FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	:	**BIR/17UB/LIS/2021/0047** **BIR/17UB/LIS/2021/0048**
Properties	:	**Apartments 9 and 12, St George's Court, Cromford Road, Langley Mill, Nottingham NG16 4EH**
Applicants	:	**Gary Aitken & Suzanne Aitken (1)** **Martyn Haines (2)**
Representative	:	**Ms B Lyne of Counsel instructed by Roythornes, Solicitors**
Respondent	:	**The Imperial Decorating Company Ltd**
Representative	:	**Mr T Hammond of Counsel instructed by Richard Nelson LLP, Solicitors**
Type of application	:	**(1) Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985** **(2) Application for an order under section 20C of the Landlord and Tenant Act 1985** **(3) Application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing a tenant's liability to pay an administration charge in respect of litigation costs**
Tribunal members	:	**Judge C Goodall** **Mr G S Freckelton FRICS**
Date and place of hearing	:	**30 March 2022 (remote hearing) and 8 November 2022 at Nottingham Justice Centre**
Date of decision	:	**18 November 2022**

DECISION

Background

1. St George's Court is a mixed retail and residential building in Langley Mill, refurbished in around 2017, and comprising of six retail units and 12 residential flats.

2. The flats are let on long term sub-leases between the residential lessees and the Respondent at a ground rent and for a premium. The sub-leases also oblige lessees to pay a service charge.

3. A dispute has arisen between the Applicants, being two of the residential lessees, and the Respondent as to the payability of service charges. Separate applications by each of the Applicants were made to the Tribunal both dated 12 November 2021. The applications were consolidated and heard together.

4. It was envisaged in the sub-leases that the service charge year would be the calendar year starting 1 January, with the right for the Respondent to change the date of the commencement of the annual accounting period.

5. In the event, the Respondent had accounted for service charges incurred in the years prior to the issue of this application for the following periods:

   24 April 2017 – 30 April 2018 ("17/18")

   1 May 2018 – 30 April 2019 ("18/19")

   1 May 2019 – 30 March 2020 ("19/20")

6. There is no issue between the parties as to the selection of accounting periods.

7. For the years 1 April 2020 – 30 March 2021 ("20/21"), and 1 April 2021 – 30 March 2022 ("21/22"), the Respondent has demanded on account service charges of £800.00 per period.

8. Accounts have been produced for 17/18, 18/19, and 19/20. This decision will therefore reach a determination on the service charge due for each of those years under section 19(1) of the Landlord and Tenant Act 1985 ("the Act"). A determination will also be made on the demands for anticipated service charge expenditure for 20/21 and 21/22 under section 19(2) of the Act, as the final outcome for those years has not yet been calculated (to the best knowledge of the Tribunal).

9. The Tribunal inspected St George's Court on 29 March 2022. A hearing of the applications commenced on 30 March 2022, but it was adjourned for a further bundle of copy invoices to be provided. That hearing resumed on 8 November 2022 at Nottingham Justice Centre on a face to face basis. Both parties were represented by counsel.

10. The Tribunal had before it a hearing bundle of 399 pages, the additional bundle of invoices running to 506 pages, copies of two head leases, an updated Scott Schedule, and a letter from the Respondents solicitors dated 8 May 2022 to which were attached spreadsheets showing the totals of the invoices for contained in the additional bundle for each service charge year.

11. This decision sets out our conclusions on the payability of service charges for the years in dispute as identified above, and our reasons for our decisions.

The Law

12. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

13. 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

14. Section 19(1) of the Act provides that:

    "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

    and the amount payable shall be limited accordingly."

15. Section 19(2) of the Act provides that:

    "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.

16. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the tribunal will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

17. In *Schilling v Canary Riverside* (unreported 2005 LRX/26/2005 Lands Tribunal – see paragraph 32-35 of *Service Charges and Management 5th edition*) Judge Rich observed (inter alia):

    a. the fiduciary duty of landlords to account for any service charge which they collect, and their statutory duties under Landlord and Tenant Act 1985 ss.21 and 22, mean that it is sufficient for tenants to raise the absence of a proper account in order to place upon landlords an evidential burden to satisfy a tribunal that costs have, in fact been incurred;

    b. if landlords are seeking a declaration that a service charge is payable, they must show not only that the cost was incurred but also that it was reasonably incurred in the provision of services or works of a reasonable standard under Landlord and Tenant Act 1985 s.19;

18. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

    "39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

    40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

19. Section 21B of the Act provides:

    "21B Notice to accompany demands for service charges

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

(2) The Secretary of State 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 a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand."

20. Section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act") provides:

"47 Landlord's name and address to be contained in demands for rent etc.

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge or an administration charge ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant."

The leases

21. The freehold of St Georges Court is in the names of Alexander George Stevenson and Julie Ann Stevenson. By leases dated respectively 18 December 2015 and 30 August 2017 ('the Leases"), they demised the whole of St Georges Court to the Respondent, which is a building company of which we understand the Stevensons are the directors and shareholders. The Stevensons' covenanted in the Leases to maintain St Georges Court in return for a service charge. The flat sub-lessees in turn covenanted to pay a proportion of that service charge.

22. The Tribunal gratefully adopts the identification of the key terms of the Leases and the flat sub-leases provided by the Applicants Counsel in her Skeleton Argument, as follows.

The flat sub-leases

23. The relevant parts of the leases for Apartments 9 and 12 are in the same form.

24. Clause 1.1 provides the following definitions

    a. "Service Charge" means "the Tenant's Proportion of the Service Costs."

    b. "Service Costs" means "the costs listed in paragraph 2 of Schedule 7."

    c. "Services" means "the services listed in paragraph 1 of Schedule 7".

    d. "Tenant's Proportion" means "such fair and reasonable percentage as the Landlord may notify the Tenant from time to time."

25. Paragraph 1 of Schedule 7 defines the "Services" as the "Services to be performed by the Head Landlord under the Head Lease".

26. Paragraph 2 of Schedule 7 defines "Service Costs" as the "services costs incurred by the Head Landlord under the Head Lease".

27. By clause 5(a), the tenant covenants to "observe and perform the Tenant Covenants", which are set out in Schedule 4.

28. Paragraph 2 of Schedule 4 sets out the service charge mechanism as follows:

    "2.1 The Tenant shall pay the estimated Service Charge for each Service Charge Year in two equal instalments on the Rent Payment Dates.

    "2.2 If, in respect of any Service Charge Year, the Landlord's estimate of the Service Charge is less than the Service Charge, the Tenant shall pay the difference on demand. If, in respect of any Service Charge Year, the Landlord's estimate of the Service Charge is more than the Service Charge, the Landlord shall credit the difference against the Tenant's next instalment of the estimated Service Charge (and where the difference exceeds the next instalment then the balance of the difference shall be credited against each succeeding instalment until it is fully credited).

29. Under paragraph 3.1 of Schedule 4, the tenants covenant to pay "the insurance Rent demanded by the Landlord under paragraph 2 of Schedule 6".

30. By paragraph 6.1 of Schedule 4, the tenants are required:

    "To pay all costs in connection with the supply and removal or electricity, gas, water, sewage, telecommunications, date and other services and utilities to or from the Property."

    By paragraph 4.1 of Schedule 6, the landlord is required to "use it [sic] reasonable endeavours to ensure that the Head Landlord provides the Services."

31. By paragraphs 4.2, 4.3 and 4.5 of Schedule 6, the landlord is required to:

"4.2 Before or as soon as possible after the start of each Service Charge Year, the Landlord shall prepare and send the Tenant an estimate of the Service Costs for that Service Charge Year and a statement of the estimated Service Charge for that Service Charge Year."

"4.3 As soon as reasonably practicable after the end of each Service Charge Year, the Landlord shall prepare and send to the Tenant a certificate showing the Service Costs and the Service Charge for that Service Charge Year."

"4.5 To keep accounts, records and receipts relating to the Service Costs incurred by the Head Landlord and the Landlord and to permit the Tenant, on giving reasonable notice, to inspect the accounts, records and receipts."

The Headleases

32. The material provisions of the headleases are in the same form. By clause 1.1 of the headleases the following definitions apply:

"Service Charge" means "a fair and reasonable proportion determined by the Landlord of the Service Costs."

"Service Costs" means "the total of:

(a) all of the costs reasonably and properly incurred or reasonably and properly estimated by the Landlord to be incurred of:

(i) providing the Services; and

(ii) complying with all laws relating to the Retained Parts.

(b) the reasonably and properly incurred costs and fees and disbursements of any managing agent or other person retained by the Landlord to act on the Landlord's behalf in connection with the Building or the provision of the Services; and

(c) all rates, taxes, impositions and outgoings payable in respect of the Common Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Building)."

"Services" means

(a) cleaning, maintaining, decorating, repairing and replacing the Retained Parts and remedying any inherent defect;

(b) providing heating to internal areas of the Common Parts during such periods of the year as the Landlord reasonably considers appropriate, and

cleaning, maintaining, repairing and replacing the heating machinery and equipment;

(c) lighting the Common Parts and cleaning, maintaining, repairing and replacing lighting, machinery and equipment in the Common Parts;

(d) cleaning, maintaining, repairing and replacing the furniture, fittings and equipment in the Common Parts;

(e) cleaning, maintaining, repairing, operating and replacing security machinery and equipment on the Common Parts;

(f) cleaning the outside of the windows of the Building other than those comprised within the demise of the Commercial Premises;

(g) maintaining any landscaped and grassed areas of the Common Parts;

(h) cleaning, maintaining, repairing and replacing the floor coverings on the internal areas of the Common Parts; and

(i) complying with the requirements of the insurer of the building

(j) any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building."

33. Under paragraph 4.1 of Schedule 6 to the Headlease, the head landlord covenanted to provide "the Services".

Inspection

34. St Georges Court is an "L" shaped brick built building estimated to date from the early 1900's. It has a two-storey frontage running north / south to Cromford Road, Langley Mill, with retail shops on the ground floor and flats above. There is gated access on the northern gable end to a car park. The rear section of the building is slightly higher than the frontage, so two further storeys of flats can be accommodated in it.

35. Two flats can be directly accessed from the northern end of the building. The remaining 10 flats are accessed via an entrance lobby off the car park, with internal corridor access to these flats. There are stairwells to allow access to all flats and two stairwell emergency exits to ground level.

36. The corridors are carpeted, lit, heated, and supplied with emergency lighting and fire protection systems. At the time of our inspection the property was noted to be in generally good condition commensurate with its age and type. The internal and external common parts were well maintained, clean and tidy.

The Service Charges claimed by the Respondent

37. Service charges have been demanded by a company called St Georges Court (Langley Mill) Limited ("SGC"). In the course of the application it has emerged that this company is a wholly owned subsidiary of the Respondent, specifically formed as a "not for profit company" to act as the managing agent of the Respondent. This was not clear initially, and we comment on the issue later in this decision. References in this decision to the Respondent should be taken to incorporate references to SGC, which is the Respondent's agent.

38. In each year in dispute, SGC has demanded an advance payment towards service charges of £800 per flat. Where the expenses in any year have exceeded the advance payment, a contribution toward that deficit has been demanded.

39. SGC claim that the service charges due for the 17/18, 18/19, and 19/20 years are derived from the financial statements of SGC prepared by a firm of chartered accountants. The financial statements are not audited, and the accountants do not confirm that they have verified the accuracy or completeness of the statements. Each set of statements identifies the administrative expenses incurred in each year, as shown in the table below:

	17/18	18/19	19/20
Cleaning	539	1,875	1,373
Power light and heat	3,827	4,509	2,703
Repairs and maintenance	2,098	1,866	3,758
Insurance	2,260	2,195	1,774
Legal and professional fees	-	-	780
Accountancy	900	1,188	1020
Bank charges	54	131	140
Totals	**9,678**	**11,764**	**11,548**

40. The Respondent's case is that the service charge due for each year from each Applicant is one twelfth of the total for each year; thus the sum due is:

17/18 year	£806.50
18/19 year	£980.33
19/20 year	£961.33

The issues

41. In addition to challenges to specific service charge costs incurred, the Applicants have raised (in their statement of case, witness statement, or Counsels skeleton argument) the following additional issues:

    a. Service charge are demands not in accordance with sections 21B of the Act or section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act");

    b. Apportionment of some costs between the residential and commercial elements of the building is not clear;

    c. Inclusion in the budgets for on account service charge demands of a sum to cover anticipated costs for future years (by way of a reserve fund);

    d. Noise from the commercial units;

    e. The bins for the commercial units are over-flowing;

    f. Overhanging branches from a tree in neighbours land adjoining the car park.

The evidence

42. At the hearing, the Tribunal heard oral evidence from Mr Haynes, the Second Applicant, and from Mr Stevenson, for the Respondent. The Tribunal has also considered their written witness statements.

43. Mr Haynes told us:

    a. He moved into flat 12 in March 2017. At the outset, he said Mr Stevenson had promised to arrange for the wall of the property immediately adjoining the boundary of the car park to be painted, as it was unsightly;

    b. Matters started to go wrong with the service charges not long after he moved in as:

        i. The service charge demands were from SGC, not the Respondent;

        ii. Demands were sometimes sent by post and sometimes by email;

iii. No copy invoices were sent with notifications of expenditure incurred in each year, and the lists of expenditure looked unprofessional;

iv. His emails raising problems with St Georges Court had been ignored;

v. He had never been supplied with a breakdown of the way in which service charge monies had been spent.

c. Specifically in relation to individual items of expenditure:

i. There was little evidence of regular cleaning of the corridors;

ii. The carpets had never been cleaned since he moved in;

iii. The corridor carpets are filthy and the neighbours dog urinates on them;

iv. The car park has not been cleared often enough. Mr Stevenson promised it would be cleared every 4 months, which has not transpired;

v. The window cleaning is sporadic;

vi. Corridor radiators were not turned on;

vii. No insurance certificate has been provided to him;

viii. There are no fire notices and no fire drills;

ix. St Georges Court has not been properly maintained;

d. On cross-examination, Mr Haynes said:

i. He agreed that the car park wall he wanted to have painted was not part of St Georges Court;

ii. Although he insisted he had sent emails about problems he wished to raise, he had not realised he could provide copies of them to the Tribunal;

iii. He was not able to personally confirm that the cleaner had not visited every week as he was at work during the day, until Covid intervened;

iv. He agreed that the corridors were clean at the time of the Tribunal's inspection, and in the photographs provided to the Tribunal;

v. He agreed that the emptying of commercial bins was a matter to take up with the commercial tenants, though he still felt Mr Stevenson should do something about it:

vi. He agreed in principle that it was a good idea to build up a reserve fund to cover anticipated major expenditure in future years;

vii. He accepted that a discrepancy in his statement concerning the frequency of cleaning. He retracted his allegation that no cleaning was undertaken;

viii. It was put to him that he had been provided with a reasonable level of services at a reasonable cost since 2017. He agreed.

44. Mr Stevenson then gave evidence. He told us:

a. Perhaps unsurprisingly, that he believed the flats are well maintained and kept in a good state of repair;

b. A series of photographs taken on 26 January 2021, attached to his written statement, confirmed that the common areas are clean and tidy;

c. Costs incurred on services to the communal areas are apportioned equally between the twelve flat owners;

d. Estimates of costs for each service charge year are provided to flat owners in advance. Mr Stevenson however seeks to manage the building in a collaborative manner with the flat owners and consults them on expenditure. The aim is to keep service charges as low as possible. £800 has been sought in advance for all the service years to date. To that end, questionnaires are sent out to flat owners asking for their opinion on anticipated expenditure, and the view of the majority is adopted in relation to certain expenditure items.

45. In support of his evidence in the preceding paragraph, the documentary evidence provided by the Respondent included an informal consultation letter accompanied by a questionnaire to all flat owners following the production of the draft 18/19 accounts (see IB p124) and a follow-up letter later that year (see IB p295). The consultation seems to have resulted in a decision to cease maintenance of hanging baskets for 20/21 and possibly to turn corridor heaters off for that year as well. The consultation was motivated by a desire to keep the annual service charge as low as possible.

46. On cross-examination, Mr Stevenson told us:

a. His explanation for the fact that invoices for window-cleaning made reference to both the commercial and residential units was

that the window-cleaner in fact stopped cleaning the commercial units some time in 2017, but the contractor never changed the wording on his invoices. The commercial units paid for their own window cleaning from that point on;

b. There has always been regular cleaning of the corridors for the flats. His view is that the standard of cleaning has been high and the contractors provide value for money;

c. On the cost of electricity, which the Applicants' say is too high, Mr Stevenson said he had no control over the cost charged by his supplier, E.ON. There is only one meter which supplies all the communal areas. He did check the markets from time to time and he was satisfied that E.ON are reasonable value. The cost covers heat, light, and energy (e.g. door entry system, fire protection, cleaners hoovers) for quite extensive corridors;

d. Fire alarm checks are carried out every six months by an external contractor called O'Heap. It was put to him that O'Heap had invoiced on 11 April 2019 for a service of the fire alarm and emergency lighting system at a cost of £604.80 including VAT, and then the Respondent (i.e. Imperial Decorating Company Ltd) had issued its own invoice on 20 June 2019 for a fire alarm service fee for 2019 at a cost of £480.00 including VAT. Mr Stevenson said that the Respondent did not supply fire alarm services and the second invoice was effectively an apportioned part of an O'Heap invoice for the whole building for the next service due after the one invoiced in April 2019. He thought the date of the O'Heap April invoice did not necessarily mean that the service was carried out in April as they were sometimes slow to invoice for work done;

e. Repair and maintenance costs were raised. It was put to Mr Stevenson that the totals of the invoices in the bundle of invoices for repairs and maintenance were well below the figures set out in the financial statements. Mr Stevenson was not able to explain the reason. He thought one factor might be that hanging basket costs were allocated to repairs and maintenance which would bring the difference down;

f. In response to costs put through the service charge for accountants fees for company secretarial services to SGC, Mr Stevenson said he had been advised by his conveyancing solicitors (who are not the solicitors advising on the conduct of this litigation) that he had to set up a separate company to carry out the management of St Georges Court and that all the costs were to be charged to the lessees;

g. Staying on the subject of professional fees, on re-examination, Mr Hammond asked Mr Stevenson whether a legal fee of £780 which

had been included in the 19/20 service charge accounts related to a letter dated 14 November 2019 his solicitors had had to send to the Applicant's solicitors. He confirmed this was so;

h. Mr Stevenson was asked about bank charges. In response to the suggestion that he could have arranged cheaper banking, he said that he believed it would not be possible to obtain cheaper banking elsewhere;

i. On insurance premiums, Mr Stevenson was asked to consider the insurance renewal quote for October 2019 (invoice bundle p 369). He confirmed that the quote was accepted and the insurance put in place. He was asked to justify how the premium of £4,533.98 resulted in only £1,866 being shown in the accounts for the 18/19 year. Mr Stevenson said the accountant sorted the apportionment and he was unable to assist.

47. Ms Lyne took Mr Stevenson to the Respondents solicitors spreadsheets totalling the invoices provided for each completed service charge year, which for ease of reference we show in the table below:

	Spreadsheet totals (£)	Accounts expenditure (£)
2017/18	8,243	9,678
2018/19	15,295	11,764
2019/20	11,716.75	11,548

48. It should be noted that the Respondents solicitors expressly pointed out that bank charges were not shown on the spreadsheets, so those costs should be added to the spreadsheet totals. On the other hand, the spreadsheets made no attempt to apportion any costs that should be shared with the commercial units, the obvious example being insurance premiums.

49. Mr Stevenson agreed that it was difficult to reconcile the spreadsheets with the accounts. He said he was not the bookkeeper and he relied upon the accountants to keep the figures in order.

Submissions

50. Mr Hammond accepted that none of the service charge demands complied with section 21B of the Act or section 47 of the 1987 Act. Those deficiencies, he said, could be cured and the Tribunal was asked to

determine the underlying section 19 and 27A applications so that the parties knew where they stood when and if curative invoices were presented. Ms Lyne agreed with this approach.

51. Mr Hammond very broadly asked the Tribunal to accept Mr Stevenson's evidence on the questions of cleaning costs, window cleaning costs, and fire alarm maintenance costs which in his submission supported the amounts claimed in the financial statements.

52. On energy costs, Mr Hammond accepted that there were some missing invoices for electricity, but the Tribunal should not therefore assume that no electricity had been used. There must have been light and heat provided in the periods for which invoices were missing. Some leeway should be allowed.

53. The Tribunal should not determine that the Respondent had to shop around for the best quotes for electricity services; the Respondent was entitled to act reasonably in selecting a contractor, and in selecting a market leading company in E.ON, it was doing so.

54. On repairs and maintenance, it was not possible for him to argue that the invoices supported the accounts figures, but it was odd that for 18/19 the accounts showed expenditure of £1,866.00 but the invoices totalled £3,700, and for 19/20 the accounts show expenditure of £3,500.00 but the invoices only total £1,758.00. The Tribunal might wish to reflect this position in its determination.

55. On bank charges, Mr Hammond's submission was that a monthly charge region of in the region of £10.00 per month was entirely reasonable and there had been no evidence adduced that better banking charges were available.

56. On accountancy and legal costs, Mr Hammond relied upon sub-paragraph (b) in the definition of "service costs in the headlease which allows recovery of "the reasonably and properly incurred costs and fees and disbursements of any managing agent or other person retained by the Landlord to act on the Landlord's behalf in connection with the Building or the provision of the Services". In his submission, "other person" can include an accountant and a lawyer, and the accounting and legal services charged within the service charges are provided "in connection with the building" and should fall within the service charge.

57. A legal issue arose on the draft budget relating to inclusion of a contribution to a reserve fund in the annual budgets. Mr Hammond relied upon *Garrick Estate Ltd v Balchin* [2014] UKUT 407. Where a lease included the possibility of service charges for costs estimated by the landlord to be incurred, as the head leases did in the definition of "service costs", it was legitimate for the landlord to include a contribution to a reserve fund.

58. Ms Lyne submitted that if a service charge cost could not be evidenced by production of an invoice, it was not payable, as it could not be established that it was reasonably incurred.

59. There are multiple discrepancies between the copy invoices produced by the Respondent and the amounts set out in the financial statements. In her skeleton argument and oral submissions, Ms Lyne went through the discrepancies in detail. We cover her points in detail in the discussion section below and will therefore not set them out in detail here.

60. On the ability of the Respondent to include a reserve fund contribution in the budgeted expenditure, Ms Lyn's position was simply that this lease did not allow it on its specific wording.

61. A specific point was made concerning company secretarial fees. Ms Lyne did not challenge the principle that accountants or lawyers fees could be considered as "other persons" within the definition of service costs in the head lease, but she challenged that company secretarial fees could fall within the scope of services "in connection with the Building or the provision of the Services". They were services to SGC, not for the Building or the provision of services to it.

Discussion

62. We commence with some general observations. The issue we have to grapple with is that the Respondent has not provided copies of all invoices to support the charges it says are due as service charges identified in paragraph 40 above.

63. The Applicants' position is that no invoice means no service charge is due. We note the extract we have set out in paragraph 16 above from *Schilling v Canary Riverside*, which provides some support for this proposition. Respectfully however, we do not consider this to be the law. Our view is that absence of invoices means the Respondent cannot discharge the burden of proving that service charges were incurred via production of the invoices and must instead satisfy us via alternative evidence that the cost was in fact incurred. We have endeavoured to apply this principle to discussion of each service charge year below.

64. We also make an initial determination to the effect that none of the service charge demands served on the Applicants complied with the requirements of section 21B of the Act or section 47 of the 1987 Act. The Respondent did not resist this conclusion. It is therefore the case that, even if service charges for any of the years in dispute in this case were paid, the Applicants are entitled to treat their payments as "not being due", and can exercise their right to "withhold payment" until such time as the deficiencies arising under the two sections are cured. We make no further determination on the curative process. The parties should note that the deficiencies that result in the invalidity of service charge demands issued apply equally to demands for service charges in advance.

65. Our final general observation relates to SGC. This is the wholly owned subsidiary company of the Respondent which has issued the service charge demands and accounts for the service charges for St Georges Court. It must be treated as the Respondent's agent, for it has no proprietorial interest in the property and no obligations on its own behalf to provide any services, let alone charge for them, to St Georges Court. It is entirely proper for the Respondent to appoint an agent if it wishes, but the agency relationship should have been made clear.

66. We will now consider the specific charges challenged by the Applicants in each of the three completed service charge years we have considered.

Insurance

67. The whole of St Georges Court, including the commercial premises, are insured under one policy. Policy schedules for 17/18, 18/19, and an estimate for 19/20 (which we are satisfied was accepted by the Respondent) were supplied to the Tribunal showing premiums of:

17/18	£4,233.60
18/19	£4,390.24
19/20	£4,533.98

68. The Applicants' issue was apportionment. In the accounts, the residential flats have been charged:

17/18	£2,260.00
18/19	£2,195.00
19/20	£1,774.00

69. Mr Stevenson's evidence was that half the premium was charged to the residential flats. In our view that is a reasonable apportionment.

70. For 18/19, the figures are clearly correct on that basis. They are clearly not so for the other two years. 17/18 may be partly explained by the fact that it contains an additional 7 days (24 April – 30 April 2017). If so, one half of the premium for 372 days would equate to £2,145.80. We were offered no other explanation to justify the accounts figure, and we therefore allow £2,145.80 as the insurance premium for this year instead of £2,260.00.

71. 19/20 may also be partly explained by the fact that it is an 11 month year. Even then, the premium would be £2,070.07 for the residential flats (i.e. half of 11/12ths of the premium). Again, we were offered no explanation for the lower charge in the accounts. As the accounts are the basis for the Respondent's service charge claims against the Applicants, we do not make any adjustment to them and allow the sum claimed in the accounts of £1,774.00. The Applicants may consider themselves fortunate in

securing this determination. Had the higher figure been inserted into the accounts, we would have allowed it.

Cleaning

72. There are two challenges to the cleaning costs, being (a) that they were not actually incurred (as there were insufficient invoices to support the charges), and (b) that the cleaning was not carried out to a reasonable standard.

73. The table below informs the first of these points:

Cleaning costs (including window cleaning)

	Accounts (£)	Invoices (£)
17/18	539.00	434.00
18/19	1,875.00	1,900.00
19/20	1,373.00	1,222.50

74. Clearly for the 17/18, and 19/20 years, there is a small shortfall when comparing the costs claimed and those supported by invoices.

75. In this case, it is our view that there are some missing invoices, and not that the service was not provided. We accept Mr Stevensons evidence that there was a continuous service, and for the periods when invoices have been supplied, it is clear there is a regular pattern. Mr Haynes accepted that he was not able to prove that cleaning had not been provided as he had been at work when the cleaners came.

76. Our view is therefore that cleaning was contracted on a regular basis. The contractor charged a reasonable sum (£10 per hour initially, rising to £12.50 per hour). Although there are missing invoices, our finding is that the sums claimed in the accounts, which were prepared by external accountants, who we presume required the Respondent to provide adequate evidence to support the accounts, were in fact incurred.

77. The second point is whether the standard of cleaning was reasonable. Mr Haynes said it was not. Mr Stevenson said it was. We had photographic evidence to show the state of the internal corridors at 21 January 2021, which showed them to be in a very good state. Similarly, we found them to be so on our inspection on 29 March 2022. Of course, we entirely accept that Mr Stevenson would have been highly likely to have ensured the property was cleaned on these two occasions, but we had no photographic evidence to the contrary from the Applicants. We had no evidence from

Mr & Mrs Aitken at all. Mr Haynes did exhibit photographs of what he regarded as the unsatisfactory state of the car park to his witness statement, but he did not include any photographs evidencing his claim of inadequate internal cleaning, which we would have expected from him if the issue was of real merit.

78. Evaluating this evidence, we find that there is no basis upon which we can find that the standard of cleaning was not of a reasonable standard. We find that the sums claimed in the accounts are reasonably incurred and are for cleaning to a reasonable standard.

79. Window cleaning costs have been included within the overall sums for cleaning. There was no specific challenge to the standard of window cleaning, but Ms Lyne argued that the window cleaning cost was for both residential and commercial units and should be apportioned between the two. Each window cleaning visit was charged at the sum of £85.00, and the wording on the invoices was almost always window cleaning for "outside apartments and shop front windows".

80. Mr Stevenson confirmed in evidence that though the shop fronts had at some point also been cleaned, for the service charge years under consideration, the shop window cleaning had not taken place. Each retail shop arranged and paid for its own window cleaning. His view was that the window cleaner had simply failed to change the rubric on his invoices.

81. Using its knowledge and expertise in property management, the Tribunal finds that £85.00 per visit to clean the residential windows at St Georges Court is a reasonable sum and well within market norms. It is entirely conceivable that the cost per visit would reduce very little if the retail element of the window cleaning were removed, as most of the cost is in purchase of equipment, travel, and set-up on arrival. We found Mr Stevensons explanation to be believable. We find that the window cleaning costs were reasonably incurred.

Electricity (light heat and power)

82. The challenges to this head of expenditure are (a) that the accounts figures do not correspond with the invoices, and (b) that the sums appear to be excessive in any event.

83. Again, the table below illustrates the first issue:

Electricity costs:

	Accounts (£)	Invoices (£)
17/18	3,827.00	1,972.83

18/19	4,509.00	4,319.28
19/20	2,703.00	2,892.10

84. Again, there are missing invoices. For 2017/18, only one invoice was provided, covering the period 13 October 2017 to 10 January 2018 (just under 3 months), and based upon actual readings both at the beginning and end of that period, and charging for 5,940kwh at 19.65p each, plus standing charge and climate change levy, during that period. That invoice was for £1,972.83.

85. For 17/18, in our respectful view, it would fly in the face of all logic to determine that nothing was payable by way of service charge to reimburse electricity costs incurred between 24 April 2017 and 12 October 2017, and between 11 January and 30 April 2018. Electricity must have been supplied during these periods. The invoice that we do have covers much of the more expensive winter months. The accounts figure is for an additional £1,854.17 for just over nine months, and in our view this is entirely reasonable. We allow the electricity cost for 17/18.

86. For 18/19, the invoices are short by £189.72, but for this year (which is a full calendar year) monthly invoices have been supplied for only 11 months. The May invoice is missing. We determine that the most likely explanation for the disparity between the accounts and the invoices for this year is that the cost for May would have been that shortfall. Again, electricity must have been supplied, and it would not be reasonable for us to find nothing is payable for a service that must have been supplied. We therefore find that the accounts figure for this year is the cost of electricity for this year.

87. For 19/20, the Respondent's position is that it relies upon the accounts. We therefore determine that the accounts figure is the correct figure to use, even though the actual expenditure would appear to have been higher. Again, the Applicants may consider themselves fortunate.

88. Turning to the question of whether the charges are excessive, we accept Mr Stevensons evidence that there is only one meter to supply all the communal areas. We accept that the charges in the accounts are the actual costs the Respondent has incurred. Should the Respondent have market-tested the supply of electricity to find a cheaper supplier? Our view is that it was reasonable for the Respondent to contract with a recognised supplier, and we were not quoted authority for the proposition that failure to market-test meant that we should find the cost was unreasonably incurred. It would have been open to the Applicants to provide us with illustrative alternative and better prices, but they did not do so.

89. We find the electricity costs to be reasonably incurred.

Repairs and maintenance

90. This expenditure is challenged, once again, on the basis that the sums claimed are not supported by invoices. There are also specific challenges to specific invoices. The table below illustrates the first issue:

Repairs and maintenance costs

	Accounts (£)	Invoices (£)
17/18	2,098.00	1,487.75
18/19	1,866.00	3,621.83
19/20	3,758.00	1,267.00

91. The sums shown in the "invoices" column are not those shown in Ms Lyne's skeleton argument. This is because we find that the invoices for hanging baskets in 17/18 and 18/19 should be treated as repair and maintenance costs. Our figures are therefore uplifted by those invoices for those years.

92. For cleaning and electricity costs above, we have applied the idea that although not all invoices have been supplied, this does not mean that costs were not incurred, for the reasons we gave. We find that idea difficult to apply to repairs and maintenance. This type of expenditure lends itself much more so than the other headings to discrete decision making to incur a particular cost. There is thus much more expectation that specific decisions to purchase a service are supported by evidence of expenditure on that service.

93. Mr Stevenson was asked to provide details of the expenditure on repairs and maintenance over and above that illustrated by the invoices in the bundle, and he was not able to do so.

94. In principle, therefore, we are unable to find that any expenditure was in fact incurred on repairs and maintenance over and above that evidenced by the invoices provided.

95. The Applicants raised a specific challenge to the cost of servicing the fire alarm system in 2018/19 (£604.80 by an invoice from O'Heap & Sons dated 11 April 2019), and in 2019/20 (£480.00 by an invoice from the Respondent itself dated 20 June 2019). Ms Lyne suggested this was duplication.

96. On consideration, the Tribunal's decision is to allow both charges. We accept Mr Stevenson's explanation (see paragraph 46(d) above), and we

consider that the charges are not out of line with the cost levels for fire alarm checks, which ought to be conducted once a year by a competent management company.

97. We were asked to determine that an invoice for £120.00 dated 20 February 2020 for application of weedkiller to the carpark was excessive. Mr Stevenson was not specifically asked about this invoice. We note that it records labour cost for 2 men engaged for one day. We do not consider that cost to be unreasonable.

98. Our attention was also drawn to an invoice for replacement lightbulbs in January 2018 that was not dated until 31 December 2020. That is indeed odd, but as, again, this point was not specifically put to Mr Stevenson, and it is not clear what we are being asked to determine in relation to it, we do not make a determination in relation to it.

99. We therefore make no adjustments to the individual repairs and maintenance invoices that we were asked to adjust. We do find that all the sums which are supported by invoices were incurred, and reasonably so.

100. This then leaves the question of what sums we allow for repairs and maintenance and for which years. The table above shows that there is a significant undercharge in 18/19 and a significant overcharge in 19/20. As our conclusion is that all the invoices were reasonably incurred, it seems unfair to require that the Respondent be limited to the accounts sum for 18/19 and the invoices sum for 19/20. We highly suspect that something has gone wrong with the accounting for those two years. We therefore determine that the sums allowed as costs reasonably incurred for repairs and maintenance are:

17/18	1,487.75
18/19	1,866.00
19/20	3,022.83

101. This allocation results in the accounts figures being maintained for 17/18 and 18/19, and reduced for 19/20 by £735.17, so that no more than £6,376.58 (the total of the invoices) can be recovered over the three year period for repairs and maintenance, this being the sums evidenced by invoices for this category of expenditure.

Professional fees (legal and accounting)

102. The challenges are again that the invoices do not correlate with the accounts. The principle of charging for company accounts, including company secretarial services, is also challenged.

103. The accounts and invoices positions is shown below:

Accounts and legal fees

	Accounts (£)	Invoices (£)
17/18	900.00	0.00
18/19	1,088.00	1,014.00
19/20	1,800.00	1,800.00

104. The 19/20 figure is apportioned between accounting (£1,020) and legal (£780).

105. The accounting fees have been for a full set of company accounts for SGC, and associated company secretarial work, and calculation of corporation tax.

106. Although Mr Stevenson told us that SGC was a non-profit company, set up on the advice of his conveyancing lawyers, it is not constituted as such. It is a private limited liability company with shareholders. It appears to trade (in the sense that it records income and expenditure) and it files returns and statutory information with Companies House.

107. We strongly suspect that Mr Stevenson has inadvertently mis-understood the advice he received from his solicitors. Under section 42 of the 1987 Act, all service charge payments must be held in trust for the service charge payers. Mr Stevenson is therefore entirely right not to intermingle service charge funds with the Respondent's own funds (and here, by "Respondent" we mean Imperial Decorating Company Limited). SGC should also keep its own funds separate from service charge payments received from the service charge payers.

108. The RICS Service Charge Residential Management Code 3rd edition, explains this in paragraph 7.6 as follows:

> "You must hold service charge monies, and any interest accruing, by way of statutory trusts in accounts established in accordance with section 42 of the *Landlord and Tenant Act* 1987. Service charge payments must be kept separate from the landlord and managing agent's own money and must only be used to meet the expenses for which they have been collected."

109. Paragraph 7.10 of the Code provides:

> "An annual statement should be issued to leaseholders following the end of each service charge period, giving a summary of the costs and expenditure incurred and a statement of any balance due to either party to the lease. It is also

recommended that explanatory notes are included. The accounts should be transparent and reflect all of expenditure in respect of the account period.

Many leases set out the procedures regarding preparation of the annual statement and often require for it to be certified by the landlord's surveyor, managing agent and sometimes the landlord's accountant. In addition, certain leases might also require the statement to be audited.

It is essential that contractual requirements in the lease are followed. Compliance with the requirements and procedures set down in the lease may be a condition precedent. You should therefore ensure that service charge statements are issued strictly in accordance with the procedures and requirements as set down under the terms of the lease.

If the lease does not specify the form and content, service charge accounts should be prepared in accordance with TECH 03/11 (see glossary for details) It is best practice and helpful to users of the accounts if prior year numbers and/or budgeted figures are included. …"

110. These extracts illustrate that the accounts actually produced by the Respondent were not in the form normally required. All that was needed was a statement of expenditure, and a reconciliation between the payments received from the service charge payers and the sums they are obliged to pay under the leases.

111. In our view, the Respondent was not entitled to charge for work beyond that described above within the service charge. Company secretarial fees and corporation tax issues are not within the service charge.

112. We will allow what we regard as a reasonable sum of £600.00 per annum for the cost of preparing service charge accounts. In our view, using our experience and expertise, this is a fair market charge for the preparation of such accounts.

113. Under the heading of professional fees, a charge of £780.00 for legal fees was also included in 19/20. Mr Stevenson had confirmed in evidence that this fee was charged when his solicitors wrote to the Applicants' solicitors on 19 November 2019. We have reviewed that letter carefully. Part of it covered a personal dispute between Mr Stevenson and Mr Aitken. Our view is that the cost of this work cannot be included within a service charge. It is nothing to do with the provision of services to St Georges Court. However, part of it can, as it was clearly responding to queries about management of St Georges Court. We allow one half of the substantive charge of £600.00 plus the cost of identification checks (which would have been necessary for the solicitors to act at all), and the VAT. The sum allowed is £437.50.

Bank charges

114. These are claimed in the accounts as respectively £54.00, £131.00, and £140.00 for 17/18, 18/19, and 19/20.

115. The challenge is that these are too high; the Respondent should have found a bank that had no charges, or negotiated a lower fee.

116. Using its expert knowledge, it is the Tribunal's understanding that whilst free banking is readily available to private individuals, it is rarely so for commercial accounts. The sums claimed are entirely reasonable in our view. There is no obligation upon the Respondent to find the cheapest available service as long as it makes a reasonable choice. SGC banks with Lloyds Bank, which is clearly reputable and an entirely reasonable choice of bank.

Summary for 17/18, 18/19, and 19/20

117. Our decisions thus far produce the following service charge sums for each of the Applicants as follows:

	17/18 accounts	17/18 tribunal	18/19 accounts	18/19 tribunal	19/20 accounts	19/20 tribunal
Cleaning	539	539	1,875	1,875	1,373	1,373
Power light and heat	3,827	3,827	4,509	4,509	2,703	2,703
Repairs and maintenance	2,098	2,098	1,866	1,866	3,758	3,022.83
Insurance	2,260	2,145.80	2,195	2,195	1,774	1,774
Legal and professional fees	-	-	-		780	437.50
Accountancy	900	600	1,188	600	1,020	600
Bank charges	54	54	131	131	140	140
Totals	**9,678**	**9,263.80**	**11,764**	**11,176**	**11,548**	**10,050.33**

Per flat	**806.50**	**771.98**	**980.33**	**931.33**	**962.33**	**837.52**

Budget service charges for 20/21 and 21/22

118. It appears that an on account demand for these two service charge years of £800.00 per flat has been demanded. We say "it appears" as we have been supplied with documents from SGC setting out some proposed costs (pages 301, 298 of the hearing bundle and 503 and 504 of the Invoices Bundle). In fact, the addition of the costs set out is not £800.00 per flat. On both, the sums proposed are greater than £800.00 per flat.

119. In both "budgets", a sum of £1,000 is included towards a reserve for painting. The proposal is to collect this sum annually and keep it in reserve for an anticipated re-paint in 2025.

120. We then have copies of what purport to be demands for £800 per flat on pages 262 to 265 of the hearing bundle. However, these state that the service charge year is 1 January – 31 December. Our attention was not drawn to any decision to change the service charge year, and in our view, the demands should have been for 1 April to 30 March.

121. The Applicants challenge the Respondent's right to include a contribution towards a reserve fund.

122. Dealing first with whether the proposed budget is "reasonable", as is required by section 19(2) of the Act, we have no hesitation in confirming that it is. Indeed, we do not understand why it is so low. A glance at the table above shows that to keep the service charge costs below £800.00 per flat has proved impossible for 18/19 and 19/20. Further, neither year included any management charges, which the Respondent is entitled to charge. We applaud the Respondent's attempt to make the service charge as affordable as it can, but we see little prospect that St Georges Court can be professionally managed for as little as £800 per flat per year.

123. On the question of whether a contribution towards a reserve fund can be charged, Mr Hammond drew our attention to *Garrick Estates v Balchin*. In that case Judge Gerald held that it was permissible to include a reserve in the 2012 service charge year for proposed expenditure in 2013. He explained:

> "The words "incurred or to be incurred" make clear that the appellant landlord is entitled to include in service charge demands not only expenditure which had been incurred at the time of the demand but also was "to be incurred" in the future, which would include the following service charge year …"

124. The same words are included in the head leases of St Georges Court in the definition of "service costs". Our view is therefore that the Respondent is entitled to ask for a contribution towards a reserve for future anticipated expenditure. It must be said that Mr Haynes agreed that was a sensible course when giving his evidence.

Noise, bins, and the car park area

125. Part of Mr Haynes' case was that Mr Stevenson had failed to arrange to paint an unsightly wall adjoining the car park which belonged to the neighbour, and to renew some fence panels, contrary to a promise he had made to do so, and that a tree on neighbouring land should have been trimmed to avoid nuisance and damage. Mr Haynes also complained that one of the commercial tenants was excessively noisy, and that the commercial tenant's refuse bins were allowed to overflow.

126. In our respectful view, these issues are not for this Tribunal to consider. Our jurisdiction is limited to determining what service charges are or are not payable. No service charge has been claimed for these items.

Summary

127. We determine that at the present time, due to non-compliance with section 21B of the Act and section 47 of the 1987 Act, service charges already demanded from the Applicants are not due and can be withheld.

128. If valid service charge demands are served, we determine that the service charges payable by each Applicant for the service charge years shown below would be as follows:

	£
17/18	771.98
18/19	931.33
19/20	837.52

129. We determine that a budgeted service charge for 20/21 and 21/22 in the sum of £800.00 per flat is reasonable.

Costs

130. The Applicants have applied for orders under section 20C of the Act and paragraph 5A of the Commonhold and Leasehold Reform Act 2002.

131. It was agreed at the hearing that the Tribunal would allow the parties time to make submissions in support of or opposing these applications, so they could do so knowing the outcome of the substantive applications. We therefore direct that the parties should provide written representations to the Tribunal within 14 days of the date of this decision, copying those to

the other party. The Tribunal will then determine those applications thereafter on the basis of the written representations and without a hearing.

Appeal

132. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)