FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/29UE/LSC/2021/0084 & CHI/29UE/LAC/2021/0008
Property:	4 Delf Mews Cottages, Delf Street, Sandwich, Kent CT13 9BZ
Applicants:	Sandra Gillian Boselli and Alain Boselli
Representative:	Tom Morris of counsel for Brethertons LLP
Respondent:	Delf Mews Limited
Representative:	David Nicholls of counsel for North Star Law Limited
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Tenants' application for the determination of reasonableness of service charges for the years 2021 and 2022. Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay administration charges)

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	Tenants' application for the determination of reasonableness of service charges and administration charges for the year 2021
Tribunal Members:	Judge A Cresswell Mr M Donaldson FRICS Mr P Gammon MBE BA
Date and venue of Hearing:	15 February 2022 by Video
Date of Decision:	22 February 2022

DECISION

The Application

1. This case arises out of the Applicant tenants' applications, made on 7 September 2021, for the determination of liability to pay service charges for the years 2021 and 2022 and administration charges for the year 2021. The Tribunal has limited its consideration to the issues raised by the parties.

Summary Decision

2. The Tribunal has determined that the apportionment of service charge costs for the property should be ¼ of those costs.
3. Subject to exceptions (Jet Washing and Accountancy and Refuse Area), the landlord has demonstrated that the charges in question were reasonably incurred and that the services or work was of a reasonable standard and that they are reasonable in amount and are payable by the Applicants in ¼ share.
4. Jet Washing is reduced to £150.
5. Accountancy is reduced to Nil.
6. Refuse Area is reduced to Nil.

7. The Administration Charges are reduced to £6,264 and £783.30 respectively.

6. The Tribunal allows the Applicants' application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Respondent from recovering its cost in relation to the application by way of service charge or administration charge.

Inspection and Description of Property

7. The Tribunal did not inspect the property, but saw it on the internet and was provided with plans and photographs and descriptions within the bundle.

8. The property is a Grade 2 Listed building, converted in 2016 into 4 self-contained units. It is built on ground and first floors with predominantly rendered elevations mainly under pitch timber roof clad with clay tiles with more modern single storey extensions.

Directions

9. Directions were issued on various dates.

10. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. This determination is made in the light of the documentation submitted in response to those directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by Sandra Boselli and Fraser Pearce (both live) and by Jennifer Rogers and Nigel Curtis (both written). At the end of the hearing, counsel for both parties told the Tribunal that they had had the opportunity to say all that they wished and had nothing further to add.

11. The Tribunal has regard in how it has dealt with this case to its overriding objective:
The Tribunal Procedure (First-tier Tribunal)
(Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the

parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

. (a) exercises any power under these Rules; or

. (b) interprets any rule or practice direction.

(4) Parties must:

. (a) help the Tribunal to further the overriding objective; and

. (b) co-operate with the Tribunal generally.

The Law

12. The relevant law is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.

13. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable – by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

14. The Tribunal has the power to decide about all aspects of liability to pay administration charges and can interpret the lease where necessary to resolve disputes or uncertainties. Administration charges are sums payable in addition to rent inter alia in respect of failure by a tenant to make a payment by the due date to the landlord. The Tribunal can decide by whom, to whom, how much and when an administration charge is payable. An administration charge is only payable insofar

as it is reasonably incurred. The Tribunal therefore also determines the reasonableness of the charges.

15. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.

16. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 *Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.*

17. In **Enterprise Home Developments LLP v Adam** (2020) UKUT 151 (LC):

27. In Yorkbrook Investments Ltd v Batten (1986) 18 HLR 25 Wood J, giving the decision of the Court of Appeal, addressed the issue of the burden of proof on the reasonableness of service charges. At page 34 he said this:

> *"Having examined the statutory provisions we can find no reason for suggesting that there is any presumption for or against a finding of reasonableness of standard or costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence – of his case. No doubt discovery will need to be ordered at an early stage, but there should be no problem in each side knowing the case it has to meet, providing that the court maintains a firm hold over its procedures. If the tenant gives evidence*

establishing a prima facie case then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions."

28. 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 sceptical approach. In this case it might quite reasonably have taken the view that Mr Adam had failed to establish any ground for thinking the sums claimed had not been incurred or were not reasonable, which would have left only the question whether any item of expenditure was outside the charging provisions.

18. "*Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available:* **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.

19. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee's challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord's costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** [2015] UKUT 0333 (LC)).

20. In **The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** (see below), the Tribunal was faced with a three-way choice:

1) To make no reduction, thereby leaving the costs as they were;
2) To adjourn to allow the landlord to provide evidence, or

3) To adopt the **Country Trade** "robust, commonsense approach".

The first of these options would have been wrong in the light of the landlord's concession that the CCTV charges included an element designed to allow the developer to recover some of its construction costs.

The second would have imposed a disproportionate burden on the parties in the light of the relatively modest sums at issue.

The Tribunal concluded that the third was the right option to have followed. It may have been unscientific, but it was proportionate and involved the application of the Tribunal's overriding objective.

21. The Upper Tribunal reiterated in **Knapper v Francis** [2017] UKUT 3 (LC) that the Tribunal can make *its own assessment of the reasonable cost*.

Apportionment

22. In **Windermere Marina Village Limited v Wild & Barton** [2014] UKUT 0163 (LC), the Lessees covenanted "*To pay a fair proportion (to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding)…*" of the service charge. It was held by UT that the contractual agreement was void because it had the effect of providing for the manner in which an issue capable of determination under section 27A(1) is to be determined, namely by a binding decision of the landlord's surveyor. Section 27A(6) LTA 1985: "An agreement by the tenant…is void in so far as it purports to provide for a determination (a) in a particular manner, or (b) on particular evidence, of any question which may be the subject of an application" under section 27A(1) or (3).
The effect of s.27A(6) was to strike out so much of the agreement as provides for the manner in which a question capable of consideration under sub-section (1) is to be determined – in that case being determination by the landlord's surveyor. Therefore, it is a matter for the FTT itself to determine a "fair proportion". It is not simply to review the fairness or reasonableness of the landlord's approach.

23. In **Aviva Investors Ground Rent GP Ltd and another company v Williams and others** (2021) EWCA Civ 27, the Court of Appeal advised that a clause describing a share as "*your share of the insurance costs is 0.7135% or such part as the Landlord may otherwise reasonably determine", "should be read as if it had provided for the fixed percentage "or such part as … may otherwise reasonably*

determine." If further slight linguistic adjustment is needed to make grammatical sense, so be it. On that reading, there is a vacuum to be filled, and it is filled by the FTT. Accordingly, the function of making that determination is, as HHJ Gerald held in ***Fairman****, transferred from the landlord to the FTT."*

"*In my judgment, the clear thread that runs through the previous decisions of the UT is that section 27A (6) is concerned with no more than removing the landlord's role (or that of another third party) from the decision-making process; in order not to deprive the FTT of jurisdiction under section "27A (1)". That is made clear by Windermere at [42] and [48]; Oliver at [54] and Fairman at [45] and [46]. As the UT held in Fairman, the statutory objective is satisfied if the landlord's role is transferred to the FTT. To reach a broader conclusion than that would, in my judgment, leave the contract emasculated and, in practical terms, unworkable. Nor, as those cases also show, is there any objection in principle to a degree of flexibility in the apportionment of a service charge, provided that the decision is taken by the FTT."*

24. In **Price v Mattey and others** (2021) UKUT 7 (LC), the Upper Tribunal considered a case where the demands simply stated £z. Only the budget calculation showed that £z was the wrong proportion. "*The demands seek payment of costs that are not recoverable under the lease, being in excess of the proportion for which the tenant is liable; they are valid demands, and the FTT had jurisdiction under section 27A to permit the landlords to recover only what the lease entitled them to*."

25. **Fairman and Others v Cinnamon (Plantation Wharf) Limited** (2018) UKUT421: "it is not an inquisitorial tribunal but makes its decision based upon the issues, arguments and evidence before it. Whilst it no doubt could of its own volition make inquiries and raise issues and call for evidence not ventilated by either party, if it does not do so it in my judgment is not open to a party to appeal the decision on the basis of issues and arguments which had not been put before it or, indeed, complain."

26. The relevant statute law is set out in the Annex below.

Ownership and Management

27. The Respondent is the owner of the freehold from November 2019. The property is managed for it by Delf Mews Management Limited.

28. The Applicants were given 1 of 3 shares when they bought their flat in November 2016. A fourth share was subsequently issued and given to Mr Pearce.

The Lease

29. The Applicants hold Flat 4 Delf Mews Cottages under the terms of a lease dated 18 November 2016, which was made between Realite Investments Europe Limited as lessor and Delf Mews Limited as Management Company, the Applicants as lessees.

30. The freehold was transferred to the Respondent on 19 November 2019.

31. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).

32. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce

International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

33. Clause 1.1 defines

***Common Parts**: the external paths, driveways, yard, staircases and Refuse Area at*
the Building that are not part of the Property or the Flats and which are intended to be used by the tenants and occupiers of the Building.

***Property**: the upper first floor flat of the Building known as 4 Delf Mews Cottages, Delf Street, Sandwich, CT13 9BZ including the entrance hall and stairs leading to the flat the floor plan of which is shown edged red on the Plan and more particularly described in Schedule 1.*

***Refuse Area**: the refuse area shown on the Plan or in such area as the Landlord shall*
from time to time designate.

***Retained Parts**: all parts of the Building other than the Property and the Flats including:*
(g) the main structure of the Building including the roof and roof structures, the foundations, the external walls and internal load bearing walls, the structural timbers, the joists and the guttering;
(h) all parts of the Building lying below the floor surfaces or above the ceilings;
(i) all external decorative surfaces of:
(1) the Building;
(ii) external doors;
(iii) external door frames; and
(iv) external window frames;
(j) the Common Parts;

***Service Charge**: a fair and reasonable proportion determined by the Landlord.*
Service Costs: the costs listed in Part 2 of Schedule 7.

34. Schedule 1 of the lease describes **the Property** and includes the doors and windows and their frames, fittings and glass, but excludes all of the Retained Parts.

35. Schedule 2 records the **Tenant Covenants**. These include the duty to pay the Service Charge and refer to costs:

*7. **COSTS***

To pay on demand the costs and expenses of the Landlord (including any solicitors', surveyors' or other professionals' fees, costs and expenses and any VAT on them) reasonably incurred by the Landlord (both during and after the end of the Term) in connection with or in contemplation of any of the following:

(a) the enforcement of any of the Tenant Covenants;

(b) preparing and serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections, notwithstanding that forfeiture is avoided otherwise than by relief granted by the court;

I preparing and serving any notice in connection with this lease under section 17 of the Landlord and Tenant (Covenants) Act 1995;

(d) preparing and serving any notice under paragraph 9I of Schedule 3; and

I any consent applied for under this lease, whether or not it is granted [(except to the extent that the consent is unreasonably withheld or delayed by the Landlord in circumstances where the Landlord is not entitled to unreasonably withhold or delay consent).

36. Schedule 4 details **Tenants Covenants**

3.2 To inform the Landlord, and until the Handover Date, the Management Company, immediately that:

(i) any matter occurs in relation to the Tenant or the Building that any insurer or underwriter may treat as material in deciding whether what terms, to insure or continue insuring the Building;

(b) any damage or loss occurs that relates to the Building and arises from an Insured Risk; and

I any other event occurs which might affect any insurance policy relating to the Building.

16. INDEMNITY

To indemnify the Landlord, and until the Handover Date, the Management Company,

against all liabilities, expenses, costs, (including but not limited to any solicitors', surveyors' or other professionals' costs and expenses, and any VAT on them, assessed

on a full indemnity basis), claims, damages and losses (including but not limited to any diminution in the value of the Landlord's interest in the Building and loss of amenity of the Building) suffered or incurred by the Landlord arising out of or in connection with:

(a) any breach of any of the Tenant Covenants; or

(b) any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any other person at the Property or the Building with the express or implied authority of any of them.

37. Schedule 5 details **The Regulations**:

6. Not to do anything which may cause any insurance of the Building to become void or voidable or which may cause an increased premium to be payable in respect of (unless the Tenant has previously notified the Landlord or, until the Handover Date, the Management Company and has paid any increased premium).

7. To comply with the requirements and recommendations of the insurers relating to the Property and the exercise by the Tenant of the Rights.

38. Schedule 7 details **The Services** and **Service Costs.**

26 (l) *any other service or amenity that the Landlord or, until the Handover Date, the Management Company may in their reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.*

27 (b) *the costs, fees and disbursements reasonably and properly incurred of:*

(i) managing agents employed by the Landlord or, until the Handover Date, the Management Company for the carrying out and provision of the Services or, where managing agents are not employed, a management fee for the same;

(ii) accountants employed by the Landlord or, until the Handover Date, the Management Company to prepare and audit the service charge accounts; and

(iii) any other person [reasonably and properly] retained by the Landlord or, until the Handover Date, the Management Company to act on their behalf in connection with the Building or the provision of Services.

Sums Agreed or Admitted

39. The Tribunal was asked by the Respondent to find that it had no jurisdiction to determine payments by the Applicants for 1/3 of the costs of External Decoration, Jet Wash and Accountancy because, by reason of the Applicants paying the sums demanded on 1 January 2021, the Applicants had admitted they were due.

40. The Tribunal takes guidance from the following caselaw:

41. **Marlborough Park Services Ltd v Mr Micha Leitner** [2018] UKUT 230 (LC)**:**

> *28. The FTT should take a robust approach where it is clear that an application under section 27A is seeking to challenge service charges which have been the subject of the judgment of the court, whether that judgment follows contested proceedings in the county court or whether it has been entered by default. The issue goes to jurisdiction. The FTT should therefore have struck out the application insofar as it related to service charges the subject of prior judgments of the court.*
>
> *29. In order to satisfy the FTT that it should strike out the proceedings as it relates to these charges, the appellant must prove that the respondent had agreed or admitted those charges. Putting to one side the letter of 21 March 2016, consideration should be given to the conduct of the respondent in the period between 2007 and 2012. The charges for that period have been paid, and charges accrued subsequently have led, as explained above, to default judgments being entered.*
>
> *31. In **Shersby v Grenehurst Park Residents Co Ltd** [2009] UKUT 241 (LC), the lessee made payments towards insurance premiums pursuant to his obligations under the lease between 1997 and 2004, only challenging the payments demanded in 2007, and having made a separate application to a leasehold valuation tribunal in the interim in relation to service charges in the course of which he did not raise the issue of insurance. The Tribunal held, in conducting a re-hearing on appeal from the FTT, that the lessee must be taken to have agreed or admitted the insurance premiums.*
>
> *32. In **Cain v Islington BC** [2015] UKUT 542 (LC), the lessee paid service charges between 2001 and 2007 without any protest, challenging the sums payable by application to the FTT in 2014. The FTT took the view that it was "now no longer*

appropriate" for those years to be litigated: not only had the lessee made the payments, he had also waited an extremely long time before making his challenge, in the meantime there having been other cases involving the same parties. The Tribunal upheld the decision of the FTT to treat the lessee as having admitted or agreed the amounts of service charge over the period between 2001 and 2007. Following the reasoning in Shersby, the Tribunal addressed section 27A(4) as follows:

"[14]… An agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant—usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two.

"[15] Absent [section 27A(5)] and depending upon the facts and circumstances, it would be open to the FTT to imply or infer from the fact of a single payment of a specific sum demanded that the tenant had agreed or admitted that the amount claimed and paid was the amount properly payable, a fortiori where there is a series of payments made without challenge or protest. Part of the reason for this is that people generally do not pay money without protest unless they accept that that which is demanded is properly due and owing, and certainly not regularly over a period of time. Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible."

33. In my judgment, the FTT erred in law in failing to recognise the significance of the payment of service charge without protest over a period of time long before the application to the FTT was made, the issue of proceedings in the county court to enforce payment of subsequent amounts of service charge and the entry of default judgments in favour of the lessor. As the Tribunal said in Cain at [18], "it would offend common sense for a tenant who without qualification or protest has been paying a series of demanded service charges over a period of time to be able to turn

around and deny that he has ever agreed or admitted to that which he has previously paid without qualification or protest."

42. In an email of 27 July 2020, Mrs Boselli had said: *With reference to the costs as described by you, we will pay the apportionment requested by you for the amount of £3,032 with regards to the external repairs and redecoration to the inner courtyard areas that is to say the covered walkway and garage doors. The same applies for Delf Mews accountancy (£120) and the jet washing of the court Yard (£83,33).*
43. She told the Tribunal that she was not a business person and had been told that a Tribunal would not take her payment into account.
44. What was said in that email, however, was part of a negotiation between the parties as to these and other payments. For instance, Mr Pearce had offered to pay the full costs of the firewall if the Applicants paid certain items and yet, because the negotiations were not fruitful, he subsequently sought to demand 50% of the costs of the firewall from the Applicants. All of that being the case, and in a situation where there had been no previous service charge demands at the property, and guided by the above caselaw, the Tribunal cannot see this correspondence or payment as being an admission such as to oust the Tribunal's jurisdiction under Section 27A(4)(a).

Apportionment

The Applicants

45. The Applicants say that they should pay ¼ of relevant costs. They argue that this was what they were told by and what they paid to the original landlord for insurance costs. They further argue that the change to 1/3 was imposed upon them by the Respondent due to the voting power of Mr Fraser Pearce, the owner of the rest of the properties in the building. A ¼ payment is fair because a measurement of the floor space of their flat, using the plans, reveals 25% to 26%.
46. When disposing of his interest in the property to Mr Pearce, the previous landlord said in an email of 26 September 2019:

"There are currently four properties and there should be four shares in the Freehold company (Delf Mews Ltd). This means that all costs are split four ways – as has been happening since the beginning. There should always have been four

shares and it was an oversight on the part of my lawyer that only three were issued. I am trying to rectify that mistake before I hand everything over."

47. The Applicants say that they agreed to waive their pre-emption rights in respect of the new share, but were unsure as to what that all meant.
48. The Applicants say that they agreed to pay 1/3 for one bill "*hoping the Mr Pearce's demands would cease*". The offer to pay was made before there was a demand for service charges.

The Respondent

49. The Respondent relates that 1/3 apportionment was agreed by the leaseholders in August 2020.
50. The service charge for 2019/20 and the first service charge bill for 2020/21 has been paid by the Applicants in 1/3 shares.
51. A 1/3 share, an equal share, is fair because there are 3 two-bed residential units; the 3 units share equally the private gated courtyard; Delf Mews is not a block of flats; the three units can be distinguished on many different bases, including ease of access for maintenance; size and number of windows; the age and construction of different areas of the property; usage, and so on, all of which pull in slightly different directions in terms of what is a fair proportion; industry guidance is that the apportionment should be equal.
52. No maintenance was done or service charges levied by the previous landlord, so that there could not be an alteration from ¼ to 1/3. The ¼ charge for insurance could be distinguished by the then relevant factors, being 4 separate units; one was an unoccupied commercial unit.
53. The Respondent does not dispute that the unit created by amalgamating a living unit with the retail unit is larger than Flat 4 or that Flat 4 is approximately 25% of the internal floor area of the internal habitable spaces.
54. A factsheet from "Service Charge Dispute Guide" gives 4 alternative methods of apportionment and states: *"some leases state no way of sharing the costs between properties. In these types of cases, the normal practice is simply to apportion the costs equally between all the properties"*
55. The service charges relate exclusively to the outside areas of the property. All 3 properties share the courtyard.

56. Flat 4 is on the first floor so requires scaffold access, unlike the other 2 flats. Scaffold is the costliest item. Flat 4 has the largest windows and the greatest volume of accessible loft space.

57. No.3 has the greatest floor area, but the greatest volume of restricted headroom due to configuration; No.5 has a separate roof, but the roof is modern (corrugated asbestos was replaced with modern fabricated corrugated surface in 2015 rather than the protected Kent peg tile, as with No.3 and No.4) and the whole of No.5 is accessible from within the confines of the Building; No.5 is also an entirely different build (a barn conversion, substantially rebuilt in 2015).

The Tribunal

58. The Tribunal notes the history of the building. It was converted by the original landlord so as to constitute 3 flats and a further retail unit in 2016. Since buying the other 3 elements, being 2 flats and the retail unit, Mr Pearce had further altered the structure so as to combine one of the living units with the remaining retail unit so as to reduce the overall number of units to 3 living units.

59. The property is a first floor flat.

60. The Applicants were given 1 of 3 shares when they bought their flat in November 2016 but a fourth share was subsequently issued.

61. The Tribunal further notes that the Decision to alter the ¼ payment to 1/3 payment was one taken by the Respondent, but effectively by Mr Pearce as he has majority voting rights. He was, effectively, reducing his personal outlay by the decision.

62. The Tribunal believes that the fairest way to apportion costs in this building is on the basis of floor space. It is not attracted to an argument based upon the earlier ¼ charge by the previous landlord as setting the fair apportionment or the latter 1/3 apportionment "agreed" by the shareholders, i.e, imposed by Mr Pearce as the majority voter.

63. Nor was the Tribunal swayed by the Respondent's arguments that there was a distinction to be drawn between the Applicants' flat and the rest of the building, such that the access to the courtyard or the nature of the upkeep of the building or the nature of the building itself was likely to be a determining factor.

64. Nor is the Tribunal persuaded that the number of bedrooms should be the deciding factor; Mr Pearce owns 75% of the building and how he configures that portion in terms of bedrooms is a matter for him to determine.

65. It is the Tribunal's combined experience which leads it to an apportionment on the basis of floor space. People often pay an equal percentage in buildings, part of which they cannot immediately see the benefit of, such as a ground floor flat not using a lift or complaining that they are a long way from the roof. In truth, and in experience, when a person buys a lease in a part of a building, they take on shared responsibility for the whole building.
66. The Respondent accepts that the Applicants occupy 25% of the floorspace.
67. The Tribunal determines, based on the above reasons, that the correct apportionment for the Applicants' property should be a ¼ share of demandable service charge costs. The Tribunal was not asked to determine the fair apportionment for the 2 units owned by Mr Pearce, save that logically they represent a combined ¾ share of demandable service charge costs.

Invoice dated 1 January 2021

External decoration £9,096 inclusive of VAT

The Applicants

68. The Applicants dispute that this was reasonable as their windows were not painted.

The Respondent

69. The Respondent complied with Section 20 consultation and attempted, unsuccessfully, to obtain an estimate from a contractor named by the Applicants. It chose the preferred contractor, Wealden Design & Build, on the basis that they were a long-established company, which offered best value for money.
70. The works were completed between the erection of scaffold in December 2020 and when the scaffold was removed in Spring/summer 2021.
71. The Applicants' windows and private front door were not painted. Mrs Boselli has recorded that the frames were in a poor state. The contractor reported rot in the frames; the Respondent offered to have this work done as part of the works, despite it being the responsibility of the Applicants. The offer was declined.
72. The Respondent was unable to persuade the contractor to paint the frames without the windows being opened as required by Mrs Boselli. The contractor did not charge for this work and issued a credit.

The Tribunal

73. The Tribunal finds the sum of £9,096 inclusive of VAT to be reasonable and payable.

74. Its reasons for so deciding follow.

75. The Respondent followed a proper Section 20 consultation exercise. He sought a tender from the contractor suggested by the Applicants. He chose the cheapest tender. There is no evidence before the Tribunal to suggest either that the work was not carried out to a reasonable standard or that it was not reasonably costed.

76. The only complaint that the Applicants appear to make is that their windows were not painted. As to this, the Tribunal comments that they were not charged for that work; their windows (their responsibility) were not in a fit state to be painted; they made a demand that the windows be painted whilst closed, which the contractor reasonably refused to do.

Jet washing: 2 x £250

The Applicants

77. The Applicants say that the charge is too high for the limited work required, some 20 square metres.

The Respondent

78. The Respondent says that the courtyard is block paved and, given it is bounded by walls on all sides, it gets only a little direct light. It requires cleaning to ensure the surfaces do not get covered in moss and become slippery.

79. The Respondent engages a specialist contractor to jet wash the communal area twice annually at a cost of £250/visit. It takes 3 hours for 3 men to set up and carry out the clean. He had been quoted a higher price on Checkatrade of over £400.

80. The cost was outlined in the Respondent's email to the Applicants of 10 July 2020 and agreed by them in their email, dated 27 July. This work has been carried out as per the Applicants' express agreement.

81. He provides a 'before and after' photograph for the second jet wash carried out (subsequently, he told the Tribunal that there had been only one jet wash).

82. He made two charges for £250, one being for a second, as yet unplanned jet washing.

The Tribunal

83. The Tribunal notes the description of the works in the receipt given by the contractor: Removed all moss from Back patio
Removed all moss from front of house and said of house and clean all front of house and side of house and resealed back patio and front of house and side of house.

84. The description encompasses more than the simple description of the Applicants, but the cost is still more than the Tribunal could accept as reasonable for a task known to them as being relatively simple and not too time consuming. The Tribunal, accordingly reduces the charge to £125.

85. Mr Pearce's evidence on jet washing was confused. It transpired that he had sought 2 payments of £250, but that the second jet wash was not planned. "*The second wash was never carried out. There was an allowance for 2*." The second demand was not, therefore, reasonably demanded.

1 Hour Firewall to No.3 / No.4 loft space: £1,200 inclusive of VAT

The Applicants

86. The Applicants say that they are being charged 50% of this expenditure.

87. Installation of a firewall is not included within works chargeable to the service charge. It relates to Health and Safety work as part of Mr Pearce's conversion works.

The Respondent

88. The Respondent says that the conversion of No.3 did not require any works or access to the loft or roof space.

89. The cost of installing the firewall is claimed under Schedule 7, Paragraph 26 (f) ("..... maintaining and replacing fire prevention … machinery and equipment … on the Common Parts") and/or Paragraph 26 (l) ("any … amenity that the Landlord … may in their reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building")

90. No objection was received from the Applicants after they were given notice of the proposed works; indeed, they paid the interim service charge demand.

91. The Respondent agrees that this should have been charged at 1/3 rather than ½.

The Tribunal

92. The Tribunal can see that a firewall is very important and for the benefit of all leaseholders. The Applicants have provided no evidence that this was part of Mr Pearce's conversion works; certainly, the Applicants raised no objections to the works when Mr Pearce told them of his intentions.

93. No suggestion has been made that the cost is unreasonable.

94. Accordingly, the Tribunal finds the sum of £1,200 inclusive of VAT to be reasonable and payable on the basis of a ¼ share.

Improvements to Refuse area: £1,800 inclusive of VAT

The Applicants

95. The Applicants say that this is not included within works chargeable to the service charge.
96. The works are stated to be "improvements", which cannot be covered by the service charge.
97. It relates to Mr Pearce's conversion works.

The Respondent

98. The Respondent says that this did not relate to the conversion.
99. There had been an issue with the wheelie bins causing an obstacle to the gates, and rubbish accumulating in the courtyard. Tenants were leaving their bins immediately behind the main door, causing an obstruction, in breach of regulation 22 of Schedule 5 and causing a health and safety risk. On the plans for the properties, a contained bin storage area is shown in the Courtyard entrance, out of the way on the right on entry, but, for whatever reason, this had not been maintained.
100. Again, the Landlord gave notice of this work in the August 2020 Notice. The Applicants did not object within the consultation period. The cost for the bin storage was billed by the Landlord and this was paid by the Applicants in December 2020 and this work was contracted for and completed on that basis.
101. The Respondent did not use the word "improvement" in any technical sense.
102. The cost of restoration of the bin storage area is claimed under Schedule 7 Paragraph 26 (a) "…replacing the Retained Parts", and/or Paragraph26 (l) "any … amenity that the Landlord … may in their reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building" and Paragraph 27(a).

The Tribunal

103. The Tribunal was not content that this work was actually required on the basis of the disputed circumstances. Whilst there may have been a bin store indicated on the 2015 plans, that did not mean that one was required.
104. The Respondent said that it was chargeable because he was "…replacing the Retained Parts", and/or Paragraph 26 (l) "any … amenity that the Landlord … may in their reasonable discretion (acting in accordance with the principles of good estate

management) provide for the benefit of the tenants and occupiers of the Building" and Paragraph 27(a)

105. The Tribunal finds that he was not replacing the Retained Parts because there was nothing to replace, the bins having simply been stored in the yard area.

106. Nor, the Tribunal finds, was this an amenity that the Landlord may in its reasonable discretion be provided as described above. It hasn't been shown to be necessary, at a cost of £1,800 inclusive of VAT, when all that was required, at most, was a bit of "bin discipline" by the leaseholders.

107. Accordingly, the Tribunal reduces this charge to nil.

Annual roof and boiler safety inspections for Insurance: £720 inclusive of VAT

The Applicants

108. The Applicants assert that the boiler inspections are not needed as they have their own plumber.

The Respondent

109. The Respondent has removed the charge for the boiler safety inspection.

The Tribunal

110. The Tribunal noted that this issue has been resolved by the parties without the need for a determination.

Two sets of Managing agent fees at 5%

The Applicants

111. The Applicants say that Mr Pearce has set up a company, Delf Mews Management Limited, and is, in effect, paying himself.

The Respondent

112. The Respondent says that Delf Mews Management Limited entered into a contract with the Landlord to provide the services, for a sum of 5% of the service charges as per Paragraph 27 b (i).

113. Mr Pearce says that he has not made money from this and, given the vast amount of time he has spent on managing the issues arisen, there is no possible prospect that he will do so. The Landlord is, however entitled to charge a fee pursuant to Paragraph 27(b)(i) and it considers a 5% fee to be reasonable given the workload and sums

involved. If a professional agent were instructed, it believes the cost would far exceed 5% of the service charges.

The Tribunal

114. The Tribunal first details the relevant part para 27:
(b) the costs, fees and disbursements reasonably and properly incurred of:
(i) managing agents employed by the Landlord or, until the Handover Date, the Management Company for the carrying out and provision of the Services or, where managing agents are not employed, a management fee for the same;

115. It finds that the Respondent is able to employ managing agents or to charge a management fee itself. In this case, Mr Pearce has set up a management company through which to charge for the services he provides personally in the management of the property. The Applicants do not argue that this is a sham.

116. What the Applicants do say, having heard the evidence given, is that it is unreasonable to charge them a management fee when the monies they pay go only to the filing costs of the management company. The Tribunal finds, however, that that is to conflate 2 issues of reasonableness, being whether the management fee can reasonably be demanded and whether its future expenditure can reflect upon the first question. The Tribunal finds that the answer to the second question cannot reflect on the first; if it could, there would be endless challenges to landlords as to how they spent the costs of management.

117. Is 5% a reasonable sum to charge? The Applicants did not say that it was too high and had no comparative figures to offer for consideration. In the Tribunal's experience, the costs of employing a managing agent for 3 flats in a building such as this would be far in excess of the 5% charged.

118. Having regard to all of the above, the Tribunal finds that 5% charges were reasonable and payable in accordance with the term of the lease.

Costs expected to be invoiced in September 2021

Roof Survey: £780 / Emergency roof repairs: £3,660 / Extra scaffolding rental: £3,600 / Additional scaffolding for roof works: £9,000 / Roof works: £6,840

The Applicants

119. The Applicants say that the roof was overhauled in 2015.

120. It is disputed that they fall within the landlord's covenants or that they are reasonable in sum.

The Respondent

121. The Respondent discovered the requirement for these works in December 2020 when scaffolding allowed access.

122. The Applicants had previously complained about problems with the roof, falling tiles and damp. Their surveyor, Mr Curtis, was granted access when he requested it on 23 March 2021; his report was not shared with the Respondent until 20 July 2021.

123. Proper notice of the works was given and a report was obtained and shared with the Applicants, which identified the defects, all consistent with the earlier complaints of the Applicants. Mrs Boselli later also complained that her windows had rotted due to a defect in the roof.

124. Against a backdrop of a failure to supply Mr Curtis' report and weekly scaffolding charges of £750, the works needed to go ahead.

125. It received three estimates for this work and proceeded with Bennicks because it considered this to have responded most accurately to the work required. Bennicks agreed to subcontract to Wealden Design & Build, who were contracted to manage the external works.

126. The additional hire costs for the scaffold was caused by the Applicants refusal initially to agree to the consultation period under the s.20 Notice being shortened to allow the works to proceed whilst the initial hire period of the main scaffold was in place. It is on this basis that it is charged to the Applicants.

127. These costs are sought to be recovered by the Landlord pursuant to schedule 7, Paragraph 26 (a) *"… maintaining … repairing and replacing the Retained Parts*".

The Tribunal

128. The Tribunal noted that Mr Curtis, a chartered surveyor and witness for the Applicants, did not attend the hearing, so that it was not possible to explore his evidence with him. In any event, he had seen the works only after they had been completed.

129. These works followed a report on the state of the roof and a proper Section 20 consultation process and the cheapest contractor was chosen.

130. Further evidence that the works were required can be found in the fact that the Applicants themselves had previously complained about the state of the roof.
131. The Tribunal can see no evidence to suggest that the works as done were overpriced. There is a conflict of evidence as to the costs of the scaffold and the materials used, which could not be explored further in the absence of Mr Curtis.
132. Having regard to all of the above, the Tribunal finds that the cost of all of these works was reasonable and payable on the basis of ¼ share.

Legal costs for DML constitution / governance

The Applicants

133. The Applicants say that these are legal costs understood to relate to the change to the service charge percentages and merger of the units. The only benefit was to Mr Pearce.
134. How do these sums fall within the service charge provisions?

The Respondent

135. The Respondent says that these costs all relate to the advice given in relation to the preparation of amended memorandum and articles of association (providing the benefits outlined above), creation of additional shares for Nos. 4 and 5, preparation of the resolutions, preparation of management agreement and assistance with the s20 Notices.
136. Copies of all of the documents prepared by the Landlord's solicitors were sent to the Applicants by email dated 26 August 2020.
137. These costs are raised under Schedule 7, Paragraph 26 (l) any other service … that the Landlord … may in their reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.

The Tribunal

138. The Tribunal agrees with the Applicants that this charge is not covered by Paragraph 26(i) because it is not a service provided for the benefit of the tenants and occupiers of the building, but rather one for the benefit of the landlord. In so determining, the Tribunal is conscious that this charge may find its way to the Applicants via another route, i.e. as shareholders of the Respondent company.

139. Advice on preparation of the management agreement can only be for the benefit of Mr Pearce.
140. Even if it was possible for the Respondent to engage a solicitor to assist with the preparation of Section 20 notices, which the Tribunal later finds is not a proper charge under the lease, it was not reasonable to use a solicitor when there is so much free advice available to a landlord on the topic.
141. Accordingly, the Tribunal finds that this charge is not payable.

Accountancy

The Applicants

142. The Applicants believe that this relates to the unnecessary constitution change.

The Respondent

143. The Respondent says that it has to prepare service charge accounts. Its accountant is employed for that purpose. A charge was made in 2020 for the previous year's accounts and was paid by the Applicants.
144. The cost is passed on to the leaseholders pursuant to Schedule 7, Paragraph 27 (b)(ii).

The Tribunal

145. The Tribunal notes that the actual invoices make no mention of preparing service charge accounts. There are references to: *Examining your books and records for the year ended 30 September 2021 and preparing therefrom the financial statements for the year ended on that date. Provision of bookkeeping services. Xero subscription for the period 1 April 2021 to 31 March 2022 at £10 per month.* However, in the context of the accountancy invoices and correspondence within the bundle, this, and the other references not listed here, all appears to relate to the Respondent's company accounts for filing.
146. The Respondent is entitled to engage an accountant and to charge for that service under Paragraph 27(b)(ii) of the lease, but it is far from clear that this is what is being charged for here.
147. Accordingly, the Tribunal finds that the sums charged are not payable. In so determining, the Tribunal is conscious that this charge may find its way to the Applicants via another route, i.e. as shareholders of the Respondent company. It is also open to the Respondent to go back to its accountants and seek invoices relating only to the preparation of service charge accounts before actually seeking payment by way of service charge demand.

Lock repairs to communal doors

The Applicants

148. The Applicants dispute this as the lock remains broken. There are no issues with the lock.

149. They were unaware that the locksmith had provided them with a bad copy of the key.

The Respondent

150. The Respondent says that in March 2021 Mrs Boselli reported to Mr Pearce that the lock was broken and demanded it be repaired.

151. He had the lock repaired.

152. In June 2021, Mrs Boselli instructed her property agent to attend the property with a locksmith to change the locks. The locksmith attended the property, inspected the lock and concluded that Mrs Boselli had had made a bad copy of her key.

The Tribunal

153. The Tribunal notes that this issue was conceded by the Applicants and not further pursued.

DMML costs at 5% of qualifying works

The Applicants

154. The Applicants say that Mr Pearce has set up a company and is, in effect, paying himself.

The Respondent

155. The Respondent repeats what was said above.

The Tribunal

156. The Tribunal repeats what was said above.

Administration Charge: Legal Costs of freeholder: £12,957.47

The Applicants

157. The Applicants complain that part of this sum relates to preparation and service of a Section 146 Notice.

158. Section 168 of the Commonhold and Leasehold Reform Act 2002 applies prohibiting the service of a Section 146 Notice without first obtaining a determination that a breach of covenant has occurred or an admission by the tenant that a breach has

arisen. The Applicants had not admitted any breach, but rather deny that one has arisen.

159. If there was a breach during any period because of gaps in inspections of the premises as required by the Insurance policy, the legal costs incurred by the Respondent are wholly disproportionate to the breach.

160. They were not provided with details of the requirement for weekly inspections, which differed from the monthly inspections in the earlier insurance policy.

161. They were stuck in lockdown in France. They had to rely upon an agent in the UK, whose visits were made difficult by Mr Pearce.

162. They subsequently made arrangements for weekly inspections.

The Respondent

163. The Respondent says that the Administration Invoice relates to the legal costs incurred in seeking to compel the Applicants to rectify their breaches of lease and in dealing with their various allegations and challenges to the freeholder.

164. Recovery is sought pursuant to Paragraph 7 and/or Paragraph 16 of Schedule 4 of the Lease.

165. The Applicants (and all leaseholders at Delf Mews Cottages) have covenanted, by Clause 5 of the lease and Paragraph 6 and 7 of Schedule 5 to comply with the conditions of any insurance policy: "*Not to do anything which may cause any insurance of the Building [i.e. Delf Mews] to become void or voidable or which may cause an increased premium to be payable in respect of it (unless the Tenant has previously notified the Landlord…)*

"To comply with the requirements and recommendations of the insurers relating to the Property and the exercise by the Tenant of the Rights."

166. They were also under a duty in accordance with Paragraph 3.2 of the Fourth Schedule to inform the landlord immediately that

"(a) any matters occurs in relation to the Tenant or the Building that any insurer or underwriter may treat as material in deciding whether or on what terms, to insure or continue insuring the Building;

"(b) an damage or loss occurs that relates to the Building and arises from an Insured Risk; and

"(c) any other event occurs which might affect any insurance policy relating to the Building."

167. Delf Mews were originally insured by East Kent Underwriting Limited. It was a condition of the policy that an internal and external inspection was to be carried out at least once every 14 days, and a record of such inspections should be kept.

168. On 29 August 2017, the director of the previous landlord (Terry Jordan of Realite Investments Europe Limited) informed the Applicants about the insurance with East Kent, providing a copy of the insurance schedule and policy by email. Mr Jordan stated:

"*Please read the attached documents carefully and note that we are required to carry out an inspection of all properties at least once every 14 days and to record the dates of the inspection and any issues that arise.*"

169. For the 12 months to August 2021, the Building was insured by Aviva.

170. The definition of "unoccupied" means "any Residential Building or Residential Unit is not being lived in by anyone with Your permission for more than 90 consecutive days." The Policy requires turning off utilities and/or setting the heating and carrying out weekly inspection visits and maintaining a record of such visits.

171. Details of the policy were sent to the Applicants on 13 July 2020. The Applicants were not happy with weekly checks because they live in France. They said to both the Respondent and the insurance broker that they were unable to meet the weekly visit requirement.

172. Having failed to make any headway on compliance with the insurance conditions, on 23 September 2020 Mr Pearce wrote to the Applicants putting them on notice that he would be instructing solicitors to take further action if they did not make arrangements to comply with the insurance conditions.

173. The Landlord instructed solicitors to prepare a letter before action, and serve a Section 146 notice on 1 October 2020, demanding that the Applicants remedy the breaches that they had admitted to the insurance broker and to him – namely that they did not agree to the conditions of inspection in the insurance policy and could not and would not carry out weekly inspections.

174. A log was submitted by a friend of the Applicants and completed up to September 2021, but weekly visits were not taking place.

175. Mr Pearce instructed the Landlord's solicitors to write again in November 2020 in an attempt to impress upon the Applicants that compliance with the terms of the insurance was not 'frivolous', and recording the fact that the weekly visits were still not taking place, and to suggest that a third-party professional might conduct the inspections.
176. Breaches were admitted by the Applicants in an email of 17 July 2020 to Mr Pearce, in contact with the insurance broker of 22 July 2020 and suggested in an email to Mr Pearce of 27 July 2020.

The Tribunal

177. The Tribunal takes the view that the breaches by the Applicants, admitted as detailed above in the Respondent's case, are very serious. They impact upon the whole investment in the building.
178. The Applicants were, the Tribunal acknowledges, faced with a very difficult set of circumstances as health issues and Covid militated against weekly trips to the UK to check the property themselves. There were, however, other options available to them. They could have taken Mr Pearce's offer to check on their behalf or pay a third party to check.
179. They did not take those other options, but failed to comply with the requirements of the lease and admitted in writing that they had done so. The Respondent was entitled to regard the admissions made as being admissions for the purposes of Section 168 Commonhold and Leasehold Reform Act 2002, which would otherwise have prevented the service of a notice under Section 146 Law of Property Act 1925.
180. That being the case, the Respondent was able, under Paragraph 7 (a) and (b) of the Lease, to engage solicitors. It was so serious an issue, the Tribunal finds, that it was reasonable to engage solicitors and the reasonable charges of those solicitors are payable by the Applicants in accordance with Paragraph 7 (a) and (b).
181. Are the sums charged reasonable at a cost of some £12,957.47?
182. The statement of legal costs is sparse on detail.
183. The Tribunal refused the request on behalf of the Respondent that it be able to submit more refined costs after the hearing because they had already had ample time to do so within the bundle and the Tribunal had to have regard to its overriding objective as further submissions would have further lengthened the proceedings, have led to

further submissions by the Applicants and led to more costs for the parties and the Tribunal.

184. The statement refers to charging for correspondence with the witness Mrs Rogers, such that the Tribunal cannot be satisfied that all that is charged is recoverable.

185. The Tribunal is surprised that a detailed description in the form of an itemised invoice supported by a record detailing which level of lawyer dealt with which issues, when, for how long, at what cost was not submitted for summary assessment.

186. The fact that the above issues make the Tribunal's task more difficult should not mean that the Tribunal cannot itself assess what would be the reasonable costs of necessary works. The Tribunal has already recorded that the solicitors were engaged to follow up on an admitted serious breach of the lease. The Tribunal can see the correspondence and the Section 146 notice.

187. Working with what it has got and, in an attempt to arrive at a fair sum, the Tribunal has looked at what a reasonable cost for such work might be.

188. Allowing for a Grade A National fee earner's fees, taken from the Master of the Rolls' Guide to the Summary Assessment of Costs of 1 September 2021, of £261 per hour plus VAT, or £313.32 per hour, and allowing 20 hours work, the Tribunal finds that £6,264 inclusive of VAT is a reasonable sum.

189. Accordingly, the Tribunal finds that a cost of £6,264 is reasonable and payable.

Administration Charge: £1,557.55

The Applicants

190. The Applicants say that the legal fees are charged at 100% so thought to be an administration charge. It is not clear to what it relates.

The Respondent

191. The Respondent says that this relates to legal fees incurred in 2021 in respect of the continued efforts to ensure compliance with the insurance conditions and terms of the lease.

The Tribunal

192. The Tribunal, taking the same approach for the reasons given in the previous head of expenditure, finds that a £313.32 rate for 2.5 hours leads to a reasonable charge of £783.30 inclusive of VAT.

Section 20c and Paragraph 5A

The Applicants

193. The Applicants argue that the lease does not allow legal costs of these proceedings to be recovered by service charge demand.
194. 26 (l) does not help because it is not a service provided by the landlord to the tenants.
195. 27 (b)(iii) does not help because the lawyers are not asked to act on behalf of the landlord in connection with the Building or the provision of services.
196. What is significant is that Paragraphs 7 and 16 of Schedule 4 deal specifically with solicitors' costs, whereas Paragraph 27 (b) makes no specific reference to solicitors.
197. The Applicants are likely to be substantially successful.
198. Had the Respondent sought professional advice when it was suggested by Mrs Boselli in 2019, it is likely the proceedings would not have been necessary.
199. The proceedings had led to 3 concessions on the part of the Respondent, being the firewall apportionment, boiler inspection charge and a substantial reduction in threatened legal fees.

The Respondent

200. The Respondent argued that the landlord's involvement in the proceedings is a service or amenity. "Any other person" should not exclude a solicitor.
201. The issue should be seen in the context of a small block with only 2 leaseholders.
202. The issue of apportionment is relatively insignificant representing a change of only 1/12 in the 2 positions.
203. The concessions were not all wins. The boiler charge was conceded only when the Respondent became aware that the Applicants used their own plumber. The legal fees were reduced due to Mr Pearce's insistence on only claiming for issues relevant to the relationship of landlord and tenant.

The Tribunal

204. The Tribunal first examines the lease to determine whether the Applicant is able to recover its costs via the Service Charge in accordance with the lease. The Tribunal has followed the guidance of the Upper Tribunal in **Geyfords Ltd v O'Sullivan, Grinter, Shaw, Morgan, Bonsor** [2015] UKUT 0683 (LC) and has interpreted the lease in accordance with the guidance of the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36.
205. In **Union Pension Trustees Limited, Paul Bliss v Mrs Maureen Slavin** [2015] UKUT 0103 (LC), the UT considered whether a lease including the following

wording gave the landlord the power to recover £6,500 in legal costs incurred in LVT proceedings:

"… any other costs and expenses reasonably and properly incurred in connection with the landlord's Property including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents and (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder."

It was argued that the legal costs had been incurred "*in connection with the landlord's property*" in particular since it must have been contemplated that costs might be incurred in connection with the recovery of the expense of maintaining the fabric of the building. The Upper Tribunal rejected the argument. In another part of the lease there was the power for the landlord to recover the cost of specified professionals but lawyers were not included. In those circumstances: "*The parties cannot be taken to have slipped in, under general words, an obvious category of potential expenditure which their more specific provisions appear consciously to omit*."

206. In **Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited** [2016] UKUT 317 (LC), the Upper Tribunal refused to allow legal costs in the absence of clear words. There it was said that there is no need to construe service charge clauses restrictively. That said, '*it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease*': see ***Francis v Philips*** *[2014] EWCA Civ 1395* at [74]. The court or tribunal should not therefore '*bring within the general words of a service charge clause anything which does not clearly belong there*.'

207. In **Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited,** the terms of the lease were detailed as follows:

6. By Clause 3(A) *the Lessee covenants with the Lessor that the Lessee will at all times during the term:*

Pay to the Lessor such annual sum as may be notified to the Lessee by the Lessor from time to time as representing the due proportion of the reasonably estimated amount required to cover the costs and expenses incurred or to be incurred by the Lessor in carrying out the obligations or functions contained in or referred to in this

Clause and Clauses 4 and 6 hereof and in the covenants set out in the Ninth Schedule hereto…

The 'costs and expenses' are referred to in clause 3A as "*the Management Charge*s", the clause making further provision for the calculation and the time for payment of such charges and the establishment of a reserve fund.

7. By Clause 4 *the Lessor covenants with the Lessee that the Lessor will perform and observe and carry out the covenants and obligations set out in the Ninth Schedule and the obligations on its part contained in the lease.*

8. By Clause 6(A) *it is agreed and declared as follows:*

That the Lessor shall at all times during the term hereby granted manage the Estate and the Block in a proper and reasonable manner and shall be entitled:

(i) to appoint if the Lessor so desires managing agents for the purpose of managing the Estate and Block and to remunerate them properly for their services;

(ii) to employ architects surveyors solicitors accountants contractors builders gardeners and any other person firm or company properly required to be employed in connection with or for the purpose of or in relation to the estate and the Block or any part thereof and pay them all proper fees charges salaries wages costs expenses and outgoings;

(iii) to delegate any of its functions under Clause 6 and sub-clause A(i) and (ii) of this clause and the Ninth Schedule hereof to any firm or company or any other body of persons whose business it is to undertake such obligations upon such terms and conditions and for such remunerations as the Lessor shall think fit.

208. Sinclair Gardens and Avon Estates previously had proceedings in front of the First-tier Tribunal in 2010 and 2011. Sinclair Gardens attempted to recover the total sum of £10,112.40 in legal costs from its tenants via the service charge provisions under the lease.

The Upper Tribunal held that the only legal costs that could be recovered from the tenant were those incurred in the "*ordinary course of the management of the estate*." Clause 6 did not mean the landlord could instruct solicitors for any purpose and recover the costs from the tenant. The costs of litigation did not qualify as those incurred in the ordinary course of the management of the estate. Although the clause

made explicit reference to solicitors, the recoverable solicitors fees were only those relating to their employment for the purposes of the management of the estate.

The Upper Tribunal considered the whole lease. As there were more specific provisions elsewhere, the general wording of clause 6 (A) did not impose liability on the tenant for the costs of litigation. In order for legal costs to be recovered under a general service charge clause, it must be clear from the wording that this is the intention.

209. This Tribunal finds that the lease does not allow the recovery of the legal costs of these proceedings by service charge. Accordingly, it allows the applications under Section 20C and Paragraph 5A so that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service or administration charge payable by the Applicants in this or any other year.

210. The Tribunal, having assessed the facts here in the light of the guidance from the above caselaw, agrees with the Applicants that what is significant is that Paragraphs 7 and 16 of Schedule 4 deal specifically with solicitors' costs, whereas Paragraph 27 (b) makes no specific reference to solicitors. It is inconceivable that the draftsman who prepared the lease would specifically use the reference to solicitors twice and yet not in relation to Paragraph 27 (b). If "any person" was meant to include solicitors, why not use that term also in Paragraphs 7 and 16 of Schedule 4.

211. More importantly, the Tribunal finds that the Tribunal's reading of the lease in this respect is *what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.*

212. The Tribunal also agrees with the Applicants that the costs of a solicitor cannot be described as *any other service or amenity that the Landlord ….. may in their reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.* To find otherwise would be to overstretch the generality of this provision within 26 (l) and to ignore provisions which are clearly specific to the issue, being Paragraph 27(b) (seen in the context of the overall lease) which almost immediately follows it.

RIGHTS OF APPEAL

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

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

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

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

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(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.

19 Limitation of service charges: reasonableness

(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.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a postdispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration
agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Commonhold and Leasehold Reform Act 2002

Schedule 11, Part 1, Paragraph 5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal