FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BK/LSC/2019/0482** **LON/00BK/LDC/2020/0044**
HMCTS code (paper, video, audio)	**:**	**V: CVP VIDEO**
Property	**:**	**Flats 1 and 2, 502 Harrow Road, London W9 3QA**
Applicants	**:**	**Fiorina Fortunato (1)** **Cadenza Properties (2)**
Representative	**:**	**Mr J Platt FRICS**
Respondents	**:**	**Harminder Pal Singh (1)** **Baljit Kaur (2)**
Representative	**:**	**Mr R Bowker of Counsel**
Type of applications	**:**	**For the determination of the liability to pay service charges under s.27A Landlord and Tenant Act 1985 and for dispensation from the statutory consultation requirements**
Tribunal members	**:**	**Judge N Hawkes** **Mr T Sennett FCIEH** **Mr J Francis QPM**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**14 August 2020**

DECISION

Covid-19 pandemic: VIDEO HEARING

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVP REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in a main bundle of 991 pages, a supplementary bundle and a dispensation bundle, the contents of which we have noted. The order made is described below.

Decisions of the Tribunal

(1) The following matters are within the scope of the applications which are before the Tribunal:

a. whether the Respondents have complied with the statutory consultation requirements in respect of the Major Works;

b. if not, whether dispensation from the statutory consultation requirements should be granted;

c. the reasonableness and payability of the estimated service charges for the years 2018 and 2019 (insofar as they do not concern the Major Works).

(2) The Respondents have failed to comply with the statutory consultation requirements in respect of the Major Works.

(3) Dispensation from the statutory consultation requirements is granted on terms that:

a. The costs recoverable by the Respondents in respect of the Major Works are limited to £25,000 in total (before any reduction on account of any breach of the Respondents' repairing covenants is taken into account).

b. The Respondents shall pay the Applicants' reasonable costs of instructing Mr Platt to investigate the issues of consultation and prejudice and of responding to the dispensation application, to be assessed if not agreed.

c. The Respondents' costs of the dispensation application shall not be recoverable from the lessees through the service charge

(4) The amount payable by the Applicants is, at present, nothing, because a condition precedent to liability has not been fulfilled. The Tribunal

was asked to make findings concerning the sums which would be payable if the condition precedent were to be complied with and these findings are set out below.

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges which are payable by the Applicants in respect of the service charge years 2018 and 2019.

2. The Applicants contend that the Respondents have failed to comply with the consultation requirements under section 20 of the 1985 Act in respect of certain major works.

3. The Respondents' primary case is that they have complied with the statutory consultation requirements. However, they have issued an application for dispensation as a protective measure and they submit, in the alternative, that unconditional dispensation from the consultation requirements should be granted.

The background

4. 502 Harrow Road, London W9 3QA is a building comprising three two-bedroom flats spread over three floors which are situated above a hardware shop on the ground floor ("the Building").

5. The First Applicant, Ms Fortunato, is the long leaseholder of Flat 2; the Second Applicant, Cadenza Properties Limited (a company in respect of which Ms Fortunato is the sole director), is the long leaseholder of Flat 1; and the long leaseholder of Flat 3 is not a party to these proceedings.

6. The Respondents are the head leaseholders of the Building and the Tribunal was informed that they have retained and occupy the shop premises on the ground floor. Since 2004, the freehold owner of the Building has been Romo Properties Limited. The First Applicant is the sole director of Romo Properties Limited.

7. In 2018, the freehold owner of the Building served a schedule of defects and wants of repair on the Respondents which was prepared by Savills (UK) Limited ("the Savills' Report"), following an inspection which took place on 17 April 2018.

8. It was the freeholder's position that the Respondents were in breach of their covenants under the head lease and were obliged to carry out the work set out in the Savills' Report.

9. Savills priced the work at £43,665 but were of the opinion that the cost would have been £26,515 if the Respondents' repairing covenants had been complied with. Following receipt of the Savills' Report, major works were carried out to the Building by the Respondents ("the Major Works").

10. In October 2018, the Respondents appointed Aldermartin, Baines & Cuthbert ("ABC") to manage the Building.

11. Due to the coronavirus pandemic, the Tribunal was unable to carry out an inspection of the Building. Accordingly, photographs of the Building were provided in the hearing bundle and a video of the common parts was played by Mr Platt during the course of the hearing.

The hearing

12. A video hearing in this matter took place on 8 and 9 June 2020 and on 2 and 3 July 2020. The Tribunal reconvened in order to reach its decision on 7 July 2020.

13. The Applicants were represented by Mr J Platt FRICS at the hearing and the Respondents were represented by Mr R Bowker of Counsel. Although Mr Platt is an expert, the Tribunal is mindful that he appeared solely as an advocate in these proceedings. Mr Platt confirmed that a document which he has prepared titled "Appendix 1" is not relied upon as an expert's report but rather reliance is placed on the underlying documents which Mr Platt refers to in Appendix 1.

14. The Tribunal heard oral evidence from:

    (i) Ms Fiorina Fortunato, who is the lessee of Flat 2, the sole director of the Second Respondent, and the sole director of the freehold owner of the Building.

    (ii) Ms Eloise Brett, who occupies Flat 1 as a periodic tenant.

    (iii) Mr Mukul Motiwala, who was employed by ABC from 16 May 2018 to 1 October 2019 as an Assistant Property Manager.

    (iv) Mr Matthew Alderman, a director of MA Premier Property Services Limited ("MAPPS"), a company which ABC instructed to clean the common parts of the Building.

(v) Mr Vicky Patel, who has been employed by ABC as an Assistant Property Manager since 15 January 2019.

(vi) Mr Mark Reed, who is Head of Block Management at ABC.

(vii) Ms Jennifer Birikorang, who is a Property Manager employed by ABC.

15. The Tribunal received both written and oral submissions and heard extensive evidence, all of which has been taken into consideration. In order to keep this decision to a manageable length, the Tribunal has not sought to reproduce all of this material below and has focussed on setting out the information which is needed in order to understand the determinations which have been made.

The scope of the Applicants' application

16. The Tribunal was asked to determine a dispute between the parties concerning the scope of the Applicants' application as a preliminary issue.

17. It is common ground that the Tribunal is to determine all matters relevant to the issues of (i) whether the Respondents have complied with the statutory consultation requirements in respect of the Major Works, and (ii) if not, whether dispensation should be granted. These matters were fully presented and argued.

18. The Applicants' application is in respect of the service charge years 2018 and 2019 and the Applicants submitted that the scope of their application extends to seeking determinations in respect of all matters concerning the actual as well as the estimated service charges for these service charge years.

19. The Respondents have, to date, only demanded the estimated service charges and Mr Platt accepted as he was bound to do that there was, at best, ambiguity concerning the nature of the determinations sought by the Applicants.

20. In a Scott Schedule which was drafted before Mr Platt was instructed, the dispute was set out by the Applicants with express reference to the service charge "budgets", without making it clear that determinations were also sought in respect of the actual service charges in reliance upon *Warrior Quay v Capt Joachim and others* LRX/42/2006, as indicated by Mr Platt at the hearing.

21. In the Counter-schedule, the Respondents stated that they understood the Applicants' case to be based upon the on account interim service charges. Accordingly, in the body of the Counter-schedule, the Respondents set out their comments in respect of the budget items.

22. By the Tribunal's directions dated 31 December 2019, the Applicants had permission to serve a brief Reply to the Respondent's Counter-schedule but they did not do so. Accordingly, the Respondents proceeded to prepare their case on the basis that only the estimated service charges were in dispute.

23. Mr Bowker's primary position was that the actual service charges were not before the Tribunal and that the Tribunal should not allow the Applicants to change their case during the course of the hearing. He also stated that his questions for the Applicants' witnesses had been prepared on the basis that only the budgets were in issue and submitted that, if the Applicants were permitted to seek determinations in respect of the actual service charges, he should have the opportunity to prepare further questions for the Applicant's witnesses.

24. The Tribunal accepted that it could not, of course, consider the reasonableness and payability of the actual service charges without giving Mr Bowker the opportunity to question the Applicants' witnesses concerning these charges.

25. The time estimate for the hearing had already been extended from two days to three and a half days and the Tribunal was concerned that there was unlikely to be sufficient time available to hear evidence and argument concerning both the estimated and the actual service charges. In fact, the hearing ultimately exceeded its time estimate of three and a half days and did not conclude until after 4 pm on the fourth day, notwithstanding that the actual service charges were not under consideration.

26. At page 13 of the application form, the Applicants were required to give a description of the questions they wished the Tribunal to decide. In setting out the matters to be determined, the Applicants referred to sums which had been claimed and paid. There was no reference to the actual service charges which are yet to be demanded from the Applicants by the Respondents.

27. Having considered the relevant documents and the parties' submissions, the Tribunal found that the Applicants' application, insofar as it does not relate to the Major Works, solely concerns the estimated service charges in respect of the service charge years 2018 and 2019. Accordingly, any remaining dispute concerning the actual service charges will fall to be determined by way of a separate application.

28. Having heard evidence and submissions from the parties and having considered all of the documents to which it was referred, the Tribunal has made determinations on the various issues as follows.

The Major Works

Whether the statutory consultation requirements were complied with

29. Section 20 of the 1985 Act provides for the limitation of service charges in the event that statutory consultation requirements are not met. The consultation requirements apply where the works are qualifying works (as is the case in respect of the Major Works) and only £250 can be recovered from a leaseholder in respect of such works unless the consultation requirements have either been complied with or dispensed with by the Tribunal. The consultation requirements are set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations").

30. Schedule 3, Part 2 of the 2003 Regulations (consultation requirements for qualifying works for which public notice is not required) applies in the present case. The procedure was summarised in *Daejan Investments Limited v Benson* [2013] UKSC 14 as follows:

Stage 1: Notice of intention to do the works

Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates

The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notices about estimates

The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons

Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

31. The power to dispense with the consultation requirements is conferred on the Tribunal by section 20ZA(1) of the 1985 Act which provides that:

"Where an application is made to [the appropriate tribunal] for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ... the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

32. The Applicants accept that work was required to the Building. Mr Bowker stressed that the freehold company, of which the First Applicant is the sole director, served the Respondents with the notice of defects which is referred to above. However, the Applicants submit that the statutory consultation requirements were not complied with before the Major Work was undertaken because section 20 notices dated 19 February 2019 were not served on the Applicants. They state that the estimated service charges relating to the Major Work are therefore limited to the sum of £250 per leaseholder.

33. Section 7 of the Interpretation Act 1978 ("the 1978 Act") provides that certain notices are deemed to have been served if they have been sent by ordinary post, unless the contrary is proved:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

34. The parties were in agreement that section 7 of the 1978 Act is engaged in the present case and the Tribunal was referred to *Southwark v Akhtar* [2017] UKUT 0150 concerning its interpretation.

35. Mr Platt submitted that the section 20 notice which is said by the Respondents to have been served on the Second Applicant, Cadenza Properties, was not "properly addressed".

36. Mr Patel gave evidence on behalf of the Respondents that the section 20 notices, which are in the form of letters, would have been

posted in window envelopes. Accordingly, the addresses printed on the letters were also the addresses on the envelopes.

37. The letter intended for the Second Applicant was addressed to Sherrards Solicitors LLP ("Sherrards") rather than to Cadenza Properties Limited and, in fact, the Second Applicant is not named anywhere in the letter. Mr Bowker submitted that this error is not sufficiently serious to invalidate service.

38. At [88] of *Southwark v Akhtar*, the Upper Tribunal gave the following guidance:

"…. to meet the requirements for the presumption in s 7 of the Interpretation Act 1978 to apply the address itself must obviously be set out correctly, but there is no requirement to address the envelope to 'The Leaseholder' or any named individual."

39. It is not in dispute that Sherrards' address was the correct address for service of the Second Applicant and, applying *Southwark v Akhtar*, there was no requirement to name the Second Applicant on the envelope.

40. Mr Platt also challenged the Respondents' factual evidence concerning service. Mr Patel and Mr Motiwala gave evidence of service on behalf of the Respondents.

41. Mr Patel stated that, on 19 February 2019, he was at work. It was his job to operate the franking machine and to post the franked letters. At paragraph 9 of his witness statement, Mr Patel says:

"I am aware that Mark Reed says he prepared the 3 notices and that Mukul Motiwala says he addressed the notices and put them in the post tray. I believe them."

42. For this reason, Mr Patel believes that he would have posted the stage 1 section 20 notices. It was his job each day to frank and post items but, understandably, he could not remember which specific items he posted on 19 February 2019. Accordingly, Mr Patel's evidence was based upon his acceptance of the evidence of Mr Reed and Mr Motiwala.

43. At paragraph 6 of his witness statement, Mr Motiwala explained that his responsibilities for ABC included Assisting the Property Manager and the Head of Block Management. At paragraphs 14 to 16 of his witness statement, he stated (emphasis supplied):

"Mark Reed had already prepared the section 20 notices and schedule so my responsibility was ***to address each notice, address the envelope for each notice*** *and to arrange for the envelope containing the notice including the schedule to the notice to be posted using first class post.*

This is what I did.

I believe I correctly addressed each notice ***and addressed the envelope*** *using the information that was held on the Qube database."*

44. It cannot be correct that Mr Motiwala both addressed each notice and addressed the envelope for each notice because, as indicated above, during cross-examination Mr Motiwala conceded that the envelopes used were window envelopes and that it was not necessary to write the addresses on the envelopes. Accordingly, Mr Motiwala's written and oral evidence about addressing the envelopes was inconsistent.

45. Mr Motiwala also gave evidence that he had never visited the Building himself and that instead he gave keys to the contractors so that they could inspect in his absence in order to tender for the Major Works. When asked how many contractors he had given the keys to Mr Motiwala could not give any clearer indication than "more than one". He was unable to give even an approximate indication of when the contractors' inspections took place as part of the tendering process. These are matters which are likely have been more memorable than preparing two envelopes to be sent out.

46. Further, the Tribunal is not satisfied that the ABC office was likely to have been run in an efficient and reliable manner. The Respondents accepted that, in error, the section 20 notice which is said to have been served on the Second Applicant made no reference to the Second Applicant in the letter.

47. Mr Alderman gave evidence that Mr Motiwala instructed him to clean the communal areas of the Building and the Tribunal accepts the evidence of Ms Brett that any cleaning which took place was carried out to an extremely poor standard. Accordingly, Mr Motiwala cannot have adequately supervised Mr Alderman and his company, MAPPS.

48. Mr Reed played a key role in running the ABC Office as the Head of Block Management. In concluding that the systems within the office were unlikely to be efficient, the Tribunal has also taken into account its findings concerning Mr Reed, which are set out below.

49. In all the circumstances, the Tribunal is not satisfied that the evidence of the Respondents' witnesses as to service is reliable and we

are not satisfied on the balance of probabilities that the two section 20 notices which are said to have been served on the Applicants were properly pre-paid and posted. Accordingly, the requirements of section 7 of the Interpretation Act 1978 are not met and the statutory presumption does not apply.

50. Further, the Tribunal is satisfied on the evidence that, had the assumption applied, the Applicants would have satisfied the burden under section 7 of the 1978 Act of proving the contrary i.e. that the section 20 notices were not delivered.

51. In *Southwark v Akhtar*, Ms Akhtar gave evidence that she did not receive the relevant notices; that she kept all the notices about the lease on a file and would have filed them if she had received them; she did not have them on file and so was confident that she had not received them; and that her lodger would not have intercepted the notices.

52. The Upper Tribunal found at [84] and [85] that Ms Akhtar's evidence went no further than a bare denial and was insufficient to rebut the presumption in section 7 of the 1978 Act. Further, the Upper Tribunal stated:

"That is the case even if the FTT was convinced that Ms Akhtar was not telling lies, because memories can fail, envelopes can be mislaid, items of post can be overlooked."

53. The Upper Tribunal also stated that there were reasons for doubting the accuracy of Ms Akhtar's recollection. The First-tier Tribunal had said that her answers during cross-examination were "confused and confusing". Moreover, it had already been established that she had denied receiving a section 20 notice which was proved to have been served personally and a second respondent had received the relevant notices.

54. The rebuttal of the presumption which is contained in section 7 of the 1978 Act will always involve the denial of service. In the present case, having seen and heard Ms Fortunato give evidence, the Tribunal is satisfied that her denial is more than simply a bare denial.

55. The relevant period was clear in Ms Fortunato's mind because she felt strongly about the Major Works and the freehold company of which she was sole director had served notice that work needed to be carried out. The Tribunal accepts as strong and credible, Ms Fortunato's oral evidence that, if notices had been served on either Applicant, she would have taken steps to respond.

56. Ms Fortunato gave evidence that she has an individual letter box in the door of her flat and that the section 20 notice addressed to her was not delivered through this letterbox. This is not a case in which it is clear that one of the notices said to have been served was received. Ms Fortunato also gave evidence that, in June 2019 when she became aware that ABC asserted that they had served section 20 notices by post in February 2019, she contacted Sherrards (whose address is the Second Applicant's address for service) and was told that no section 20 notice had been served on the Second Applicant.

57. She explained that Sherrards scans incoming post for Cadenza Properties on receipt and forwards it to her. She herself previously worked in Sherrards' office and could give evidence of the internal procedures.

58. This account is supported by a witness statement dated 9 April 2020 with a statement of truth signed by Ben Walters, who is a Solicitor at Sherrards. Whilst Mr Walters' witness evidence must be given limited weight because he did not attend the hearing in order to give oral evidence, it corroborates Ms Fortunato's oral evidence that Sherrards Solicitors' position is that they also did not receive the section 20 notice which is said to have been served at their offices. In addition, this is confirmed in correspondence from Sherrards to ABC.

59. Mr Bowker drew the Tribunal's attention to a Tribunal decision dated 7 November 2019 in appointment of manager proceedings. In those proceedings, Ms Fortunato did not arrive for a hearing; a Case Officer contacted her by telephone; and Ms Fortunato explained that she was in France on an extended visit and would not be returning for another two weeks. The Tribunal had sent Ms Fortunato two letters in October 2019 concerning the hearing of 7 November 2019 and the Judge observed:

"Evidently, Ms Fortunato had not made arrangements for mail to be forwarded to her or otherwise dealt with in her absence and thus she had not seen the letters sent to her at the correspondence address."

60. This was put to Ms Fortunato in cross-examination as a matter going to her credibility. Ms Fortunato explained that, in November 2019, she was abroad supporting her mother who was undergoing chemotherapy. Ms Fortunato had unexpectedly been forced to extend her stay because, sadly, her mother had needed more chemotherapy than had originally been anticipated. She had not made arrangements for her post to be dealt with in her absence during this period because she had not planned the extended stay. She confirmed that she did receive the correspondence from the Tribunal on her return home.

61. The Tribunal accepts Ms Fortunato's explanation and notes that Ms Fortunato does not deny that the correspondence from the Tribunal was delivered to her London home.

62. The Tribunal accepts Ms Fortunato's evidence, which remained consistent under thorough cross-examination and was, in part, supported by a witness statement of a solicitor at Sherrards, and is satisfied that the section 20 notices said to have been served on the Applicants were not delivered.

63. Accordingly, the Tribunal accepts the Applicants' case and finds that the Respondents have failed to comply with the statutory consultation requirements.

Whether dispensation should be granted

64. The power of the First-tier Tribunal to dispense with the statutory consultation requirements was recently considered by the Upper Tribunal in *Aster Communities v Kerry Chapman & Others* [2020] UKUT 177, in which the leading case of *Daejan Investments Limited v Benson* [2013] UKSC 14 was applied.

65. It is clear from these authorities that the statutory consultation requirements have two distinct purposes: to ensure that tenants are not required to pay more than they should for those services that are necessary and provided to an acceptable standard, and to ensure that tenants are not required to pay at all for unnecessary or defective services.

66. The scale of the landlord's culpability is not a material factor because it is not the function of the Tribunal to punish the landlord. When entertaining an application for dispensation from the statutory consultation requirements, the Tribunal should instead focus on the extent, if any, to which the tenants have been prejudiced by the landlord's failure to comply with the requirements.

67. The Respondents have invited the Tribunal to make specific findings as to:

(i) whether a quotation produced by Hammer & Chisel Builders ("Hammer & Chisel"), the contractor ABC instructed to carry out the Major Work, was part of a "plan hatched" by the Respondents in offering to reduce the charge for the Major Works on account of allegations of breach of repairing covenant (there is a dispute between the parties which the Tribunal has no jurisdiction to determine concerning whether or not a binding agreement was reached that there will

be a 50% reduction in the cost of the Major Work on account of the breach of covenant allegations);

(ii) whether Mr Reed's site inspection report and the Hammer & Chisel breakdown, which were disclosed late, were created after the event; and

(iii) whether the contract entered into with Hammer & Chisel was not at arm's length.

68. These matters were put to Mr Reed in cross-examination. As the scale of the landlord's culpability is not a material factor, the Tribunal is not satisfied that it is necessary to make findings of fact concerning these issues.

69. The Tribunal has, however, set out below a detailed account of Mr Reed's evidence insofar as it is relevant to the issue of whether, in light of Mr Reed's knowledge, experience and expertise he can be described as a surveyor. The Tribunal had sufficient information from Mr Reed concerning matters which were not in dispute to make findings on this point and, insofar as the allegations which are set out above may be potentially relevant, we gave Mr Reed the benefit of the doubt and assumed that they were incorrect.

70. Once a credible case of prejudice is made out, it will be for the landlord to rebut it and each case must be decided on its own particular facts. At [67] of *Daejan*, Lord Neuberger said (emphasis supplied):

"However, given that the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, ***for instance by resolving in their favour any doubts as to whether the works would have cost less*** *(or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. As Lord Sumption JSC said during the argument,* ***if the tenants show that, because of the landlord's non-compliance with the requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord.*** *Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice."*

71. The loss of the opportunity to make representations does not on its own establish prejudice and it may be incumbent on tenants to

indicate what they would have said if they had been properly consulted by the landlord.

72. In *Aster,* the First-tier Tribunal had determined that the lessees had made out a credible case of relevant prejudice, namely that they would be asked to pay for inappropriate works. The Tribunal granted dispensation on terms that the landlord was to pay the reasonable costs of an expert nominated by the lessees to consider and advise the lessees on the necessity of carrying out the relevant work; the landlord was to pay the lessees' reasonable costs of the dispensation application, to be summarily assessed if not agreed; and on terms that the landlord's costs of the dispensation application should not be recoverable from the lessees through the service charge.

73. The landlord contended that the appropriateness of the works was not an issue for the dispensation application but was instead an issue for a future application concerning the reasonableness of the actual service charge costs.

74. In dismissing the landlord's appeal against this decision, the Upper Tribunal quoted, with approval, the following passage from the First-tier Tribunal's decision:

"If every lessor making a section 20ZA application could neutralise a plea of inappropriate (or excessively costly) works by saying that there is no prejudice because the lessees can always challenge the service charge under section 19 in a section 27A application, unconditional dispensation would be the norm."

75. Mr Bowker submitted that, although on first reading *Aster* looks remarkably similar to the present case, there are some important differences. In particular, the Applicants' failure to adduce expert evidence leaves a gap in their evidence and, in the present case, the Respondents were required to carry out the work set out in the Savills' Schedule.

76. The Tribunal is mindful that at [71] of *Aster*, the Upper Tribunal stated:

"It is axiomatic that each case must be decided on its own particular facts. Moreover, the FTT should be guided, but not led, by the principles laid down in Daejan. I note what is said by Lord Neuberger at [41]:

'…the very fact that Section 20ZA(1) is expressed as it is means that it would be inappropriate to interpret it as imposing any fetter on the [FTT's] exercise of the jurisdiction beyond what can be gathered from the 1985 Act itself, and any other relevant admissible material.

Further the circumstances in which a Section 20ZA(1) application is made could be almost infinitely various, so any principles that can be derived should not be regarded as representing rigid rules.'"

77. Accordingly, this Tribunal should be guided by the principles which are to be derived from the authorities when considering the specific facts of the present case. The factual similarities and differences between cases are of limited relevance.

78. On the facts of the present case, the Tribunal is satisfied that the Applicants have shown, on the balance of probabilities, that due to the Respondents' failure to comply with the consultation requirements they were unable to make reasonable points within the relevant 30-day period. The Tribunal is also satisfied that these were points which, if adopted, would have been likely to have reduced the costs of the works. Following the decision of the Supreme Court in *Daejan,* the Tribunal has resolved in the Applicants' favour any doubts as to whether the Respondents would have accepted reasonable points made by the Applicants within the 30-day period.

79. On 8 July 2019, ABC served stage 2 section 20 notices having obtained the following estimates:

(i) A quotation dated 18 March 2019 in the sum of £37,430 plus VAT from Sinclair Builders Limited, which was obtained by ABC on behalf of the Respondents.

(ii) A quotation dated 5 April 2019 in the sum of £35,450 plus VAT from Hammer & Chisel, which was obtained by ABC on behalf of the Respondents.

(iii) A quotation dated 20 April 2019 in the sum of £39,850 plus VAT, which was obtained by ABC on behalf of the Respondents.

80. After the eventual receipt of the stage 1 section 20 notices dated 19 February 2020 and the stage 2 section 20 notices dated 8 July 2019, Sherrards wrote to the Respondents by letter dated 9 August 2019. In the letter of 9 August 2019, Sherrards stated that the section 20 notices dated 19 February 2019 were not initially received and supplied the Applicants' observations in respect of both the stage 1 and stage 2 notices.

81. Sherrards referred to an email which they had sent to ABC on 9 July 2019 and requested a breakdown of the Major Work, to include all points raised in their earlier correspondence. They stated:

A detailed breakdown for the major works proposed needs to be provided in order to assess these properly, in particular to take into account the costs already incurred in relation to the roof/roof terrace which is accessed solely through Flat 1.

82. Sherrards also challenged the proposed supervision fees; said that Ms Fortunato objected to the appointment of Hammer & Chisel to undertake the specified works; and said that the freeholder and the Applicants had obtained three separate quotations for the Major Work which were up to more than £20,000 lower than the figures provided in the Respondents' notices of estimates:

(i) a quotation from Deluxe Maintenance in the sum of £36,000;

(ii) a quotation from Baron Mint in the sum of £27,000; and

(iii) a quotation from Sark Bros Ltd in the sum of £27,000.

83. In addition, Sherrards asserted that breaches by the Respondents of their repairing covenants had increased the scope of the Major Works.

84. By letter dated 22 November 2019, Sherrards reiterated their position that the statutory consultation process was defective and asserted that the Respondents should consider the contractors put forward in their letter of 9 August 2019.

85. Having considered a breakdown in respect of the Major Works, the Applicants assert that these works should not include:

(i) Works to the roof/roof terrace of Flat 1 because this work had been carried out and paid for by Ms Fortunato.

(ii) Work to remedy damage to Flat 3 and the roof above Flat 3 because this was the subject of a buildings' insurance claim.

(iii) The other work referred to in paragraph 127 below.

86. The Respondents did not invite the contractors put forward by the Applicants to tender for the Major Works. The steps which were taken by Mr Reed on behalf of the Respondents in respect of the Major Works were as follows.

87. The stage 1 notices which the Respondents contend were served were dated 19 February 2019. Mr Reed indicated, when giving oral evidence, that it was his practice to sometimes send out requests for quotations a week or so earlier than the closing date for lessees' observations. He explained that, if a lessee then nominated a contractor, he would also obtain a quotation from the lessee's proposed contractor.

88. Mr Reed accepted that, by emails dated 21 February 2019 (that is only two days after the date on the stage 1 section 20 notice letters), he asked three contactors, Hinge & Bracket, BMS London and Mr Alderman to provide quotations for the Major Work. In these emails, Mr Reed said:

"we are only sending this out to 3 x contractors (max). Please get me the tender returned by 10 March 2019 at the latest".

89. Mr Reed also accepted that the tender period in these emails closed before the end of the period for making observations, on his case that the stage 1 notices were properly served.

90. When it was put to Mr Reed that he must have had no intention of requesting quotations from any lessee nominated contractors because he had limited the number of contractors to three, Mr Reed said:

"We sent it to more, we say that so they quote, [it] is a little lie to get them to tender."

91. Mr Reed informed the Tribunal that none of the three contractors who he emailed on 21 February 2020 did in fact tender. He said that he thought that he had sent the contractors whose quotations are relied upon in the notice of estimates invitations to tender by email. However, Mr Reed could not explain why he had not disclosed any of these invitations to tender. Mr Platt had specifically asked for disclosure of all invitations to tender.

92. In April 2018, that is the same month as the Savills' inspection, the Respondents were provided with the following quotations for the Major Works.

(i) A quotation dated 9 April 2018 in the sum of £10,720 plus VAT provided to the Respondents by London Expert Builders. They also provided an updated quotation giving a revised price for the project of £12,820 plus VAT (to reflect the need to apply window varnish and to replace two windows rather than one with UPVC) on 11 April 2018.

(ii) A quotation dated 8 February 2018 in the sum of £13,000 provided to the Respondents by D Sterlini Roofing.

(iii) A quotation dated 16 April 2018 in the sum of £16,900 plus VAT provided to the Respondents by Ajax Builders.

93. Mr Bowker observed that these quotations were produced late by the Applicants but they are the Respondents' documents and therefore would not have taken the Respondents by surprise. Mr Bowker did not have instructions as to why the Respondents had not themselves disclosed these documents which are of potential assistance in determining this dispute.

94. Mr Platt took Mr Reed in detail through the three quotations obtained by the Respondents in 2018 and he accepted that these were similar in scope to the Hammer & Chisel estimate, save that some works were excluded. M Reed agreed that the value of the additional work was approximately £6,000.

95. Mr Platt referred Mr Reed to the three quotations received from the contractors named in the notice of estimates and asked why he had accepted them without any breakdown of the costs. Mr Reed said that he did not accept them "in their current form" and that the contractors were asked to resubmit a "detailed breakdown".

96. However, he did not refer the Tribunal to any documents relied upon as comprising detailed breakdowns of the Sinclair Builders and Valens estimates. He was also unable to explain why a more detailed breakdown from Hammer & Chisel had not been disclosed in the original disclosure bundle.

97. When asked why he had included in the invitation to tender works to the flat roof which had been undertaken in July/August 2018, Mr Reed explained that he had heard that the freeholder had carried out works but that he was not sure what works. He did not explain why no inspection was undertaken to ascertain the nature and scope of the work carried out by the freeholder.

98. When asked why the contractors had been asked to price for internal work to Flat 3, Mr Reed said he did not include this work in the specification because it had been dealt with by way of an insurance claim. However, he then accepted that each of the three quotations included this work. He also accepted that electrical works were included in the quotations which were not required explaining that he had taken out items which were not needed and "reallocated the funds

as necessary". He could not, however, provide any detail or documentary evidence concerning how he had reallocated the funds.

99. Mr Reed could not satisfactorily explain how he had compared the three quotations from the contractors who tendered without breakdowns from each contractor. He could not say how much had been included by each of the contractors in respect of the work which was not needed. He did not inspect the site until 4 December 2019, after Hammer & Chisel had been appointed and had commenced work on site.

100. On being referred to the more detailed breakdown provided by Hammer & Chisel, also dated 5 April 2019 and with the same estimate number, 246/19, Mr Reed said that he had asked for the work to Flat 3 to be taken out. He was unable to satisfactorily explain why the revised quotation then came to exactly the same figure as the original specification, namely £35,450 plus VAT (£42,540 in total). He could also not satisfactorily explain why an estimate from Hammer & Chisel dated 5 April 2019, that is the same date as the breakdown, still included the items which did not need to be carried out.

101. On 18 November 2019, Mr Reed sent Hammer & Chisel an email which simply said:

"Hi Simon,

Please take this email as your official works order to commence these works as per your quote and the Savills Specs that you made your quote from.

Please let me know when the start date is going from here?"

102. When asked why he had used a short email rather than a JCT contract, Mr Reed said that he used email for smaller works. When it was put to him that works with a total value of £42,540 are not small, he explained that he did not necessarily use a full written contract when he knew the contractors well.

103. Mr Platt asked whether Mr Reed had thought of putting in provisions concerning warranties, health and safety and working hours and Mr Reed responded that it "was in the works order". On being reminded that his email of 18 November 2019 was the works order, Mr Reed said that he probably met the contractors on site and went through these things. He accepted that if there had been a more detailed works order it should have been disclosed.

104. Mr Platt referred Mr Reed to an invoice dated 18 November 2019 from Hammer & Chisel for the full amount of the cost of the

Major Work and to an online banking transaction report showing that the full amount of the invoice was paid to Hammer and Chisel on 19 November 2019. 19 November 2019 was the day after Mr Reed had asked Hammer & Chisel when the works were going to start.

105. Mr Reed stated that the payment of 19 November 2019 was an advance payment in order to enable Hammer & Chisel to obtain materials, scaffolding, licences and so on and that, as a company ABC dealt with on a regular basis, he trusted them. He was unable to provide any satisfactory explanation as to why this advance payment was for the entire contract price.

106. On being asked why he had chosen the three contractors who had provided quotations, Mr Reed had said he thought they were good. However, on being referred to their accounts by Mr Platt, he accepted that all three companies appeared to be trading whilst insolvent. He said that a lot of small contractors are "companies of straw" and "we never pay monies in advance". On Mr Platt reminding Mr Reed that he had paid in advance in this instance, he said that most of the time he did not. Mr Reed could not point to any due diligence which he had undertaken.

107. Mr Platt questioned why Mr Reed had included work which he had already decided did not need to be carried out (when he had asked Hammer & Chisel to provide the revised breakdown in April 2019) in the notice of estimates dated 8 July 2019. Mr Reed said that the Building was not a normal block and that he had made an error. He denied Mr Platt's suggestion that the Hammer & Chisel breakdown had first appeared in 2020.

108. Mr Platt referred Mr Reed to the letter from Sherrards dated 9 August 2019 containing observations in respect of both the stage 1 and stage 2 section 20 notices. He agreed with Mr Platt's suggestion that he had had no regard to the observations contained in this letter because he took the view that they were too late. This is notwithstanding that Mr Reed accepted that the letter was in time insofar as it concerned the stage 2 notices. He should therefore have had regard to the observations in respect of the stage 2 notices even if he considered that the observations in respect of the stage 1 notices were out of time.

109. When asked why he did not in any event investigate the possibility of using other contractors in light of the fact that the contractors proposed by the Applicants were significantly cheaper than Hammer & Chisel, Mr Reed repeated that he had taken the view that the stage 1 notices had been properly served. He said that he had been following the strict letter of the law, which is what the law is there for, and that he had not wanted to "breach the section 20 regulations". However, in response to questions from the Tribunal, Mr Reed said

that his understanding had simply been that, if the stage 1 notices had been validly served, he did not have to have regard to the Applicants' observations. He had not thought that there was any legal requirement preventing him from doing so.

110. Mr Reed conceded that he did not prepare any tender report. He also conceded that his Site Inspection Report dated 4 December 2019, which runs to three sentences, was "basic". When asked why he had taken a photograph which did not show the work being carried out by the contractors and why he had not taken any photographs of the work which was being carried out, Mr Reed said that the contractors had sent him photographs of the work in progress. He informed the Tribunal that he was on site for less than an hour himself. He was unable to state how many people were on site, he failed to inspect the rear of the Building, and he was uncertain whether ladders at the rear of the Building belonged to Ms Fortunato.

111. Mr Reed accepted that Hammer & Chisel's registered office is the address of the accountants used by ABC. He said that this "might be" the address of ABC's registered office as well. He explained that the directors of Hammer & Chisel had asked whether ABC knew a good accountant and that ABC had referred Hammer & Chisel to these accountants.

112. Mr Reed denied that there was any intentional similarity between Hammer & Chisel's price for the project and the price given in the Savills' Report. He said of the Respondents' much lower 2018 quotations that it is always possible to find a "one-man band" who is cheaper. On being referred to records showing that Hammer & Chisel only has one employee, Mr Reed said that they may have subcontractors.

113. In response to questions from the Tribunal, Mr Reed accepted that the Savills' Report was not a specification "in the traditional meaning" and that there was no mention of materials or of areas. Mr Reed accepted that he did not prepare a specification on this occasion and that the contractors who provided him with quotations did not work to any specification.

114. As regards his inspections, Mr Reed said that he did not go onto the main roof to inspect Hammer & Chisel's work because it was raining a lot of the time and they sent him photographs. However, he did go up the first level of scaffolding (to the front elevation) in order to check the window repairs. He did not issue variation orders when he agreed to move costs because he considered the Major Works to be "smallish works".

115. Mr Reed said that he did not prepare a final summary of costs, he just agreed on site that the works had been completed and

held back a retention for a few months "against final snagging works". However, on being reminded that he had already accepted that the full sum of £42,540 had been paid to Hammer & Chisel in advance, he said "I got it wrong, there was no retention in this instance. I thought there was a retention, I had forgotten." Mr Reed confirmed that the full amount of his supervision fee was also paid before the work was completed.

116. When asked whether there was any written memorandum concerning the Major Works, Mr Reed said, "No we sent an email and the instructions were based on estimates. We considered these small works". He confirmed that he had had no discussions with the lessees before issuing the notices of intention. He also confirmed that he had not compared the cost of replacing the windows with the cost of repairing them, simply saying that the Savills' Report did not mention replacement. Mr Reed did not measure the area to be repointed and confirmed that he had not even seen this area before the repointing work was undertaken. There was no email or letter itemising the snagging. Although Mr Reed said that he had a day book in which he kept notes, this has not been disclosed.

117. The entirety of the Applicants' observations concerning both the stage 1 and stage 2 section 20 notices appear to have been dismissed out of hand on the basis that, on the Respondents' case, the Applicants did not reply within time to the stage 1 notices.

118. The Tribunal is satisfied, on the balance of probabilities that, had the section 20 consultation process been followed, the Applicants would have found and nominated appropriate contractors who were considerably cheaper than Hammer & Chisel. Further, regard would have been had to the Applicants' reasonable challenges to the nature and scope of the proposed work. This would have led to a significant reduction in the cost of the Major Work.

119. Mr Platt submits that a reasonable charge for the Major Work would be £17,820 plus VAT (subject to a reduction on account of the Respondents' alleged breach of covenant, a matter which is not before this Tribunal). Mr Platt bases this figure on the three quotations obtained by the Respondents in 2018, which he has adjusted to take account of additional work carried out by Hammer & Chisel which the Applicants accept was necessary.

120. Without a specification and detailed breakdowns of each estimate based on the specification (which we would expect in the case of Major Work of this nature) it is difficult to make an assessment of the reasonable cost of the work and the Tribunal has done its best on the basis of the evidence available.

121. The Tribunal considers that the Savills' Report dated 17 April 2018 is likely to constitute a reasonably accurate guide to the condition of the Building at the time when that report was prepared.

122. The Tribunal was also referred to and has taken into account a report prepared for the Respondents in July 2018 by Alexander Scotland Chartered Surveyors ("Alexander Scotland") concerning defects to the ground floor shop caused by a structure on the flat roof above. The Alexander Scotland report includes black and white images of the rear elevation showing that one common part window is clearly in poor condition with a small patch of painted render beneath. Alexander Scotland also record that the felt covering to the flat roof was in "fair to poor condition". The Tribunal has also considered the other photographs contained in the hearing bundles, including those taken by Paul McCarthy RICS on 19th November 2019 as part of the Insurance Valuation, and Mr Platt's video evidence.

123. Having considered the evidence which was presented and applying its knowledge and experience, the Tribunal is satisfied that the work to the mansard crown appears to be generally straightforward. The photographs show the brickwork pointing to be generally sound and Savills' Report records that only minor repointing was necessary. Further, the area requiring painting is small and scaffolding would not have been needed to the rear of the Building.

124. The Tribunal accepts that the 2018 quotations obtained by the Respondents are in many respects like for like when compared with the Savills' Report, as was accepted by Mr Reed. We have taken into account the period of delay between the 2018 quotations (including the Savills' Report) and the commencement of the Major Work in late 2019.

125. We have given limited weight to the quotations set out in Sherrards' letter of 9 August 2019 because they are not broken down at all. However, we accept evidence given by Ms Fortunato that these quotations were based on the Savills' Report and we have not disregarded these figures.

126. We have also given limited weight to the Respondents' three 2019 estimates. As pointed out by Mr Platt, there is no documentary evidence of any of the three contractors being invited to tender or of them visiting the Building before providing their quotations. No priced tender returns were completed by at least two of the contractors. All of the estimates followed the wording of the Savills' Report notwithstanding that it included work which had been completed at the time when the estimates were obtained.

127. Mr Reed accepted that, of the items referred to in the Savills' Report the work to Flat 3, which was not costed, and the electrical, fire and lighting certificates should not have been included. Mr Reed was

unable to give any specific evidence concerning how he had reallocated these costs so that there was no change in the total charge for the Major Works. We consider it likely on the balance of probabilities that, if the Applicants' reasonable observations had been considered, the removal of these items would have resulted in a reduction in the costs.

128. Taking all of these factors into account and doing our best in the absence of any specification for the Major Works we find, on the balance of probabilities, that the sum of £25,000 would be a reasonable price for the Major Works and that insofar as the Hammer & Chisel quotation exceeded this sum it fell outside the reasonable range of charges.

129. In all the circumstances, we are satisfied that it should be a term of granting dispensation that the costs recoverable by the Respondents in respect of the Major Works are limited to £25,000 in total (before any reduction on account of any breach of the Respondents' repairing covenants is taken into account). The Tribunal is not satisfied that Mr Reed was qualified to supervise the Major Works. Accordingly, in reaching this total figure we have allowed nothing in respect of supervision fees.

130. We are also satisfied that it should be a term of granting dispensation that the Respondents shall pay the Applicants' reasonable costs of instructing Mr Platt to investigate the issues of consultation and prejudice and of responding to the dispensation application, to be assessed if not agreed (but not the costs of the other matters before the Tribunal).

131. Finally, we accept Mr Platt's submission that it should be a term of granting dispensation that the Respondents' costs of the dispensation application shall not be recoverable from the lessees through the service charge.

132. We accept Mr Bowker's submission that it would not be appropriate, as a term of granting dispensation, to require the Respondents to immediately commence consultation with a view to potentially appointing new managing agents. The Tribunal's role is to remedy prejudice which has been caused, not to decide how the Respondents should manage the Building in the future.

The condition precedent argument

133. The Service Charge Schedule in the Applicants' leases includes the following provision ("Paragraph 3"):

"Provisions for the Calculation and Payment of the Service Charge

…

3.On each of the usual quarter days in every year of the Term the Tenant shall pay to the Landlord ***such sum*** *("an Advance Payment") in advance on account of the Service Charge for the relevant Service Charge Year* ***as the Landlord's Surveyor specifies represents a fair and reasonable assessment*** *of one quarter of the likely Service Charge for that period."*

134. Mr Platt referred the Tribunal to *Rita Akorita v Marina Heights (St. Leonards) Limited* [2011] UKUT 255 (LC) and submitted that Paragraph 3 is a condition precedent and that no advance payments are currently payable because the Respondents have failed to comply.

135. In response, the Respondents contended that by sending the lessees the service charge budget and the service charge demands ABC, acting on their behalf, had met this condition.

136. The Tribunal does not accept the Respondents' contention. The Tribunal was not referred to any statement from a surveyor that the charges represent a fair and reasonable assessment of one quarter. Further, as was the case in *Rita Akorita v Marina Heights (St. Leonards) Limited* (see [20] of the judgment) no evidence has been called to show that any surveyor addressed their mind to the amount of the on account demands and considered them to be appropriate. In fact, Ms Birikorang accepted when giving evidence, as she was bound to do, that no surveyor had said that the figures were reasonable.

137. The Tribunal is not satisfied on the evidence that the Respondents have engaged any surveyor to act on their behalf. Whilst the Tribunal accepts that a "surveyor" need not be regulated by the RICS, the Tribunal does not accept the Respondents' contention that Mr Reed has acquired the necessary knowledge and expertise to meet the definition of "surveyor" by virtue of his experience.

138. The Tribunal was informed that Mr Reed has 40 years' experience but was given no clear information concerning the nature of this experience. In any event, applying its own expertise, the Tribunal was able to assess the level of Mr Reed's knowledge and experience when it heard Mr Reed giving detailed evidence.

139. The Tribunal is not satisfied on the balance of probabilities that Mr Reed falls within the definition of a "surveyor". In reaching this conclusion, the Tribunal has taken into account the entirety of Mr Reed's evidence and, in particular, the following matters.

(i) He was unaware of the need to prepare a specification for a project of this size. Although he claimed that the project was small, its value is over £40,000 which is a significant sum.

(ii) He failed to prepare a specification which the Tribunal considers to be necessary for a project of this nature.

(iii) He requested tenders from three contractors before the period for the lessees to nominate a contractor had closed and failed to ensure that all tenders were returned on the same date to avoid collaboration.

(iv) There is no evidence that Mr Reed carried out a competent tender analysis.

(v) Due to the lack of a specification, the estimates were not detailed enough and were not like for like.

(vi) When the Hammer & Chisel breakdown came to exactly the same price as their previous estimate even though it excluded the electrical works and work to the hallway, Mr Reed did not question this. He was also unable to explain with clarity how Hammer & Chisel had reached exactly the same figure.

(vii) Mr Reed failed to enter into a sufficiently detailed written contract in respect of the Major Work. While Mr Reed is not regulated by RICS, he should have followed the RICS code in terms of the letting of contracts, preparing works orders and other relevant matters.

(viii) Mr Reed failed to keep a retention and, in fact, he paid the whole contract price in advance of the work starting, which was clearly very unwise.

(ix) Mr Reed failed to issue variation orders.

(x) The site inspections were inadequate and Mr Reed placed too much reliance upon the builders who he had already paid in advance.

(xi) Mr Reed was unable to present any documentation to the Tribunal concerning the snagging which he said had been carried out.

140. No person other than Mr Reed was put forward by the Respondents as acting as a surveyor on their behalf.

141. In the Scott Schedule, the Respondents state, in the alternative, that the Applicants are estopped by convention from relying upon Paragraph 3. However, the Respondents did not assert at the conclusion of the hearing, with reference to the evidence which the Tribunal had heard, that each element of estoppel by convention was made out. The Tribunal notes that ABC have managed the Building for a relatively short period of time and accepts the Applicants' contention that all payments have been made under protest.

142. Accordingly, we conclude that in respect of each of the service charge years with which we are concerned, the amount payable by the Applicants is, at present, nothing, because the condition precedent to liability has not been fulfilled.

143. Ms Birikorang gave evidence that ABC's accounts department had informed her that the condition precedent was likely to be fulfilled during the week following the conclusion of the hearing and we have been asked to determine the sums which would be payable if the Respondents were to comply with Paragraph 3. The findings below are made on this basis.

The service charge year 2018

144. All of the charges referred to below are estimated on account service charges.

Out of hours helpline £43 for one quarter.

145. The "Service Charge Schedule" of the Applicants' leases includes within the definition of "Services":

"1. Maintaining repairing replacing renewing rebuilding altering cleaning lighting and decorating:

1.1 the Common parts

…

8. Carrying out works or providing and maintaining any other Services which the Landlord in its reasonable discretion deems desirable or necessary for the purpose of good estate management of the Building."

146. "The Landlord's Expenses" includes providing the Services, employing staff to provide the Services and the fees of appointing or engaging professionals in connection with providing the Services. The lessees are required to contribute to the cost of the Landlord's Expenses through the service charge.

147. The Applicants contend that a charge in respect of the out of hours helpline cannot be reasonably incurred. Mr Platt pointed to the fact that there are only three flats in the Building and to the limited nature of the communal services.

148. Ms Birikarong gave evidence that this service is provided for use in general emergencies, for example, if there is a broken front door lock or a leak, and ensures that a contractor would be on site within a few hours. She accepted that this service had not been used since 2018 but made the point that it might be needed in the future.

149. The Tribunal finds that it is reasonable to incur the costs of an out of hours helpline on the basis that this reduces the role of the managing agents and is a factor which will be taken into account when assessing the reasonableness of the managing agents' fees. The Tribunal accepts Ms Birikarong's assertion that it is reasonable to plan for the possibility that urgent work may be required, whether or not this has yet occurred.

150. No alternative quotations were provided, although the Applicants referred to a Baron Mint quotation in respect of managing agents' fees which was inclusive of an out of hours service. The Tribunal finds that the sum claimed, if properly demanded, would be reasonable and payable.

Accountancy costs £660

151. The Applicants state that the leases and the provisions of the 1985 Act do not require an audit or the certification of the service charge accounts by an accountant. They also state that it is not proportionate to use accountants given the nature and size of the Building. Further, in the event that the Tribunal finds that the accountancy costs are payable, the Applicants rely upon an alternative quotation in the sum of £120 plus VAT.

152. The Respondents rely upon paragraph 8 of the Service Charge Schedule and submit that an accountants' involvement is desirable or necessary for the purpose of good estate management of the Building. They also submit that the Applicants' alternative quotation is low and the Tribunal has been asked to apply its general expert knowledge and experience.

153. There are only three residential flats in the Building (plus the commercial unit) and no contracts other than in respect of fire safety and, in 2019, cleaning. Having taken into account the nature of the work which the accountants would need to carry out, the Applicants' alternative quotation and its general expert knowledge and experience, the Tribunal finds that a reasonable on account charge for the accountancy costs would be £75 plus VAT per unit or £360 in total for one year. However, the Tribunal notes that the email instruction dated 14 May 2019 to Platt Accountants from ABC stated: *'We would like the accounts certified for the above-mentioned property for the year end 31/12/2018. Please note this is three month Account to y/e 31/12/2018.*' A reasonable on account charge is therefore £90 inclusive for 2018.

Management fee £420 for one quarter

154. Under the terms of the leases, the Landlord's Expenses include:

"5. The fees of any Managing Agents appointed by the Landlord to manage the Building."

155. In asserting that the charges are too high, the Applicants rely upon a quotation from Baron Mint dated 5 February 2020 in the sum of £200 per unit. The Respondents submit that this quotation is at the lower end of the range and, again, the Tribunal has been asked to apply its general expert knowledge and experience.

156. The Tribunal accepts the Respondents' contention that the Baron Mint quotation is low. The Tribunal also accepts the Applicants' contention that the Building is a relatively straightforward block to manage and has taken into account the fact that ABC are not providing accountancy or out of hours services, in respect of which there are separate charges.

157. Having considered all of the evidence and applying its general expert knowledge and experience, the Tribunal determines that, if properly demanded, the sum of £250 plus VAT per unit per year would be a reasonable on account charge in respect of the managing agents' fees. This would amount to £300 (or £75 per flat) for one quarter.

Estimated management set up fee £600

158. Ms Birikarong gave evidence that the Respondents had agreed to pay this fee. The Tribunal accepts that the new managing agents would be likely to spend some time setting up their systems

which would not be covered by a fee of £250 plus VAT per unit per year for general management.

159. However, on the basis of the evidence presented to the Tribunal, the set up in respect of this Building containing only three flats would have been straightforward. Applying its general expert knowledge and experience, the Tribunal finds that an estimated set up fee of £100 plus VAT would be reasonable, if properly demanded.

Insurance valuation £500

160. The Tribunal accepts that it was reasonable for ABC to obtain an insurance valuation. The Tribunal was not provided with any alternative quotations. The Tribunal notes that this is a mixed-use building and is satisfied that £500 would be a reasonable estimated charge, if properly demanded.

Asbestos report £180

161. The Applicants agree that an asbestos report is necessary. No alternative quotations have been provided and the Tribunal finds that the sum claimed would be reasonable, if properly demanded.

Cleaning £312

162. When asked by Mr Platt why cleaning was not undertaken before June 2019, Ms Birikarong explained that ABC did not have sufficient funds to employ cleaners until June 2019.

163. In the circumstances, the Tribunal does not accept that it was reasonable to anticipate spending any sum on cleaning in 2018.

Fire risk assessment £400

164. A fire risk assessment had been carried out in 2017. The Tribunal is not satisfied on the evidence that any change to the Building occurred which would warrant carrying out another fire risk assessment the following year. Accordingly, the Tribunal does not accept that it was reasonable to anticipate spending any sum on a fire risk assessment in 2018.

General repairs and maintenance £1,000

165. It is common ground that it is prudent and reasonable to set aside a sum in respect of general repairs and maintenance; the dispute

is as to the amount. The Applicants contend that £200 would be a reasonable sum and the Respondents maintain that the £1,000 on account charge is reasonable.

166. The Tribunal notes that the Major Works were planned and the common parts of the Building are small in size with only two windows. In all the circumstances, the Tribunal finds that a charge of £400 would be reasonable under this heading, if properly demanded.

The service charge year 2019

167. It was not suggested that any increase in the on account charges from 2018 to 2019 was required on account of inflation and the Tribunal makes the following determinations.

Accountancy costs £660

168. For the reasons set out above, the Tribunal finds that a reasonable on account charge for the accountancy costs would be £75 plus VAT per unit or £360 in total, if properly demanded.

Management fee £1,680

169. For the reasons set out above, the Tribunal finds that, if properly demanded, the sum of £250 plus VAT per unit per year would be a reasonable on account charge in respect of the managing agents' fees. This would amount to £1,200 in total.

Out of hours helpline £173

170. For the reasons set out above, the Tribunal finds that the sum claimed, if properly demanded, would be reasonable and payable.

Insurance Valuation £500

171. Having obtained an insurance valuation the previous year, the Tribunal would expect ABC to rely upon index linking or on a table top valuation the following year. Accordingly, the Tribunal is not satisfied that it would be reasonable to make any on account charge in respect of an insurance valuation fee in the year 2019.

Insurance £3,100

172. Ms Birikarong accepted that it was anticipated that ABC would receive commission in the sum of £363.29 simply for instructing the brokers. The Tribunal accepts the Applicants' contention that it is not reasonable to include anticipated commission of this nature as part of the estimated charge for insurance. Although Mr Platt suggested that the Respondents might also anticipate receiving commission, the Tribunal was not presented with evidence to this effect.

173. The Tribunal accepts Mr Platt's submission that there is limited evidence of market testing. We also accept Mr Bowker's submission that the Applicants' evidence of cover at a lower rate is not like for like and that, insofar as the policy actually obtained includes cover which is not needed, this is often the case at no extra costs.

174. As was emphasised by the Respondents, we are determining what would be an appropriate allowance on account of anticipated expenditure. The detail concerning the policy which was in fact taken out will no doubt be further considered.

175. On the basis of the evidence presently available, we find that the sum of £2,736.71 would be a reasonable on account charge for insurance, if properly demanded.

Insurance claims excess £250

176. The Tribunal heard evidence, which it accepts, that this excess relates to work which was carried out to Flat 3 and that it has been paid by the lessee of Flat 3. Accordingly, the Tribunal is not satisfied that it would be reasonable to claim this sum as an estimated service charge.

Cleaning £650

177. This sum is based on an estimated charge of £35 per visit for fortnightly cleaning of the common parts. The Tribunal accepts Ms Birikarong's evidence that to allow £35 per visit is reasonable when account is taken of the need to drive to the site, to park, to provide materials and to pay the employers' overheads. Whilst Ms Fortunato has found cheaper cleaners, a landlord does not have to use the cheapest contractor and a charge will be reasonable if it falls within the range of reasonable charges.

178. It is not open to the Tribunal to take into account the evidence which it heard concerning the actual standard of the cleaning when considering the estimated service charges. Accordingly, the Tribunal finds that the sum claimed under this heading would be payable as an on account charge, if properly demanded.

Fire equipment maintenance £390

179. The Applicants have provided an alternative quotation in the sum of £42 which the Tribunal has taken into account, whilst accepting the Respondents' contention that this is at the low end of the scale. Having considered the evidence concerning the nature of the work to be undertaken, the Tribunal finds that £95 plus VAT would be a reasonable on account charge, if properly demanded.

Health & Safety Fire Risk Assessment £402

180. The Tribunal accepts the Respondents' case that it is reasonable to commission assessments from external specialists every other year.

181. Applying its general expert knowledge and experience as it was invited to do, the Tribunal considers that the one single alternative quotation obtained by the Applicants in the sum of £229 is at the lower and of the scale and finds that £402 by way of an estimated charge would be reasonable, if properly demanded.

General repairs and maintenance £1,000

182. For the reasons set out above, the Tribunal finds that a charge of £400 would be reasonable under this heading, if properly demanded.

Additional matters

183. Any application for an order under section 20C of the Landlord and Tenant Act 1985 and/or for an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and/or an order for the reimbursement of Tribunal fees and/or for Mr Platt's costs to be assessed (see determination (3) above) should be made to the Tribunal in writing and on notice to the other parties within 28 days of the date of this decision.

Name: Judge N Hawkes **Date:** 14 August 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).