FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HH/LSC/2022/0111 CHI/00HH/LSC/2023/0008
Property	**:**	15 and 28 Holme Court, Lower Warberry Road, Torquay, Devon TQ1 1QR
Applicant	**:**	Clare Hart (15) James Brent (28) and other listed applicants
Representative	**:**	Clare Hart
Respondent	**:**	Holme Court (Torquay) Association
Representative	**:**	Amanda Barlow and Alun Miller (Directors)
Type of Application	**:**	Determination of service charges; section 27A of the Landlord and Tenant Act 1985 (the Act)
Tribunal	**:**	Judge C A Rai (Chairman) Mr M Woodrow MRICS Mrs J Playfair
Date type and venue of Hearing	**:**	23 May 2023 Exeter Law Courts 24 May Keble House Exeter
Date of Decision	**:**	26 June 2023. Amended 18 July 2023 [See addendum to Applicant's submissions; para 25A]

DECISION

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1. The Application is dismissed in its entirety.

2. The Tribunal declines to make an Order under section 20C of the Act.

3. The Tribunal declines to make an Order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

4. The reasons for the Tribunal's decisions are set out below.

Background

5. The Tribunal received two separate applications seeking a determination of service charges for Holme Court, Lower Warberry Road, Torquay TQ1 1QR (the "Property") for specified past years and for the determination of the on account service charges for 2022/23 and the current year from 1 February 2023 until 28 September 2023. Miss Hart's application was dated 23 September 2022. The Tribunal received Mr Brent's application in January 2023. The copy of his application in the Hearing Bundle is neither signed nor dated. At the Case Management Hearing (CMH), which took place remotely on 15 February 2023, Miss Hart and Mr Brent confirmed they also acted for Colin Bowden (25) Barbara Kinzett (21) Joyce Hudson (20) Pauline Baird (10) Paul Bowden (16) Malcolm Thorpe (13) Christine Evans (18) Susan Chave (6) and John and Amanda Morgan (4).

6. The Respondent is a resident management company formed by the Landlord before the grant of the leases of the 30 flats at the Property. It was granted a lease of the Property by the original freeholder on 1 October 1963 (the head lease) and is the named lessor in the lease of Flat 25 dated 16 September 1965 (the lease provided in the bundle) made between the Respondent (1) Sir Lindsay Parkinson (Properties) Limited (2) William Wilders Taylor and Kathleen Marion Taylor (3) (the Lease) [226]. One leaseholder of each flat within the Property is entitled to be a proprietary member of the Respondent (Article 7 of the Articles of Association) [217]. The current freeholder of the Property is not party to the proceedings.

7. The Tribunal issued Directions on 10 January 2023, 17 February 2023, 29 March 2023 and 16 May 2023. Initially, Judge Tildesley OBE explained the limits of the Tribunal's jurisdiction stating that questions raised by the Applicants about the directors' fiduciary duties and whether service charges could have been better spent elsewhere are not matters which can be decided by the Tribunal. Judge Tildesley directed that the Applicant's principal dispute was about the estimated costs of the major works and the impact of those costs on the resources of the Applicants. He referred to the Applicants' other concerns in the applications being the cost of the works to the swimming pool (2017/2018) and gardening costs (multiple years). He directed the Applicants to prepare a Scott Schedule.

8. He advised that the Applicants undertake a similar exercise with regard to the major works, identifying which elements they are saying are not necessary, which estimated costs are unreasonable and why, and submit their proposals as to the reasonableness of the costs supported with evidence.

9. Judge Tildesley told Mr Brent that the means of the leaseholders was not a relevant factor but that the Tribunal could consider whether the works could be phased to mitigate the financial impact of the major works on the leaseholders [78]. However, he also acknowledged and recorded in his directions, the Respondent's observation that the works cannot proceed until the Respondent has sufficient funds in the service charge account to enable it to instruct the works.

10. Having considered both parties representations, Judge Tildesley told them that the Tribunal has a duty to avoid delay and that the parties would be required to co-operate with the Tribunal and assist it to further the overriding objective. He summarised the scope of the dispute which the Tribunal would determine as:-

    a. The reasonableness and payability of the actual service charges for the years 2017/18, 2018/19, 2019/20, 2020/2021 and 2021/22.

    b. The reasonableness and payability of the on account service charges for the year 2022/2023 (ending on 31 January 2023) and the part year 1 February to 28 September 2023, and

    c. The reasonableness and payability of the on account service charges for the major works.

11. It was noted that the service charge accounts for the year ending 31 January 2023 are not yet available, and that the short service charge period between 1 February and 28 September 2023 has resulted from a change in the accounting period to coincide with the provisions in the Lease.

12. Mr Brent was unable to attend the Hearing. An application made by the Applicant to adjourn the Hearing was rejected by the Tribunal on 16 May 2023. The Respondent objected to this application as well but leave was given for the application to be renewed at the Hearing.

13. Prior to the Hearing, the Tribunal received the bundle of documents in two parts (487 pages). The electronic page numbering does not match the pdf page numbers. Reference to numbers in square brackets in this decision are to the electronic page numbers of documents in the bundle. The bundle has not been bookmarked. The Tribunal also obtained a separate copy of the appendices to the Respondent's statement (115 pages). References to any documents in those appendices are preceded by the letter R and are to the pdf page numbers. The Tribunal has also seen a copy of Judge Tildesley's directions dated 16 May 2023 which were not included in the Bundle.

The inspection

14. The Tribunal inspected the property at 2 o'clock on **Monday 22 May 2023**. Miss Hart, one of the Applicants, Miss Barlow and Mr Miller (directors of the Respondent) and Mrs Radcliffe from Carrick Johnson Management Services Limited (CMJS), the managing agent, accompanied the Tribunal members. The members arrived on foot via the entrance drive and walked around the garden including the area referred to in the evidence as the Glade, the swimming pool and the ground floor communal areas. The members entered the entrance lobby at the front of the building and looked at the staircase leading to the next floor. The lift was out of order so was not inspected. The members also walked around the entrance drive and parking area leaving the Property via stone steps leading up to Lower Warberry Road (the pedestrian access).

15. The Property is an eight storey building containing thirty flats occupying a sloping site with mainly lawned gardens. The garages, entrance drive and adjacent landscaping, which includes some shrubs and bushes, are at the front of the building. There are two flats on the lower ground floor and four flats each of the other (seven) floors. Those flats located on south side of the building have balconies. There are safety railings at the front of the building alongside the drive. The outdoor swimming pool is located at the back of the building.

16. The gardens, the majority of which is lawn, includes several mature trees, hedges as well as some newly planted trees. The boundaries are well defined by walls and hedges. On the day of the Tribunal's inspection, the gardens appeared well maintained.

17. Garages for some flats and communal parking spaces are located at the front of the Property. The access drive from Lower Warberry Road is shared with another property in separate ownership.

The Hearing

18. Prior to the commencement of the formal hearing the Judge sought clarification from Miss Hart as to which leaseholders are party to the application. She confirmed that, in addition to herself and Mr Brent, the other Applicants are:- Susan Chave (6) Pauline Baird (10) Malcolm and Yvonne Thorpe (13) Paul and Alina Bowden (16) Christine Evans (18) Joyce Hudson (20) Spencer and Barbara Kinzett (21) Colin Bowden and Christine Ferrera (25). Although Miss Hart had referred to Mr and Mrs Morgan (4) it was confirmed that they are former leaseholders.

19. Miss Hart declined to renew her previous application for an adjournment of the hearing but renewed her application, originally made to the Tribunal on 11 May 2023, to debar the "future evidence from Tony German (Croft surveyors)" who she described as the Respondent's expert witness. The Tribunal rejected her application explaining that the bundle does not contain an expert witness statement made on behalf of the Respondent and addressed to the Tribunal. The bundle contained a letter dated 30 January 2023 addressed to CJMS from Tony German [200]. The Tribunal confirmed that the letter is admissible as evidence for the Respondent. Mr German was present throughout the first day of the Hearing.

Swimming Pool

20. The Applicant submitted that the cost of the works carried out during 2017/2018 to repair the swimming pool had been unreasonable because the Respondent failed to disclose a much cheaper quotation.

21. The parties agreed that that swimming pool had been in poor condition before the works were caried out. Miss Hart suggested that the cost of the swimming pool upgrade was "circa £30,000" and stated that the Applicant "would like the Tribunal to determine that was unreasonable because not all options were shared with leaseholders"[88].

22. Miss Hart's complaint arose because of a letter sent by Crown Property Management (CPM) the previous Managing Agent, dated 1 July 2013 to Mr Cooper, former leaseholder of flat 6, which stated that CPM had received Harris Pools' quote for a new surface for the bottom and sides of the swimming pool. No quotation from the company has been produced. CPM's letter quoted what Harris Pool had apparently stated to it, although it is not evident if that "quote" resulted from a conversation, an email or a letter [277]. Miss Hart was unable to refer the Tribunal to any other evidence in the bundle in support of her statement.

23. Miss Hart referred to non-essential improvements to the swimming pool area including moving the pool shed and associated pipework. She suggested that the cost of these works depleted the reserves previously set aside for the repair or replacement of the lift. She also stated [99] that during the EGM held on 30 April 2016 only two quotations were disclosed, which were for £33,365 and £37,124. She suggested that the third option, the Harris Pool quote, could have saved the leaseholders up to £21,124. There is no explanation how Miss Hart calculated that figure but it appears to be based upon the combined cost of the swimming pool repairs and ground works to the pool area.

24. The Respondent said that the swimming pool had not been maintained for many years and the equipment required replacement. The area surrounding the pool had been in poor condition. Options considered by leaseholders included the installation of a pool liner but the leaseholders had chosen to fully tile the pool and that work was undertaken following a section 20 consultation. The pool shed was rotten and not big enough to house the upgraded filtration system and several leaseholders, including Mr Colin Bowden, requested it be relocated.

25. The accounts for 2016/17 [411] show the total expenditure for the repairs to the swimming pool as £38,867. Those accounts also refer to section 20 (consultation) notices having been served by CJMS in September 2016 in respect of the pool refurbishment and the pool side patio refurbishment.

25A. During the Hearing Miss Hart explained to the Tribunal that although she is named as the Applicant, and had submitted and signed her application the leasehold title to Flat 15 is held by Opal Affordable Homes Limited and she is the sole director and officer of that company and acted as its representative.

Decision and reasons

26. During the Hearing the Tribunal told Miss Hart that the CPM letter which she sought to rely upon "as a quote" was not a quotation. The CPM letter, dated 1 July 2013, was sent to Mr Cooper three years before the consultation about the proposed works was undertaken. It is headed "Swimming pool quote;" It says that (CPM) have had Harris Pools quote for a new surface for the bottom and sides of the swimming pool and that he has come back to us with the following: "**The problem with that pool is that it was built as a concrete pool as opposed to a liner**

pool, and if the surfaces need replacing this is a major job. This can be overcome by fitting a 'site-liner'. This means that a thick liner type material is welded together on site as a perfect fit and is then guaranteed for 25 years against any leaks. This pool can be converted to a site line(sic) but will need adapting from the original fittings you have, ie., the skimmer, the sump etc. Due to the size and dept of the pool there, you will need a budget of at least £16,000 - £20,000……" [277]

27. Harris Pool had also suggested that the size of the pool could be reduced to lower future costs at a similar cost and that special winter rates would apply " if the project was booked off season".

28. Miss Hart was not a leaseholder during 2016. She told the Tribunal that her submissions are based on other Applicants' recollections. Miss Hart has supplied no evidence that, until the applications, the service charges relating to the swimming pool refurbishment costs were ever challenged. The Applicants have supplied no evidence illustrating that the repair works which were undertaken could and should have been undertaken more cheaply.

29. Paragraph 19 of the collective statement made by the six directors of the Respondent stated that Mr Brent has failed to provide the Respondent with any evidence that the works which were carried out could have been carried out at a lesser cost [144]. The Tribunal agrees with the Respondent.

30. The works to the swimming pool which were undertaken following prior consultation do not appear to be either equivalent or comparable to the works described in the 2013 CPM letter. There is no evidence to show whether Haris Pools were still in business in 2016 or would or even could have carried out any work to the pool three years later for the same price as one given verbally and apparently only recorded in a letter sent to a former leaseholder three years earlier. Furthermore, the minutes of the EGM which took place on 30 April 2016 record that those leaseholders present voted on two options which were (a) to commission a pool liner or (b) to tile the pool. Neither Miss Hart nor Mr Brent were leaseholders in 2016. No votes were received in favour of the liner option; the tile option received 24 votes [R5].

31. As the Applicants were told at the hearing, the Tribunal finds that they have failed to submit any evidence which demonstrated that the service charge expenditure on the swimming pool in 2016/2017 was unreasonable.

Gardening (all service charge years disputed)

32. Miss Hart has claimed that the contract between the Respondent and Haley's Services Ltd (Haley's) (who supply both gardening and cleaning services) is a qualifying long term agreement which should have been subject to prior consultation under section 20 of the Act. She referred to sets of qualifying works, the decision in **Francis and Phillips v. SOS for Communities and Local Government [2014] EWCA Civ**

1395 and the cost of routine gardening stating that "works carried out are contiguous both in theory and physically "[20].

33. During the Hearing it was agreed that there is no written contract between the Respondent and Haley's . The Respondents supplied a copy of an email dated 3 May 2023 to CJMS [181] from Haley's which stated that it provided communal cleaning and grounds maintenance on the basis of a contract which can be terminated at any time by either party on one months' notice.

34. The only documentary evidence about the terms of that contract is a letter dated 20 October 2014 from Colin Haley on Haley's headed paper addressed to CPM which contains a quotation for ground maintenance at a cost of £5,185.56 per annum (ex VAT) payable monthly [246].

35. Although the Tribunal heard submissions from the Applicants regarding specific works to the garden, and in particular works undertaken to clearing the Glade, including verbal comments from some of leaseholders who attended, it heard no evidence which supported Miss Hart's submission that the contract for gardening services was, or indeed was ever intended to be, a qualifying long term agreement.

36. From the submissions made by the Applicants and the comments made by those leaseholders who attended the hearing and are Applicants, the Tribunal was made aware of the animosity between the Applicants and the Respondent regarding the works carried out to the Glade.

37. Copies of photographs were produced by the Respondent (with the permission of the Tribunal) and shared with the Applicants. These showed the tree (subsequently removed) and a substantial hedge in front of the wall forming part of the eastern boundary The parties could not agree if the removal of the hedge would have breached the Tree Preservation Order, or needed prior permission, because the Property is within a Conservation Area.

38. The Tribunal concluded that none of those considerations would affect or influence its decision that the gardening contract is not a qualifying long term agreement. It finds the Applicants' submissions that the contract was potentially a qualifying long term agreement wholly without merit.

39. Since the same arguments have been relied upon by the Applicant for each of the years it has disputed the gardening costs, the Tribunal concluded that the Applicant has not demonstrated that the gardening costs incurred in <u>any</u> of the service charge years between 2017 and 2022 are unreasonable.

40. The Applicants supplied no other evidence that service charges collected on account of gardening costs during 2022/23 and for the shorter period between 1 February 2023 and 28 September 2023 are unreasonable.

41. The multiplicity of references in the Applications to the alleged misuse of reserve funds earmarked for other expenditure are not within the scope of the Tribunal's jurisdiction as was recorded in Judge Tildesley's Directions dated 17 February 2023.

42. Whilst not specifically discussed at the Hearing, the Applicants made similar observations when questioning the reasonableness of the cleaning costs. Haley's are contracted to carry out cleaning services. It supplied a written quotation to CPM on 20 October 2014 [245]. That quotation is not a contract but it is evidence of the oral contract which exists between Haley's and the Respondent. The letter does not evidence the intended or actual duration of the agreement. Haley's have confirmed that the agreement is terminable by either party on one months' notice.

43. Miss Hart's references to **Phillips and Francis** and "sets of works" is misleading. She has muddled the provisions about long term qualifying agreements for services (in this instance gardening and cleaning) with a decision which dealt with consultation in respect of "sets of works" the potential cost of which would have resulted in contributions which exceeded the appropriate amount referred to in section 20 of the Act and defined in Regulation 6 of The Service Charges (Consultation Requirements) (England) Regulations 2003 as being an amount which results in the contribution of any tenant being more than £250 [237].

Decision and Reasons

44. The "quotation" from Haley's is not a contract. Miss Hart identified this in her email to Mrs Radcliffe [240]. It is merely evidence of the contractual terms relied upon by both the Respondent and Haley's with regard to an oral agreement for the company to provide identified services at a specified cost. The potential duration of the agreement was not specified by either party when the agreement was entered into. The existing agreement can be terminated by either party at any time and could have been terminated during the first 12 months of the contract, so Miss Hart is wrong. The agreement to supply gardening services is not a qualifying long term contract.

45. The Tribunal determines that neither agreement between the Respondent and Haley's (gardening and cleaning services) required prior consultation. These contracts were never intended to be long term agreements. Haley's have confirmed that these existing oral agreements are terminable by either party on one months' notice.

46. Once it is established that there are no qualifying long term agreements for services, the Applicants' submissions claiming to limit the amount recoverable from the Applicants for those services, in each of the service charge years to which the applications relate, cannot succeed.

Legal Fees

47. In the Scott Schedule for 2022/2023 the Applicants referred to Legal Fees totalling £14,795.55. This appears to be a reference to a service charge of £14,795.55 referred to in a letter dated 15 August 2022 from LMP Law to Opal Affordable Homes (leaseholder of flat 15) [260] On

the line beneath that figure, legal fees of £200 plus VAT of £40 and disbursement of £9 are recorded as being outstanding. The only service charge demands for this year in the bundle are the demands dated 1 February 2022 [280] for £3,600 (ex the ground rent demanded) and the 28 June 2022 for £12,997.79 (the cash call) [R71].

48. The Respondent has stated in the same Scott Schedule (2022/2023) that the expenditure report for that year refers to an amount of £703 for legal fees. It was suggested that this figure is a "red herring" as it does not relate to the demands made by LMP Law for outstanding service charges.

49. Mrs Radcliffe (CJMS) confirmed that there are no outstanding legal fees which relate to the service charges demanded from the five leaseholders who had not paid the cash call for the major works by 1 August 2022. She also stated that LMP Law is no longer instructed.

50. It was therefore agreed by both parties that the Applicants' submissions regarding legal fees are no longer relevant. No fees for the legal demands for service charges which related to the cash call for funds by the 1 August 2022 have been charged by or paid to LMP Law. The Tribunal makes no determination on this part of the application.

The Lift

51. Following the appointment of CJMS, a 10 year expenditure forecast was prepared by the Respondent and shared with the leaseholders. That forecast anticipated that the lift would be replaced in 2027. However, the lift failed in 2019, following which urgent repairs were undertaken. The existing reserve fund was used to defray the costs of £29,640, after a successful section 20ZA application to dispense with consultation.

52. The Applicants stated that leaseholders have been advised that another cash call will be made to provide a further £105,000. Miss Hart, in her first statement dated 20 March 2023, said that Mr Miller had referred to another cash call being made following the completion of the major works to fund the new lift which will costs about £110,000. She asked that the Tribunal determine if it was reasonable "to expect leaseholders to pay for another cash call for the lift replacement soon after the cash call for Major Works totalling £12,997 per leaseholder" She said this call would be "in addition a cash call for CJMS and Croft Surveyors professional fees and a further cash call on the 2022 Major Works project because it is not a fixed cost and thus that cost is liable to increase" [97].

53. Miss Hart also asked that the Tribunal determine how "these expenditures can be phased in order to prioritise health and safety, fire safety and the Major Works" [97].

54. The Respondent stated that when the lift failed in 2019 it could not be repaired. The works which were carried out were a partial refurbishment and modernisation. However, the lift is not currently working satisfactorily although it is possible to "put it into service" in an emergency. The Tribunal was told that some residents have independently contacted the lift company calling it out to enable the residents to attend routine hospital appointments. The "call out" costs

are being charged to the service charge fund. Whilst the Respondent accepted that a "call out" in a medical emergency is acceptable it was suggested that residents should individually bear the costs of "call outs" in all other circumstances.

55. Miss Hart claimed that the Respondent is in breach of the Equality Act but offered no further comment or explanation for her claim.

56. Mrs Radcliffe told the Applicants (and the Tribunal) that she is doing all that she can to ensure that the lift is repaired as soon as possible by regularly contacting the lift company but the delay in putting the lift back in services has resulted from it hitherto being difficult to identify the actual cause of the current malfunction.

57. Mr Miller explained that the original 10 year forecast had been documented following the appointment CJMS and a survey undertaken by Crofts. The leaseholders and the accountant were both involved in discussions before the forecast was drawn up. The intention at the time was to enable leaseholders to budget for service charge contributions which would build the reserve fund to pay for the identified major works. However, although various options were proposed and voted on by the leaseholders, as recorded in the AGM minutes, it had been identified at that time that the proposed dates for all, or any of the major works could change.

Decision and reasons

58. The Tribunal has no jurisdiction to make a determination about whether the timing of the lift replacement works has resulted in unfairness because of the unexpected advancement of cash calls for additional service charges. Each leaseholder is entitled to participate in the decision making process, which precedes setting the service charges, by nominating and supporting directors of the Respondent willing to take responsibility for the administration of the service charges.

59. The Tribunal was not shown evidence of any lack of motivation on the part of the Respondent or CJMS to maintain the lift. References made by Miss Hart to some leaseholders being trapped within their flats does not appear entirely accurate if, as suggested by Mrs Radcliffe, arrangements can be made to assist those leaseholders in a medical emergency.

60. Whether or not all the leaseholders are prepared to share the additional service charges costs which will inevitably be incurred in calling out the lift maintenance company on each occasion a leaseholder on the upper floors needs to use the lift for a non-urgent reason is not a decision which this Tribunal has any jurisdiction to make.

61. Neither can the Tribunal how to prioritise the service charge expenditure. This is something that the leaseholders must decide between themselves.

The costs of drying out flat 30 and providing alternative accommodation for the leaseholder.

62. The Applicant submitted that the leaseholders were told on 11 November 2022 and 6 February 2023 that the service charges will include the costs of alternative accommodation for the leaseholder and the costs of drying out the flat because the insurers have declined to continue to cover those costs.

63. At the hearing the Respondent stated that the insurance claim, for the reinstatement of that part of the roof damaged by Storm Eunice and the alternative accommodation for the leaseholder of flat 30 remains open. At present the insurers are still bearing these costs.

64. The background to this problem is that once part of the roof was damaged, it was agreed by the Respondent that it would be sensible to agree a settlement figure and use the funds towards the replacement of the roof which is part of the major works proposed. However, the Applicants have been critical of the amount of the insurance settlement and have challenged the decision made by the loss adjustor appointed by the insurers, notwithstanding the advice obtained by CJMS that the proposed settlement is fair. Although flat 30 was dry, further water ingress caused by the delay to the commencement of the repair/replacement works, caused by the failure of all leaseholders to pay the cash call, has delayed the commencement of works. The insurer has not yet instructed the repair works independently although it has been suggested that it may well do so.

65. The Respondent's statement stated that B-Dry roofing have instructed to put a permanent felt roof covering over the west wing [140].

Decision and reasons

66. The Tribunal agree with the Applicants that there is no provision in the Lease which would enable the Respondent to recover the costs of alternative accommodation for the leaseholder of flat 30 as part of the service charge. The Lease contains an obligation for the Lessors in the event or loss of damage (to the building) to apply the proceeds of insurance in the first instance to the reinstatement (of the Block) [231].

67. The Tribunal has concluded that the failure of the Respondent to repair the roof promptly has resulted in the leaseholder of flat 30 being unable to occupy his flat. Should the insurers decide to stop reimbursing the cost of that leaseholders alternative accommodation, it would be appropriate for the leaseholder to reclaim that cost from the Respondent.

68. The Respondent is a limited liability company. The individual liability of each director is limited and therefore the financial cost of a successful claim would be shared equally between the members of the company, who are the 30 leaseholders of the flats in the building.

The Major Works (Replacement of the roof and external redecoration)

69. The Respondent undertook a consultation exercise following which three tenders for the major works were received. The works are described in the consultation notice as "the repair and renewal of various failing parts of the building structure and replacement of the failing roof covering" [284].

70. The Applicant does not dispute that the works are necessary. From the evidence in the bundle, it appears that some of the external redecoration works might have been undertaken sooner, if not for the Covid-19 pandemic.

71. Part of the roof of the building was damaged by a storm in 2022. It appears to have been intended by all parties that the settlement agreed with the insurers could be used towards the cost of the replacement of the roof which is part of the major works, although because of the ongoing delay in instructing this work, this may not now be possible.

72. Following the section 20 consultation, three tenders were received and analysed by Croft Surveyors Limited (instructed by CJMS) [256]. The stage two consultation notice was issued by CJMS on 18 May 2022 [R59/60] and the leaseholders were invited to make written observations.

73. Various observations were received, most of which related to the potential costs of the proposed works. Some of the leaseholders wanted to hold another EGM. The Directors of the Respondent decided it was unnecessary because the works had been discussed at every AGM held since 2017 and at the EGM and the AGM in 2022. CJMS subsequently sent Mr Brent a letter dated 9 June 2022 which stated in a numbered paragraph "3":-

    a. *Prior to the 2021 EGM and AGM Leaseholders were invited to contact ourselves (CJMS) as Managing Agents with any questions or concerns regarding the proposed essential works. None were received.*
    b. *CJMS also invited Leaseholders to put forward any questions to Croft Surveyors (via CJMS) regarding the works. None were received.*
    c. *CJMS have urged anyone who feel that they may struggle to pay their legal contribution to the essential works to contact them in confidence, to date no contact has yet been received* [R67].

74. On 28 June 2022, CJMS wrote to the leaseholders confirming that no feedback was received during the consultation preferring any contractor other than TJ Smith Contracting (the lowest tender) as a result of which, once funds were received, the Respondent would instruct that contractor. An invoice for the cash call of £12,977.79 was enclosed with that letter [R70].

75. Subsequently two things occurred. Twenty five leaseholders paid the cash call. Five did not.

76. Since there was not enough money in the service charge account to cover the cost of the works, due to the shortfall arising from five leaseholders not having paid anything, the contractor was not instructed and CJMS were instead asked to find out from the preferred contractor if their estimated costs still stood.

77. An EGM was held on 24 August 2022. Leaseholders from 19 flats attended or were represented. It was identified that the service charge funds were short of £62,988.85. Since there were no spare funds, a discussion took place as to whether the 25 leaseholders who had already paid would each pay an additional sum of up to £1,500 to provide sufficient funds to enable the contract for the major work to proceed.

78. It was suggested by Miss Hart that the scaffolding costs had been double counted by CJMS which had resulted in the cash call being higher than was necessary to cover the cost of the works.

79. Two options were put forward. Option 1 was to allow the insurers to instruct works to repair the damaged part of the roof. The Respondent would thereafter re-tender the remaining works. Option 2 was to instruct the whole works with twenty five leaseholders contributing additional moneys to cover the shortfall arising from five leaseholders contributing nothing. It was recorded that the Respondent was unwilling to instruct the works until there is sufficient money in the service charge account to pay for it. The leaseholders voted in favour of Option 2.

80. CJMS sent a letter of apology to all the leaseholders on 18 October 2022 which stated that the cash call should have been for £10,777.82. Mrs Radcliffe said that she had used an earlier tender comparison report showing higher roofing cost so those leaseholders who had paid, had overpaid by £2,219.97. A revised invoice was sent to the leaseholders on 7 November 2022 [R83].

81. An anonymous letter dated 21 October 2022 was circulated to leaseholders. During the Hearing Miss Hart admitted she had written the letter claiming it was not anonymous as it included her telephone number. However, the letter included in the bundle [R86] does not include either a telephone number or the name of the sender. The letter claimed that the leaseholders had been "double charged for scaffolding", that the leaseholders should be eligible for a Building Safety Fund Grant to replace the cladding on the south elevation of the building and that an alternative roof to the Bauder system would cost £40,000 less.

82. CJMS sent another letter to the leaseholders dated 10 November 2022 which was expressed to be in response the anonymous letter circulated to all residents [R84]. That letter (a) clarified the position with regard to the miscalculation of the cash call, (b) contained accurate information about the Building Safety Fund which is designed to meet costs addressing life safety fire risks associated with cladding on high rise residential buildings where the Responsible Entity are unwilling or unable to afford to do so, and (c) included both a copy of the anonymous letter and the email dated 1 November 2022 from Croft to Gemma

Radcliffe explaining why the Bauder roofing system had been selected and specified.

The Applicants' claim.

83. The Applicant's claim to have obtained indicative prices/quotes for building contractors and surveyors which evidence that the cost of the major works could have been carried out for £431,000. Miss Hart produced quotations from Bluestone Design and Construction Limited (Bluestone) dated 24 April 2023 [271] and Robinson White (surveyors) dated 22 March 2023 [274].

84. Miss Hart has suggested that leaseholders are entitled to an "outstanding refund" of £13,941.22 but has not explained her calculation of this amount.

85. Miss Hart suggested that CJMS Fees and the abortive costs associated with the section 20 process to date are £30,000 too much. She also claims that fees of £47,000 being the Surveyor's professional fee and the £111,619 being the overall roof cost in the tender comparison schedule is unreasonable.

The Respondent's reply.

86. The Respondent's first statement in the bundle is not dated or signed [124]. However, it appears to have been produced in response to Miss Hart's application (23 September 2022).

87. In that statement the Respondent addresses every issue raised by the Applicant in relation to the major works project. The bundle also includes a letter from Croft Surveyors, the appointed Contract Administrator of the external works project. [200 - 204].

88. Mr German helpfully commented specifically on the quotations which the Applicants had obtained from Robinson White as well as the "indicative quote" from Bluestone.

Decision and Reasons

89. The Applicants appear to have believed that their comments or observations in relation to the consultation process were either discounted or ignored. Miss Hart suggested that this undermined the effectiveness of the process.

90. In fact it emerged at the Hearing that the Applicants had not known that professional fees do not fall within the definition of works within the Act and that there is no legal requirement consult the leaseholders about these fees. However the Respondent had negotiated the amount of with both Croft and CJMS professional fees as documented in the letter from Croft dated 30 January 2023 [200].

91. The Tribunal explained to the Applicant that section 20 of the Act refers specifically to qualifying works. Professional fees associated with the works are not within the statutory definition of works and are not subject to prior consultation.

92. The application of section 20 to professional fees was considered in **Marionette v Visible Information Packaged Systems Limited 2002 EWHC 2546 Ch**. Judge Nicholas Warren QC stated that "works are in my judgement restricted to physical works involved in the repair or maintenance and the costs of those works is the charge made by the contractor carrying out those works for doing so. This is also very much the flavour given by subsection 20(4)(c) requiring a description of the works to be carried out to be given in the notice which has to be served on the tenants; that provision seems to me to inapposite to cover professional services provided by an independent person as part of the works which need to be described" [paragraph 95] (The provisions to which Judge Nicholas Warren referred are still relevant but are now contained in Schedule 1 of The Service Charges (Consultation Requirements) (England) Regulations 2003 [472].

93. Judge Warren went on to consider the position of a separate fee charged to the landlord for the design and or supervision of the execution of a project and whilst he accepted that the fees are certainly incurred in relation to works, he concluded that in his judgement the service for which such fees are paid are not part of the works themselves.

94. Judge Warren commented that tenants will recognise that the repairs of any significant scope will be likely to require supervision and that relevant costs, to be recoverable are subject to the "reasonableness" provisions of section 19 but are not subject to any need for prior notice under section 20 [paragraph 98].

95. The Applicant's evidence that the major works should cost less relied on an email from Keith Molyneux RM dated 24 April 2023 [271]. Miss Hart supplied him with copies of the works specification obtained from CJMS. However, the email is headed "Indicative Cost Quote Bluestone Ltd". It has not been analysed against the other quotations received as part of the formal section 20 consultation.

96. Mr German explained that the quotation from the Robinson White Partnership is for the stage 2 process. At present no charge has been made by his firm for the preliminary works which has included the provision of drawings and documentation to enable planning and building regulation consent for the works to be obtained. This is set out in the Croft letter to CJMS [200].

97. Robinson White identified that it was concerned about the timescales which Miss Hart had stated and that it recommended carrying out a "due diligence" exercise initially whereupon it would provide a fixed fee. It stated that "if we are able to utilise the reports already provided and specifications developed, we would clearly be able to provide the services at a more competitive rate"[274].

98. The Tribunal is satisfied that the Applicant's criticism of the section 20 process has no merit. It is also satisfied that CJMS with assistance from Croft satisfactorily addressed and justified the specification of the Bauder roofing system.

99. Whilst there had been an error in the calculation of the amount of the first cash call, the original demand was withdrawn and replaced. Leaseholders who had already paid the sum specified in the original demand received refunds. The funds were collected and paid into the service charge accounts. There was no overcharge because the funds had been collected to cover intended costs not actual costs already incurred. Subsequently, because the Respondent has been unable to instruct the works as some leaseholders have refused to pay the cash call.

100. Since the Respondent has still not collected sufficient money to fund the major works, it appears that a temporary repair to the damaged roof has been undertaken, or soon will be and the insurance claim for storm damage settled. It is intended to recommence the section 20 consultation to obtain up to date cost estimates following the issue of this decision because the three tenders received are now out of date.

101. Whilst the parties have accepted that the major works could not have been progressed until sufficient funds were accumulated in the service charge account, the inevitable consequence of this application has been a delay to the reinstatement of the damaged roof which has exposed the Respondent to further consequential expenses and potential costs because the leaseholder of flat 30 has still not been able to occupy his flat.

The current level of monthly service charges

102. The Applicant has suggested that the "current" monthly service charge payment of £300 was not agreed. She said that service charges had been increased to £300 a month in 2022/2023 without a vote.

103. Clause 1 of the lease requires that the lessee pays to the lessor (the Respondent) the maintenance payment which shall be such sum as the Lessor and Lessee may agree or as in default of agreement may be determined by two chartered surveyors one to be appointed by and at the expense of the Lessor and the other by and at the expense of the Lessee. This also applies to the amount of service charges payable on account for each service charge year [227].

104. The Tribunal is satisfied that it has seen sufficient evidence that the level of service charge payments was agreed by the leaseholders and the Respondent. Whether or not a vote took place has no impact on this agreement. If Miss Hart considered that the service charge was not agreed she could have challenged it by appointing, and paying for, a surveyor to determine an appropriate amount.

105. Miss Barlow told the Tribunal that resolution 12 of the minutes of the AGM on 23 August 2021 was evidence of the agreement to increase the monthly service charge payment to £300 per flat from 1 February 2022 [336]. The resolution was to discuss the service charge for the year commencing on 1 February 2022 (ending on 31 January 2023). The relevant minute states "Based on the funding options previously discussed the service charge will continue as per the earlier schedule meaning the service charge will increase to £300 per flat per month from 1st February 2022…." It is also recorded that following the completion of

the works the service charge will be reviewed to enable consideration of future works and Lease obligations.

106. Miss Hart suggested the original schedule had been different and it was intended that the service charge would revert to £260 a month. She also said Dr Rendel, one of the directors at that time, had not at that time paid her service charge but was still allowed to vote.

107. Whilst the Tribunal and the Respondents were unwilling to discuss the financial position of Dr Rendel, who did not attend the Hearing, Miss Barlow suggested that a cheque had been received from Dr Rendel before the meeting. The more material point was that even if Dr Rendel's vote is discounted, a majority of the leaseholders agreed and the omission of a single vote would not have altered the outcome of any vote taken.

108. The Tribunal is satisfied that the amount of service charges being collected has been agreed between the parties in accordance with the provisions of the lease.

109. Miss Hart said that Judge Tildesley had indicated, in his directions, that the Tribunal would be able to decide if it was appropriate to phase the service charge contributions. However, the minutes of the AGM reflect a recurrent theme, namely that collectively the leaseholders decided to collect a service charge to enable them to carry out a forecast maintenance and repair programme. Unfortunately, the preferred timescale for the identified repairs and refurbishment was affected by the early failure of the lift and the storm damage to the flat roof.

110. When Miss Hart made this submission at the beginning of the hearing, the Judge read Judge Tildesley's Directions aloud to those present at the hearing, and drew both parties attention to paragraph 9 of the Directions dated 17 February 2023 (made following the CMH) which stated that "the Tribunal can consider whether the works can be phased to mitigate the financial impact of the major works on the leaseholders" [78] but which also recorded Miss Barlow's response by which she "submitted that a substantial number of the leaseholders had paid the cash call for the major works and that many leaseholders were wanting the works to be carried out as soon as reasonably practicable" [78].

111. Miss Hart claimed that she has provided the Tribunal with a market analysis from local estate agents which demonstrates that flats for sale within the Property are priced out of the marketplace due to the ordinary annual service charges being too high. She said one leaseholder had to sell his flat for significantly under market value due to high service charge costs and poor upkeep of the block. No evidence of this was provided.

112. The Tribunal told Miss Hart that it does not accept her submission that that the information she provided in the bundle about why flats in the Property have not sold can be accurately described as "market analysis".

113. The bundle contains copies of various emails as well as one letter addressed to Ms Chave. None of the information appears to have been provided on an objective basis. Comments have been made in response to specific requests from Ms Chave for agents to list reasons, including those she herself suggested, as to why buyers were unwilling to purchase Flat 6. Ms Chave's reasons referred to cash calls, service charges and the shabbiness of the building [250].

114. It is not possible to directly compare the service charges being paid by leaseholders at Holme Court with service charges being paid by leaseholders of other blocks of flats in Torquay. Such comparisons take no account of the comparative condition of the Property or of the services provided or required. The amount of service charges demanded should reflect the cost of the services provided and the obligations of the landlord in the relevant lease. In the case of Holme Court, the Tribunal has received information explaining why the current level of service charge was agreed and set which was with an expressed intention of undertaking necessary maintenance and repair to the building.

115. For all of those reasons, the Tribunal finds that the Applicant's submission that these emails and letters are evidence that the monthly service charge has devalued the flats and made them difficult to sell unproven. In any case, those submissions are not relevant to the Applicants' claim under section 27A of the Act. Neither do they provide any support for her submissions that works should be phased.

116. Miss Hart acknowledged that the monthly service charges currently being collected are those set out in the agreed schedule (2017) but she said she believed this has only come about because of the Tribunal Application. She claimed that the leaseholders had "probably been overcharged £14,400 in 2022/2023 for ordinary annual service charges" which she said the Applicants believed was unreasonable.

117. Miss Hart's statement is not accurate. The Respondent has provided service charge accounts which transparently document the service charge expenditure.

118. It was established with the assistance of the Respondent and CJMS that a schedule of various options relating to service charges for the years between 2018 and 2029 was drawn up [64].

119. The evidence in the bundle, including the reserve fund totals, shown in the last service charge accounts which are for the year ending 31.01.2022, show that the reserves carried forward at that date are £141,153 which was an increase of almost £50,000 accumulated in accordance with an agreed plan to budget for the major works.

120. When discussing the last AGM, Miss Hart claimed it had been preceded by Mrs Radcliffe accusing her of fraud. A form prepared by CJMS on its headed paper was amended to include a statement that any party who had signed the form was attending and voting at the AGM under protest. Miss Hart admitted adding that statement to the CJMS form but she denied sending the form to other leaseholders. She admitted that she

had shared it with Mrs Kinzett. It was not clear if Mrs Kinzett had circulated the form to other leaseholders, but this seems likely. Mrs Radcliffe said she had been contacted by other leaseholders who were confused by the additional statement on the form assuming that, because the form appeared to have come from CJMS, the statement on it was authorised by CJMS.

121. Miss Hart had also breached crown copyright by cutting and pasting the judicial crest on to the front sheets of both her statements in the bundle. Mrs Radcliffe told the Tribunal she thought both statements had come from the Tribunal. Fortunately, the Respondent has not claimed that it was misled by Miss Hart's actions and has not made submissions to the Tribunal which refer to this. Having questioned Miss Hart about her motivation, the Tribunal has concluded that whilst Miss Hart may not have intended to deliberately mislead any leaseholder, her actions could be interpreted as deliberate misrepresentation. It is satisfied from the evidence it heard from Mrs Radcliffe that other leaseholders were misled by Miss Hart and Mrs Kinzett circulating the amended CJMS form prior to the last AGM.

122. The Applicant's dispute is, for the most part, a dispute on which the Tribunal has no jurisdiction to adjudicate. The Tribunal's jurisdiction is confined to sections 27A and 19 of the Act. It cannot adjudicate between leaseholders who cannot agree. Judge Tildesley explained this at the CMH and advised Miss Hart and the other Applicants both at the CMH and in his subsequent directions. Judge Dobson also confirmed this in his directions. Sadly, undeterred by the advice received from the Tribunal, Miss Hart repeated those submissions throughout the hearing.

123. Miss Hart appears unable or perhaps unwilling to understand that when submitting evidence in support of the Applications, she needs to provide objective evidence, not rely upon unattributed third party comments or the undocumented recollections of other leaseholders. Her claim that a written summary of an oral indication of the cost of repairing the swimming pool provided three years before the work was commissioned was one such example.

124. When concluding her submissions, Miss Hart persisted in maintaining that the quotation for repairs to the roof which she obtained after the consultation process was completed, and which has not been analysed and compared with the other quotations received, will result in savings to the leaseholders. In fact, the Respondent has already undertaken a comprehensive consultation exercise in relation to the quotes it has obtained in response to the tender for those works. The Applicants have not. The Respondent has relied on professional expertise to advise and inform it. The Applicants have not.

125. Although Mr Bowden claimed to have obtained a report that the damaged part of the roof measured 20% of the entire roof, the claim from Mr Carlino (contained in a short letter not a report) was not substantiated and nothing further was ever provided by Mr Bowden [R104].

126. For all of those reasons the Tribunal finds, confirming what it told the parties at the hearing, that the Applicant's claim that the consultation process was not followed correctly in relation to the major works has not been proven.

Costs Applications

127. Following the conclusion of the parties submissions on the substantive application, the Tribunal considered the costs applications.

128. Miss Hart made no application for the reimbursement of the Tribunal Fees.

129. Miss Hart made submissions regarding both her applications for orders under section 20C of the Act and to limit the recovery of the Applicant's litigation costs under paragraph 5A of Schedule 11 to CLARA.

130. The Tribunal having found no merit whatsoever in the application, finds it is neither just nor equitable to make a section 20C order in favour of the parties referred to in the applications.

131. Given the background to the service charge applications, the content of the Applicant's submissions and taking into account the way in which the Applicants behaved during the Hearing, the Tribunal has concluded that the costs incurred by the Respondent in relation to the applications are relevant costs which may be taken into account in determining the service charges. It is entirely appropriate that the Applicants contribute to the costs which have resulted because of their application.

132. For the same reason the Tribunal has concluded that it would not be just and equitable to make an order under paragraph 5A of Schedule 11 to CLARA. (An order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs).

133. The Applicants have not succeeded in proving any of their claims.

134. The Respondent raised the issue of costs at the conclusion of the Hearing. The Tribunal confirms what the Judge said at the Hearing which was that any claim by the Respondent must be sent to the Tribunal within 28 days of the issue of this decision.

Judge C A Rai (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Chamber must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to **rpsouthern@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.

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

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