FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2020/0078**
Property	**:**	**Flats 71, 76A, 82A, 83A, 83B & 83C, Block 6 Ashley Gardens, Thirleby Road, London SW1P 1HG**
Applicant	**:**	**(1) Mr David Franses (Flat 71)** **(2) Ms Jane Franses (Flat 76A)** **(3) Mr Simon Franses (Flat 82A)** **(4) S Franses Limited (Flat 83A)** **(5) Mr James Ramsey (Flat 83B)** **(6) Ms Lindsey McCaig**
Representative	**:**	**A4 by Counsel, Mr Jacob, otherwise in person**
Respondent	**:**	**Block 6 Ashley Gardens Limited**
Representative	**:**	**Ms Gray of Counsel**
Type of application	**:**	**Liability to pay service charges**
Tribunal member(s)	**:**	**Tribunal Judge Hansen (Chair)** **Mr C Gowman**
Venue	**:**	**Remote hearing**
Date of Hearing	**:**	**6-7 July 2020**

DECISION

Determinations

(1) Service charge items 1, 2, 3, 6, 7, 8, 9, 10, 14, 15, 16, 17, 20, 21, 23, 26, 28, 29, 30, 31 & 32 (as identified in Appendix 1 hereto) are payable and reasonable.

(2) Service charge items 4, 5, 11, 12, 13, 18, 19, 22, 24, 25 & 27 (as identified in Appendix 1) are not payable and/or unreasonable.

(3) The estimated cost of £50,000 for legal and professional fees for 2019-20 is not reasonable. A reasonable estimated figure would have been £25,000.

(4) The estimated cost of £15,000 for surveyors' fees for 2019-20 is reasonable.

(5) The estimated cost of £3,500 for window cleaning fees for 2019-20 is not reasonable. A reasonable estimated figure would have been £600.

(6) The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that no more than 70% of the costs incurred by the Respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Decision

1. By an application dated 12 February 2020 ("the Application") made pursuant to section 27A of the Landlord and Tenant Act 1985 ("LTA") the Fifth Applicant (A5), the tenant of Flat 83B, Block 6 Ashley Gardens, Thirleby Road, London SW1P 1HG ("the Property"), seeks to challenge various items of service charge in respect of the years 2017-18, 2018-19 and 2019-20. By order of Judge Donegan dated 10 March 2020 the other Applicants were joined, save for the Sixth Applicant who was joined by direction of this Tribunal on the first morning of the hearing pursuant to her application dated 1 July 2020. There is a parallel action involving the same parties, being an application to appoint a manager, which by order of Judge Donegan was stayed pending the outcome of this service charge dispute. The Applicants applied to lift the stay and at the conclusion of this hearing the Tribunal lifted the stay and issued separate case management directions to progress that application. However, it is unnecessary at this stage to consider that application any further.

2. The Fourth Applicant (A4) was represented by Mr Jacob of Counsel. The other Applicants represented themselves and largely made common cause

with Mr Jacob, although they did make their own representations on a number of the issues that arose. The Respondent was represented by Ms Gray of Counsel. We are grateful to all participants for their assistance in what was a difficult case, with a main bundle running to more than 1000 pages, conducted remotely by video in light of the COVID-19 public health emergency.

3. The Property consists of 19 flats held on long leases. The long leaseholders are all shareholders in the Respondent freeholder. We were taken to a specimen lease dated 29 November 1984. By Clause 3(2) the tenant covenants to pay the service charge subject to various terms and conditions including provision for a Certificate signed by an accountant containing "*a fair summary of the expenses and outgoings and other heads of expenditure set out in the Fourth Schedule*". The heads of expenditure identified in the Fourth Schedule include:

> *1. The expense of maintaining repairing redecorating … the Building*
>
> …
> *7. All fees and costs incurred in respect of the said Accountant's Certificate and of accounts kept and audits made for the purpose thereof including the cost of and incidental to the administration of and running of the Company*
>
> *13. The cost of doing all act matters and things as shall be necessary or advisable for the proper maintenance and administration or inspection of the Building (including but without prejudice to the generality of the foregoing the appointment and remuneration of managing or other agents solicitors surveyors and accountants*

4. There had been, on the pleadings, a dispute arising out of the service charge machinery and whether the sums claimed had been properly demanded but this was not pursued. There had also been an issue in relation to limitation but this too was not pursued. The Application itself did not provide much in the way of detail to identify the points in dispute or the reasons for any dispute. In accordance with the Tribunal's standard directions, the Applicants were directed to set out in a Scott Schedule (i) the item and amount in dispute (ii) the reason(s) why the amount is disputed and (iii) the amount, if any, that the Applicants would pay for that item. The Respondent was directed to reply. In fact, little or no detail was provided by the Applicants as to the basis of their challenge in the Scott Schedule. It was simply said of the items in dispute

that they were "*not chargeable under [the] lease*". In response, the Respondent relied primarily on paragraph 13 of the Fourth Schedule, although reference was also made, albeit in general terms, to the "*heads of expenditure under the Fourth Schedule to the Lease*".

5. On the face of the Scott Schedule, therefore, the only challenge being pursued by the Applicants was as to the payability of the disputed items having regard to the terms of the Lease. In fact, a large number of submissions were directed towards reasonableness. In some cases, the Respondent was able to fairly deal with the wider challenge without unfairness but in relation to a number of the disputed items this was not the case. We have tried to show both parties a degree of leeway, having regard not only to the Scott Schedule but also the Statements of Case and the evidence, but not so as to prejudice either party in the conduct of their case. Where, therefore, we have declined to consider the wider arguments put forward in relation to certain items, this has been on the basis that it would be unfair to do so having regard to the pleaded issues. This applies primarily to the Applicants, but in some instances it applies to the Respondent too, principally its attempt to rely on paragraph 7 of the Fourth Schedule.

6. The issues were not as clearly defined on the pleadings as they should have been. Thankfully the parties have agreed that the disputed items which the Tribunal must determine are (i) the 32 items set out in a schedule to Mr Jacob's skeleton argument relating to the service charge years 2017-18 and 2018-19 ("the Schedule") and (ii) the reasonableness of estimated service charges for 2019-20, and in particular the items therein relating to legal and consultancy fees (£50,000), surveyors fees (£15,000) and window cleaning fees (£3,500). The Schedule is appended to our decision as Appendix 1.

7. In dealing with Items 1-32 we have used the actual costs incurred and rather than deal with each item individually we have, with the agreement and indeed encouragement of the parties, grouped together similar items which raise the same issue of principle. Thus Mr Jacob, in his very helpful skeleton argument, submitted that "*the items can be conveniently addressed in 6 categories*" as follows:

(1) Category 1: Licences for alterations and related works (items 2, 10, 18, 19, 21, 23, 28, 29 and 31)

(2) Category 2: Mediation costs – flats 77/79 (items 9, 14, 15, 22, 26 and 32)

(3) Category 3: Roof Garden Leases and Licence (items 6, 7, 8, 12 (in part), 16, 17)

(4) Category 4: Investigations/reports that were not followed up (items 1, 3, 20 and 30)

(5) Category 5: Costs concerned with internal management of R company and miscellaneous costs (items 11, 12, 13 and 27)

(6) Category 6: "Unexplained" costs (items 4, 5, 24 and 25)

8. In dealing with the estimated costs, our focus has primarily been on the reasonableness of the budget by reference to what was known at the time that the budget was fixed, which was in or about May 2019.

9. One other aspect of the background to this hard-fought application warrants emphasis at this stage. The Respondent freeholder is a lessee-owned and managed company. Much of the difficulty in this case goes back to events in 2012 when the Respondent granted the lessees (A3, A4 and A5) of 3 flats on the sixth floor (83A, 83B and 83C) leases of the roof area above their demised premises. At the time the roof was in a poor state of repair and the thinking appears to have been that the Respondent could avoid a large liability for repairing the roof by handing this responsibility (together with a repairing liability for the next 20 years) to the three lessees of the top floor flats who in return were granted leases of the roof area above their flat in anticipation that they would then develop the area into roof garden terraces, as has now happened.

10. We were shown a specimen roof lease dated 5 July 2012 ("the Roof Garden Lease") and a license dated 31 May 2017 ("the License"). The Roof Garden Leases require the lessee to carry out works to create a new flat roof surface for the Property, over which the lessee would construct a roof garden area ("the Works"). The Roof Garden Leases also allowed for roof common parts.

11. The lessee covenanted to carry out the Works in good and workmanlike manner (Clause 3) and to keep the roof garden common parts in good and substantial repair and condition (Clause 4.3). Various other obligations and restrictions were imposed by Clause 4, including the lessee providing the Respondent with a full indemnity against any damage caused to the roof by reason of its act/default and any costs, etc., by reason of its breach of the lease (Clauses 4.10.3 and 4.11).

12. On 31 May 2017 the License was granted, being a licence to carry out works to the roof. By Clauses 4.5 and 4.7 of the Licence, the roof garden lessees covenanted:

> *"4.5 Fully and effectually to indemnify the Landlord … from and against liability in respect of all loss damage actions proceedings claims demands cost injury damages and expense of whatsoever nature:*
>
> *(a) Arising out of or in relation to the Works in this Licence or any non-observance of its terms.*
>
> *(b) Resulting from any failure to comply with any statute or bye-law or other similar requirements relating to the Works.*
>
> *(c) And so that this indemnity shall extend to any injury damage or loss arising as a result of the carrying out of the Works or the state or condition of the premises.*
>
> *4.7 To pay the following:*
>
> *(A) On the execution of this Licence the agreed fees of the Landlord's Surveyor in the sum of £900 and expenses and disbursements (plus Value Added Tax) in respect of and incidental to the approval of the Works and the supervision and carrying out of the Works at an agreed rate of £155 per hour (Plus Value Added Tax).*
>
> (B) *All Surveyors costs, fees and disbursements incurred by the Landlord in connection with this licence and which may be incurred pursuant to this Licence including the reasonable fees and expenses of the said Surveyor in connection [with] any variation of the plans and specifications and any approval and/or supervision of the carrying out of the varied Works and any works or reinstatement consequent to these variations.*"

13. We shall refer later in this decision to the relevant terms in the Roof Garden Lease or License where necessary to resolve any particular dispute but for

present purposes it is important to record the fact that the grant of the Roof Garden Leases and/or the License has caused serious bad blood in the block. There is or appears to be litigation proceeding on one or more fronts, including litigation under Part 1 of the Landlord and Tenant Act 1987 (tenants' rights of first refusal) in relation to the Roof Garden Leases, and there have been myriad threats of litigation. The constitution of the Board has changed and it is suggested by the Applicants that the new Board are trying to unpick the Roof Leases and to that end are incurring significant professional costs in instructing lawyers and surveyors which they are then attempting impermissibly to recover via the service charge. The Tribunal is not in a position to rule on these issues and does not consider it necessary to do so, particularly having regard to the pleaded issues. The challenge is as to the payability of these items having regard to the terms of the Lease. This is the challenge which the Tribunal will rule on. In particular, the position of the Applicants is that a large number of the disputed items should not have been put through the service charge because they do not relate to "*the proper maintenance and administration or inspection of the Building",* to use the language of paragraph 13, but relate instead to the management and administration of the Respondent company and/or are costs which can and should be recovered from individual lessees and are not therefore recoverable under paragraph 13. In addition, in a number of instances, the Applicants, or at least the lessees of the Roof Garden Leases, positively aver that these are costs which *they* should bear pursuant to the terms of the Roof Leases and/or the License, and that they are not therefore recoverable under the terms of the Lease, and in particular paragraph 13 of the Fourth Schedule thereto.

14. Against that background, we turn to deal with the particular items in dispute. In doing so, we have largely adopted Mr Jacob's proposals as to the grouping of items but where any particular item warrants special mention, we have dealt with that particular item separately. Where, however, the outcome in relation to any particular item turns on the resolution of the common issue identified, we have dealt with that item briefly by reference to our decision on the common issue. The net result is that our conclusions will enable the parties to know whether any particular item in dispute is payable.

Category 1: Licences for alterations and related works (items 2, 10, 18, 19, 21, 23, 28, 29 and 31)

15. Costs relating to licences for alterations and related works are reflected in items 2, 18 and 23 (flats 77/79), 10 (flat 79), 19 and 29 (flat 73), 21 and 28 (basement flat) and 31 (flat 72).

16. The key provision in this case is paragraph 13 of the Fourth Schedule set out above. On its face it is very wide and Ms Gray relies on its width. She referred us, in particular, to the case of *Assethold Ltd v Watts* [2014] UKUT 0537 (LC), a decision of Martin Rodger QC, Deputy President, who had to consider whether the landlord's legal costs associated with a party wall dispute with the owner of neighbouring land were recoverable pursuant to a lease which permitted the landlord to recover the costs of and incidental to *"all works installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development"* (Paragraph 6, Schedule 1).

17. In that context, the Deputy President said this:

> *57. I am satisfied that although the words of paragraph 6 are general, they are sufficient to encompass the Landlord taking professional advice prior to deciding what course of action to follow in order to preserve the safety and amenity of the Building. It is clear that the language is not limited to carrying out work to the Building itself, because the acts matters and things covered may include those for administration, as well as for safety, amenity and maintenance. The LVT thought that the engagement of a surveyor to advise on and respond to a party wall notice was within the language of the paragraph. I think they were right to do so, and Mr Bates has not suggested the contrary. Why then should taking and following the advice of a lawyer be excluded from the scope of the same provision? The activities within the scope of the paragraph are widely expressed, extending to "all works installations acts matters and things" for the specified purposes. Those purposes are also described in broad terms by reference to their general character. The answer given by Mr Bates is that the language is insufficiently clear to demonstrate an intention to include expenditure on litigation.*
>
> *58. I accept that, as a general principle of interpretation, if contracting parties intend that a payment obligation such as a service charge should cover a particular type of expenditure they will*

wish to make that clear. Unclear language should therefore be read as having a narrower rather than a wider effect. Nonetheless, I do not think that principle should be pushed to the point where language which was clearly intended to encompass expenditure in a wide variety of situations which the parties have not explicitly catalogued should be so restrictively construed as to deprive it of any real effect. It seems to me to be wrong in principle to start from the proposition that, with certain types of expenditure, including the cost of legal services, unless specific words are employed no amount of general language will be sufficient to demonstrate an intention to include that expenditure within the scope of a service charge. Language may be clear, even though it is not specific.

59. The First and Second Schedules to the Lease specify a variety of activities the cost of which is to form part of the Annual Expenditure. The description of most of those activities is fairly precise, although not in all cases, yet the parties have clearly evinced an intention that expenditure by the Landlord falling within all of the listed categories, whether specific or general, should be recoverable through the service charge. A general provision such as paragraph 6 is included in a lease precisely because the parties appreciate that they cannot anticipate all eventualities. The parties must be taken to expect that, in an agreement intended to last for 125 years, circumstances may arise which they do not specifically contemplate at the time of contracting and in which expenditure by the Landlord may be necessary or desirable in their mutual interests. The object of a provision such as clause 6 is to allow for the recovery of such expenditure through the service charge so long as it is for the proper maintenance, safety, amenity and administration of the Building.

60. I do not think that either Sella House or Gilje requires a different approach in principle to expenditure on legal advice and representation. Sella House concerned expenditure on proceedings brought against individual tenants to recover debts which they owed to the landlord, which the Court of Appeal did not regard as acts for the maintenance, safety and administration of the building. Gilje concerned the recovery of notional expenditure which had not been incurred. Nothing said in those cases about the need for clear and unambiguous language requires that language which is clear and of deliberately wide scope should be interpreted narrowly in the case of some categories of expenditure.

61. It is of course necessary to interpret specific provisions of the Lease in the light of the document as a whole. In particular it is necessary to consider the lengths to which the draftsman has gone in other places to stipulate that the Tenant will be liable to reimburse expenditure by the Landlord on legal advice and the cost of litigation. I refer in particular to the Tenant's covenants at clauses 3.19 and 3.23 and the proviso to the landlord's covenant at clause 4.2.1 (see paragraphs 26 to 28 above). Those covenants demonstrate that the draftsman was aware of the wisdom and importance of spelling out that reimbursement of Landlord's expenditure was intended in those specific circumstances to include legal costs. They

might also suggest an appreciation that such costs may become substantial and, for that reason, highly contentious. Nonetheless they do not seem to me to dictate an exception for legal expenses from the very wide language of paragraph 6 of the First Schedule.

62. I am satisfied that, though general, the language of paragraph 6 of the First Schedule is sufficiently clear to entitle the appellant to recoup through the service charge the cost of engaging solicitors to take steps which in themselves are agreed to have been reasonable, to ensure that the protection afforded to the Building by a party wall award under the 1996 Act would not be lost. In my judgment those steps can appropriately be described as having been taken for the proper maintenance, safety, amenity and administration of the Building. There is nothing in the context or commercial purpose of the leases to suggest that the preservation of the Building from external interference ought not to be the responsibility of the Landlord. Indeed, the opposite is the case as the structure of the Building remains vested in the Landlord and the service charge puts it in a position to fund action for the common good which might be beyond the resources of individual tenants. The Lease also permits the recovery through the service charge of all sums reasonably and properly incurred in the abatement of a nuisance (paragraph 13 of the Second Schedule) and, although that provision has not been specifically relied on by Mr Sissons, its inclusion in the Lease is consistent with the conclusion I have reached. That conclusion is that the cost of obtaining the injunction against Freetown is capable of being included as part of the Annual Expenditure recoverable through the service charge under paragraph 6 of Schedule 1.

18. That decision pre-dates the decision of the Supreme Court in *Arnold v. Britton* [2015] AC 1619 but it is clearly consistent with it and rightly emphasises the primacy of the contractual language and the natural and ordinary meaning of that language, and in particular the centrally relevant words to be interpreted.

19. Mr Jacob contends that paragraph 13 is not as wide as it appears and that it must be construed in the context of the Lease as a whole. He relied, inter alia, on the *Sella* decision to which the Deputy President referred, but insofar as that might be taken as indicating that there are any special rules of construction for service charges, that is clearly no longer the case following *Arnold v Britton*. Otherwise, it is simply a case that turns on the particular facts, and in particular the terms of the lease under consideration in that case. The other principal point of construction relied on by Mr Jacob was this: if particular costs are recoverable from an individual tenant under the terms of

the Lease, it cannot have been within the contemplation of the parties to the Lease that that same cost could be recovered through the service charge. The particular covenant he relies on is Clause 3(7) whereby the tenant covenants that he will:

> *Not make any alterations in or additions to … the demised premises … without the previous consent in writing of the Lessor to the plans and specifications thereof … and in connection with any such consent given by the Lessor to pay the proper fees of the Lessor their architects or surveyors in granting such consent and approving all necessary plans and specifications*

20. In support of his argument, and in response to the point that paragraph 13 is widely drawn, he submitted that even a seemingly broad clause, such as paragraph 13 of the Fourth Schedule must be construed in the context of the Lease as a whole. He submitted that the existence of other clauses (in particular Clause 3(7) in this context) may necessarily reduce its scope and he referred us to the case of *Lloyds Bank plc v Bowker Orford* [1992] 2 EGLR 44. On that basis, Mr Jacob submitted that as these costs are clearly intended to be paid by a lessee seeking consent to alter, they cannot be construed as falling within paragraph 13.

21. The Tribunal fully accepts the principle that even potentially wide words must be read in the context of the Lease as a whole and their scope may be narrowed when so read. This was the principle that David Neuberger QC (as he then was) applied in the *Lloyds Bank* case. However, that case turned on the particular language of the lease under consideration, and the same applies here.

22. The Tribunal does not accept Mr Jacob's submission for the following principal reasons. Firstly, the language of Clause 13 is very wide and we see no good reason, whether in the other terms of the Lease, including Clause 3(7), or otherwise, to narrow its scope or depart from its clear meaning. There is no special rule of construction for service charge clauses. Secondly, as the Deputy President observed in the *Assethold* case, it seems to us that a general provision such as paragraph 13 has been included in the Lease "*precisely because the parties appreciate that they cannot anticipate all eventualities*" and the object of such a provision is to allow for recovery of expenditure through the service charge so long as it is "*necessary or advisable for the proper maintenance and administration or inspection of the Building"*. We

regard each of the items referred to in Category 1 as falling within this language. Thirdly, if Mr Jacob were right, it would have bizarre and unlikely consequences which cannot have been intended. The point can be tested shortly in this way: suppose, as actually happened in relation to Flats 77 and 79, consent to alter is sought, advice is taken by the freeholder from lawyers and/or surveyors and on the basis of that advice, consent is refused. On Mr Jacob's case, those costs are irrecoverable. They cannot be recovered from the lessee pursuant to Clause 3(7) because consent was not given and they cannot be recovered via the service charge under paragraph 13 because, so it is said, the effect of Clause 3(7) is to narrow the scope of paragraph 13 and render such costs irrecoverable. In our judgment, it is very unlikely that the parties intended or contemplated such a result when drafting the Lease and the language of the Lease militates against such a construction.

We conclude as a matter of construction of the Lease that each of the items in Category 1 (items 2, 10, 21, 23, 28, 29 and 31) is recoverable through the service charge via paragraph 13 of the Fourth Schedule save for items 18 and 19 on the basis of the landlord's concession.

Category 2: Mediation costs – flats 77/79 (items 9, 14, 15, 22, 26 and 32)

23. In the present case, staying with the example of Flats 77 and 79, the matter did not end there. Following the initial refusal of consent, the matter went to mediation and the net result was that consent was given. However, the Respondent incurred significant costs in dealing with the mediation, including legal and surveying fees, and, when the matter was settled at mediation, there was no or only very limited recovery of those costs from the lessee(s) as part of the mediation settlement (£2,000 was paid by the tenant of Flat 79). Nonetheless, Mr Jacob says that in those circumstances, Clause 3(7) kicks in and because all the costs could, in principle, have been recovered from the lessee, this precludes recovery via the service charge under paragraph 13. We disagree. Firstly, on Mr Jacob's construction, what was hitherto irrecoverable because consent had been refused, becomes recoverable because consent has now been given. It seems to us singularly unlikely that the parties can have intended that costs should "flip-flop" in this way, being irrecoverable one day, and recoverable the next. Secondly, the fact that a

landlord is, or might be, able to recover some or all of these costs from the lessee does not, in our judgment, preclude recovery via the service charge under paragraph 13 either as a matter of principle or on the proper construction of this Lease. The landlord may be advised to compromise on particular terms that preclude such recovery. There was no pleaded case that the landlord had acted unreasonably in settling the mediation on the terms that it did. Confining ourselves to the issue of payability under the terms of the Lease, given the pleadings, we are satisfied that each of the items in Category 2 (items 9, 14, 15, 26 and 32) is payable with the exception of item 22. This was money paid over to solicitors in relation to an undertaking. We were told it is still held by the solicitors and can readily be recovered from them by the Respondent. In those circumstances, we consider that this item is not payable.

Category 3: Roof Garden Leases and Licence (items 6, 7, 8, 12 (in part), 16, 17)

24. As noted above, the Roof Garden Leases were granted in 2012, but related works did not start for a number of years. The Applicants' case is that following an influx of new directors in 2017, board meetings became hostile and the new directors began to investigate methods of obtaining the roof gardens from the lessees under the Roof Garden Leases.

25. These items relate to legal and surveying costs and the Applicants contend that these costs are not payable. It is a matter of record that the Respondent has engaged solicitors to advise in relation to the Roof Garden Leases and to work on a deed of variation to the Roof Garden Leases and related advice. It is said by the Applicants that these are matters relating to disputes between lessees with the lessees on the board engaging solicitors to assist them in their personal disputes.

26. The Respondent has also engaged surveyors to report on the roof. The Applicants submit that the costs of these reports should not be payable as service charge for either or both of the following reasons. Firstly, it is submitted that the reports were not obtained with a view to supporting the Respondent's repairing and/or management functions but as a means to pursue the challenge to the Roof Garden Leases. It is therefore submitted that the expenditure was therefore not within the service charge expenditure

within the leases and/or it was not reasonably incurred (in this connection, we repeat our previous observations about the scope of the challenge). Secondly, it is said that if the reports were in fact obtained for a legitimate reason, the Respondent was entitled to recover the expenditure under the indemnities in the Roof Garden Leases (Clauses 4.10.3 and 4.11 referred to above) and/or the Licence (Clauses 4.5 and 4.7 referred to above).

27. We reject the challenge to these items for the following reasons. Firstly, insofar as it is relevant to the pleaded challenge (which is doubtful), we do not accept that the Respondent has been used by the new Board to pursue their personal disputes. It is common ground that by 2017, 5 years after the grant of the Roof Garden leases, there were a number of new lessees and that matters relating to the roof and the Roof Garden leases were causing disquiet amongst the general body of lessees, a number of whom had not been around in 2012. We note that the three owners of the Roof Garden leases took it upon themselves to write an open letter (addressed "*Dear Resident*") to explain the position as they saw it. That letter specifically noted that there had been "*some negative discussion from some flat owners and confusion about the terms of the agreement between the owners of the 6th floor flats and Block 6*" and that "*some residents have raised queries about the rationale and process*" relating to the Roof Garden Leases. It is against this background that the Respondent's actions fall to be judged and we have concluded that it was entirely legitimate to instruct solicitors and surveyors to advise in relation to issues around the Roof Garden Leases, and in particular the License and its execution by A5 on behalf of the Respondent (given the potential conflict of interest), but also in relation to the impact of the Works on the Property and on the amenity of the other residents.

28. Secondly, for the reasons given above when we considered the scope of paragraph 13, we are satisfied that this expenditure falls within the wide words of paragraph 13 of the Fourth Schedule.

29. Thirdly, we reject the submission that these costs were recoverable from the Roof Garden lessees pursuant to the terms of their Roof Garden leases and/or the License, as set out above but even if they were, this does not preclude recovery via the service charge under paragraph 13.

30. Fourthly, even if were we to allow a wider reasonableness challenge, which we do not, we are satisfied that these costs were reasonably incurred for the reasons we have already given in paragraph 27.

31. We are therefore satisfied that each of the items in Category 3 (items 6, 7, 8, 12, 16, 17) are payable.

Category 4: Investigations/reports that were not followed up (items 1, 3, 20 and 30)

32. The items that the Applicant says fall under this head are 1 (in part), 3, 20 and 30.

33. The Applicants challenge these items on the basis that, so it is said, the Respondent has instructed professionals to carry out inspections and prepare reports relating to potential issues at the Property, which then appear never to have been followed up. In argument no point was taken that these items did not fall within the terms of the Fourth Schedule and we are satisfied that they do (paragraphs 1 and/or 13). Thus for example, item 1 relates to inspecting and reporting on flat 71; item 3 is a report on Legionnaires; item 20 is a report on damp in flat 83B; item 30 relates to a damp inspection in the basement flat.

34. We reject this challenge. There is no suggestion that these reports were not commissioned in good faith in relation to real problems. There is no evidence that the same costs have been duplicated or will be duplicated. The Respondent is about to commence a major programme of works when many of these outstanding issues will be addressed. The Applicants submitted that if the Respondent incurs expenditure on reports that it has no intention to follow up on, such expenditure cannot be said to be reasonably incurred. We have two difficulties with this submission. Firstly, there is no evidence that the reports in question have been commissioned with no intention to follow up on them. Secondly, the challenge was as to payability. Thirdly, in any event, we are satisfied that the Respondent does intend to follow up on them and had that intention at the time they were commissioned.

35. We are therefore satisfied that each item within Category 4 (items 1, 3, 20 and 30) is payable.

Category 5: Costs concerned with internal management of Respondent company and miscellaneous costs (items 11, 12, 13 and 27)

36. Item 11 relates to legal advice on a sale of flat 80A and the transfer of ownership, including a shareholding in the Respondent company. Item 12 relates to legal advice on share transfers and missing share certificates in the Respondent company. Item 13 is a company secretarial fee. Item 27 relates to legal advice in relation to directors' duties.

37. The Applicants submit that these items are issues relating to the Respondent's internal management and not service charge items within the scope of paragraph 13. Reliance is placed on *Fairbairn v Etal Court Maintenance Ltd* [2015] UKUT 639 (LC) for the proposition that costs incurred in the management of a landlord company (as opposed to the building) have nothing to do with the costs recoverable under a service charge relating to the management and administration of a building [46]. Further, the fact (if it be the case) that the landlord is without means is said to be irrelevant to the interpretation of the service charge provisions: *Fairbairn v Etal* at [42].

38. We agree with both of the points made by the Applicants. Ms Gray acknowledged her potential difficulties in this regard and sought to rely on paragraph 7 of the Fourth Schedule but we decline to allow reliance on this unpleaded point. In any event, even were to allow reliance on this provision, we are not persuaded that it assists the Respondent: the words "*the cost of and incidental to the administration of and running of the Company"* are preceded by the word "*including*" and in our view this controls and limits the scope of these words by reference to the first part of the provision which refers to "*All fees and costs incurred in respect of the said Accountant's Certificate and of accounts kept and audits made for the purpose thereof…"* We do not consider that these items fall within paragraph 7, properly construed.

39. We therefore determine that none of these items (items 11, 12, 13 and 27) are payable.

Category 6: "Unexplained" costs (items 4, 5, 24 and 25)

40. The difficulty we have with these items is the lack of any proper evidence to explain them. There are no invoices for items 4 and 5. We can discern from a ledger summary that item 4 appears to relate to a title download and item 5 relates to a company secretarial fee. Absent an invoice or any explanation, we find item 4 not payable. We find item 5 not payable for the reasons we have already given in relation to company administration.

41. Items 24 and 25 relate to seeking counsel's advice. Ms Gray was constrained to accept that "There isn't much evidence about these invoices". There isn't any evidence. The Respondent has failed to provide any evidence as to the nature of this advice. For that reason, these items are not payable.

42. 2019-2020. The budget for 2019-2020 was sent to the lessees on 31 May 2019 and made provision for estimated costs as follows: £50,000 for legal and professional fees, £15,000 for surveyors' fees and £3,500 for communal window cleaning. Demands for advance service charge were made on the basis of this budget. The Applicants challenge these three items as unreasonable. Section 19(2) LTA provides that: "*Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable…*"

43. We uphold the challenge to the figure of £50,000. It seems to us that this is unreasonably high based on the information available at the time. The comparable actual figures for the previous two years were £7,512 (2019) and £25,784 (2018). The budget for the previous year was £27,000. This was therefore almost a two-fold increase. Whilst we acknowledge that there were a number of problems likely to require legal advice, and we note the Part 8 claim brought by A5 on 29 January 2019, we consider that this provision is unreasonably high. Insofar as any explanation is given in the letter that accompanied the budget dated 31 May 2019, we consider that explanation

insufficient to justify a figure of £50,000. We consider a reasonable figure to have been £25,000.

44. We dismiss the challenge to the budgeted surveyor's fees. The comparable actual figures for the two previous years were £9,255 (2019) and £976 (2018). The budget for the previous year made the same provision, namely £15,000 and the letter accompanying this budget noted that there would be a fee for a planned preventative maintenance programme. We consider this a reasonable figure.

45. The figure in the budget for communal window cleaning was £3,500. Ms Gray on instructions informed us that reliance would now be placed on a lesser figure, namely £600. We consider the sum of £600 to be a reasonable figure.

46. Section 20C. The Applicants seek an order under section 20C of the Landlord and Tenant Act 1985. They have succeeded in their challenge as to approximately 28% in value of the items challenged (£12,823 out of £46,697). They also succeeded in relation to 2 of their 3 challenges in relation to estimated costs. The Tribunal has a discretion in the matter which must be exercised having regard to what is just and equitable in all the circumstances: *Tenants of Langford Court v. Doren Ltd* (LRX/37/2000). Having regard to the extent of the parties' respective successes, we have concluded that the just and equitable order is that not more than 70% of the costs incurred by the Respondent in connection with these proceedings should be able to be passed on to the Applicants through the service charge.

Name: Judge W Hansen **Date:** 26 August 2020

APPENDIX 1

Item number	Date	Item	Cost	Invoice bundle ref	Description
1	24/10/2017	Celador	£744.00	155	(1) advice on broadband installation (2) inspection and report on flat 71
2	04/07/2018	Hurst Pierce + Malcolm	£720.00	166	Refurbishment works to flats 77/79
3	13/09/2018	Ergro	£804.00	167	Legionnaires report
4	31/12/2018	Warwick Estates	£12.00	no invoice	UNKNOWN
5	30/09/2018	Warwick Estates	£336.98	no invoice	UNKNOWN
6	25/02/2020	LSGA	-£1,584.00	148	Work on deed of variation for Roof Garden Leases
7	31/03/2017	LSGA	£1,920.00	147	Work on deed of variation for Roof Garden Leases
8	27/10/2017	LSGA	£6,000.00	156	Work on disputing roof garden licences
9	29/03/2017	LSGA	£2,670.30	145	Mediation with owners of flats 77/79
10	30/06/2016	LSGA	£2,952.72	142	Flat 79 request for licence for alterations
11	31/03/2017	LSGA	£606.00	146	Advice re change of ownership of flat 80A
12	31/03/2017	LSGA	£1,080.00	149	Advice on roof garden leases and share transfers within R
13	30/06/2018	HML	£600.00	165	Company secretarial fee
14	06/06/2017	S Franses	£101.53	151	Mediation with owners of flats 77/79
15	27/03/2017	S Franses	£2,107.10	144	Mediation with owners of flats 77/79

16	23/04/2018	Day & Associates	£2,912.40	161	Inspection and report on roof
17	14/06/2018	Day & Associates	£1,173.36	162	Report on roof works and roof licence
18	26/06/2018	Shaw & Co	£510.00	164	Licence to alter re flats 77/79
19	10/01/2018	Day & Associates	£1,960.80	160	Licence to alter re flat 73
20	29/11/2017	Day & Associates	£322.80	157	report on damp in flat 83B
21	08/01/2018	Day & Associates	£322.80	159	Licence to alter re basement flat
22	17/08/2017	LSGA	£600.00	153	Mediation with owners of flats 77/79
23	15/12/2017	Hurst Peirce + Malcolm	£1,620.00	158	Licence to alter re 77/79
24	19/06/2019	Child & Child	£517.56	172	Seeking counsel's advice (reason undisclosed)
25	14/09/2018	Tanfield Chambers	£5,460.00	168	Counsel's advice in conference and note (reason undisclosed)
26	09/04/2020	1 Chancery Lane	£4,200.00	173	Mediation with owners of flats 77/79
27	23/10/2017	LSGA	£1,140.00	154	Advice re R's directors' duties
28	18/07/2017	Celador	£840.00	152	Licence to alter basement flat
29	19/06/2019	Child & Child	£22.44	171	Licence to alter flat 73
30	16/01/2017	Day & Associates	£534.60	143	Damp inspection basement flat
31	16/12/2018	Day & Associates	£1,500.00	169	Licence to alter flat 72
32	04/04/2017	Celador	£3,990.00	150/ 196i	Mediation with owners of flats 77/79
		TOTAL:	**£46,697.39**		