FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00LC/LSC/2022/0079**
Property	**:**	**24-38 Phalarope Way, St Mary's Island, Chatham, Kent ME4 3JQ**
Applicants	**:**	**(1) Ms Kathleen Neagle (Flat 32)** **(2) Ms Withey (Flat 38)** **(3) Mr Taylor (Flat 30)**
Representative	**:**	**(1) In person** **(2) In person** **(3) The First and Second Applicants**
Respondent	**:**	**RG Reversions (2014) Limited**
Representative	**:**	**Mr Haydon-Cook, Counsel**
Type of Application	**:**	**Liability to pay and reasonableness of service charges**
Tribunal Members	**:**	**Judge Paul Letman** **Mr David Ashby FRICS** **Mr Peter Gammon MBE**
Date and venue of	**:**	**Medway County Court**
Date of Decision	**:**	**28 March 2023**

DECISION WITH REASONS

Introduction

1. By an application dated 27 June 2022 ('the Application') the First Applicant tenant seeks a determination under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') both as to her liability to pay and the reasonableness of various service charges (as specified in her application) claimed by the Respondent landlord. The relevant years for which a determination is sought are 2017/2018 (after a Mediation), 2019/2020 and 2020/2021.

2. In addition, the Applicant seeks an order under section 20C of the 1985 Act limiting his liability for payment of landlord's costs as service charge and similarly, in so far as necessary, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in relation to any liability to pay an 'administration charge in respect of litigation costs,' i.e. contractual costs in a lease.

3. By procedural order dated 17 October 2022 the Tribunal directed the Application to be dealt with on the papers and made standard directions for the conduct of the Application. Pursuant to those directions the First Applicant served a Statement of Case in the form of a Witness Statement dated 2 November 2022 and accompanying bundle. Thereafter, the Respondent served its' Statement of Case (signed with a Statement of Truth) and dated 7 December 2022, together with an extensive bundle (in excess of 300 pages) of supporting documentation. The First Applicant duly filed and served a Response dated 9 January 2023, attaching further supporting documentation.

4. Although the parties did not request an oral hearing, on 13 January 2023 the Tribunal reviewed the separate bundles provided by the parties and decided that a hearing was necessary. The initial listing was adjourned at the request of the Respondent and relisted for 2 March 2023.

5. At the said hearing, the Tribunal noted that applications had been made on paper by Ms Withy and Mr Taylor, the lessees respectively of flats 38 and 30, to be joined as Applicants on the basis that they adopted the First Applicant's case. No objection was taken by Mr Haydon-Cook on behalf of the Respondent and the Tribunal, deciding that it was fair and just to do so, acceded to the applications and directing the joinder of Ms Withy and Mr Taylor as the second and third applicants as requested.

The Inspection

6. For the record it is noted that no inspection of the subject premises was required by the tribunal or the parties and none has been made. Although the Tribunal has had the benefit of viewing the premise (virtually) on line and some photographs of the premises were included in the papers.

The Jurisdiction

7. As referred to above the present application is made under section 27A of the 1985 Act, which provides as follows:

27A Liability to pay service charges: jurisdiction

(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…
(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.
(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).

8. In relation to liability to pay the Applicants have raised compliance with relevant statutory requirements, in particular service of a copy of 'Service Charges – Summary of Tenants' Rights and Obligations.' So far as is relevant in this regard section 21B of the 1985 Act provides as follows:

'***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.
(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.
(5) Regulations under subsection (2) may make different provision for different purposes.
(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.'

9. Regulations have been promulgated for the purposes of the above provision, see SI 1257 of 2007 which sets out the form and contents of the requisite statement. Notably also, equivalent provision has been made in relation to demands for

administration charges (under section 158 of and Schedule 11(4) to the 2002 Act and like accompanying regulations).

10. Further, the present application engages section 19 of the 1985 Act that establishes a statutory test of reasonableness limiting the recovery of relevant costs making up any service charge as follows:

'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 provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.'

11. The meaning of reasonably incurred was considered by the Upper Tribunal in the lead case of *Forcelux v Sweetman*, where Mr Francis stated that:

'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. Secondly, whether the amount charged was reasonable in the light of that evidence. This 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.

41. It has to be a question of degree, and whilst the appellant has submitted a well reasoned and, as I have said, in my view correct interpretation of 'reasonably incurred', that cannot be a licence to charge a figure that is out of line with market norm.'

12. In relation to the costs (of major works) in issue in that the Upper Tribunal accepted that whilst there could be no criticism of the landlord's policies and procedures for appointing contractors, nonetheless it did *'..not see why they [the tenants] should be saddled with a cost that appears from the evidence to be substantially in excess of what could reasonably be construed as a market rate.'*

13. More recently this approach was endorsed by the Court of Appeal in *LB of Hounslow v Waaler* [2017] EWCA Civ 45, where Lord Justice Lewison stated '*In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome*.'

14. As to the second limb of section 19, dealing with the standard of services, it is well established by the cases (see *Yorkbrook v Batten* (1985) HLR 25) that where a service has been carried out otherwise than to the relevant standard that does not necessarily mean that no charge is payable. Rather the amount charged should be reduced to reflect the extent to which the service fell short of the requisite standard. Though the charge may of course be diminished to zero where the tenant received no value whatsoever from the services or work for which the service charge has been levied.

15. As regards the application for a section 20C order, the section itself provides as follows:

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

16. The relevant case law in relation to section 20C was reviewed by the Deputy President in the Upper Tribunal in *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0519 (LC) at paragraphs 51 to 59. His review began necessarily with reference to the Court of Appeal decision in *Iperion Investments Corporation v Broadwalk House Residents Limited* (1996) 71 P & CR 34 and the well known passages from the judgment of Peter Gibson LJ, before continuing with detailed reference to the decision of the Lands Tribunal (HH Judge Rich QC) in *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000.

17. The Deputy President in *Conway* quoted with apparent approval the following passages from the judgment of HHJ Rich QC in *Doren* relating to the exercise of the 20C discretion:-

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

29. I think that it can be derived from [Iperion] that where a court has power to award costs, and exercises such power, it should also exercise its power under s20C, in order to ensure that its decision on costs is not subverted by the effect of the service charge.

30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

31. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants or some particular tenant should have to pay them.

18. The review in *Conway* continued with reference to *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 where HHJ Judge Rich QC reiterated that the only guidance as to the exercise of the statutory discretion which can be given is to apply the statutory test of what is just and equitable in the circumstances. Noting that the observations he had made in his earlier decision were intended to be "illustrative, rather than exhaustive" of the matters which needed to be considered, and adding significantly (at paragraph 13) that:

    "The ratio of the decision [in Doren] is "there is no automatic expectation of an Order under s.20C in favour of a successful tenant." So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s20C in his favour."

19. A similar point was made by the Deputy President in *Re SCMLLA* [2014] UKUT 58 (LC), where it was noted that an order under s.20C should not be made lightly or as a matter of course, since its effect was to interfere with the parties' contractual rights. Whilst in *Church Commissioners v Derdabi* [2011] UKUT 380 (LC) it was suggested that there may be circumstances where the landlord should only be prevented from recovering his costs of dealing with issues upon which the tenant succeeded.

20. More recently in *Bretby Hall Management Co Ltd v Pratt* [2017] UKUT 70 (LC) His Honour Judge Behrens referred to the decision in *Conway v The Jam Factory* [2013] UKUT 0592, which he took to contain a full review of the authorities, and summarised the applicable principles as follows:

    "1. The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.

    2. The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.

    3. Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.

4. The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.

5. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income."

21. This Tribunal duly relies upon the guidance detailed above in its consideration of the Applicants' application for a direction under section 20C (it is not apparent that any issue arises under the equivalent and like worded provision in respect of litigation costs claimed as administration charges at paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002).

The Lease

22. The hearing bundle includes the lease dated 20 August 2004 of the Second Applicant's Flat made between Countryside Maritime as landlord, Covent Garden Limited as management company and one Alex Hunter as the original tenant. All the flat leases are understood to be in common form, albeit the percentage contribution applicable to the costs of services varies between them.

23. In so far as is presently material, under the terms of the Lease provision is made for a service charge. By the Particulars, at paragraph 21 the Service Charge is defined as 'The total cost of the services set out or referred to in Schedule 5.' The Service Charge Year is 1 April to 31 March unless otherwise specified.

24. Further, in so far as is relevant to the issues in the case, the Lease contains express provisions as follows:

1) Under clause 1, Definitions and Interpretations

'*Surveyor*' *any Chartered Surveyor or member of the ISVA who may be employed by the Management Company in respect of any matter set out in Schedule 5 or any other matter in this Lease;*

2) Under clause 3, Lessee's covenants with the owner and the management company, it is provided 'The Lessee hereby covenants separately with each of the Owner and the Management Company as follows:

....

3.3 in respect of every Service Charge Year to pay the Percentage of the Service Charge to the Management Company by two equal instalments in advance on the Half-Yearly Dates;

3.4 to pay to the Management Company on demand the Percentage of the Service Charge Adjustment pursuant to Schedule 4 ...

3.5 to pay to the Management Company on demand the Percentage of any Additional Contribution that may be levied by the Management Company;

3) Under clause 4, Covenants by the Management Company, it is provided 'The Management Company will during the Term carry out the works make the payments and provide the services specified in Schedule 5 provided always that :

4.1.1 the Lessee shall have paid the Service Charge and any Service Charge Adjustment or Additional Contribution due; …

4) Under Schedule 4, Computation of the Service Charge, it is provided, amongst other things, as follows;

1. *The service charge shall be a sum equal to the Percentage specified in the Particulars … of the aggregate Service Charge for the whole of the Block …*

2. *The Service Charge in respect of each Service Charge Year shall be computed not later than the beginning of March immediately preceding the Commencement of the Service Charge Year …*

5) Under Schedule 5, Purposes for which the Service Charge is to be applied, it is provided, amongst other things, that the service charge is to be applied for the following:

'5. Payment of Costs Incurred in Management, To make provision for the payment of all costs and expenses incurred by the Management Company

5.1 in the running and management of the Block and the collection of the rents and service charges in respect of the properties therein and in the enforcement of the covenants and conditions and regulations contained in the leases of the properties of the Block; …

13. Joint Expenditure

To reimburse to the adjoining owner … a due proportion of any expenditure incurred by the adjoining owner … provided always that where any such expenditure is incurred it shall be apportioned in such manner as may be agreed between the Management Company or the Surveyor and the adjoining owner's surveyor or in default of agreement determined by an independent surveyor …'.

25. The Applicants are all currently lessees and the Respondent is now the registered freehold owner of the Block and the Applicants' immediate landlord.

The Contested Charges

26. The Applicants' case was presented primarily and ably by the First Applicant, with supporting submissions made by the Second Applicant. Each item was taken in turn, with the Respondent replying as appropriate. This decision follows the same pattern, setting out the parties' respective submissions followed by the Tribunal's decision on each contested item.

1) Service Charge Year 2017/2018

(1) Mediation Credit, £1,683

27. The first issue raised by the Applicants in respect of this year is an alleged failure on the part of the Respondent to credit monies agreed to be refunded pursuant to a Mediation Agreement. The Mediation Agreement is dated 12 December 2018 and required the Respondent to credit the service charge fund with the sum of £1,683.00 within 28 days of the date of the agreement.

28. The Applicants' Statement of Case asserts that this credit was never given and this position is maintained in the Response. Further, the Applicants' case objects to the balancing charge raised on 18 February 2019 in respect of the y/e 31 March 2018 on the basis that this includes a number of items that were the subject of the settlement in mediation and contains a number of discrepancies (which are addressed individually below).

29. The Respondent's case is that the said credit has been given and is seen in the y/e 31 March 2019 accounts as 'Developer contribution' in the sum of £1,683. As to the balancing demand including matters which were settled, the Respondent submits that no where in the agreement does it state that any sums relating to the service charge year which may subsequently fall due after the Agreement were included in the scope of the settlement.

Decision

30. On the basis of the accounts for the y/e 31 March 2019 in the bundle provided to the Tribunal it appears plainly to be the case that the required credit has been given to the Applicants and the Tribunal so finds. Whilst the credit may not have been given within the time frame required by the Mediation Agreement nothing appears to turn on this and certainly nothing within the scope of the Tribunal's jurisdiction (above).

31. As for the objection to the balancing charge on the basis this must have included sums settled by the Mediation Agreement, in the Tribunal's view this objection is misconceived. Under the terms of the Mediation Agreement the Applicants accepted that '*All service charges, insurance and section 20 major works are agreed and payable in full value'* subject only to (a) a letter from insurance brokers confirming the section 20 balcony works were not covered under the buildings insurance and (b) the said credit of £1,683.00.

32. Given these terms, in the Tribunal's view there can be no subsequent challenge raised to the costs incurred and claimed up until the date of the Mediation Agreement, these are covered by a combination of the express admission and the agreed credit. Further, the Tribunal agree with the Respondent's contention that the terms of the Mediation Agreement do not extend to any sums incurred after the date of that agreement, nor do they purport to exclude any entitlement to claim a balancing charge for the year. Indeed, such an exclusion would be inconsistent with the admission of all sums (subject only to the two matters stated).

(2) Insurance Claim £1,713.05

33. These costs relate to the carrying out of remedial works for fire damage to Flat 34. The Applicants' case is that these costs should not have been charged to the service charge account, rather they are believed to have been the subject of a successful insurance claim and the cheque from insurers should have been credited to the service charge account.

34. In response, the Respondent referred the Tribunal to the costs reconciliation for the y/e 31 March 2018 prepared by Inspired (the managing agents until March 2019) attached at exhibit K to its Statement of Case. Under 'Repairs' the reconciliation shows 'Works to repair the fire damaged balcony' and cross refers to an invoice from DMB contractors in the sum of £1,713.05. The next line item records '34 Phalarope Way Claim – insurance receipt' and shows a credit of £1,713.05. The Respondent pointed out that subject to this credit the total for Repairs is stated in the sum of £6,269.00 and that this figure is reflected in the sum of £6,270 for Repairs shown in the y/e 31 March 2018 accounts.

Decision

35. On the basis of the said reconciliation and the figure for repairs in the sum of £6,269.00 carried forward into the y/e 31 March 2018 accounts in the rounded-up sum of £6,270.00, the Tribunal is entirely satisfied that the Applicants have not been charged for the fire related repair works and that due credit has been correctly and properly given for the insurance receipt.

(3) Westway Property Management Limited, £1,280

36. The Applicants note that the repairs charged in this Service Charge Year included an invoice dated 31 March 2018 for roof and gutter works carried out as long ago as 2015. With reference to section 20B of the Landlord and Tenant Act 1985 and the 18-month limit on making demands, the Applicants contend that this invoice in the sum of £1,280 is out of time.

37. The Respondent contends that the costs of the works were not incurred until the invoice for the works was actually raised on 31 March 2018 and that accordingly the claim is not time barred under section 20B. They refer to and rely in this regard upon the authority of *OM v Burr* [2013] EWCA Civ 479.

Decision

38. The law in this regard is relatively well settled and the Respondent's contention is correct. Thus, in *Burr v OM Property Management* the Court of Appeal held that a cost is not incurred until 'the obligation to pay has crystallised' by virtue of an invoice or demand for payment, if not in fact when payment is made pursuant thereto (see also *Capitol & Counties Freehold Equity Trust Ltd v BL Plc* [1987] 2EGLR 49 and *Ground Rents v Dowlen* [2014] UKUT 0144 (LC) to like effect). The Tribunal is bound by these decisions and has no hesitation therefore in dismissing the Applicants' challenge to this item.

(4) Professional Fees, £2,435

39. The professional fees in question here are the legal costs of the Respondent's solicitors JB Leitch Ltd in the sum of £2,435. These costs were incurred by the Respondent in 2018 in bringing County Court Proceedings against the First Applicant 'in contemplation of forfeiture' for service charges due under her lease. The action concluded with a judgment against the First Applicant in the sum of £1,581.90 but also 'No order as to costs' being made. The First Applicant informed the Tribunal that in making this order, the Deputy District Judge Rahman had commented to counsel 'You know the Rules, no order as to costs.'

40. The Respondent, however, has subsequently included its' costs in the y/e 2018 Service Charge and seeks to recover the said sum pursuant to Schedule 5, paragraph 5.1 (see paragraph above). It contends that these are costs and expenses incurred by the Management Company in 'the collection of rents and service charges' or 'in the enforcement of the covenants and conditions and regulations contained in the leases of the properties in the Block.' These provisions it argues are clear enough to include legal costs, which must have been intended to be part of the costs of collecting rents or enforcing covenants.

Decision

41. An appropriate starting point in relation to this issue is the lead case of *Sella House v Mears* [1989] 12 EG 67. In that case the subject lease permitted recovery by way of service charge of the total expenditure incurred by the lessor of carrying out its obligations under clause 5(4) which included in sub-clause (j) a covenant by the landlord with the tenant in sub-heads (i) and (ii):

"(i) To employ at the Lessors' discretion a firm of Managing Agents and Chartered Accountants to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents and service charges in respect of the Building or any parts thereof

"(ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building."

42. It was argued by the lessor that if solicitors were instructed by the managing agents the costs incurred were part of the charges and expenses payable to the agents for collecting the rents and service charges. Lord Dillon (with whom Lord Taylor agreed) having noted that in clause 3(9), relating to the preparation of any section 146 notice, specific reference was made to Solicitor's costs, then said this:

'I have had certain hesitation on this point, in the light of the argument in relation to the position where solicitors are instructed by the managing agents. It does not appear from the evidence whether that was actually the case. On the whole, however, I have come to the conclusion that the judge was right in his view that the fees of solicitors and counsel are outside the contemplation of either limb of Clause 5(4)(j) of the lease.'

43. If the terms of the instant Lease were limited to the Management Company's costs of the collection of rent and service charges we would no doubt reach the same conclusion, but they are not. Importantly, the Lease here, as the Respondent additionally points out and relies upon, includes reference to the costs and expenses incurred by the Management Company '*in the enforcement of the covenants … in the leases of the properties of the Block.*'

44. Given that the most likely means by which any covenant will be enforced is by court proceedings, it seems eminently likely the parties would have contemplated and by the same token intended that legal costs were within the scope of the recoverable costs and expenses under this clause. Indeed, this conclusion is consistent with and strongly supported in our view by the similar terms of paragraph 8 of Schedule 5, where the recoverable '*costs and expenses*' of the Management Company must likewise necessarily encompass the costs of legal proceedings '*to enforce the covenants and conditions*' of the leases of the properties in the Block.

45. In our judgement, therefore, it is clear in this case that on a proper construction of the terms of the Lease the Respondent is contractually entitled to the legal costs claimed by way of service charge. The fact that 'no order for costs' was made in the County Court does not affect this position; that order was no doubt made, entirely correctly, because the principal claim fell below the small claims limit in the County Court, in which circumstances there is no entitlement under the Civil Procedure Rules to an order for costs.

(5) Flat 36 Balcony Remedial Works

46. In this regard the Applicants' firstly alleged and objected to the payment of Inspired's section 20 consultation fee for the works from Reserve Fund, as was said to be indicated by a section 20 Notice of Estimates dated 26 September 2017. The Applicants also challenged the invoice from Olligroup for the works because the publicly available information on the company at Companies House showed it to be 'dormant' and it seemed unlikely to have the £5m public liability insurance in place that the partnership agreement between the freeholder and agent required.

47. In addition, the Applicants noted that the Inspection and Defect report dated 28 July 2017 by Hallas & Co, Chartered Surveyors for which they had been charged was actually prepared by one Andrew Hentschel, who although described as a 'Senior Building Surveyor' was not in fact a chartered surveyor. They contend that this is contrary to the terms of the Lease, which defines 'Surveyor' as set out above and therefore it is said requires any appointed surveyor for the purposes of the Lease to be chartered.

48. The Respondent says (see paragraph 58(vii) of its Statement of Case) that the section 20 consultation was not paid out of reserves and referred the Tribunal to the dedicated entry for these costs in the sum of £300 under Expenditure in the y/e 31 March 2018 accounts. As for the other objections raised it was contended these were misconceived and based upon a misinterpretation of the Lease in the case of the Hallas costs. The stipulated qualifications it is submitted are only required where the 'Surveyor' as defined is referred to under the terms of the Lease, as is the case under paragraph 13 of Schedule 5.

Decision

49. It is clear from the evidence before the Tribunal that the section 20 consultation costs were not paid from the reserve fund. Indeed, it is not apparent from the letter relied upon by the Applicants that they were so paid. Further, and in any event it is not clear to the Tribunal what sensible objection there could to this cost being paid from the reserve fund even if that had been the case.

50. As for the dormant company and insurance points, the Tribunal agree with the Respondent that these objections are misconceived. The status of the company as dormant is an accounting matter (Olli Construction Services Ltd being part of a wider group of companies) and does not mean the works were not done nor invalidate the relevant invoice. Likewise, the unproven allegation regarding the level of insurance cover does not in the Tribunal's judgment affect the Applicants' liability to meet the invoiced costs.

51. As regards the contention that the individual surveyor at Hallas & Co instructed to carry out the inspection and prepare a report must be a Chartered Surveyor or member of the Independent Surveyors and Valuers Association, in our judgement this point too is wholly mistaken. The argument for the Respondent is plainly correct. The said qualifications are only required where the 'Surveyor' as defined is required to fulfil a specific role or function under the Lease as under paragraph 13 of Schedule 5.

52. The foregoing would be enough to decide the 'Surveyor' point, but it is also worth noting that Hallas & Co is itself an established firm of independent Chartered Surveyors which would appear to meet the qualification requirement, were it applicable, in any event. It also appears to the Tribunal to be the case that these costs were in point of fact within the scope of the Mediation and are necessarily covered by the settlement reached.

2) Service Charge Year 2019/2020

53. In relation to the year 2019/20 the subject of complaint in the Applicant's Statement of Case is, in broad terms at least, the standard of performance of the then managing agent, Caxtons. They were appointed to replace Inspired, whose appointment was terminated at the First Applicant's insistence due to their poor performance and as agreed with the Applicant as part of the Mediation Agreement. Certainly, after some discussion at the hearing the Applicants invited the Tribunal to treat this section of their case as a challenge to the Management Fees of £3,600 charged in that year.

54. Mr Haydon-Cook formally objected to the Tribunal allowing this challenge on the basis it had not been stated in terms, but nonetheless he realistically accepted that the Respondent was as well placed as it was likely to be to deal with the complaint. Moreover, it seemed to the Tribunal that the allegation was actually sufficiently clearly stated for the matter properly to be pursued by the Applicants at the hearing and the Tribunal so ruled.

55. Although Caxton had been one of the 3 other managing agents that the First Applicant proposed in place of Inspired, it is clear from the Applicants' submissions that the course of their appointment was an unhappy one. The Applicants complained of a lack of engagement, with no contact with leaseholders until 3 July 2019. There were delays also in putting in place cleaning and gardening services. Caxtons were also criticized for the fact that they did not produce a budget until November 2019, when this was due by end March (under the paragraph 2 of Schedule 4 to the Lease).

56. The Respondent sought to defend Caxton's performance. Pointing out that it inevitably took time for them to take over from the previous managing agents. Indeed, this was clearly the reason for the delay in the computation of the Service Charge in respect of the year 2019/20. Further, the Respondent pointed to the fact this was done and of other service charge expenditure incurred in this year (in the sum of £9,113 (exclusive of Sinking Fund contribution) as per the y/e accounts for 31/3/20) as evidence that Caxton were carrying out the management of the Property.

57. The Tribunal accept the points made by the Respondent. But at the same time there is clearly substance in the Applicants' criticism of Caxton's performance in terms of responding to and engaging with leaseholders. On the basis of the Applicants' evidence the Tribunal is satisfied that for a period of months the block was not being managed to a proper standard. Whilst this may largely be explained by difficulties Caxton faced in taking over from Inspired at the outset of their appointment, it does not avoid the fact that the standard of management experienced by the leaseholders fell significantly below that ordinarily to be expected.

58. Whilst the Tribunal accept that not every failure or delay in responding to an email or telephone call amounts to a failure in management, managers are neither required to be omniscient nor infallible, we are persuaded that the extent of the Applicants' complaints in the subject year are sufficiently serious and substantial to justify a reduction in the charges levied. On the basis of the evidence put before the Tribunal in our judgement it is appropriate to discount the managing agent's charges in this year by 25% to reflect poor performance and we so determine.

3) Service Charge Year 2020/2021

(1) The Service Charge Demand 24 September 2021

59. This Service Charge Year saw the appointment of new managers Omnicroft Limited, to replace Caxtons who in December 2019 resigned with effect from 20 March 2020. The Applicants' Statement of Case notes that Omnicroft introduced themselves to the leaseholders by letter dated 26 August 2020. Further, that by letter dated 7 May 2021 Omnicroft issued a Section 20B(2) Landlord and Tenant Act Notice in respect of expenditure for the year to 31 March 2021. In due course by letter dated 24 September 2021 Omincroft provided a copy of the Audited Accounts for the y/e 31 March 2021, together with demands for that Service Charge Year.

60. The preliminary point taken by the Applicants in relation to the 24 September 2021 demand (at pages 122 and 123 of the Applicants' bundle) is that it omitted to include the Summary of Rights and Obligations which is required pursuant to SI 2007/1257, Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.

61. The Respondent accepted this omission but sought to rely upon the provision of the relevant Summary of Rights and Obligations with the hearing bundle. Further, the Respondent relies on the proposition that the failure to ensure that the Summary accompanied the demand does not invalidate the demand but is merely suspensory in effect. The failure to comply entitles a leaseholder to withhold payment only until such time as compliance has been effected (see *Staunton v Kaye* [2010] UKUT 270 (LC) and *Beitov Properties Ltd v Martin* [2012] UKUT 133 (LC)).

Decision

62. The Tribunal does not accept that provision of the Summary in the hearing bundle is sufficient for the purposes of section 21B of the Landlord and Tenant Act 1985, which provides that the demand must be accompanied by the summary. However, the Respondent is correct as to the effect of the authorities cited above, so that as soon as the demands have been reissued accompanied by the Summary in accordance with the regulations, the objection falls away and the demand is properly payable by the Applicants subject to any other successful challenge to the sums claimed (see below).

(2) Management Charges, £1,723.00

63. In this regard the Applicants' Statement of Case seeks clarification of Omnicroft's claim for management fees of £1,723.00 where this amounts to £287.17 per month for 6 months whilst their management fees in the following year apparently equates to £180 per month.

64. For the Respondent Mr Haydon-Cooke invited the Tribunal to hear briefly from Mr Dann a director of Omnicroft to explain the charges. No objection was taken to this course, which given that Mr Dann is the only person who could provide the information sought by the Applicants made eminent sense.

65. Mr Dann explained that the charges for the year were computed on the basis of an annual management charge of £2,160 including VAT pro rata'd for the period of Omnicroft's appointment from 25 June 2020 to year end 31/03/21 (a period of 249 days rather than just 6 months). It is also understood that the Management Charges include a cost of £84 for achiving, which Mr Dann explained was an annual charge levied by Omnicroft for storing documents relating to each client in the basement area of their (rented) office premises.

Decision

66. The difficulty with Mr Dann's explanation is that it is difficult to reconcile with the sum claimed. Annual charge of £2,160 pro rata for 249 days amounts to the sum

of £1,473.53. In the circumstances the Tribunal determines accordingly, that subject to compliance with section 21B, this latter sum is the sum properly payable under this head of costs.

67. As for the archiving cost, the Tribunal is not satisfied that this is an appropriate additional cost. The space taken up by client documentation within Omnicroft's offices should no more be charged as an extra than the desk space used by the property manager for any given premises. Rather their overheads should be met more broadly by their management income.

(3) Accounting Charges, £1,063.00

68. As explained by Mr Dann in evidence, the total charged to the accounts in the sum of £1,033 takes account of the following (i) a £600 inherited charge, identified and carried over from Caxtons (ii) a £400 one off charge for taking over and reconciling the account information from Caxtons (iii) £250.33 charged by Chartered Accountant Tom Madge for preparing the draft year end service charge accounts, and (iv) £444 charged by Myers Clark for final preparation of the year end service charge accounts.

69. The Applicants admit the Myers Clark charge but contend that there is no requirement for 2 accountants and the charge is wholly unjustified. For the Respondent Mr Dann of Omnicroft stated that whilst bookkeeping is done internally, they are a small enterprise and do not have the capacity to prepare all the accounting information required for submission to Myers. For this reason, he maintained that this work is necessarily outsourced; asserting that if Omnicroft were to do this internally it would only increase their costs and the overall level of management charge.

Decision

70. Again, and most unsatisfactorily the Tribunal is unable to reconcile the sum claimed in the accounts with the explanation offered by Mr Dann. However, the result appears to undercharge rather than overcharge the leaseholders.

71. Thus, considering the constituent costs detailed by Mr Dann, the Tribunal is satisfied on the basis of the evidence that the very limited charge made by Mr Madge for the work described is reasonably incurred and (subject to lawful demand, see above) is properly payable. Likewise, the one-off charge made on the takeover of the management from Caxtons.

72. No sufficient explanation or substantiation though has been provided for the carried over charge from Caxtons of £600. However, as noted above the overall charge of £1,063 does not appear to include anything of this charge. In the circumstances, the Tribunal determines that the sum claimed (which is less than the total of the 3 charges allowed), is properly payable by the Applicants under this head.

(4) Cleaning, £1,212

73. These costs, according to the evidence provided by Mr Dann, comprise charges in the sum of £639 inherited from Caxtons, a further accrual in the sum of £198 again from Caxtons and the sum of £375 paid to Dust Busters Commercial Cleaners.

74. The Applicants' Reply admits the latter charge on the basis of the attendance sheet from Dust Busters (at page 127 of the Applicants bundle), but contests the balance. The Applicants' primary case at the hearing was that there was no evidence that cleaning had taken place nor other substantiation of these charges. It was said that they had not seen a cleaner and that there was no record of visits.

75. Mr Dann giving evidence for the Respondent, however, was clear that whilst there had been difficulties getting documentation on handover from Caxtons, nonetheless these costs had been identified as having been incurred and as properly chargeable to the leaseholders.

Decision

76. The Tribunal notes that the evidence that these charges were incurred at all is incomplete. However, we approach the allegation that cleaning did not take place during Caxton's tenure with some caution, as it is often the case that lessees and residents do not see cleaners when they visit. Notably also no contemporaneous evidence, such as photographs or emails, has been produced in support of any complaint about the cleanliness of the block.

77. On the other hand, the Tribunal found Mr Dann to be a genuine and helpful witness and accept his evidence in this regard as to what charges incurred. Further, the fact that cleaners were in fact employed by Caxtons, contrary to the Applicants' assertions, is evidenced by the (unchallenged) cleaning charges levied in the y/e 2020 accounts. Whilst the accrual of this charge (in addition to the y/e 2020 charges) is consistent with the normal level of cleaning costs incurred in previous years and subsequently.

78. In the circumstances, on the basis of the evidence referred to above, the Tribunal is satisfied on the balance of probabilities that the cleaning charges claimed were incurred, are reasonable in amount and properly payable.

(5) Gardening (Grounds Maintenance), £1,612

79. The Applicants' case in this regard is that the garden was poorly maintained and the performance of the retained contractors DT Environmental (DTE) inadequate in the course of this Service Charge Year. Mrs Withey raised the neglect of the garden with Omnicroft at an early stage. Ms Neagle followed up on 24 August 2020

with a lengthy email noting that whilst DTE had attended on 7/7/20 and 21/7/20 the garden was still in a poor condition.

80. The Applicants' Statement of Case refers to two further 'unacceptable attendances' on 5/8/20 (for 20 mins) an 20/8/20 (for 15 mins). The Applicants also allege that DTE damaged a hopper for which they understand they will be charged in 2021/2022 a repair cost of £78.

81. Mr Dann from Omnicroft gave a very different version of events. He accepted that when Omnicroft took over the grass and gardens were overgrown but explained that the invoices from DTE were only paid against photographic records confirming that the grass had been cut and work completed.

82. Further, he stated that in any event Omnicroft had listened to the wishes of the leaseholders and replaced DTE with new gardeners, namely Urban Spaces, who had been nominated by the tenants but whose charges were higher at £240 per visit during the growing season (although as noted in the Respondent's Statement of Case, Urban Spaces have in turn now been replaced at the request of the leaseholders by Garden Care).

83. Mr Dann did not accept that DTE had damaged the hopper, this was he said a wholly unsubstantiated allegation. Rather they had properly reported that it was damaged and in need of repair.

Decision

84. Based on the evidence put before the Tribunal we are not satisfied that the gardening works were not carried out to a reasonable standard by the relevant contractors in this Service Charge Year. There was clearly a legacy of neglect that needed to be addressed when Omincroft took over and this required attention, but we have not been provided with any sufficient evidence that DTE's work was not carried out to a reasonable standard.

85. Nor would we be prepared to find that DTE did not carry out the work for which they raised their invoices, which at one point in the hearing appeared to be the allegation. Similarly, we are not prepared to find on the evidence that DTE were themselves responsible for damaging the hopper and we prefer the explanation of events offered on behalf of the Respondent and find accordingly.

86. In the circumstances, the Tribunal determines that, subject again to compliance with SI 2007/1257, the sum claimed under this head is reasonable and properly payable.

Conclusions

87. In accordance with the reasoning above the Tribunal duly decides that the following sums are reasonably incurred, reasonable in amount and due and payable:

1) Service Charge Year 2017/2018

(1) Mediation Credit, £1,683 – challenge dismissed.
(2) Insurance Claim £1,713.05 - challenge dismissed.
(3) Westway Property Management Limited, £1,280 – challenge dismissed.
(4) Professional Fees, £2,435 – challenge dismissed.
(5) Flat 36 Balcony Remedial Works – challenge dismissed.

In summary, the amount claimed in service charges for this year was and is accordingly reasonable, due and payable as claimed.

2) Service Charge Year 2019/2020

(1) Managing Agent's charges £3,600 – credit to be given to the service charge account in the sum of £900.

In summary, subject to a credit of £900 the amount claimed in service charges for this year is and was accordingly reasonable, due and payable as claimed.

3) Service *Charge Year 2020/2021*

(1) The 24 September 2021 demand – the Tribunal accept the complaint of non-compliance with statutory requirements.
(2) Management Charges, £1,723.00 – only the sum of £1,473.53.
(3) Accounting charges, £1,063 – no change in sum claimed.
(4) Cleaning, £1,212 – challenge dismissed.
(5) Gardening (Grounds Maintenance), £1,612 – challenge dismissed.

The Tribunal determines accordingly that, subject to proper demand (including the Summary of Rights in compliance with SI 2007/1257) and the reduction in Management Charges mentioned, the amount claimed in service charges for this year is reasonable and payable.

Section 20C/Paragraph 5A

88. Although the Respondent has been very largely successful in resisting this Application, nevertheless, to reflect the extent to which the Applicants have achieved some success the Tribunal is persuaded, in the light of the principles and case law referred to above (see paragraphs 15 to 20 above), that in the circumstance it would be just and equitable to make an order under Section 20C, and for

completeness also under Paragraph 5A, depriving the Respondent of 20% of its costs incurred in connection with these proceedings.

89. The tribunal accordingly directs that 20% of the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants, and equally under Paragraph 5A makes an order limiting the Applicants' liability if any to pay an administration charge in respect of any such costs to 80% of those costs.

Right to Appeal

Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated as above.