some problems with its registration at the Land Registry, a replacement Head lease was granted on 20 February 2012.

26. According to Mrs Ings, the Respondent held one meeting with the leaseholders in 2011, and did not hold another until forced to in August 2015. Mrs Ings said that during that time the Respondent did not address the Council's concerns with the safety of the building and allowed the accumulation of service charge arrears. In March 2015 the arrears stood at £168,000 with many leaseholders not paying their service charges.

27. On 11 May 2015 the Council wrote to the Respondent saying that an inspection of the property had been carried out, and that it had identified the existence of significant issues all of which contributed to a serious fire hazard. The issues identified included a non-functioning automatic fire detection system, inadequate fire stopping of services between floors, and damaged glazing affecting the overall structure integrity of the building. The Council advised the Respondent to attend immediately to the fault with the fire detection system otherwise the Council would consider undertaking the works in default.

28. On 27 August 2015 the Council notified the Respondent that its Officers intended to inspect the property on 27 August 2015 for the purposes of HHSRS assessment.

29. On 8 January 2016 the Respondent issued proceedings against Wigmore for the non payment of service charges in relation to Flat 7. Wigmore owned 13 flats and had paid no service charges since 2010 bar £13,500 as an on account charge. The liability for service charges for this single leaseholder constituted 39 per cent of all costs incurred.

30. On 19 January 2016 19 leaseholders met to discuss the condition of the property and requested the Director of the Respondent company to appoint a new management company. On 13 May 2016 the Respondent appointed Omnicroft Limited as managing agents.

31. On 1 March 2016 Wigmore filed a Defence and Counterclaim alleging that the service charges had not been properly demanded and a claim for damages was made as a result of the Respondent's alleged failure to carry out its repairing obligations under the lease. The Respondent's claim was transferred to the FTT and Wigmore's counterclaim was adjourned.

32. On 15 November 2016 the Council served a Prohibition Order on the Respondent. The Order cited seven category 1 and category 2 hazards that had to be addressed by the Respondent within 28 days. The Respondent took legal advice on the Prohibition Order and lodged an appeal against it.

33. On 4 August 2017 the First-tier Tribunal heard the appeal and found in the Respondent's favour in respect of five of the seven hazards (CHI/00LC/HPO/2016/0011). The Tribunal, however, decided that the property suffered from two significant hazards of fire and falling between levels. This resulted in the Prohibition Order being effective in relation to the flats above ground floor level which meant that those flats had to be vacated. Since September 2017 the property has remained empty save for flats 1-6 on the ground level, and will remain so until the necessary works are carried out in accordance with the Prohibition Order. According to Mr Dann's witness statement the cost of those works is in excess of £982,800. Mr Dann also stated that Wigmore owed £631,661.54 in service charge arrears.

34. On 16 June 2017 the First-tier Tribunal determined that Wigmore was liable to pay in respect of Flat 7 interim service charges in the sum of £8,144.26 for the period 23 August 2010 to 19 May 2015 and a further sum of £696.24 which fell due on 30 September 2015 (CHI/00LC/LIS/2016/0036).

35. Wigmore appealed to the Upper Tribunal and was partly successful. The Upper Tribunal determined on 17 July 2018 that the sums claimed on account of service charges for 2009/10 were reasonable but reduced the amounts claimed on account for the years from 2010 to 2016 by 50 per cent ([2018] UKUT 0252). Wigmore's counterclaim was remitted back to the County Court, and was due to be heard on 13 January 2020. The Tribunal understands that the hearing was adjourned as Wigmore had submitted its hearing bundle late and the Respondent was unable to appoint a joint expert due to insufficient service charge funds.

36. On 3 December 2019 at an EGM the directors of the Respondent Company were replaced. Three of the six new directors are principal debtors including Mr Low of Wigmore, Mr Shaeri-Saisan and Andrew Christie. The last two are Applicants in this case. According to Mr Wicking, another EGM had been called on 10 February 2020 with a view of replacing him, Mr Poole and Mr

Lancaster which according to Mr Wicking would have the effect of putting the Respondent under the control of its principal debtors.

The Issues

Whether the Respondent is entitled under the terms of the lease to recover legal costs through a service charge payable by the leaseholders?

Legal Costs

37. The legal costs and professional costs under dispute were £33,571 (2016/17), £120,511 (2017/18), £123,468 (2018/19), and £75,000 on account (2019/20).

38. The legal costs for 2017/2018 included the contractor costs in relation to the Prohibition Order.

39. Mr Dann explained in his witness statement that the legal costs were incurred in the years ending 24 March 2017, 2018 and 2019 on taking action against leaseholders for non payment of service charges, in particular Wigmore, and in dealing with the Prohibition Order including the Appeal to the Tribunal.

40. The budget statement for the year ended 24 March 2020 recorded that the reason for the on account charge of £75,000 was "ongoing surveyors and solicitors' fees and associated experts, consultants related to Medway Council Prohibition Order, cost of arrears collection support. Allows for section 20 fees and surveyors fees on Prohibition Notice, related works to prohibition notice".

41. The Respondent considered it necessary to pursue Wigmore for non payment of service charge arrears in view of the large sums involved (£631K) which if recovered would enable the Respondent to meet the majority of the anticipated costs of the necessary works to render the property safe and to discharge the Prohibition Order.

42. Mr Dann stated that the high professional costs connected with the Prohibition Order arose from the requirement to agree with the Council a detailed and complex specification of works to remedy the defects identified in the Order. According to Mr Dann, the specification included a full sprinkler system fitted throughout the development, a new fire alarm system, working with Kent Fire and Rescue Service in respect of the compartmentation of the building for the purpose of protecting the residents if a fire broke out and the installation of a Dry Riser.

43. At the hearing on 5 February 2020 Mr Wicking supplied a bundle of Bills of Costs from Brady Solicitors and KDL Solicitors covering the period of 27 April 2016 to 24 July 2019. The narrative on the Bills of Costs confirmed that the legal costs had been incurred on

the proceedings in connection with Flat 7 (Wigmore) and the Prohibition Order and on taking action to collect arrears of service charges from individual leaseholders.

44. Mrs Ings contended in the Scott Schedules that the professional costs incurred in relation to the Prohibition Order were unreasonable due to historic neglect and that the legal costs incurred in relation to the collection of service charge arrears were not recoverable under the terms of the lease.

45. Mrs Ings made no challenge about whether the professional costs including legal costs connected with the Prohibition Order were authorised by the terms of the lease. In the absence of a specific challenge, the Tribunal is satisfied that the Respondent was entitled to recover such costs through the service charge by virtue of paragraph 4 of the Fourth Schedule which related to the costs of complying with all orders notices regulations or requirements of any competent authority. The question of the reasonableness of those costs is dealt with under the heading of historic neglect.

46. Mrs Ings' contention on legal costs was that the definition of services in The Fourth Schedule made no explicit reference to the costs of proceedings and or of solicitors and that in order for the Respondent to recover its legal costs through the service charge there had to be express mention of such costs in the Schedule. In this respect Mrs Ings relied on the decisions in *Sella House Ltd v Mears* [2002] EWCA Civ 1491 and in *St Mary's Mansions v Limegate Investments Co Limited* [2002] EWCACiv 1491.

47. Mr Dann said that the Respondent relied on paragraphs 10 and 14 to the Fourth Schedule of the leases to provide the basis for the recovery of costs not otherwise recovered from the defaulting leaseholder in action for the remedy of a breach of lease terms. Mr Dann said it was worthy of note that the Applicants were seeking to dismiss liability for proportion of costs incurred in seeking to enforce the lease provisions against Wigmore which had unlawfully withheld service charges.

48. The Tribunal noted that Mrs Ings had made the same argument about legal costs in the earlier proceedings involving Mr Johnson in 2014. The Tribunal then found that paragraph 14 authorised the costs of obtaining legal advice on recovery of arrears in general. The Tribunal noted that paragraph 14 expressly provides for reasonable steps to enforce contributions.

49. Lord Neuberger in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at paragraph 15 set out the approach that courts and tribunals should follow when interpreting a lease:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a

> reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

50. Lord Neuberger at paragraph 23 was unconvinced by the notion that service charge clauses are subject to any special rule of interpretation, and whether they should be construed restrictively.

51. The Tribunal reminds itself that the dispute concerns the solicitor's costs incurred by the Respondent against individual leaseholders for non payment of service charges. The costs related to the time spent by the solicitors in giving advice on the collection of arrears, initiating proceedings, the costs of those proceedings (FTT, Upper Tribunal, and Court), and the payment of Counsel's fees. The preponderance of the costs involved Wigmore (Flat 7) but it included other leaseholders at the development. In respect of the latter grouping the costs were restricted to advice and initial steps to recover the monies.

52. The Respondent relied on paragraphs 10 and 14 of The Fourth Schedule as its authority to recover the costs through the service charge. The wording of those paragraphs are as follows:

> "10. To provide such other services and discharge such other obligations or functions as the Landlord shall reasonably from time to time consider necessary or expedient for the use and occupation of the apartments in the Buildings.
>
> 14 To take reasonable steps to enforce a proper contribution to the Landlord expenses by all persons required to contribute".

53. The Tribunal considers that the answer to the question depends upon the wording of paragraph 14. The Tribunal finds that the wording of paragraph 10 is general and intended to cover services and functions to respond to changing circumstances which would not have been in the knowledge of the parties at the time the contract was made in 2004.

54. The Tribunal finds that the wording of paragraph 14 is specific and focussed on the landlord's costs associated with the recovery of service charges. The Tribunal places emphasis on the ordinary and

natural meaning of "enforce a proper contribution". "Enforce" connotes positive and strong action, whilst "proper" is associated with lawful obligations. The Tribunal turns next to the meaning of "reasonable steps". In this context "reasonable" is associated with the appropriateness of the moves taken to enforce the contribution. Reasonable is not directly concerned with the costs of the action. The Tribunal is satisfied that it was in the contemplation of the parties when they made the contract that the landlord would have the right to recover the costs of taking strong lawful action against leaseholders who do not pay their contribution to the service charge as defined by the lease.

55. In the Tribunal's view, the fact that paragraph 14 does not expressly mention the costs of solicitors and of proceedings is not decisive of whether such costs are included within the scope of "reasonable steps to enforce a proper contribution". In this regard the Tribunal is entitled to look at other provisions of the lease. Clause 4.7 mentions explicitly the tenant's obligations to pay the solicitors costs of the landlord in connection with forfeiture proceedings. Clause 6.4 requires the tenant to indemnify the landlord of any legal costs where the tenant has requested enforcement action for breach of covenant by another tenant. The Tribunal considers the significance of these two clauses is that the parties must have contemplated that the landlord would incur legal costs in dealing with potential breaches of covenants under the lease.

56. It follows, therefore, that the overall purpose of the clause and the lease is that there was an expectation that the landlord would enforce the tenant's covenants including the obligation to pay service charges and that in doing so the landlord would incur legal and solicitor's costs. The Tribunal considers that such a construction is supported by commercial common sense, namely, the enforcement of legal obligations involves the services of a solicitor.

57. The final question on the interpretation of paragraph 14: Is it wide enough to embrace the costs of proceedings before the Tribunal and the Court? The Tribunal is of the view that the answer to the question is found within the meaning of reasonable steps to enforce. The Tribunal finds on the facts of this case that the Respondent followed the appropriate route of using proceedings as the last resort. The Respondent also only took action in respect of one of the flats owned by Wigmore which meant that it could accept payment from Wigmore in respect of the other flats without prejudicing its right to forfeit the lease for Flat 7.

58. The Tribunal decides that a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean that the landlord would be entitled to recover through the service charge the solicitor's costs incurred by the

Respondent including the costs proceedings against individual leaseholders for non-payment of their contribution of the charge.

59. The Tribunal notes that the Applicants put forward no case for challenging the reasonableness of the amount of the costs. Also the Applicants did not challenge the Respondent's power to collect on account charges.

60. **The Tribunal, therefore, finds that the Respondent had the authority under the lease to recover the legal costs and professional costs for the years ended 24 March 2017, 2018 and 2019 and the on account charges for the year ended 24 March 2020.**

Whether the Respondent is entitled under the terms of the lease to establish a reserve through a service charge payable by the leaseholders?

61. The reserve funds under dispute are £273,000 (2017/18) and £276,000 (2018/19), and £477,000 on account (2019/20). There was no allocation to reserves in the service charge accounts for the year ended 24 March 2017.

62. The reason given by Mr Dann for the creation of reserves was to meet the costs of complying with the prohibition order estimated to be in excess of £982,000 to make the property habitable. The narrative in the accounts refer to a 10 year major works plan to justify the amounts.

63. Mrs Ings' challenge was that there was no authority under the lease for the Respondent to establish a reserve. Mrs Ings referred to paragraph 15b of The Fourth Schedule which said

> "Provision for such anticipated future expenditure of a periodic or recurring nature as the Landlord shall allocate to the financial year in question as being fair and reasonable in the circumstances".

64. Mrs Ings argued that paragraph 15b does not refer to a reserve or sinking fund but relates to expenditure of a recurring nature such as insurance and other known recurring items annually and in particular that financial year.

65. Mr Dann disagreed with Mrs Ings interpretation of paragraph 15b. Mr Dann placed emphasis on the phrase "provision for such anticipated future expenditure".

66. Before considering the question of construction, the Tribunal reminds itself of the factual context namely, that the Respondent has set up the reserves to pay over time for the major works

necessary to meet the requirements of the Prohibition Order in order to render the building safe so that it can be inhabited above the ground floor. The major works are identified in the 10 year programme which was not included in the evidence. The Tribunal finds that the Respondent is required to do this in order to meet its repairing obligations and its obligation to comply with the orders of the local authority under The Fourth Schedule, and its obligation of quiet enjoyment to the leaseholders above the ground floor.

67. The Tribunal prefers Mr Dann's interpretation of paragraph 15b. In the Tribunal's view, Mrs Ings concentrated on an aspect of the paragraph "of a recurring nature" and built her proposition on the meaning of "recurring" rather than examining the words of the paragraph as a whole.

68. The Tribunal construes the phrase "Provision for such anticipated future expenditure" as meaning setting aside monies to meet future known liabilities. The object of the set aside is to discharge expenditure of a periodic or recurring nature as and when it occurs. In the Tribunal's view periodic includes the costs of major works which will happen from time whilst recurring refers to regular items such as cleaning whose costs may vary from time to time. The Tribunal interprets the last part of the phrase of "the Landlord shall allocate to the financial year in question as being fair and reasonable in the circumstances" as giving the power to the Landlord to spread the expenditure over financial years provided it is fair and reasonable.

69. The Tribunal is satisfied that its construction is supported by looking at the lease as whole. Paragraph 15b is a separate and stand alone clause which suggest that it gives the landlord a additional power to meet his obligations under the lease. The setting up of a reserve and or sinking fund makes commercial good sense.

70. The Tribunal decides that a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean that the landlord would be entitled to allocate sums of money to reserves to meet the future known expenditure of the major works necessary to render the property safe and habitable.

71. The Tribunal observes that Mrs Ings did not challenge the reasonableness of the amounts allocated to the reserve and whether an allocation of the anticipated costs over a three year time span was reasonable and fair. Mrs Ings rested her argument solely on the question of whether the Respondent had the authority under the lease to set up a reserve to meet anticipated future expenditure.

72. **The Tribunal, therefore, finds that the Respondent had the authority under the lease to allocate service charge monies to reserves for the years ended 24 March , 2018 and 2019 and to the budget for the year ended 24 March 2020. As there was no challenge to the reasonableness of the amount the allocated, the Tribunal finds that the said amounts are payable.**

Whether the Applicants' case for historic neglect has any reasonable prospect of success?

73. Following her application Mrs Ings was given two opportunities to explain the Applicants' case regarding historic neglect and why it provided a defence to non-payment of professional charges incurred in connection with the Prohibition Order.

74. The Applicant's case was that all lessees were made aware of the problems that existed with the conversion of the Property in 2009 when the original developer went into administration. According to Mrs Ings, the lessees met with the Officers of the Council and were told about the defects in the construction. Despite knowing this the Respondent purchased a head lease from the new freeholder in 2010 which meant that the Respondent took on the Landlord's repairing responsibilities for the building. Mrs Ings asserted that at the beginning there were only two shareholders of the Respondent Company, Mr Edwards and Mr Johnstone.

75. Mrs Ings stated that following the grant of the head lease the Respondent carried out no repairs to the building and drew up no plans to meet the defects in the building. Mrs Ings said that the Council was inundated with complaints from the lessees' tenants at the property who were concerned with their safety. Mrs Ings quoted from a Council Officer who said that it was due to the Respondent's unwillingness to continue with a dialogue with the Council along with further deterioration of the building that lead to the Council taking out the prohibition order.

76. Mrs Ings blamed Mr Johnstone and Mr Edwards for the problem that the Respondent was now in. Mrs Ings asserted that if they had taken on the work back in 2010 the massive costs connected with the Prohibition Order would have been avoided.

77. Mr Dann argued that the defence of historic neglect was flawed and had no basis when the post Appeal prohibition order was considered. The hazards remaining under the prohibition order, fire and falling between levels, were not issues of repair but were in fact issues that were not addressed properly or not at all when the building was converted around 2000, by the then developer, Construction Link Limited.

78. Mr Wicking produced a copy of the Prohibition Order which confirmed that the Category 1 hazards identified in the building arose from deficiencies in the original design and construction.

79. Mr Dann pointed out that the professional costs spent by the Respondent on dealing with the prohibition order produced significant savings for leaseholders in the region of £500,000 as a result of the Respondent's successful appeal in part.

80. The Tribunal reminds itself that the Applicants' defence of "historic neglect" is against the reasonableness of the professional costs incurred by the Respondent in challenging the Prohibition Order. Mrs Ings' argument appeared to be that these costs would not have been incurred had the Respondent taken action earlier and addressed the defects in the building. As the authors of "Service Charges and Management" (Tanfield Chambers) 4th edition at [14.16] point out that such an argument places more strain on the words, "reasonably incurred" than they can bear. Further the question to be addressed is whether the actual incurring of the cost was reasonable and that must depend upon on whether the landlord's response at the point in time when the decision was made to act, was a reasonable one".

81. The Tribunal is, therefore, required to consider the issue of the reasonableness of the professional costs at the time they were incurred in 2016 onwards. The Tribunal is satisfied that in 2016 the Respondent's action in engaging legal and property professionals was necessary in order to deal with the wide ramifications of the Prohibition Order. In this respect the Applicants have adduced no evidence to undermine the Tribunal's finding. Further the Applicants have not argued that the amount of costs spent on professional services were excessive. The Tribunal agrees with Mr Dann's depiction of the Applicants' defence of historic neglect as flawed and not thought out.

82. The Tribunal recorded at [59] that the Applicants were not challenging the reasonableness of the legal costs incurred in enforcing payment of the service charge. Further the Tribunal noted at [44] that the issue of historic neglect was only relevant to the reasonableness of the professional costs expended on the prohibition order.

83. **The Tribunal, therefore, finds that the legal costs and professional costs for the years ended 24 March 2017, 2018 and 2019 and the on account charges for the year ended 24 March 2020 had been reasonably incurred and were payable.**

Determination

84. These proceedings were commenced in May 2019. They were originally listed for hearing on 4 and 5 November 2019 but that hearing was vacated at the Respondent's request. During that period the Tribunal held two lengthy case management hearings by telephone principally to gain understanding of the Applicants' case. The Tribunal afforded the Applicants three opportunities to articulate and refine their statement of case. Mrs Ings to her credit at the end limited the Applicants' case principally to the questions of legal and professional costs, reserves and "historic neglect. The Tribunal has made determinations on each of those matters.

85. In her final witness statement of 13 December 2019 Mrs Ings also raised the question about why the water rates had not been paid despite charges being made in the service charge accounts. Mr Dann's response was that there were insufficient funds in the service charge accounts to discharge the historic debt owed to the water company. The Tribunal has not addressed the issue because it is not a matter that falls within the its jurisdiction. As far as the Tribunal is concerned, it does not raise questions about the reasonableness of the charges or whether they have been incurred.

86. The Tribunal originally indicated that it intended to decide in the light of the overriding objective how best to progress the application including the possibility of striking out the Application in its entirety.

87. The Tribunal no longer considers that necessary in view of reaching a determination on the Applicants' principal issues in the case. The Tribunal, therefore, brings the proceedings to an end with the publication of this decision subject to the parties' rights of appeal.

88. The Applicants have been given full rein to articulate their case. It may be said that the Applicants could have presented stronger and different lines of argument. The Tribunal is not entitled to enter into the arena and make a case on behalf of a party. The Tribunal acknowledges that the Applicants' representative, Mrs Ings, is a lay representative but she has experience of Tribunal proceedings and ultimately it was the Applicants' choice for her to represent their interests.

89. There is another compelling reason why these proceedings should be brought to an end, and that requires an understanding of why the proceedings were brought in the first place.

90. The Tribunal recognises the very difficult position faced by the leaseholders as a result of the defects in the construction of the building and the imposition of the Prohibition Order. Most if not all the leaseholders purchased the flats as an investment, the

leaseholders above the ground floor are not receiving a return on the investments and the value of the investment will be much reduced whilst the Order remains in force.

91. The Respondent's initial strategy to deal with this problem was to limit the scope of the Prohibition Order and take action against the leaseholder, Wigmore, which owed the most in service charges. Although the Respondent was partly successfully with its challenge to the Prohibition Order, the proceedings against Wigmore remain unresolved which has meant significant sums have been spent on legal costs and nothing on the building.

92. Some of the Applicants and the Director of Wigmore have now taken action to replace the directors of the Respondent company with the effect that the Respondent is under the control of its principal debtors in respect of service charge arrears. Mrs Ings intimated at the hearing the strategy of the new board was effectively to find a way of surrendering the head lease in the hope that the freeholder would then take on the repairing responsibility for the building.

93. In order for the new board to formulate its strategy it is imperative that the Tribunal brings certainty to the Applicants' challenge to their liability to pay service charges.

94. **The Tribunal finds against the Applicants and confirms the service charges as set out in the accounts of £66,255 for the year ended 24 March 2017, £422,089 for the year ended 24 March 2018, £428,591 for the year ended 24 March 2019, and an on account charge of £579,608 for the year ended 24 March 2020. The Applicants are each liable to pay a contribution of 1/33 of the charges.**

95. The Tribunal notes that the Applicants applied for orders under section 20C of the Landlord and Tenant Act and paragraph 5A schedule 11 of the Commonhold and Leasehold Reform Act 2002 limiting the landlord's ability to recover its legal costs in connection with these proceedings. In view of the outcome of the application the Tribunal decides it is not just and equitable to make the Orders sought

RIGHTS OF APPEAL

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

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

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

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

5. **In view of the Coronavirus Emergency all communications with the Tribunal should be by way of email at** rpsouthern@justice.gov.uk

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 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.