FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT at LEICESTER

Tribunal references	:	**BIR/00FN/LIS/2021/0034** **BIR/00FN/LLC/2021/0011** **BIR/00FN/LLD/2021/0007**
Court claim number	:	**H10YJ386**
Property	:	**Apt 7, 137 Humberstone Drive. Leicester LE5 0RF**
Applicant/Claimant	:	**Cedar Court Management Co (Leicester) Ltd**
Representative	:	**Butlins**
Respondent/Defendant	:	**Mr Leon Baker**
Representative	:	**None**
Tribunal members	:	**Judge C Goodall (Chair), Mr D Satchwell FRICS, and Judge C Payne**
In the county court	:	**Judge C Goodall (sitting as a Judge of the County Court (District Judge))**
Date of decision	:	**7 March 2022**

DECISION

Summary of the decisions made by the FTT

1. The following sums are payable by the Respondent, Mr Leon Baker, to the Applicant, Cedar Court Management Co (Leicester) Ltd, by 21 March 2022:

   (i) Service charges: £1,115.51;

Summary of the decisions made by the County Court

   (ii) Court fee of £115.00;

   (iii) Fixed costs of £80.00;

   (iv) Interest at 2% calculated on £1,115.51 from 1 January 2021 to date of judgement: £26.44.

Background

2. Cedar Court is a block of 8 flats in a two-storey building with garages at the rear numbered 137 Humberstone Drive, Leicester ("the Property"). Mr Leon Baker ("the Respondent") owns flat 7. Cedar Court Management Co (Leicester) Ltd ("the Applicant") is the manager of the Property.

3. The Respondent holds a long lease of the subject property, which requires the Applicant to provide services and for the Respondent to contribute towards their costs by way a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

4. The Applicant issued proceedings against the Respondent on 3 March 2021 in the County Court Business Centre under claim number H10YJ386.

5. The claim against the Respondent in the County Court comprised of the following:

   (i) Arrears of service charge and an administration charge amounting to £1,630;
   (ii) Additional administration charges (described as collection costs) amounting to £293.40;
   (iii) Interest on arrears of service charges £27.72 to the date of issue and continuing at a daily rate of £0.36.
   (iv) Costs of the action

6. On more detailed analysis, it is clear that the sum claimed as arrears of service charges include a claim for ground rent in the sum of £25.00 for 2019.

7. The Respondent filed a Defence dated 7 April 2021. The proceedings were then transferred to the County Court at Leicester and then to this tribunal by the order of District Judge Severn dated 28 July 2021.

8. The order transferring issues to the tribunal was in very wide terms: "The matter is transferred to the First Tier Tribunal (Property Chamber)."

9. All First-tier Tribunal ("FTT") judges are now judges of the County Court. Accordingly, where FTT judges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues relating to interest or costs, that would normally not be dealt with by the tribunal.

10. The Tribunal issued directions dated 2 August 2021 informing the parties that all the issues in the proceedings would be decided by a combination of the FTT and the Tribunal Judge member of the FTT sitting as a Judge of the County Court.

11. The directions also invited the Respondent to make applications for orders under section 20C of the Landlord and Tenant Act 1985 ("the Act") and / or limitation of administration charges under paragraph 5A of /schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

12. The Respondent has duly applied for these orders, which have been given reference numbers BIR/00FN/LLC/2021/0011 and BIR/00FN/LLD/2021/0007.

13. On 17 February 2022 the Tribunal inspected the Property and on 18 February 2022, the matter was heard via a remote video hearing. Due to technological issues, the Respondent attended by telephone rather than video. The Applicant was represented by Mr Peter Butlin, whose firm had taken over management of the Property in January 2020. Ms Kamila Giec, the property manager at Butlins, was also in attendance.

14. Judge Goodall presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court. Those matters within the jurisdiction of the Tribunal were decided by the Tribunal members. Judge Goodall alone decided all matters within the jurisdiction of the County Court.

15. This reserved decision will act as both the reasons for the tribunal decision and the reasoned judgment of the County Court.

The issues

16. From the hearing and consideration of the documentation provided by the parties, the Tribunal considers that the issues it needs to determine are:

    a. What service charge is payable for each of 2018, 2019, and 2020;

    b. What charges for recovery of unpaid service charges are due (these are known as administration charges);

    c. Whether the Respondent has a claim in damages arising from the Applicant's failure to comply with the maintenance obligations in the lease, which he can set-off against his service charge liability;

    d. If so, and in any event, is the Respondent entitled to withhold payment of service charges because there is no long-term maintenance plan in place;

    e. And finally, what determinations on the Respondent's applications under section 20C of the Act and Schedule 11 of the 2002 Act should be made.

17. In the county court, Judge Goodall needs to determine the applications for ground rent, costs, and interest.

18. Each of the issues identified in paragraph 16 will be considered in turn.

What service charges are due for each of 2018, 2019, and 2020

Law

19. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    a. The person by whom it is or would be payable
    b. The person to whom it is or would be payable
    c. The amount, which is or would be payable
    d. The date at or by which it is or would be payable; and
    e. The manner in which it is or would be payable

20. Ascertaining the amount payable as a service charge requires consideration of the terms of the lease, as this is the foundation stone of the legal right for the Applicant to demand payment of sums due from

the Respondent to the Applicant. Secondly, it requires consideration of compliance with statutory controls over service charge demands.

21. A lessee also may ask the Tribunal (under section 27A of the Act), to determine whether a service charge is payable in any service charge year. Specific items of expenditure may be challenged, and the Tribunal will determine whether expenditure is, or would be, reasonably incurred. A lessee may argue that a demand for a service charge is invalid as it does not comply with the lease requirements. A tribunal may also assess whether other provisions of the Act limit the amount of service charge payable, for instance if there has been no or inadequate consultation, (section 20 of the Act), or whether the claim is in time (section 20B of the Act). None of these potential challenges apply in this case.

22. Sections 47 and 48 of the 1987 Act provide that service charges are not payable to a landlord unless the service charge demand contains the name and address of the landlord (section 47) or the lessee has been furnished with an address for service on which notices can be served on the landlord.

23. Section 21B of the Act provides that payment of a service charge may be withheld by the lessee unless the demand is accompanied by a summary of rights and obligations in a prescribed form. If not, a lessee may withhold payment.

The lease

24. In clause 5 of the lease, the lessee covenanted to pay a "Maintenance Contribution" to the Applicant. That phrase is defined as one eighth of the "Aggregate Maintenance Provision", which is the sum computed in accordance with Part 1 of the Fifth Schedule. Payment is to be by two equal instalments on 1 January and 1 July in each year.

25. The Fifth Schedule of the lease sets out how service charges are to be calculated. A budget is to be prepared "not later than the beginning of December" in each year, which is to set out the estimated expenditure for that year, the amount intended to be collected as a reserve for longer term expenditure, and any irrecoverable service charges from other lessees. It is to be reduced by any expenditure from reserves, and any sums which have since been recovered from non-paying lessees if their payments were previously included within the service charge budget.

26. Paragraph 3 of the Fifth Schedule provides that if the estimated costs in any year have been exceeded or fallen short of the estimate, the lessee shall either be given an allowance for the shortfall "against … a subsequent instalment of maintenance contribution", or if there was an

excess of expenditure against budget, the lessee shall pay their share on demand.

Evidence

27. The Respondent has not challenged any expenditure contained in the service charges levied for 2019 or 2020, both of which were available to the Tribunal, nor the accuracy of the arrears figures claimed.

28. The previous managing agents had provided the Applicant with a statement of account in relation to the Respondent's service charge payments, starting in June 2018 and ending on 31 December 2019. We were also supplied with accounts for 2019, prepared by a firm of chartered accountants (showing comparable figures for 2018). The statement of account recorded, on a monthly basis, the amounts said to be due from the Respondent, and the amounts paid.

29. The first element of the Applicant's claim is for arrears of service charges for the service charge years (which are 1 Jan – 31 December) 2018, 2019 and 2020.

2018

30. Looking at 2018 first, the statement of account shows that the service charge was allocated to the Respondent's account monthly. The monthly sum allocated was £60.00 until November 2018 when it increased to £75.00. The Respondent did not change his regular payment of £60 per month, resulting in £15 of arrears accruing in each of those two months (total £30.00).

31. There was no copy of any service charge demand for 2018, nor a statement of rights and obligations. There was no documentation to support the increase in November 2018. The amounts paid by directors in 2018 was recorded as being £450.00 each. The statement of account recorded payments by the Respondent of £600.00 in 2018, and that there had been no arrears as at 18 August 2018.

32. The 2018 accounts showed total income of £5,760.00, which equates to £720.00 per lessee, and a surplus for the year of £1,970.00 (£246.25 per lessee).

2019

33. The amount Mr Butlin said was due for 2019 was £1,125.00. We were not provided with copies of the service charge demand for 2019, nor any statement of rights and obligations under section 21B of the Act for

either year. Mr Butlin explained that he did not hold the papers, due to the change in managing agent on 1 January 2020.

34. According to the statement of account, monthly service charge amounts of £75 for January, February and March 2019 were due, followed by monthly instalments of £100 for the remainder of the year. Thus, the amount due for 2019 was £1,125.00 (3 x £75plus 9 x £100), supporting Mr Butlins evidence. This is further supported by a reference in the 2019 accounts to payments by directors of the Applicant of that sum for that year. We are therefore satisfied that the Applicant wished to demand £1,125 for the 2019 service charge year.

35. From the statement of account, it was clear that the Applicant has already paid £780.00 in 2019, leaving a shortfall of £345.00 on the sum sought by the Applicant.

36. The accounts for 2019 showed a deficit of £10,558.00. Mr Butlin told us that this had been covered from reserves; no separate demand for a contribution to the deficit had been made to the lessees.

2020

37. For 2020, there is clear evidence of calculation of a budget for that year (page 49 of the Applicant's bundle), and service of a demand for the service charge year, with accompanying section 21B summary of rights and obligations. The demand was for £1,200.00.

38. There is no dispute that no payment has been made for the service charge claimed for 2020.

39. Accounts for the outcome of the 2020 service charge year, prepared by a Chartered Accountant, showed a deficit of £2,369.00.

40. As well as a set of accounts for 2020, the Applicant provided what it described as a "Service Charge Expenditure Statement" for that year, dated 11 February 2021. The statement showed total "expenditure" of £8,924.06, including a contribution of £5,245 towards reserves. It therefore reported a surplus for the year of £675.94, against income of £9,600 (£1,200 per flat). Clearly this document contradicted the accounts for 2020.

41. Mr Butlin informed the Tribunal that he would be content for the Tribunal to treat the Service Charge Expenditure Statement as the document the Tribunal could rely on for 2020.

Respondent's evidence

42. The Respondent did not recall receiving any statement of rights and obligations for 2018 and 2019. He recalled that he received correspondence from both the previous managing agent and from the director involved with the service charge, Ms Simms, but he did not have copies and he did not recollect their contents. In his view, the directors of the Applicant at that time paid little attention to the requirements of the lease.

43. In support of this suggestion, the Respondent had exhibited copies of emails. One email dated 4 October 2018 (page 56 of the Respondent's bundle) was from Ms Simms, who we were informed had been a director of the Applicant at that time. She informed the lessees that "the maintenance charge needs to be increased to £75.00 per month from November and Trudy will send out the form as soon as possible". Reference to Trudy is a reference to the employee at the previous managing agent who was clearly the contact with Ms Simms. An email from Trudy was also included, dated 2 October 2018, which confirmed that the service charge would be increased to £75.00 per month with effect from 1 November 2018 and she would arrange for new standing order mandates to be sent out as soon as possible.

44. Another email is dated 26 March 2020, from Mr Payne, also we understand to be a director of the Applicant. In it he says that he proposes to put service charges on hold as from 1 April 2020.

Discussion and determination – compliance with the statutory procedural controls

45. We can deal shortly with the 1987 Act requirements. They do not apply where the service charge demands are by a Management Company rather than the landlord.

46. Section 21B causes us no difficulty in respect of the 2020 demand. The Applicant exhibited a copy of the summary of rights and obligations, no challenge to it was made by the Respondent, and it appears to the Tribunal to comply with the statutory requirements.

47. We find below that the statutory controls apply to 2018 and 2019.

Discussion and determination - service charge payable for 2018

48. As identified above, 2018 only comes into the picture because the sum claimed in the county court claim includes £30.00 of arrears for that year.

49. The arrears only arose because of a change in the service charge demanded in November 2018. There was no basis, under the lease, for a change in service charge part way through the year. The lease is clear

about the requirements the Applicant must follow in order to set a service charge. They are set out in the Fifth Schedule and they have not been followed here. We determine that the claimed arrears in 2018 are not payable at this point, as lack of compliance with section 21B entitled the Respondent to withhold payment.

50. There was a conflict in the evidence of the amount of service charge that was payable in 2018. The reason for the Respondent paying £600.00 from June to December, for three directors only paying £450.00 each, and the income appearing to have been £720.00 per lessee, is not clear. We therefore cannot make a determination of what sum was payable for 2018, and in our view we do not need to.

Discussion and determination – service charge payable for 2019

51. For 2019, the amount sought is clear - £1,125.00 per lessee. But in order for us to determine whether that sum was payable, we do need to be satisfied that it was properly demanded. The evidence does not lead us to reach that conclusion. No copy of the demand was supplied. The amount said to be payable by the Applicant increased in April 2019 from £75.00 to £100.00. No documentation supporting that increase was supplied to the Tribunal. It is inconsistent with compliance with the lease requirement for an annually calculated budget at the beginning of December, followed by a demand for the sum due arising from that budget payable from 1 January.

52. We agree with the Respondent that, evidenced by the emails we referred to, the Applicant did not pay adequate attention to the terms of the lease in so far as demanding or varying the service charge in 2019 was concerned. We find that the lease process for demanding the service charge for 2019 was not followed.

53. We also consider that on the balance of probabilities, it is more likely than not that the Applicant did not serve a section 21B statement of rights and obligations for 2019. Our conclusion partly arises from our conclusion in relation to compliance with the lease procedures. The email evidence suggests that a director of the Applicant made decisions thorough the year to change the monthly payments. That is not permitted under the lease. We think it very unlikely that where there was non-observance of the lease terms, there would be observance of the statutory requirements for demanding a service charge. Accordingly, the Respondent was entitled to withhold payment, and the service charge for 2019 is therefore not payable unless and until that statement is served, and a retrospective effort is made to make a lease compliant demand, and as long as any retrospective demand does not fall foul of section 20B of the Act.

Discussion and determination – service charge payable for 2020

54. So far as 2020 is concerned, the evidence set out in paragraphs 37 – 41 above satisfies us that a valid demand for £1,200.00 was made.

55. For 2020, our view is that the lease clearly requires that the Respondent should be credited with his share of the surplus of income over expenditure. The evidence was unclear as to the amount of that surplus. We are happy to adopt Mr Butlins suggestion that we rely on his firm's initial statement rather than on the accounts. The service charge bill was £1,200. We were shown the budget which resulted in this sum which appeared to us to comply with the relevant applicable requirements of the Fifth Schedule. That sum is payable, less a credit of £84.49, being one eighth share of £675.94. The sum payable for 2020 is £1,115.51.

56. To summarise, we determine that no service charge is payable for service charges in 2018 and 2019 for the reasons set out above. We determine that £1,115.51 is payable for 2020.

Payability of administration charges

57. The Tribunal's jurisdiction to consider an administration charge is derived from Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the Act"), the relevant parts of which provide as follows:

> 1 (1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
>
> (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
>
> (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
>
> (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
>
> (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
>
> …
>
> (3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
>
> (a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

...

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

...

4 (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

5 (1) An application may be made to an appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on an appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

...

6 (6) "Appropriate tribunal" means –

(a) in relation to premises in England, the First-Tier Tribunal...

58. In the Tribunal's view, the Applicant is entitled to charge the costs of recovery of service charges and ground rent under clause 3(19) of the lease. This allows recovery of costs of recovering rent arrears. Service charges are reserved as rent in clause 1 of the lease. The charges must be reasonable though.

59. The Tribunal understands that two separate charges were levied, being a charge for a letter of £30.00, and a debt collection agents fee of £293.40 (£244.50 plus VAT). The first appears to have been charged on 28 May 2020 and is evidenced in a Statement of Account dated 2 September 2021. The second is evidenced in a letter before action dated 2 December 2020, though in the statement of account mentioned above there is no reference to it; there is only reference to "court fee and legal charges" totalling £205.00. In its statement of case, the Applicant says there is a further fee of £75.00 plus VAT for additional administrative costs, making the total claimed in the statement for administration costs the sum of £413.40.

60. However, the statutory provisions above only allow recovery to the extent that the charge is reasonable, and only if a summary of rights and obligations is served. No evidence that the summary of rights was sent to the Respondent in respect of any of the three administration charges was produced to the Tribunal.

61. In the absence of evidence of service of a summary of rights and obligations, the Tribunal has no alternative but to disallow the charges. Paragraph 4(3) of Schedule 11 clearly allows the Respondent to withhold payment, and until service of a statement of rights and obligations takes place, the charges are therefore not payable.

62. Had the Applicant served the statement of rights and obligations, the Tribunal would have allowed recovery of the £30 charge for a letter before action. We would not have allowed recovery of the debt collection agents charges. They served no useful purpose, are too high, and it was not reasonable to incur them. Similarly, the Tribunal would not have allowed the additional charge of £75.00. There is no explanation for it.

Breach of the Applicant's repairing covenant – claim in damages

63. In law, damages are recoverable by a lessee for a landlord's breach of a repairing covenant. The measure of damages is the difference in value to the tenant during that period between the premises in the condition they now are and the premises in the condition in which they would be if the landlord had fulfilled his obligations to repair (*Hewitt v Rowlands (1924) L.J.K.B 1080*).

64. In principle, this Tribunal has jurisdiction to determine claims for damages for breach of covenant, but only in so far as they constitute a defence to a service charge claim in respect of which the LVT's jurisdiction under s.27A has been invoked (*Continental Property Ventures v White [2006] 1 E.G.L.R. 85*).

65. The Respondent's lease is a tri-partite lease dated 1 October 1987 for a term of 999 years from 24 June 1986. The freehold lessor was Kingsley Engineering Co. Ltd; the management company was the Applicant, and the third party was the original tenant. It was clearly intended that the freehold be passed to the management company on the sale of the last apartment. The Tribunal was not informed whether this had happened.

66. The Applicant is a tenant owned private limited company with share capital; each tenant has one share, according to records at Companies House.

67. In clause 8(F) of the lease, the Applicant has covenanted "to maintain and keep in good and substantial repair and condition … the foundations the roof the down water pipes from the roof the external main walls … the entrance halls staircases and used in common by any of the tenants and occupiers of the flats …"

Evidence of breach

68. Dealing first with the Respondent's case, in his written case, he provided scant details of the alleged breach of covenant. He referred to "a previous leak" and "a large roof leak" but details were absent.

69. At the hearing, the Respondent provided further details. His case was that there had been two occasions when water ingress from the roof had caused damage to his flat. The first was prior to his purchase of the flat. He had exhibited to his statement a copy of minutes of a meeting of the directors of the Applicant dated 14 February 2012 which contained a minute that "Flat 7 reported a leak to the office and a roofing contractor went out and patched the roof."

70. It was the Respondents case that the leak on that occasion had caused cracking and damage to the ceiling of the bedroom in his flat. He said that he had reached a verbal agreement with a Ms Simms, a director of the Applicant in about 2015, at an AGM, that the Applicant would in due course redecorate his bedroom ceiling because of the water damage. It had however been agreed that this work would not be undertaken until after the roof itself had been replaced, as there was always a risk of further water ingress.

71. The Respondent accepted in evidence that there had been no subsequent leaks through his bedroom ceiling. There was no evidence before the Tribunal of the cost of redecoration.

72. The Respondent said the second occasion on which there had been water ingress had taken place in around late spring / early summer of 2020. In his flat there is a skylight in the bathroom, consisting of a transparent dome affixed to a skirting to which the felt roof is bonded. He said there was a blister in the felting which caused water to run off the blister towards the corner of his skylight at a greater volume and intensity than normal. He believed that water had entered his flat on this occasion as a result of the depth of standing water on the roof caused by sagging roof timbers and the differential flow of that water arising from the presence of the blister.

73. The Respondent said he had reported the water ingress to Butlins, the management company appointed by the Applicant, but no action was taken then. However, he said they had sent a roofer to look at the problem in around August 2021. The roofer looked from inside the Respondent's flat and saw the water damage caused, but he said he would have to come back the following day and get onto the roof. He never returned.

74. There is evidence in the Respondent's bundle of documents to confirm that he raised a concern about water ingress though his skylight from April 2020. Butlins' response appears to have been to request a picture of the skylight showing the problem.

75. The Applicant's case was that the flat roof was not in a state of disrepair, and thus there was no breach of the repairing covenant. They relied upon a surveyor's report dated 10 March 2020 carried out by J R Unna & Company, who are chartered surveyors. Mr Unna had inspected the roof on 9 March 2020. Mr Unna noted that the roof had sagged slightly so that it was now holding a great deal of water. In his view there was no major structural issue and that the roof was in a satisfactory and serviceable condition. He did not indicate the extent of the useful life of the roof, but he advised building up a reserve fund to cover replacement. If there ever were to be a failure of the felt, because of the pooling of water due to the sagging roof, there was the danger of an enormous amount of water penetration.

76. Ms Giec was not able to confirm or deny the Respondent's contact reporting water ingress in 2020, but she was able to find an email from Mr Umma dated 12 January 2021. By that time, the Respondent had provided some photographic evidence (not available to the Tribunal) on which Ms Giec had asked Mr Umma to comment. His reply was:

> "I remember it well. Unless water is really pouring in, I don't think there is a leak, and the source of the water which has

adversely affected the plaster is almost certainly condensation. The skylight is a poor design and the dirt visible in the photo on the inside of the metal part is caused by condensation."

Discussion and determination

77. In order to succeed in a breach of contract claim, a claimant needs to prove that a term of the contract has been breached, which means that it has not been performed satisfactorily, and that as a result the claimant has suffered loss.

78. Dealing firstly with the allegation of breach in 2012, this occurred before the Respondent purchased his flat. The evidence is that there was a roof leak. No details have been provided of the cause of the leak. The Tribunal observed at inspection that the ceiling of the Respondent's bedroom did have some cracking to the plaster which might have been caused by water ingress.

79. There could be many circumstances in which a leak was not the Applicant's fault, and so not a breach of its contract; storm, and fair wear and tear which had not previously been noticed, are two obvious examples. In the absence of any further details, the Tribunal cannot conclude, on the evidence presented, that the leak occurred as a result of the failure of the Applicant to comply with its repairing covenant.

80. Further, in our view the Respondent has suffered no loss from this leak. Any diminution in value of his flat as a result of cracking to his ceiling would have been taken into account in the price he paid for the flat.

81. Secondly, the Respondent suggested water ingress from the roof in around Spring 2020. The Applicant disputed whether there had even been a roof leak; their expert attributed the alleged leak to condensation.

82. The quality of the evidence presented to the Tribunal on this issue was poor. The Respondent gave inadequate details of the alleged breach, which meant that the Applicant did not (until the hearing) identify relevant emails concerning the allegation. In a contractual claim for damages, it is for the Respondent to prove his case on the balance of probabilities.

83. On our inspection, we noted that there is some disturbance to the paintwork on the skylight which is consistent with water damage, but the Respondent's evidence was that condensation does occur in the skylight to his bathroom, so in our view it is possible that the flaking paintwork was caused by condensation. At the time of our inspection, the skylight was dry. The Respondent did not allege that there is continuous or regular water ingress from the roof; he complained of only one occasion when this had happened. Without an intrusive

inspection of the localised area around the corner of the Respondent's skylight, we are unable to reach a conclusion on the precise cause of any water damage there may be, or the extent of such damage to enable us to assess any loss.

84. It is a pity that the Applicant did not ask Mr Umma to inspect in more detail the localised area that the Respondent said was causing difficulty when that matter was raised with the Applicant in Spring 2020. It is also a pity that the Respondent did not provide better evidence of the water ingress; photographs were apparently supplied to the Applicant, but these were not made available to us.

85. Taking all the above into account, including the paucity of evidence on the issue, we are willing to find that there was some water ingress; we think it improbable that the Respondent invented this story. We are not willing, however, to conclude that this proves a breach of the Applicant's covenant to repair or that if was a breach, that the Respondent has suffered loss as a result.

86. The Respondent has not proved that he is entitled to damages for breach of the Applicant's repairing covenant which may be set-off against his service charge liability.

Right to withhold payment

87. In his defence document, the Respondent is quite open about making a decision to withhold service charges in order to force the Applicant to enter into a long-term maintenance plan for the Property. We comment briefly for the assistance of the parties.

88. It is generally not permissible to withhold payment unless a service charge payer can claim a legal basis for doing so. Most of the bases upon which payment can be challenged are summarised at paragraphs 21 to 23 above, and not all of them entitle a service charge payer to withhold payment. Withholding payment is likely to result in enforcement proceedings.

2021 service charge

89. For the benefit of the parties, we noted that the Applicant asked, in its statement of case, that we also determine the amount of service charge payable for 2021. We decline to do so, as that service charge year was not part of the county court claim that was transferred to us. It would have been possible for the Applicant to make a section 27A application to be heard alongside this case to determine the service charge payable for that year, or to have sought to amend its county court claim, but neither of these courses of action were followed.

Respondents s20C and para 5A applications

90. Section 20C provides:

> 20C.— Limitation of service charges: costs of proceedings.
>
> (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before … the First-tier Tribunal, … are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
>
> (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

91. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal. The discretion given to the Tribunal is to make such order as it considers just and equitable.

92. In *Tenants of Langford Court (Sherbani) v Doren Limited LRX/37/2000*, which concerned an application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 in which the applicant tenants had been successful, the Lands Tribunal (Judge Rich QC) made the following remark:

> "28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.

93. In *Conway & Others v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC), which was a case involving a tenant owned management company, Martin Rodger QC, Deputy President of the Upper Tribunal (Property Chamber), said that:

> 75. In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make.

94. In this case, the Applicant has succeeded in its claim, but not wholly. It has incurred some cost which it transpires it will not be able to recover. The Applicant is a tenant-owned management company and though it has reserves, so far as the Tribunal understands, it has no additional independent sources of funding. In so far as it may wish to seek recovery of any costs arising from this case though the service charge, we can see no reason why the Respondent should not make his own contribution to those charges. In our respectful view, he took a wrong turning in refusing to pay sums he was contractually obliged to pay, and he should make some contribution, through the service charge (if claimed) towards those costs. We refuse his application for an order under section 20C.

95. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides:

> Limitation of administration charges: costs of proceedings
>
> 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.

96. The table referred to in sub-paragraph 3(b) confirms that if the proceedings to which the costs relate were proceedings in the first-tier tribunal, then the first-tier tribunal is the relevant court or tribunal, and if the proceedings were in the county court, then the county court is the relevant court or tribunal.

97. So far as litigation costs in the Tribunal are concerned, we take into account that the Applicant had the opportunity to claim contractual costs but failed to comply with directions enabling these to be assessed. It would not be just and equitable, in our view, for the Applicant to have a second bite of the cherry even if it is possible for it to do so (which is not a matter for us at this stage). We therefore make an order under paragraph 5A extinguishing the Applicant's liability to pay any further

litigation costs in respect of this case beyond those which are ordered to be paid by the County Court determination below.

County Court matters

Ground rent

98. It has transpired that the arrears figure claimed in the County Court claim included £25.00 ground rent for 2019. However, this was not expressly claimed in the Particulars of Claim, nor is it referred to in the Applicant's Statement of Case. Indeed, it is unclear, because of these omissions, whether the ground rent is even claimed in these proceedings.

99. No evidence has been provided to the court that the ground rent has been properly demanded under section 166 of the Commonhold and Leasehold Reform Act 2002 and its associated regulations.

100. In the court's view, the Applicant has not proved on the balance of probabilities that the ground rent for 2019 is enforceable, and no order is made in respect of it.

Paragraph 5A

101. The corollary to the order made by the Tribunal under paragraph 5A of the 2002 Act above is that the same outcome should apply in relation to the proceedings in the county court, for the same reason. Judge Goodall orders, under paragraph 5A of the 2002 Act, that the Applicant's liability to pay any further litigation costs in respect of this case beyond those which are ordered to be paid in the determination in the county court is extinguished, save in relation to any costs charged through the service charge.

Interest

102. The Applicant landlord had claimed interest under s.69 County Courts Act 1984 on these sums at the rate of 8%.

103. Judge Goodall sitting alone as a judge of the County Court awarded interest at the rate of 2% after balancing the arguments that: (a) interest rates generally had been low for many years, and (b) there was no good reason for the Respondent leaseholder not to have paid the sums in question.

104. In the lease, payment of the service charge is required in two instalments on 1 January and 1 July in each year (clause 5). In practice, the Applicant has adopted a practice of allowing monthly payments. A

single invoice (rather than two as required under the lease) has been raised. This makes the date from which interest should be calculated more complex. For the 2020 service charge of £1,115.51, the court will calculate interest from 1 January 2021. The interest awarded therefore amounts to £26.44.

Costs

105. The practice on an application for contractual costs in the county court is set out in Practice Direction 44. Paragraph 9.5 states that a party who wishes to claim costs must provide a written statement of those costs. Paragraph 9.5(3) says the statement should follow form N260 as closely as possible.

106. Paragraph 9.6 deals with failure to comply with paragraph 9.5. It provides that:

> "The failure by a party, without reasonable excuse, to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure."

107. In the directions issued in this case by the Tribunal dated 2 August 2021, the Applicant was directed to provide a Statement of all Legal Costs to be claimed up to and including the final hearing in Form N260. The Applicant did not comply.

108. In its statement of case, the Applicant said that it had incurred costs of £1,100 plus VAT in instructing solicitors to prepare its statement of case. No solicitor however went on the record or corresponded with the Tribunal. No solicitors invoice for these costs was provided to the Tribunal. As no detail of the costs incurred has been provided, it is impossible for the court to assess those costs.

109. The court declines to make an order for contractual costs in these circumstances. The Applicant, the director of which is a professional property agent, who took advice from solicitors, and was reminded of its obligation in directions which were not complied with, should have followed the established procedure and provided details of its costs to enable them to be assessed. As it did not do so, no order for those costs will be made.

110. The Civil Procedure Rules however do make provision for fixed costs in small claims (which this is). There is no reason to deny these costs, and as the Applicant has succeeded in obtaining a judgement against the

Respondent, the court orders that the Respondent do pay fixed costs under CPR Rule 45 of £80.00. The Respondent must also re-imburse the issue fee of £115.00.

Judge C Goodall

Rights of appeal

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against a reserved judgment made by the Judge in his/her capacity as a Judge of the County Court

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.

2. The date that the judgment is sent to the parties is the hand-down date.

3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the xx County Court office within 14 days after the date the refusal of permission decision is sent to the parties.

7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

8. In this case, both the above routes should be followed.