In the FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) and in the COUNTY COURT AT Croydon sitting at 10 Alfred Place, WC1E 7LR

Tribunal Case reference	:	**LON/00BA/LSC/2022/0253**
County Court Claim Number	:	**J25YX739**
Property	:	**Flat 27, Fairgreen Court, London Road, Mitcham CR4 3NA**
Applicants (Claimants)	:	**FIT Nominee Ltd** **FIT Nominee 2 Ltd**
Representative	:	**JB Leitch**
Respondent (Defendant)	:	**Haoyang Liu**
Type of application	:	**Payability of service charges**
Tribunal members	:	**Judge Nicol (also sitting as a District Judge of the County Court)** **Mrs A Flynn MA MRICS**
Date and venue of Hearing	:	**13th & 14th March 2023** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**20th March 2023**

DECISION

Determination of the Tribunal:

(1) The Tribunal has determined that the Respondent owes the Applicants the sum of £2,511.29 in service charges for the years 2019 and 2021 and administration charges, made up as follows:

(a) The claim of £2,989.89 (taking into account recent credits);

(b) Less the Respondent's contributions to the reserve fund totalling £298.60; and

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(c) Less the Respondent's contribution of £180 to an invoice for "Recruitment of Emily Spencer".

Order of the county court:

(2) The Defendant shall pay the Claimants the sum of £2,511.29, plus interest of £124.16.

(3) The Defendant shall pay the Claimants' costs of the court proceedings summarily assessed in the amount of £4,200 (inclusive of VAT).

Relevant legal provisions are set out in the Appendix to this decision.

Reasons

Introduction

1. On 4th March 2022, the Applicants issued proceedings against the Respondent in the county court for the following sums:

   (a) Service charge arrears, administration charges, interest and fees totalling £3,526.32;

   (b) Interest; and

   (c) Costs.

2. On 15th July 2022 DJ Bishop transferred the county court case to the Tribunal.

3. On 5th September 2022 the Tribunal issued directions. The county court pleadings stood as each party's statement of case. The Tribunal was to deal only with the matters within its jurisdiction, namely the service charges, and the rest would go back to the county court.

4. The inspection of the property and the hearing were listed for 11th November 2022. On the day before the hearing, due to concerns whether the parties had prepared the case so that it was ready for hearing, Judge Carr converted the hearing to a case management hearing and the Tribunal issued further directions, including:

   1. Rather than referring parts of the case back to the county court, the Tribunal will now administer the whole of the case. The judge sitting on the Tribunal at the final hearing will also sit as a District Judge of the county court and decide those elements of the case, namely interest and costs, which are exclusively within the jurisdiction of the county court.

5. The hearing of the matter started at 1:30pm on 13th March 2023 and continued the following day. The attendees were:

- Mr Edward Blakeney, counsel for the Applicants;
- Mr Adil Riaz, Property Manager at Principle Estate Management LLP, the Applicants' agents; and
- The Respondent, along with one of his witnesses, Mr Manoharan, the lessee of Flat 35. (The lessees of 3 other flats, Mr Agyapong Kwame Ansu (Flat 15), Mr Toyab Ali (21) and, jointly, Mr Michael Ursua and Ms Fredeswinda Sonido (33), provided identical witness statements in support of the Respondent but they did not attend).

6. The documents available to the Tribunal consisted of:

- A bundle of 1,557 pages, compiled by the Applicants' solicitors;
- A completed Scott Schedule;
- A copy of the Property Management Agency Agreement between the Applicants and Principle Estate Management; and
- A Skeleton Argument from Mr Blakeney, supported by a Schedule of Invoices and some authorities.

Applicants' application for additional witness

7. By an application dated 6th March 2023, just one week before the hearing, the Applicants sought permission to rely on a witness statement from a new witness, Mr Alan Gregory. Judge Nicol replied by email that the application was not in a fit state to be considered:

   (a) No grounds had been provided in support of the application.

   (b) No explanation had been provided as to why this statement was so late, in breach of the Tribunal's directions, or why the application for permission was so late.

   (c) No request had been made for permission for Mr Gregory to give evidence at the Tribunal hearing.

8. By a further application on 7th March 2023 the Applicants sought permission for Mr Gregory to give evidence at the hearing. A covering letter purported to explain why his evidence would be relevant and significant but still there was no explanation as to why all this was so late. The Respondent emailed submissions objecting to the Applicants' applications but, given how little time was left, consideration was adjourned to the hearing.

9. The parties made oral submissions at the start of the hearing. The Tribunal decided to exclude Mr Gregory and his witness statement for 2 reasons:

   a) It was provided very late and without any good reason. Mr Blakeney said his instructions were that there had been a delay in obtaining information from the previous agents but no evidence had been submitted in support and it was, at best, a partial explanation.
   b) Mr Gregory's evidence consisted mostly of saying what was in the lease and other documents. A witness statement should never be used to point out the content of documents which the Tribunal can read for itself or

which can be the subject of submissions. Mr Blakeney suggested Mr Gregory had something to add on one issue, namely a loan taken out by the Applicants to help fund services, but, in fact, the witness statement added little or nothing from his own knowledge.

The Property

10. The Respondent's flat is one of 20 located on the upper two floors of a 3-storey building with commercial premises on the ground floor. The freeholder of the entire building is Raco Ltd. The Applicants hold a lease, essentially of the residential units alone, and the Respondent holds an underlease of his flat. In accordance with the underlease, the Applicants provide services to the Respondent and his fellow lessees, through their agents, Principle Estate Management, for which they levy service charges.

11. The Tribunal inspected the building on the morning of 13th March 2023. Mr Blakeney arrived at the same time as the Tribunal (having travelled separately). The Tribunal met the Respondent, accompanied by Mr Manoharan, outside his flat on the second floor. While the Tribunal walked around, the Respondent and Mr Manoharan pointed out relevant matters.

12. The building holds a parade of shops on a crossroads facing a green and a square with a clock tower. There are two entrances, at opposite ends of the building, one on Raleigh Gardens and the other on Upper Green West where the Tribunal members entered. The entrance consisted of a solid green wood double door. There was an entryphone panel but it didn't work, apparently due to a lack of power.

13. Through the double door was a windowless entrance hall, leading to a staircase. The floor has no covering and, while it appeared to be clean, was strewn with a few bits of rubbish. Beyond the staircase, there was a door which was supposed to provide access to the bin store in the rear yard but, when the Respondent opened the door, it was clear it was blocked by household refuse piled more than waist high.

14. Going up the staircase to the first and then the second floor and along the access balconies on both floors, the Tribunal observed similarly that the floor appeared to be reasonably clean but was strewn with bits of rubbish. Residents appear to have put items on the walkway, and even on top of the ground floor rear roofs, as storage or to dispose of them. There were areas of standing water, particularly in the corners where the first floor walkway canopies did not extend – the Tribunal later learned in the hearing that the Applicants had arranged for canopies in the corner areas to be removed. The remaining canopies were in poor condition, with numerous holes, some of which were large.

15. The Tribunal could look into the yard behind the building from the access balconies. The main entrance to the yard was through a gateway from Raleigh Gardens – the black metal gate was open and later revealed to be stuck open. On the far side of the yard was a block of flats with a

car park and bin store area beneath. There were parking spaces in the yard which was strewn with bits of rubbish. The Tribunal could also see the large pile of household refuse on the other side of the blocked door mentioned above.

16. The Tribunal was unable to see the roof, save that it was flat and accessible through a hatch above each staircase. Also, there was a housing on the roof which would be consistent with the placement of the water tank.

17. The building appeared to be in poor decorative state in parts. The staircase soffits were cracked and holed. The staircase walls were painted but clearly not recently. The stair lighting was on even though it was bright daylight. Overall, the building gave an appearance of considerable neglect.

Ownership

18. The Respondent sought to dispute some of the service charges on the basis of who owned which parts of the building. The Applicants' repairing and maintenance obligations, the costs of which they could add to the service charge, extended only to their demise. Therefore, it is necessary to look at the extent of that demise.

19. The Schedule to the Head Lease records the Applicants' demise as follows:

> all that upper part of the building known as 1 to 13 Fair Green Parade and Flats 14-33 Fair Green Court Mitcham in the London Borough of Merton comprising flats on the first and second floors of the said building together with the entrance halls staircases and landings leading thereto from the roadway which premises are for the purposes of identification only edged red on the plan Number 2 and edged red and hatched blue on the plan Number 1 annexed hereto ...

20. In relation to parts not within the demise, the Applicants were granted:

> (i) All rights of liberty for the Tenant and all persons authorised by it (in common with other persons entitled to the right) at all times by day or by night but on foot only to go pass and repass over and along the pathways leading to the main entrance of the said buildings and the passages landings and staircases leading to the demised premises so far as the same are not included in this demise

21. The plan for the first floor clearly marked the access balcony, in green, as having been retained by the freeholder while the boundary of the rest of the demise was marked in red. The second floor plan only had markings in red, apparently encompassing the whole of the second floor, including the access balcony. The Respondent nevertheless sought to

argue that the second floor access balcony had been retained by the freeholder.

22. The Respondent's first argument was that the above quoted parts of the lease referred to "entrance halls", "staircases", "passages" and "landings", none of which were apposite to describe an "access balcony", the wording used on the plans for the walkways providing access to each flat. He found a definition of "landing" in a dictionary which appeared to limit the word to the area at the top of an internal staircase off which rooms are located. He argued that the access balconies were not mentioned in the Head Lease and that this meant that the freeholder had retained them and so bore any repairing obligations.

23. The Tribunal is satisfied that the word "landings" encompasses the access balconies. If the Respondent were right and the access balconies were not mentioned in the Head Lease, it would follow not only that the freeholder had retained those areas but also that no-one would have any legal obligation to anyone else to keep them in repair and neither the Applicants nor their lessees would have any right to pass and repass over and along them. The words of the lease are governed by their ordinary and natural meaning in the context of the lease, not by a dictionary. The definition found by the Respondent is not a comprehensive one – "landing" is capable of describing the access balconies.

24. The Respondent also argued that the red line on the second floor plan was drawn in the wrong place, beyond the parapet wall to the access balcony and out into air space. He seemed to think that this invalidated the whole plan but the entire access balcony is encompassed within the red marking and adequately conveys that it is part of the demise.

25. In any event, Mr Blakeney pointed out that the red line on the second floor plan followed the line of the canopies, including the ones in the corner which are no longer there but can be seen from photos to have extended out on the same level as the surface of the second floor. Moreover, there is, of course, nothing in law to prevent a freeholder from demising air space, perhaps in order to make it clear that access is permitted to the outside of the wall for maintenance purposes.

26. In the circumstances, the Tribunal is satisfied that the second floor access balcony is part of the Applicants' demise. Their repairing obligations extend to their full demise and so include this area. Since the lessees are obliged to pay service charges for expenses incurred by the Applicants in maintaining their demise, this extends to the second floor access balcony.

The charges being challenged

27. Mr Blakeney clarified that the claim had been for £3,046.32 in service charge arrears for the two years 2019 and 2021, plus two administration charges of £120 and £180. There had since been a credit, reducing the service charge arrears to £2,689.89. The total claim, therefore, is now £2,989.89, plus interest and costs.

28. The Court of Appeal, in *Yorkbrook Investments Ltd v Batten* (1985) 18 HLR 25, stated,

> Having examined [the relevant] statutory provisions, we can find no reason for suggesting that there is a presumption for or against a finding of reasonableness of standard or of costs. The court will reach its conclusion on the whole of the evidence. If the normal rules of pleadings are met, there should be no difficulty. The landlord in making his claims for maintenance contributions will no doubt succeed, unless a defence is served saying that the standard or the costs are unreasonable. The tenant in such a pleading will need to specify the item complained of and the general nature – but not the evidence - of his case. … If the tenant gives evidence establishing a prima facie case, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions.

29. The Tribunal's role is not to carry out some sort of desktop audit of service charges but to consider the issues raised by the lessee. The lessee has to specify which items of service charges they object to and why. Therefore, the Tribunal has limited its consideration below to those issues specifically raised by the Respondent and listed in the Scott Schedule.

Leaks into commercial premises

30. The Applicants included in the service charge accounts a large number of invoices for investigating or remedying water penetration into the ground floor commercial units. The Respondent listed the following invoices in the Scott Schedule:

- 5/3/20 £235
- 31/3/20 £1,176
- 7/5/20 £159.60
- 23/7/20 £108 x 2
- 28/8/20 £480
- 9/10/20 £996.48
- 31/10/20 £884.76
- 3/11/20 £174
- 22/1/21 £228
- 11/4/22 £252
- 10/5/22 £160
- 24/8/22 £180

31. The Respondent's first objection to these items was that, since the leaks were into the commercial units, they were properly payable by the freeholder who had retained those units. Mr Riaz initially appeared confused about the extent of his client's demise but eventually explained that a contractor would be sent in to investigate the source of the leak and the results of the investigation would determine whether the

contractor's invoice was met by the Applicants or by the freeholder. If the investigation found that the leak originated from the Applicants' demise, the invoice would be referred to the Applicants and the cost would appear in the service charge accounts. The Tribunal accepts that this is a suitable process for allocating repair costs – indeed, it doesn't seem fair to do it any other way. It is not fair to ask the freeholder to bear all the investigatory costs or even the repair costs simply because of where the water ends up. The problem is at source and, if it is within the Applicants' demise, it is a service chargeable item.

32. The Respondent also asserted that the leaks would have come from the walkways which, on the basis of his argument considered above, are the freeholders' responsibility. Some of the invoices had rough descriptions of the work which the Respondent tried to read like a statute so that he could conclude that the source was outside the Applicants' demise. The invoice wording is used to help identify the item of work in question, not to provide a precise surveyor's definition of the issue. The Respondent had no evidence that the afore-mentioned process had resulted in the Applicants misallocating any of the invoices.

Refuse removal

33. It is clear from the Tribunal's inspection and the evidence from both parties and their witnesses that there is a problem with refuse accumulation around the bin store area. The local authority's regular refuse collection service has not always been reliable, particularly during the pandemic. When the paladins are full, the residents appear to put their rubbish anywhere they can in the vicinity but the local authority refuse collection staff, understandably, do not clear large accumulations of refuse on their regular visits. The Respondent said he went out of his way to find other suitable places to put his excess rubbish but he may well be the exception.

34. The Respondent and his witnesses were understandably dissatisfied with the accumulation of refuse. It is unsightly and a health hazard. The Respondent asserted that the Applicants were at fault for not proactively instituting a system to address the problem.

35. Principle carry out regular inspections of the property, of which the bundle contained a number of reports, and would normally instruct a contractor to attend and remove excess refuse if they notice on inspection that the problem has become bad enough. In February 2021 they also purchased additional paladins. In the Scott Schedule, the Respondent pointed to expenses from 13th April 2022 for £3,079.59.

36. However, the Tribunal's jurisdiction under section 27A of the Landlord and Tenant Act 1985 does not extend to failures of service as such. The issue for the Tribunal is whether the actual amounts spent addressing the issue are reasonable and payable. For example, if there is no service at all then, despite the fact that this may well involve a breach of covenant by a landlord, a charge of zero would be entirely reasonable.

37. The Respondent did not challenge the reasonableness or payability of the sums actually spent. His concern was that the problem itself should be addressed. If there were a system different from that currently used by Principle which would be more effective or cheaper, then it may be possible for the Tribunal to determine that the amount currently spent is unreasonably high. However, the Respondent presented no alternative system. Principle's system is arguably reactive, rather than proactive, but it is a system and there is no evidence that there is another system which would be more cost-effective.

Costs of £38,000

38. The Respondent challenged an entry in the 2019 accounts for £38,235. He asserted that the Applicants had neither complied with the consultation requirements as required for costs of this amount under section 20 of the Landlord and Tenant Act 1985 nor carried out any works of this magnitude.

39. The Applicants replied that they did not go ahead with the intended works and credited the lessees in the following year's accounts in the sum of £24,955.74. However, the balance went towards reports from Savills and some consequent works:

(a) Investigation of leaks to units, 1, 3 and 13 of the retail units and for re-roofing of the drying areas to the covered walkways – £1,497.72.
(b) Site inspection and report on water leaks to Flat 27 – £1,497.72.
(c) Producing specification and tender remedial works to the walkway canopies – £1,562.17.
(d) Site inspection and report on condition and repair costs of work to external fabric and structure – £3,000.
(e) Removal of canopy design and documents – £2,281.34.
(f) Installation of new entrance door and plant room doors design and documents – £1,644.41.
(g) Installation of temporary scaffold design and documents – £2,478.27.

40. None of these amounts engaged the statutory consultation requirements as the cost to each lessee did not exceed £250. There is also nothing wrong with recovering the estimated costs in anticipation of both the consultation and the works themselves. The refund appears to have been provided promptly.

41. The Respondent challenged some of these costs on the same basis as discussed above, namely that they concerned areas outside the Applicants' demise. The Tribunal has already rejected that argument.

Loan of £35,134

42. The Respondent is not the only lessee in service charge arrears. The 2021 accounts show total arrears had increased to £56,068.12. In order to cover anticipated costs, the Applicants took out loans totalling £35,134. The first part of £11,593 was used to pay the freeholder's demand for the costs of roof and gutter repairs and as a contribution to works identified

by Savills. The remainder was originally for the works which did not go ahead but, due to the service charge arrears, the money went on other costs.

43. The Respondent's case was that the costs were "fabricated". His Defence asserted that the Applicants were "creating another hidden account" and "trying to cheat the leaseholders of 20 flats". These are serious allegations of criminal conduct. Such allegations should not be brought into legal proceedings unless they are soundly based and supported by compelling evidence. The Respondent had not one shred of evidence whatsoever to suggest that the Applicants had "fabricated" anything. The explanation was far more mundane – the Respondent simply did not understand the documents provided by the Applicants.

44. When pressed, the Respondent sought to suggest that "fabricated" only meant that the Applicants were seeking to charge him in relation to items for which they were not entitled to charge. However, his language goes beyond that.

45. The Respondent also said that he had been asking for documents for some time and they had not been provided. This is true to an extent – the management agreement was plainly relevant even though Principle's fees were not included in the items being challenged but it was only produced on the evening of the first day of the Tribunal hearing. However, most of the documents the Respondent had wanted to see, such as the various invoices, had been provided by the time of the hearing and yet he maintained his allegations of fabrication.

Lack of maintenance and cleaning

46. As confirmed by the Tribunal's inspection, the building in which the Respondent's flat is located is not maintained or cleaned to an ideal standard. The Respondent and his witnesses have complained about this and asserted that the Applicants should have provided a better service.

47. However, the Tribunal explained to the Respondent during the hearing that there are other legal remedies available to lessees whose landlords fail to provide services in accordance with their covenants but his application concerned solely whether the service charges are reasonable and payable. For example, in the Scott Schedule at item 18(b), the Respondent complained about the condition of the canopies over the first floor access balcony. There is no doubt that the canopies are in disrepair but the Applicants have not charged the Respondent for maintaining them because they have not incurred any relevant costs.

48. Apart from maintenance costs already referred to, the Respondent has not challenged any particular maintenance expense. As to cleaning, the Respondent's case is that none ever happened and that he knows this because neither he nor his witnesses ever saw a cleaner.

49. The Tribunal does not know if the Respondent and his witnesses were exaggerating, lying or just didn't see the cleaners when they attended but

the Tribunal is satisfied that they are wrong. As already referred to, Principle carried out regular inspections, up to once per month. The reports used photos to show the condition of the property at the time of inspection. In particular, photos were used to highlight issues which needed to be attended to or had been attended to. For example, one photo showed an old widescreen monitor or TV left in the communal areas which had accumulated bird excrement around it, presumably when birds perched on it. The next report found neither the TV nor the bird excrement. As mentioned above, photos were also taken when there were accumulations of household refuse. The photos showed communal areas which had clearly been cleaned.

50. The Respondent responded that lessees had been doing cleaning themselves but he provided no evidence to back this up. When lessees do clean in residential blocks of flats, they tend to concentrate on areas close to home and not always consistently. The cleaning evident from the photos was over the whole of the communal areas and was more consistent with work by professional cleaners.

51. Further, the Tribunal is satisfied that the Applicants were charged by contractors for cleaning. Supported by invoices, the 2019 accounts, compiled by Fortus Chartered Accountants, show £3,963 was spent on cleaning. In 2021, it was £2,349.95. The Applicants have admitted that the low level of expenditure reflects the fact that not all the intended cleaning attendances happened, partly due to the restrictions of the COVID pandemic and partly due to the difficulty of managing the building while up to half of the residents were in significant service charge arrears.

52. The Tribunal has no doubt that there is room for greater efforts at cleaning and that the residents could assist by not using the communal areas as dumping grounds. However, a better service would cost more money. The sums actually charged by the Applicants were reasonable for the service actually delivered.

53. The Respondent also complained about the standard of cleaning to the central yard and the fact that the gate to the street is permanently open, allowing intruders who fly tip or simply leave rubbish as they make whatever use they want of the area. However, the yard and the gate have been retained by the freeholder. The Applicants have no responsibility for cleaning or maintaining them and have not themselves incurred any expenses for those purposes.

54. The Respondent claimed that an invoice of £1,153.68 from 2020 involved duplicate charges because it involved emergency lighting which had only been installed 4 years previously at a cost of £4,680. When pressed, he and Mr Manoharan had no evidence other than their personal opinion of how long the original works should have lasted without significant maintenance. There is no reason to believe that the 2020 works were incurred unnecessarily.

Reserve fund

55. There was a note in the 2016 service charge accounts which correctly stated that the leases of the flats contained no provision for a reserve fund. Nevertheless, in later years the Applicants charged for one, originally at £2,000 for the year and increasing thereafter. The Respondent asserted that the lack of provision meant that such charges were not payable.

56. The use of reserve funds is generally good practice. It allows funds to be accumulated for major expenses over a long period rather than lessees being landed with large bills in one go. If the money is not spent soon, the lessees do not lose the benefit of the money as it will be offset against expenditure which is incurred later. However, if a lease has no provision for a reserve fund, the landlord has no power to demand contributions to it. Lessees may have any number of reasons why they want to abide by the terms of the lease in such circumstances and they are fully entitled to do so.

57. Mr Blakeney tried to suggest that the service charges for the reserve fund were voluntary contributions but there is no evidence that they were demanded separately or in any way differently from any other service charge.

58. Mr Blakeney's primary argument was that the Respondent was estopped from denying the Applicants' right to retain the money as a reserve fund. The principles applicable to estoppel by convention were reiterated in paragraph 45 of the judgment of Lord Burrows in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39; [2022] AC 886:

    (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
    (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
    (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
    (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
    (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

59. The Tribunal is not satisfied that any of these principles have been established in the current case. It does appear that the Respondent did

not object to the collection of a reserve fund after 2017 but payment accompanied otherwise by mere silence will rarely be enough on its own.

60. There does not appear to have been any express sharing of anything, let alone of any common assumption. It is not even clear what the alleged common assumption would have been, given that the Applicants' position had already been stated in 2016 that the leases did not provide for a reserve fund.

61. Further, landlords and agents are fully aware that many lessees do not consider their service charge accounts in any kind of detail and therefore they would be highly unlikely to regard payment alone as conveying to them an understanding on anything, let alone some unspecified common assumption about a reserve fund.

62. Moreover, the Applicants have put forward no evidence that they relied on any common assumption, let alone that they suffered any detriment as a result.

63. The lease is clear that there is no provision for a reserve fund. The Tribunal would require something compelling to infer that a lessee had agreed that they should nevertheless be obliged to contribute to a reserve fund. Instead, there seems to be virtually no evidence that an estoppel could have arisen. The service charges attributable to a reserve fund were not and are not payable.

64. According to the budgets, £2,000 was due to be collected for the reserve fund in 2019 and £3,972 for 2021. The Respondent's share is 1/20th which amounts to £298.60.

Other item

65. There was an invoice for £3,600 listed in Mr Blakeney's Schedule of Invoices for 2021 which was said to be for "Recruitment of Emily Spencer". Ms Spencer is apparently a member of Principle's staff. Needless to say, this is not a service chargeable item. If it has been charged in the 2021 accounts, the Respondent is entitled to be refunded his share which is £180.

Conclusion on Tribunal matters

66. The Tribunal has concluded that the Applicants' claim for service and administration charges is made out other than in relation to the reserve fund and the invoice for "Recruitment of Emily Spencer". The total owing is, therefore £2,511.29 (£2,989.89 - £298.60 - £180).

67. That leaves the matters within the exclusive jurisdiction of the county court, namely interest and costs. Judge Nicol has determined these matters alone.

Interest

68. The Claimants claim interest on the amount owed, namely £2,511.29, in accordance with section 69 of the County Courts Act 1984.

69. According to the Claimants' Statement of the Defendant's account, sums from which this figure derives were contained in demands made mostly in 2021. Although interest rates have recently increased, they were historically low for most of the period since and so a rate of no more than 4% is appropriate.

70. The Claimants did not specify the date from which interest should run and so I have taken the date of the last relevant demand, 24th December 2021. The period since then to 20th March 2023 is 451 days (i.e. 1.236 years). The total interest is, therefore, £124.16 (£2,511.29 x 4% x 1.236).

Costs

71. The Claimants seek costs pursuant to their contractual entitlement under clause 2(vii)(a) of the Defendant's lease:

> to pay all reasonable and proper costs (including solicitors' costs and surveyors' fees) incurred by the Landlord and/or the Superior Landlord incidental to the preparation and service of any notice under section 146 of the Law of Property Act 1925 and/or incurred in or in contemplation of proceedings under Sections 146 and/or 147 of that Act or any statutory modification or reenactment thereof notwithstanding that in any such case forfeiture may be avoided otherwise than by relief granted by the court

72. The Court of Appeal confirmed in *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2011] EWCA Civ 1258 that this type of clause entitles a landlord to their costs of establishing their entitlement to unpaid service charges.

73. The Court of Appeal in *Chaplair Ltd v Kumari* [2015] EWCA Civ 798 confirmed or established the relevant principles:

(a) An order for the payment of costs of proceedings by one party to another party is always a discretionary order.

(b) Where there is a contractual right to costs, the discretion should ordinarily be exercised so as to reflect that contractual right (*Gomba Holdings (UK) Ltd v Minories Finance Ltd (No.2)* [1993] Ch 171).

(c) A successful litigant's contractual rights to recover the costs of any proceedings to enforce their primary contractual rights is a highly relevant factor when it comes to making a costs order. They are not to be deprived of their contractual rights to costs unless there is good reason to do so and that applies both to the making of a costs order in their favour and to the extent that costs are to be paid to them. (*Church Commissioners v Ibrahim* [1997] EGLR 13)

(d) The fact that a landlord was unable to recover costs as a service charge did not prevent them from recovering costs under another clause in the lease.

(e) The fact that a claim has (or should have) been allocated to the small track does not limit the court in awarding contractual costs.

(f) The court will enforce a contractual entitlement to costs subject to its equitable power to disallow unreasonable expenses.

74. Contractual costs are awarded on an indemnity basis but, as well as the point made in sub-paragraph (f) in the preceding paragraph, CPR r.44.3(1) makes it clear that the court will not in any case allow costs which have been unreasonably incurred or are unreasonable in amount.

75. The first point to make is that this case involves mixed court and Tribunal proceedings. Mr Blakeney's skeleton argument states that the lease clause permits recovery of costs incurred in relation to Tribunal proceedings, as well as court proceedings, but the court itself only has the power to award costs in relation to the court proceedings. Any later administration charge sought by the Applicants in relation to the Tribunal costs may be subject to a Tribunal determination under paragraphs 5 and/or 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

76. In the meantime, the Claimants' claim for costs, as set out in a Form N260, has made no distinction between the two and covers both proceedings. At the very least, costs attributable to the Tribunal proceedings cannot be included in any award of costs by the court.

77. According to the N260, the work has been done by fee earners at two rates: Ms Helen Clutterbuck is a Grade A fee earner who has charged her time at £261 per hour plus VAT while the rest of the work has been done by various paralegals and trainees as Grade D fee earners at an hourly rate of £126 plus VAT. Those rates are reasonable.

78. It is noteworthy that the majority of time (4.4 hours) for letters out/emails for attendances on the Respondent has been spent by the lower grade fee earners rather than Ms Clutterbuck (1.6 hours). This is a sensible and proportionate approach for which the Applicants' solicitors deserve credit.

79. The Schedule of work done on documents lists 35 items, mostly in reverse chronological order. It seems to me that items 30-35 pre-date the transfer to the Tribunal whereas items 1-29 relate to matters in the Tribunal. The claim for items 30-35 totals £2,985.30

80. The total claim for the work done on documents is £16,126.20. Items 30-35 constitute 18.5% of that. In the absence of any other method to allocate the costs claim between the work relating to the court or the Tribunal respectively, I will regard 18.5% of the solicitors' costs as having been incurred in relation to the court proceedings.

81. The claim for work done by the Claimants' solicitors is £22,713.30 plus VAT. 18.5% of £22,713.30 is £4,201.96.

82. Counsel's fees consisted entirely of brief fees for Tribunal hearings and so the court cannot award those costs.

83. Since costs are claimed on an indemnity basis, proportionality is not relevant. However, I still have to consider whether to exercise my equitable power to disallow unreasonable expenses.

84. The Defendant has pursued a number of points which lack much or any merit. It is highly likely that, if he had taken proper legal advice, he would not have done so. There was nothing stopping his taking legal advice – relative to the value of his flat, money spent on getting some one-off advice on his situation, rather than full representation, would have been relatively small and cost-effective. The result of failing to take such advice is that the Claimants have had to defend themselves by exploring a large number of issues, many of them involving small amounts of money. Such efforts would have incurred greater expense than would have been usual with a claim of this value.

85. It is also worth noting that the Defendant refused to engage in mediation which would also have offered an opportunity to limit costs, even if issues were only narrowed rather than resolved completely. If the Defendant was unsure as to what mediation involved, again he could have taken advice.

86. Having said that, the claim is of low value. The Claimants' costs are unreasonably high. This is not about proportionality but about whether it is reasonable to devote such significant resources to such a claim.

87. This is a summary assessment of costs. Doing the best I can with the available evidence and in light of the above points, I award costs of £4,200 (£3,500 plus VAT).

Name: Judge Nicol **Date:** 20th March 2023

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

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

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  (a) the person by whom it would be payable,

(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

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

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 5A

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

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

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

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.