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

**Case reference : MAN/00BY/LSC/2019/0019**

**Property :**

**Applicant :**

**FLATS 4 & 28 UNITY DEVELOPMENTS, 3 RUMFORD PLACE, LIVERPOOL L3 9BZ**

**MS WINIFRED OSARUMWENSE**

**FIT NOMINEE LIMITED**

**Respondent :**

**Representative :**

**Type of application :**

**Tribunal members :**

**FIT NOMINEE 2 LIMITED**

**Solicitor Paul Joyce of Womble Bond Dickinson (UK)**

**Counsel Ms Ceri Edmonds of Tanfield Chambers,**

**For the determination of the reasonableness of and the liability to pay a service charge**

**Judge J White**

**Ms S D Latham (valuer)**

**Video (v)**

**Northern Residential Property First-tier Tribunal,**

**Venue :**

**Date of decision : 14 July 2021**

**Date of determination : 18 August 2021**

**DECISION**

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**Decisions of the tribunal**

(1) The tribunal determines that the full amounts demanded, as set out in paragraph 39 below, are payable by the Applicant in respect of the service charges for the years 2018, 2019 and 2020.

(2) The tribunal determines that the Applicant does not have a claim for

set off against the service charge within this application.

(3) The Respondent has 28 days to make any submissions in respect of costs. The Applicant has 28 days to reply. The matter will be determined by the Tribunal on the papers

**The Application**

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of service charges payable by the Applicant in respect of the service charge years 2018, 2019, 2020.

2. The Applicant seeks an order under section 20C of the Landlord and Tenant Act 1985 that none of the landlord’s costs of the tribunal proceedings may be passed to the lessees through any service charge.

3. The Applicant seeks an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”). that none of the landlord’s costs of the tribunal proceedings may be passed to the Applicant as an administration charge

4. The Applicant made the applications on 11 and 14 March 2019. A CMC was held on 26 June 2019 and both parties agreed to mediation. On 16 January 2020, the Tribunal issued Directions. In accordance with those directions both parties submitted documents as set out below. The Respondent requested a strike out of the Application and the Tribunal directed the Applicant to particularise her case further and respond to the Scott Schedule provided by the Respondents. On 30 September 2020 the Applicant sent a schedule with items in dispute alongside comparisons with other developments together with a short statement.

**The Law**

5. Section 18 of the 1985 Act provides: (1) in the following provisions of this Act “service charge” means “an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord’s costs of management, and (b) the whole

or part of which varies or may vary according to the relevant costs. (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable. (3) For this purpose (a) “costs” includes overheads, and (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

6. Section 19 provides: (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly. (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction, or subsequent charges or otherwise.

7. Section 27A provides: (1) an application may be made to an appropriate tribunal for a determination whether a service charge is payable and, if it is, as to (a) the person by whom it is payable (b) the person to whom it is payable (c) the date at or by which it is payable, and (d) the manner in which it is payable. (2) Subsection (1) applies whether any payment has been made. (3) ….. (4) No application under subsection (1) …may be made in respect of a matter which – (a) has been agreed by the tenant…… (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

8. In *Veena SA v Cheong [2003] 1 EGLR 175*, Mr. Peter Clarke concluded that the word “reasonableness” should be read in its general sense and given a broad common sense meaning. He referred to the two-stage test and said that the landlord needs to demonstrate both that the action taken was reasonable and that the costs incurred in taking that action were reasonable. The issue to be addressed is whether the method adopted was a reasonable one in all the circumstances, even if other reasonable decisions could have been made.

9. The right of equitable set-off, applies to service charge cases only in clear cut cases. Where a landlord is in breach of an obligation under the lease (for example, a landlord’s repairing obligations) the lessee may set off against the service charge a claim for liquidated or unliquidated damages for breach of that obligation. [(*Filross Securities Ltd v Midgeley [1998] 3 E.G.L.R. 43*;](https://uk.practicallaw.thomsonreuters.com/Link/Document/FullText?findType=Y&amp;serNum=1998262931&amp;pubNum=4735&amp;originatingDoc=ID46BEEE0700911E8A65AAE5A943B0996&amp;refType=UC&amp;originationContext=document&amp;transitionType=CommentaryUKLink&amp;contextData=(sc.Search)) [*British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd [1980] 1 Q.B. 137*)](https://uk.practicallaw.thomsonreuters.com/Link/Document/FullText?findType=Y&amp;serNum=1978024726&amp;pubNum=3898&amp;originatingDoc=ID46BEEE0700911E8A65AAE5A943B0996&amp;refType=UC&amp;originationContext=document&amp;transitionType=CommentaryUKLink&amp;contextData=(sc.Search)). However, the lessee must show that the cross-claim is so closely connected with the landlord’s demand for payment that it would be manifestly unjust to allow the landlord to enforce its demand without taking the cross-claim into account ([*Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667; [2010] 4 All E.R. 847*)](https://uk.practicallaw.thomsonreuters.com/Link/Document/FullText?findType=Y&amp;serNum=2022174567&amp;pubNum=6448&amp;originatingDoc=ID46BEEE0700911E8A65AAE5A943B0996&amp;refType=UC&amp;originationContext=document&amp;transitionType=CommentaryUKLink&amp;contextData=(sc.Search)).

**The hearing**

10. The hearing took place on 14 July 2021 by video. The Applicant appeared in person. She brought Mrs Kimberly Davito, another leaseholder who was described as a witness who. The Respondent was

represented by Counsel Ms Edmonds. Also in attendance was Ms Magill Associate Director of the managing agent Mainstay Residential LTD (“Mainstay”).

11. Immediately prior to the hearing the Respondent submitted a skeleton argument and two precedents. The start of the hearing was delayed while the tribunal considered these new documents. As the Applicant had not had an opportunity to read the documents, Ms Edmonds went through her skeleton arguments at the start of the hearing. The Respondent maintains that the Applicant has not set out her case in enough detail to establish a prima facia case or produced any evidence in support of her application. This made it extremely difficult to respond.

12. The Applicant stated at the hearing that as she was a Litigant in person, she did not know how to prove her case, despite the directions made. She clarified some issues during the hearing and raised some new ones as set out below.

**The background**

13. The properties which are the subject of this application are two flats 4 and 28 (the Properties). On 14 June 2007, the Applicant purchased Flat 4, a two bedroomed ground floor flat with parking. On 4 April 2007, she purchased Flat 28, a one bedroom first floor flat. The ground floor flat opens onto a shared quadrangle. The Properties are part of Rumford Place Unity Development (the Development), a high-rise mixed-use development. There are 162 flats over 24 floors.

14. Neither party requested an inspection, and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

15. The Applicant holds a long lease (150 years from 1 January 2003) of the Properties which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

16. In 2015/2016 the original developer, Laing O’Rourke, began investigations to establish the cause of water ingress and has subsequently undertaken major works to remedy latent defects. The work includes replacement of defective cladding, and replacement of the membrane and detailing around the balconies. After the Grenfell fire, further work to install extra fire cavity barriers was added to the schedule. The work required scaffolding to be erected from 2018 onwards to the exterior of the Development. The project has had several delays including contractors going into liquidation. During the works the quadrangle, a communal area, has been used to store equipment. Flat 4 faces directly onto the quadrangle. This major project is not funded by the service charge and is the result of litigation between the developer and Respondent as freeholder.

**The Applicant’s case**

17. The Applicant’s case is set out in her application dated 14 March 2019 [7], statement of case dated 24 June 2020 [30], and 30 September 2020 [275]. She clarified some of the issues at the hearing. In general terms at issue are: -

(i) That defects and major works to the Development externally resulted in loss of rental income for the Properties over two years amounting to £9-11,000 due to: -

(a) Noise and disruption;

(b) Unsightly scaffolding blocking the views and

made the balcony areas unusable;

(c) Use of the quadrangle outside flat 4 on the

ground floor for storage of material.

(ii) Two occasions of water ingress, “weepy walls” and erosion of wall paint from ongoing work. The cost of repairs plus damage to flooring in Flat 4 from water ingress.

(iii) The reasonableness of the Service charge including recent increases despite ongoing works making the properties impossible to sell. She attaches two comparatives of service charges from other developments. One is a general comparison and the second details headings with the areas in dispute. Not all of these were pursued at the hearing. The Applicant also states that it would cost around£1500 per year for the upkeep of a five-bedroom house.

(iv) The general unsatisfaction with Mainstay group. She wishes to apply for a right to manage, though it is not the subject matter of this dispute.

(v) The Respondent should permit payment by

instalments during this period.

**The Respondents’ case**

18. The Respondent sets out their response in their statement of case dated 7 January 2021 [31], Witness Statement and oral evidence of Kate Magill, the Associate Director of Mainstay dated 8 January 2021 [86], the skeleton and oral argument of Ms Edmonds. In general, their response is: -

(i) The applicant is not being charged for the repair works complained of. They are not therefore relevant to the issue of whether the service charges disputed are reasonable in amount and reasonably incurred. Loss of rental income could be caused by many factors and the Applicant has not made out her case.

(a) The Applicant Use of the quadrangle outside flat 4 on the ground floor for storage of material during cladding work is not relevant to this application. Use of this area for storage was necessary during the works. This was explained at the leaseholder meeting on 6 February 2018 and by email to the Applicant dated 7 February 2019.

(b) The balcony areas were only unusable during works and are not subject to the calculation in the service charge.

(c) The Lease does not provide the Applicant with a right to use the quadrangle area.

(ii) The Respondents are not in breach of their repairing obligations. But in any event, if there has been any breach, the Applicant can bring a claim for damages in the courts. This is not the venue. The repair works have not affected the level of service charges in this application, and so the Tribunal’s jurisdiction is not

engaged (*Continental Property Ventures Inc v White* [2007] L & T.R. 4). The damp and “weepy walls” are not established and in any event outside the scope of this application. Any defect caused by these works would be remedied at no cost to the applicant as part of the cladding works.

(iii) In regard to the payablity of the service charge

(a) The Applicant has not set out in a schedule what service charges are disputed and so she has not made out her case.

(b) She has not populated the Scott Schedule

provided by the Respondent.

(c) The comparison cost to a single freehold dwelling is irrelevant and, in any event, not supported.

(d) The comparison schedule supplied is similarly not supported as they do not show the size or nature of the developments or evidence to verify the figures. The two comparisons for 2 bed flats (Western beach and Hackney) in fact show Service charge increases which are proportionally greater over the relevant years. The Newcastle development increase is 30% and this development’s increase is 34%.

(e) The increase in service charge can be explained as

detailed below.

(f) Surpluses have been used to put into the sinking fund that stands at £259,524 as at year end 2019.

(iv) The Lease prohibits payment by instalments.

(v) They vehemently deny any complaints or

accusations against Mainstay.

19. They are entitled to claim costs under the lease and the Applicant has

made some unacceptable personal accusations.

**The issues**

20. At the start of the hearing the Respondent repeated that the Applicant had wholly failed to clarify her case, to the extent it made it exceptionally difficult to respond. The relevant issues were clarified to some extent during the hearing. The relevant issues for determination were as follows:

(i) A claim for set off due to;

a. Disrepair,

b. Loss of enjoyment/derogation from grant

(ii) The payability and/or reasonableness of service charges for

years 2018,2019 and 2020 relating to;

a. The service charge in total in comparison with other

developments generally and use of reserve fund,

b. Building insurance,

c. Professional and management fees,

d. Security costs,

e. Increases in Salary and wages,

f. Lighting replacement,

g. Maintenance and cleaning services,

(iii) Payment by instalments

21. Having heard evidence and submissions from the parties and considered all the documents provided, the tribunal has made determinations on the various issues as follows.

**The Tribunal’s decision**

**Set Off**

**The Applicants case**

22. The Applicant stated that she has lost rental income due to the works as set out above. Prior to the works the Properties had good occupation rates, though low rents. She provided oral evidence that flat 28 was let until March 2019 and then empty until August 18, 2020. She conceded that this related to Covid. Flat 4 was empty 12 out of the 24 months prior to March 2019. It was then let from May 2020 to July 2021. She stated this was due to the scaffolding and noise and unsightly storage in the quadrangle. The balcony could not be used.

23. The Applicant conceded that any water ingress, there may have been, was due to the latent defect or any related work. She had to replace some flooring, though was unable to provide any more details. She had been unable to visit until recently as she lives in Cambridge. She has not made a claim on the insurance or to the developer or begun any civil proceedings in the county court.

**The Respondents case**

24. The repair works are to remedy an inherent defect, including to the cladding. The Respondents are claiming under the warranty from the original developer and lessees are not being charged for these works complained of. They are not therefore relevant to the issue of whether the service charges disputed are reasonable in amount and reasonably incurred.

25. The Respondents are not in breach of their repairing obligations. But in any event, if there has been any breach of repairing obligations the Applicant can bring a claim for damages in the courts. The repair works have not affected the level of service charges in this application, and so the Tribunal’s jurisdiction is not engaged (*Continental Property Ventures Inc v White* [2007] L & T.R. 4). There is no argument of neglect and so the stitch in time saves nine argument does not arise. *Canary Riverside Pte v Schilling (LRX/65/2005)* established that only loss leading to increased service charges could be set off*.*

26. In oral submissions they said that the use of the quadrangle for storage was the only location possible and part of the settlement with the developers. The Lease did not provide a right to enjoy use of the communal parts (Schedule 2 clause 2) excepting a right of access (Schedule 2 clause 1 and 5b). There was no derogation from grant and in any event, this was not the forum to determine any claim she may have. Any loss of income could not necessarily be attributed to the works and, as an investor landlord, risks go with the territory.

27. Ms Magill gave evidence, that they accepted that Flat 4 has been the last in the order of works and the developer would make good any defects after works were complete. The balconies were usable except whilst works were undertaken to the balconies. Though it was accepted that the presence of scaffolding may legitimately raise concerns for parents of young children. The works had been beset by delays not in their control, most recently due to the tragic deaths of workmen on site. She has requested receipts for replacement damaged flooring from the Applicant to pass onto the developer but had not been sent any, nor any detailed claim.

**The tribunal’s decision**

28. The Applicant has not established that she has a claim for set off within this application which is to determine the reasonableness of the service charge in dispute.

29. In determining the reasonableness of a service charge, the Tribunal must take into account all relevant circumstances as they exist at the date of the hearing in a broad, common sense way giving weight as it thinks right to the various factors in the situation in order to determine whether a charge is reasonable. Alternatively, the Tribunal can consider whether an invoice is payable for other reasons. *Continental Properties v White* held that: -

30. “ *In fact the LVT was entitled to determine whether the costs claimed by the landlord were “payable” within the meaning of* [*s.27A.*](http://uk.westlaw.com/Document/IA663C480E44A11DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&amp;transitionType=DocumentItem&amp;vr=3.0&amp;rs=PLUK1.0&amp;contextData=(sc.DocLink)) *They were entitled to conclude that a breach of the landlord’s covenant to repair would give rise to a claim in damages and that if the breach resulted in further disrepair imposing a liability on the lessee to pay an increased service charge that is part of what might be claimed by way of damages. Such a claim would give rise to an equitable set-off within the rules laid down in* [*Hanak v Green [1958] 2 Q.B. 9*](http://uk.westlaw.com/Document/IB991F9A0E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&amp;transitionType=DocumentItem&amp;vr=3.0&amp;rs=PLUK1.0&amp;contextData=(sc.DocLink)) *and as such constitute a defence. This would not mean that these increased costs of repair were not “reasonably incurred” but it would mean that there was a defence to their recovery.”*

72“…*the LVT has jurisdiction to determine claims for damages for breach of covenant only in so far as they constitute a defence to a service charge in respect of which the LVT’s jurisdiction under* [*s.27A*](http://uk.westlaw.com/Document/IA663C480E44A11DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&amp;transitionType=DocumentItem&amp;vr=3.0&amp;rs=PLUK1.0&amp;contextData=(sc.DocLink)) *has been invoked. I see no reason of principle why such jurisdiction should not extend to determining even a claim for loss of amenity or loss of health arising from breach of a repairing covenant but would draw attention to what I said in Canary Riverside Pte v Schilling ( LRX/65/2005…as to the desirability of the LVT’s exercising restraint in the exercise of the extended jurisdiction.” The Tribunal can determine “any issue incidental to such a determination*”.

31. In [*Daejan Properties v Griffi*n *[2014] UKUT 0206 (LC).*](http://uk.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=2033463413&amp;pubNum=7595&amp;originatingDoc=I2E8641A0FED111E79CC6D3A55B8CD832&amp;refType=UC&amp;originationContext=document&amp;vr=3.0&amp;rs=PLUK1.0&amp;transitionType=CommentaryUKLink&amp;contextData=(sc.Search))It was said by

the Upper Tribunal at 89.

“*The only route by which an allegation of historic neglect may provide a defence to a claim for service charges is if it can be shown that, but for a failure by the landlord to make good a defect at the time required by its covenant, part of the cost eventually incurred in remedying that defect, or the whole of the cost of remedying consequential defects, would have been avoided. In those circumstances the tenant to whom the repairing obligation was owed has a claim in damages for breach of covenant, and that claim may be set off against the same tenant’s liability to contribute through the service charge to the cost of the remedial work. The damages which the tenant could claim, and the corresponding set off available in such a case, is comprised of two elements: first, the amount by which the cost of remedial work has increased as a result of the landlord’s failure to carry out the work at the earliest time it was obliged to do so; and, secondly, any sum which the tenant is entitled to receive in general damages for inconvenience or discomfort if the demised premises themselves were affected by the landlord’s breach of covenant.”*

32. Consequently, the Tribunal only has jurisdiction where an applicant has established a breach of covenant or other act or omission by the landlord causing an increase in the service charge. In addition, damages must flow from that breach.

33. In this case the Sixth Schedule sets out the landlord’s repairing covenants and service obligations, including insurance (para 5(a)), window cleaning (para 9), a covenant to “repair to a good and tenantable state and condition the structure and exterior and the Common Parts” (para 6), and “such facilities for the benefit of the Block and the estate as the Landlord may from time to time determine (acting reasonably)” (para 9). The Respondent contends the duty to repair is materially different to a duty to keep in repair. The Applicant accepts that any damages she may have incurred were caused by the works to remedy inherent defects, not caused by the Respondent, except the high level of service charge making the Properties difficult if not impossible to sell.

34. The programme of works undertaken by Laing O’Rourke has been in relation to the rainscreen cladding and remedying water ingress. None of this work has been undertaken as part of the Service Charges. It was not part of a liability to repair, but remedy latent defects. Much of the works where to address latent defects under the Buildings Warranties. This included investigation and works to address the cause of water ingress. It appears that the project has been ongoing since 2015/early 2016, has been complex and encountered several difficulties along the way (for example, one company went into liquidation and serious concerns were raised about the replacement subcontractor) [35]. The programme also included replacement of cladding to address fire safety post Grenfell Tower. This extended the programmed from 2018 to 2021.

35. The Applicant has not established that there has been any breach of covenant by the Respondent nor any general increase in the service charge caused by neglect or failure to adequately repair. There are inherent defects as opposed to disrepair. They are not in breach of their obligation to repair. It is not a case of neglect causing increased service charges. Consequently, it is not so closely connected with the service charge, as to be manifestly unjust. The developer, as opposed to the Respondent, is liable for any inherent defects and any actionable loss of enjoyment or other loss. The County Court is the appropriate venue if not covered by the Respondent’s insurance.

36. The Tribunal considered whether blocking off the central quadrangle for storage could amount to derogation from grant, though the applicant had not expressed her case in these terms. The Lease provides in Schedule 2 (Rights appurtenant to the Flat): -

*“1. The right…..from time to time to pass and repass on foot only over the common access ways pathways and pavements forming part of the block and leading to or from the Flat.*

*2 (a) The right…to use such facilities (if any) within the Block that may from time to time be designated by the Landlord for use..by the tenants…*

*5 (b) [The right] to pass and repass over and along the paths roads ways and grounds forming part of and leading to and from the Block”*

37. The lease then provides for right of access only and to use such facilities that may be designated from time to time and does not provide for use of all the communal grounds, as of right.

38. The Tribunal do not, therefore, have jurisdiction to address any claim made in connection with these works, including loss of rental income. The Applicant has not, in any event, submitted persuasive evidence to establish a causal link between the works and the loss of rental income, nor established with enough particularity any other loss. She has not responded to Mainstay’s invitation to submit specific claims and invoices. Nor had they been provided to the Tribunal.

**Overall expenditure comparables and sinking fund**

39. The service charge expenditure for the years in dispute were:

2018 2019 2020   
 Flat 4 £2,899.46 £3,486.69 £3,655.72 Flat 28 £1,756.80 £2087.91 £2,210.46

40. The Applicant has attached a list of comparable service charges at 238 and 239. She claims that the level is out of line with other developments, has generally increased unreasonably and the reserve fund could have been utilised during the periods.

41. By clause 3 and paragraphs 1 and 10 of the Fourth Schedule, the Applicant covenants to pay service charges. The Respondent states that the service charges are calculated and apportioned on a square footage basis, excluding balconies. Flat 4 contributes a proportion of 0.582% towards the Group b services and 0.9091% towards parking services. Flat 28 contributes 0.3882% towards the service charge only. The Lease states that “Group B service Charge Proportion means such fair proportion as the Landlord acting reasonably shall from time to time determine”. This is payable in accordance with clause 2 (b) of the Forth Schedule. The proportion on a square footage basis is a fair proportion and not in dispute.

42. Clause 2 and 11 (a) of the Forth schedule states that the service charge is payable in half yearly contributions and so cannot be payable in instalments. It includes provision for a reserve fund at 11 (a)(iii).

**Determination**

43. The decision-making process under the lease must be rational, made in good faith and consistent with the contractual purpose as well a bearing in mind that the cost is to be borne by the lessees (see for example, *Waaler v Hounslow LBC* [2017] EWCA Civ 45). Under the two-stage test the Respondents needs to demonstrate both that the action taken was reasonable and that the costs incurred in taking that action were reasonable. It is well established that any service charge cost may well be reasonable, even if a cheaper alternative is available and it is not the Tribunal’s duty to replace a reasonable charge with what it might consider a more reasonable one.

44. The Respondent quotes the Deputy President of the Upper Tribunal at paragraph 28 of Enterprise *Home Developments v Adam* [2020] UKUT 151 (LC)

|  |  |
| --- | --- |
| ….” *Much has changed since the Court of Appeal’s decision in* | |
| *Yorkbrook v Batten but one important principle remains applicable,* | |
| *namely that it is for the party disputing the reasonableness of sums* | |
| *claimed to establish a prima facie case. Where, as in this case, the* | |
| *sums claimed do not appear unreasonable and there is only very* | |
| *limited evidence that the same services could have been provided more* | |
| *cheaply, the FTT is not required to adopt a skeptical approach.”* |  |

45. The evidence then that there are developments where the service charge is lower is not in itself persuasive. The Applicant has not provided any further evidence that they are like for like or even similar comparables, beyond saying that they are similar in terms of providing high end facilities such as gyms and 24-hour concierge. She has not provided evidence such as overall size, floors, age, grounds, carparking, details of expenditure, security. She has provided no detailed accounts or evidence to support the level of spending.

46. The Applicant did not put forward any oral arguments about the reserve fund. Clause 11 (a) of the Forth includes provision for a reserve fund. The size of the reserve fund is commensurate with the size of development.

**Insurance**

47. One of the biggest areas of increase in the service charge is the Insurance premium. The Respondent emailed the Applicant on 6 February 2019 stating it was increasing from £66,300 to £118,967[ 36]. This was due to a recent valuation, that increased the reinstatement value, plus a post Grenfell fire review on combustible materials at the Development. The Respondent had decided not to remove all these materials, due to the high cost and that several mitigating factors existed. This includes a fully audible Fire Alarm System, Automatic Opening Vents, 24/7 Concierge, Sprinkler System and three staircases.

**Determination**

48. The tribunal determines that the full amount in respect of insurance is payable

for each year at issue.

49. Despite the budget increase, the insurance for the year ending 2018 was £105,372 and £98,741 in 2019. The budget for insurance in 2020 was £162,800. The evidence submitted set out that the increase in 2018 had been due to a recent revaluation and that the increase was less than replacing combustible material. Ms Magill gave evidence that every 5 years they use an insurance broker to test the market. Many insurers have pulled out since Grenfell. For example, AXA and Aviva refused to insure due to the high risk. As Zurich has a duty to reinsure, they did so. The applicant contended that the high cost has not just been since Grenfell though provided no evidence or any alternative quotes beyond the comparators. It is not disputed that the insurable risks are within the obligations under the terms of the lease

50. In accordance with Cos *Services Limited v Nicholson & Willans* [2017] UKUT 382 (LC) the insurance was obtained through a broker on the open market. They have explained the reasons for the increase. The action taken and the cost are reasonable. Though substantially higher than 2017 the applicant has not made out that it is unreasonably incurred.

**Management Fees**

51. The Applicant sites management fee in her table of comparators and expresses general dissatisfaction with Mainstay, saying she has been involved in removing them where residents’ groups are more active, and they are generally ranked poorly. She also states that she has had trouble communicating with them and they have refused to accept payment by instalments during Covid and the period of works. She denies any personal animosity towards Ms Magill and is merely expressing dissatisfaction with Mainstay.

52. The Respondent has made a claim in the 2020 budget service charge account for an additional £7200 management fees in relation to cladding, on top of the annual £38,341 [218] plus an additional £1,562 for the car park service charge in accordance with the Management Agreement[219]

53. Ms Magill strongly denies any claims of rudeness or ignoring contact by the Applicant saying they have worked closely with the active resident’s association, communicating regularly with the group, and explaining directly to the Applicant. They have provided minutes of a meeting dated 6 February 2018 [37-52] explain the ongoing works and the detailed letter to the Applicant herself. They have invited her to make a claim for losses to contents, and this has not been forthcoming.

54. The Respondents maintained that the additional management fee was for their liaison and communication services between the tenants and developers, including arranging and attending meetings and providing updates. Ms Magill gave oral evidence that this cost could not properly be passed onto the developers as was not connected with the actual works. It was part of the terms of the court settlement that the managing agents would take on this role and recover the costs under the service charge. The developers had not accepted liability until court proceedings that were heavily contested. This fee was not part of their day-to-day management agreement, and the alternative was an hourly rate of £300 per hour that would have far exceeded this amount. They could have decided not to get involved in meetings etc., though this would have been difficult to maintain due to the extent of the works.

**Determination**

55. The tribunal determines that the full amount in respect of management fees

are payable for each year at issue.

56. By clause 9(a), the Respondents are entitled to use managing agents and to recover the costs. By clause 9(3), they have discretion to provide or install any additional systems or services for the purpose of good estate management.

57. Providing a liaison service during major works is part of good management and the Tribunal accepts the Respondents cogent reasons. General dissatisfaction with Mainstay is not enough to persuade us that the fee is unreasonably incurred. This part of the fee cannot be passed back to the developer and is akin to broker costs relating to insurance claims.

**Security costs**

58. At the hearing the Applicant challenged whether 24-hour security and concierge were reasonable due to its high cost and that the residents’ association should have been consulted. Some flats were used for Airbnb and only those owners needed a 24-hour service to provide access to overnight visitors. The other owners should not be subsiding their businesses. This increases service charges by over £1000 a year compared to other Liverpool developments. There had been an incident with one or more of the security staff.

59. Ms Magill gave evidence that the cost of the concierge had increased due to VAT on salaries. They had consulted the Residents Association about removing the 24/7 service and there was a backlash from the tenants as it is expected in this type of development. The Residents Association are consulted at every budget setting and the members have increased from 27 to 60. The security guard involved in the incident was immediately removed and this incident was prior to the service charge years which this Tribunal is determining.

**Determination**

60. The tribunal determines that the amount payable in respect

of security is reasonable.

61. The Respondent provided cogent reasons for the security costs, both in oral evidence relating to consultation with tenants and documentary evidence that the insurance required 24-hour security. Their decision-making process and outcome were reasonable. The Applicant has not provided persuasive evidence to refute this finding.

**Salaries**

62. The tribunal determines that the amount payable in respect of salaries is reasonable.

63. The Applicant did not specifically query the reasonableness of salaries beyond the breakdown in her comparator table. Without anything more, the Applicant has not set out a prima facia case as set out above. The Respondent explained that some of the reason for the increase in the service charge was that VAT was now payable on wages and this was beyond their control. The Applicant did not raise this further as an issue in the hearing and the Tribunal accepts the Respondents cogent explanation and that the outcome was a reasonable one.

**LED lighting replacement**

64. The tribunal determines that the amount payable in respect

of lighting upgrade is reasonable.

65. The Applicant did not specifically query the reasonableness of this one-off expenditure though it was part of the reason for the increase in the service charge. Without anything more, the Applicant has not set out a prima facia case as set out above. The Respondent explained that the work was undertaken following a section 20 consultation with leaseholders and was discussed at the Residents meetings on 6 February 2018. The budget estimate was £80,000 less any sinking fund expenditure. This was to replace obsolete manual lights with movement sensor lighting with a 100% coverage at 26 watts [50].

66. The Tribunal accepts the Respondents cogent explanation and that

the outcome was a reasonable one.

**Day to day maintenance and cleaning**

67. The tribunal determines that the amount payable in respect of

maintenance and cleaning is reasonable.

68. At the hearing the Applicant and her witness, another tenant of the block, said that the windows had not been cleaned and works had been carried out to the car park.

69. The Respondent Ms Magill gave oral evidence that as windows had not been cleaned the budget had been credited and no service charge had been claimed for those years. Only tenants of Flats that had car parks were charged with any maintenance to the car parks as set out in the service charge proportions above.

70. This explanation was accepted as there were no substantive reasons

provided to cast any doubt on this evidence.

**Costs and refund of fees**

71. Having heard the submissions from the parties and considering the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicant.

72. The Applicant has made an application to reduce or extinguish the lessee’s liability to pay contractual costs. The Tribunal can also consider whether costs can be recovered from the Service Charges. The parties are directed: -

(i) Within 28 days, the Respondent shall submit any claim they may have for costs, including grounds for any claim and a detailed schedule of costs.

(ii) The Applicant has 28 days to submit any response to the application for costs, together with any documentary evidence   
in support.

(iii) Any further determination required by the Tribunal shall be by paper unless either party requests an oral hearing, or the Tribunal decides it is necessary to fairly determine any remining issues.

(iv) Delivery of documents to be by email to the other party and to the

Tribunal.

**Tribunal Judge J White Date: 6 August 2021**

**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).