FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
and
THE COUNTY COURT AT BRENTFORD

Tribunal Case reference	:	CHI/43UC/LSC/2023/0062
County Court claim	:	J5QZ84Z3
Property	:	24 Bluegates, London Road, Ewell, Surrey KT17 2SA
Applicant	:	Bluegates Management Company Limited
Representative	:	Hugh Rowan of Counsel, instructed by Realty Law Limited
Respondents	:	Mr A Thomas (Nee Alessandro Roberto Criscuolo)
Representative	:	---
Type of application	:	Transferred Proceedings from County Court in relation to Service Charges
Tribunal member(s)	:	Judge J Dobson Mr N Robinson FRICS Ms J Dalal
County Court Judge	:	Judge J Dobson
Date of Hearing	:	25th September 2023
Date of Decision	:	6th October 2023

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be the date this decision is sent to you.

Summary of the Decision of the Tribunal

1. **The Residential Lease service charges claimed by the Applicant in the proceedings are payable pursuant to the Lease and reasonable with the exception of those related to tree pollarding, and so in the sum of £3230.72.**

2. **As to costs, the Applicant's application for costs pursuant to rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 is refused.**

3. **The Respondents applications for the Tribunal to prevent the legal costs of the proceedings being charged as service charges and/ or administration charges are refused.**

Summary of the Decision of the County Court

4. **The Applicant succeeds in the sum of £3212.08 plus interest of £200.00, total £3412.08, in respect of the claim.**

5. **As to costs, the Respondent shall pay the Applicant's costs, summarily assessed in the sum of £835.00 (including applicable VAT).**

6. **The Respondents applications for the Court to prevent the legal costs of the proceedings being charged as service charges and/ or administration charges are refused.**

Background

7. The Applicant is the freeholder of two plots of land which contain 21-24 and 32-35 Bluegates, London Road, Ewell, Surrey KT17 2SA ("The Estate"). The Respondent is the lessee of 24 Bluegates, London Road, Ewell, Surrey KT17 2SA ("the Property"), having been registered as such on 23rd March 1999. The Applicant was originally the management company but acquired the freehold on 20th January 1992. The Applicant employs a managing agent to deal with the day-to-day management on its behalf, most recently being Diamond Managing Agents Ltd.

8. The Property is a two- bedroom flat. It is located on the first floor of a block of four. The two halves of the building are offset and designed to have something of the appearance of two semi- detached houses.

Procedural History

9. On 16th June 2022, the Applicant filed a claim in the County Court under Claim No. J5QZ84Z3 in respect of sums said to be due from the Respondent lessee. The claim related to unpaid service charges, interest and costs. The stated value of the claim on the Claim

Form [4- 5] was £12515.27, comprising £9409.32 of unpaid charges, £1787.95 interest and £1318.00 claimed as contractual costs and apparently claimed as part of the claim, together with the court fee paid which reflected that value and excluding legal costs on issue. In respect of the contractual costs it was, however, said in the Particulars of Claim that costs were that sum and "continuing to be assessed". The status of the contractual costs claim as part of the claim is addressed below. The Respondent filed a Defence dated 20th June 2022[12- 16].

10. Deputy District Judge Lawrence struck out such part of the claim as related to the period 29th March 2017 to 21st September 2020 by Order dated 10th May 2023. The effect was to leave a balance of claimed service charges of £3509.73. There remained a claim for interest and costs, including the contractual costs claimed as part of the claim.

11. The case was transferred to the administration of the Tribunal and for the determination by the Tribunal of the payability and reasonableness of the residential service charges and determination by the Tribunal Judge sitting as a County Court Judge of the Court elements, pursuant to the Order of District Judge Ross dated 29th June 2023.

12. There have been original and corrected Directions given by the Tribunal. The Directions stated that the County Court part of the proceedings had been allocated to the Fast Track.

13. The Applicant provided a bundle for the final hearing. The bundle comprises, including the index, of 338 paginated pages, although that excluded the witness statement on behalf of the Applicant which it was identified had been omitted and was not paginated. The Respondent also provided a small supplementary set of documents in advance of the hearing, which he considered relevant but which were not within the bundle. The Applicant did not object. The Tribunal and Court considered those documents.

14. Whilst the Court and Tribunal have read the bundle (and statement and supplemental documents) in full, many of the documents are not referred to in detail, or in some instances at all, in this Decision, it being unnecessary to so refer. Where the Court and/ or Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account. Insofar as reference is made to specific pages from the bundle, that is done by numbers in square brackets [ ], as occurs in the preceding paragraphs where appropriate, and with reference to PDF bundle page-numbering.

The Lease

15. A copy of the original lease was provided within the bundle [69- 89]. That lease is dated 28th June 1991. The Applicant was one of the original contracting parties, as management company at that stage, in a

tri-partite lease. The term of the lease is 999 years from 25th March 1990.

16. Clause 2 of the Lease requires the Respondent to comply with the obligations in the Fourth Schedule. By clause 3 of the Lease, the management company agrees to perform covenants in the Sixth Schedule and by clause 4, the freeholder agrees to perform the covenants in the Seventh Schedule. Those now all fall on the Applicant.

17. Schedule 1 reserves to the Applicant the structure of the buildings- roofs, foundations, external walls and similar and also cisterns, tanks and service media and so on as would be expected. The covenants in the Seventh Schedule include the usual sort of maintenance and repairing covenants for the buildings and the common areas. Paragraph 5 adds:

> "The Management Company may employ such Managing Agents as may be approved in the absolute discretion of the Lessor from time to time to act as Managing Agents to manage the Land and building (including the gardens and common grounds_ and in its discretion it shall deem it necessary or desirable to employ a porter and/ or such staff as the Lessor or Management Company shall deem reasonably necessary for the performance of the obligations contained in this clause ……."

18. In addition, paragraph 7 enables the Applicant to maintain a reserve fund.

19. The contribution of the Respondent to service charges is provided for in the Fourth Schedule and is stated to be as follows:

> 11. (a) To contribute and pay 25% of the costs expenses outgoing and matters mentioned in the Seventh Schedule hereto
>
> (b) The contribution under paragraph (a) hereof for each year shall be estimated by the Management Company (whose decision shall be final) as soon as practicable after the beginning of each year of the Term and Lessee shall pay the estimated contribution in two instalments on the Twenty-ninth day of September and the Twenty-fifth day of March in every year of the Term……
>
> (c) As soon as reasonably may be after the end of the year ending the Twenty-eighth day of September One thousand nine hundred and ninety and each succeeding year when the actual amount of the said costs expense outgoings and matters for the year ending the Twenty-eighth day of September One Thousand nine hundred and ninety or each succeeding years (as the case may be) has been ascertained the Lessee (on being supplied with a sufficient statement of account shall forthwith pay the balance due to the Management Company or be credited in the Management Company's books with any amount overpaid
>
> (d) The certificate of the managing agents (if any) for the time being appointed hereunder or the Management Company's Auditors as the case may be as to any amount due to the Management Company under paragraph (c) hereof shall be final and binding on the parties hereto
>
> …….

14. To pay to the Lessor 25% of the premium expended by the Lessor from time to time in maintaining the policy of insurance referred to in paragraph 2 of the Sixth Schedule hereto"

20. The service charge mechanism provides for two instalments on account of the estimated service charges for the given year to be paid, each half of the required contribution, on the above dates and then a balancing credit or charge following the end of the service charge year once the actual expenditure is known and the account. All of that is a common type of arrangement.

21. The Eighth Schedule adds other matters than those in the Seventh Schedule and provides as follows:

> THE EIGHTH SCHEDULE hereinbefore referred to
> Costs Expenses Outgoings and Matters in respect
> of which the Lessee is to contribute

1. The expenses of and incidental to the running and administration of the Management Company whether or not the Management Company is also the Lessor
2. The expenses incurred by the Management Company in carrying out its obligation under Clause 4 and the Seventh Schedule of this Lease
3. The costs of maintaining (including any rental) communal television aerials (where there are any) for the use of the flats
4. The costs of maintaining (including the rental) of any entry- phone (where there is one) a(or any other similar system for the use of the flats
5. Such sum (to be fixed annually) as shall be estimated by the Lessor or Management Company (whose decision shall be final) to provide a reserve funds for items of expenditure referred to in this Schedule to be or expected to be incurred at any time during the period of three years commencing with the date upon which the estimate is made
6. All rates including water rates taxes and outgoings (if any) payable in respect of any part of the Building and/or the Lands (other than those payable solely in respect of any of the flats
7. All other expenses (if any) incurred by the Lessor or Management Company on or about the maintenance and proper and convenient management and running of the Building and the Land including in particular but without prejudice to the generality of the foregoing any expense incurred in rectifying or making good any structural defect not covered by any guarantee any interest paid or any money borrowed by the Management Company to defray any expenses and any legal or other cost bona fide incurred by the Lessor or Management Company in taking or defending proceedings (including any arbitration) arising out of any Lease of any part of the Building of any claim by or against any lessee or tenant thereof (other than a claim for rent alone) or by any third part against the Lessor as owner or occupier of any part of the Building
8. The fees and disbursement paid to any Managing Agent appointed in respect of the Building and to any auditor for the purpose of this Lease

.

22. Clause 5(a) of the Lease entitles the Applicant to re- enter the Property (in practice that is to say to bring a claim for forfeiture) if the Respondent is in breach of his obligations under the Lease. Paragraph 2

of the Fourth Schedule includes an obligation for the Respondent to do the following:

> "To pay all costs charges and expenses (including Solicitors' costs and surveyors fees) incurred by the Lessor for the purposes of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 [a notice relating to forfeiture] notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court".

23. It is well- established law that the Leases are to be construed applying the basic principles of construction of such leases, and where the construction of a lease is not different from the construction of another contractual document, as set out by the Supreme Court in *Arnold v Britton* [2015] UKSC 36 in the judgment of Lord Neuberger (paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

24. Context is therefore very important, although it is not everything. Lord Neuberger went on to emphasise (paragraph 17):

> "The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

The Hearing

25. The hearing was conducted fully in person. Mr Rowan represented the Applicant company. The Respondent, Mr Thomas, represented himself.

26. Oral evidence was received principally from Ms Concepcion Gell, Senior Property Manager at the managing agent and to a very limited extent from Mr Thomas. Mr Thomas asked various questions of Ms Gell and Mr Rowan a small number of questions of Mr Thomas. The Tribunal asked questions of witnesses seeking clarification of matters

advanced to the extent considered necessary. The Tribunal received written evidence from Ms Gell in her witness statement and from Mr Thomas in his statements of case. Both Mr Rowan and Mr Thomas gave oral closing submissions. The Tribunal and Court are grateful to all of the above for their assistance with this case.

27. Mr Rowan also relied on a Skeleton Argument, although that was only sent to Mr Thomas during the afternoon of Sunday 24th September and was known about by the Tribunal 5 minutes before the hearing was due to start. It usefully identified a number of case authorities relied on by the Applicant, although nothing novel to the Tribunal, which was perhaps fortunate given that the Tribunal was informed that an authorities bundle existed but they were not in possession of it.

28. The start of the hearing was delayed whilst the Tribunal read the document and gave preliminary consideration to some matters referred to within it. Mr Thomas was then offered further time to consider the Skeleton Argument but had identified matters he did not agree with and did not seek further time. He was unhappy that a document dated 22nd September had only been sent on the Sunday, whereas the date on it suggested he should have been in receipt two days earlier and so would have had that much more time to read it. Mr Rowan apologised for the date not being amended and explained it had been approved on the Saturday and then sent by the solicitors on the Sunday.

29. It was noted by the Judge at the start of the hearing that the County Court case did not appear to have been allocated to track and that whilst the Tribunal directions referred to the County Court case having been allocated to the fast track, that appeared to be in error. Although the original level of claim would have rendered allocation to fast track very likely and the Applicant filed a Directions Questionnaire appropriate for that, the value was then significantly reduced and the case transferred to the administration of the Tribunal without any obvious order as to track. The Tribunal could not allocate a court case to track and there was no subsequent order by a Tribunal Judge sitting as a County Court Judge. Allocation is returned to below.

30. It is very important to identify that the first substantive matter dealt with at the hearing was the question of how the approach to service charge demands made fitted with the terms of the Lease. As mentioned in the Defence, the Lease provided for the Respondent to pay 25% but demands were for 12.5%. The Tribunal noted that the Applicant's representatives responded to that but even so the Tribunal struggled on reading the papers to completely understand how that arose and understand about the building in which the Property is situated, in particular whether the block of four was half of the building and the other half of the building contained four more or whether there was another building attached in a manner not apparent.

31. The Respondent, in particular, clarified that there are two separate buildings- to the extent of being perhaps 100 yards apart. They are

visually identical or practically identical- the other building contains a further four flats, although it sits on a larger plot of land. The Applicant is the management company for both, the Estate comprising both buildings and surrounding land, including therefore eight flats in total. The accounts prepared have been for the Estate as a whole.

32. The Respondent explained that was why the shares were 12.5% in practice. The costs for the two plots, buildings and land, were added together into a collective whole and then split equally. That was, the Respondent said, despite the fact that gardening and similar costs were allowed for to a greater extent for the other portion- 2/3s to 1/3- because of that occupying more land. He specifically confirmed that if an expense arose in respect of one building or plot, it would nevertheless be charged to the eight lessees equally.

33. Mr Rowan suggested that the Applicant was entitled to adopt that approach on the basis of convention by estoppel- that all parties had acted on a common assumption. In the event, it was not necessary to consider that argument to any detailed extent. The Respondent accepted that the Estate had been operated in that manner since the 1990s, he had adopted that approach when a director of the Applicant (which it was established was until 2003 and so longer ago than the Tribunal had first perceived) and he took no issue at all with the service charges being approached in the manner they had been.

34. As there was very firmly no dispute between the parties about that matter, the Tribunal, and Court, concluded that no determination was required by them of this point and that matters could proceed on the position accepted by both sides. The clarification of the position regarding the two plots of land and two buildings was however very helpful for understanding the situation.

35. The other matter which was required to be addressed was the reference made, and set out above, in paragraph 11. a) to payment by the Respondent of "25% of the costs expenses outgoing and matters mentioned in the Seventh Schedule".

36. Mr Rowan identified in his Skeleton Argument and raised orally, that the Applicant's position is that there is an error in the drafting of the Lease and that the reference should be to the Eighth Schedule. He submitted that it is the Eighth Schedule which sets out the expenses for which the Respondent shall contribute, the Seventh Schedule listing matters which the Applicant is required to attend to. Mr Rowan referred to page 76 of the bundle and the reference to clause 13(a) of the Fourth Schedule and to the Eighth Schedule as in effect an aide to interpreting what the contracting parties in fact intended paragraph 11. a) to say. The point was relevant because the Eighth Schedule includes matters which go beyond matters in the Seventh Schedule by including other costs to which contributions would have to be made. The Tribunal was invited to rectify by construction, applying the authority of *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38.

37. Mr Thomas did not accept that and maintained that the Lease was drafted correctly- the reference to the Seventh Schedule was intended. He submitted that costs beyond those to meet responsibilities in the Seventh Schedule were modest and stated that the original freeholder was a local builder who had built flats designed to be retirement flats and where the priority has been to keep the Estate clean and tidy where occupiers may not be able to attend to matters themselves.

38. It is apparent to the Tribunal that the issue with paragraph 11. a) referring to the Seventh Schedule has never troubled the parties and that they have always taken it as read that the lessees would pay a share, albeit in the event 12.5% of the Estate sums not 25% of the sums in respect of each individual building and plot, of all amounts required and hence in practice of the items referred to in the Eighth Schedule. There was no hint that even when Mr Thomas was a director of the Applicant a different approach was taken, much as expenses were more modest, not least in the absence of fees of managing agents.

39. The Tribunal agreed that it was appropriate to apply the quoted authority and to construe the Lease as meaning in respect of paragraph 11. a) that the Respondent would pay the relevant share of the expenses listed in the Eighth Schedule, not just the matters to which the Seventh Schedule of the Lease requires the Applicant to attend. The Tribunal accepted there to be a clear mistake on the face of the Lease and it to be clear what correction was appropriate to cure that mistake.

40. There is an argument for the Applicant and the lessees correcting the position in terms of the leases. Tidying the reference to the Seventh Schedule when apparently the intention was to refer to the Eighth Schedule is one matter. Addressing the 12.5% shares of the Estate as a whole is another. However, no such application was before the Tribunal and so no more ought to be said.

41. There were a perhaps unusually significant and so time- consuming set of preliminary matters to resolve before the substantive case could be turned to. A hearing listed at 11am (albeit with the delayed for consideration of the Skeleton Argument) was adjourned at lunchtime without by that point touching on the actual service charges claimed.

42. It should be recorded that this Decision refers to a little additional caselaw to that referred to by Mr Rowan both above and below. However, such cases are all well- established authorities for the propositions referred to, which have not in the experience of the Tribunal and Court been identified as controversial by legal and other representatives or other parties in previous cases. Hence, it was determined not necessary to seek additional submissions on those.

43. This Decision also seeks to focus on the key issues and does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit

acknowledgement of the accuracy or truth of statements made or documents received. Various matters mentioned in the bundle or at the hearing do not require any finding to be made for the purpose of deciding the relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required. Findings of fact are made in the balance of probabilities.

The Tribunal matters

The jurisdiction of the Tribunal

44. The Tribunal has power to decide about all aspects of liability to pay service and administration charges in relation to residential properties and can interpret the lease where necessary to resolve disputes or uncertainties. For the avoidance of doubt, the Tribunal has no jurisdiction in respect of solely commercial premises. Service charge is in section 18 defined as an amount:

> "(1) (a) which is payable, directly or indirectly, for services, repairs, maintenance[, improvements] or insurance or the landlord's costs of management and
> (2) the whole or part of which varies or may vary according to the relevant costs."

45. The Tribunal can decide by whom, to whom, how much, when and how a service charge is payable (section 27A). Section 19 provides that a service charge is only payable insofar as it is reasonably incurred and the services or works to which it relates are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges. The amount payable is limited to the sum reasonable.

46. The Tribunal may take into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. The Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009 states: "Failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings, the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account."

47. There are innumerable case authorities in respect of several and varied aspects of service charge disputes, but most have no obvious direct relevance to the key issue in this dispute. *Cos Services Ltd v Nicholson and another* [2017] UKUT 382 (LC) (and also earlier authorities such as *Carey Morgan v De Walden* [2013] UKUT 0134 (LC)) applies such that there is a two- part approach of considering whether the decision making was reasonable and whether the sum is reasonable. It is also well established that a lessee's challenge to the reasonableness of a

service charge (or administration charge) must be based on some evidence that the charge is unreasonable. Whilst the burden is on the landlord to prove reasonableness, the tenant cannot simply put the landlord to proof of its case. Rather the lessee must produce some evidence of unreasonableness before the lessor can be required to prove reasonableness (see for example *Schilling v Canary Riverside Development Ptd Limited* [2005] EW Lands LRX 26 2005 in relation to service charges). Mr Rowan referred to a different case on the point, *Yorkbrook Investments Limited v Batten* (1986) 18 HLR 25, but the net effect is the same.

Are the Residential Lease Service Charges payable and reasonable?

48. The claim in respect of the Residential Lease made is for service charges said to be payable for the period from 21st September 2020 and onwards. That had been reduced from the original level of claim. There was necessarily no need for the Tribunal to consider the rest of the service charges in the original claim and the terms of the transfer from the County Court did not provide for that. The Tribunal does mention, albeit strictly outside of its remitting as an accounting matter not a service charges matter, that it considers that there ought now to be a credit to the Respondent's account with the Applicant in respect of service charges shown as owed but which can no longer be recovered, and appropriate write- off or other provision made in the wider accounts of the Applicant company.

49. It was not suggested by the Respondent that any statutory requirements or requirements of the Lease had not been met and it was not considered by the Tribunal appropriate to explore any point about that, even as an expert tribunal entitled to consider whether such points should be taken case even if not raised by parties. The Tribunal did consider it appropriate to take a limited point addressed below, about a specific element which the Tribunal identified and where it considered it was appropriate to take that point.

50. The Respondent's case in a nutshell was that there is maintenance required which has not been undertaken and which is overdue and he said enough is enough. He was essentially withholding payment until such time as there was agreement from the Applicant to undertake that work, which he asserted should have been undertaken years ago.

51. The Respondent particularly identified that the fascias to the buildings were in need, at least, of decoration and were unsightly. The Respondent provided photographic evidence [292]. Reference was also made to moss on the roof. The Respondent also asserted that there had been inadequate maintenance of garden areas with the garden and bushes overgrown and had taken photographs of hardstanding and a path. In closing, he referred to spiky bushes and threadbare borders but the Tribunal considered that to be the first mention of those specific matters, for which there was no prior evidence. Ms Gell said in oral

evidence that works had been undertaken and that works to what she loosely termed the roof (within which she said that she included gutters, soffits and fascias) but what was done was what the Applicant could afford from the money received.

52. In addition, the Respondent in cross- examining Ms Gell, took her to photographs showing climbing ivy reaching from the boundary up the side of the building to the balcony of his flat (having also referred to the issue in his "Particulars of Defense"). The Respondent said that had been growing into the soffits. He asked whether the plant was still so extensive and if not then who dealt with it and who paid for that. Ms Gell suggested perhaps the gardening contractor. The Respondent contended that the foliage had been removed by his sister- in law and niece. He said that the matter had been reported previously, although to a director rather than to the agents.

53. The Respondent also contended that the Applicant had made a claim to the building insurance company for works which were beyond those necessary in relation to the wall to the rear of part of the Estate. He said that the cracking was modest and not all had been dealt with. The Respondent considered that the insurance claim may have impacted on the level of insurance premiums, which inevitably would impact on the level of service charges demanded.

54. The Respondent returned a number of times to a query about why the Applicant had not agreed to undertake the works he suggested were required and accepted the money from him for that. Ms Gell observed that the Respondent needed to contribute to all expenses and not just the roof (and elements she included within that term).

55. The Respondent did not challenge any of the service charges demanded being payable in his detailed written case. He did not challenge the reasonableness of any sums involved, including the insurance beyond the above point. The Respondent was apparently agreeable to paying the service charges but sought to place conditions on that payment.

56. When specifically asked by the Tribunal during the hearing whether he challenged any sums which had been expended, the Respondent referred to the sum spent on garden maintenance. However, save for asking limited questions of Ms Gell, the point did not advance further. The Respondent did not identify the level of charges he considered appropriate and any excess he asserted there to have been.

57. It might have been implicit in the Respondent's case- with regard to sufficient gardening work and maintenance- that he asserted that the service provided by the managing agent was not satisfactory and that there should be an impact on its fees. However, he did not make that argument in the event and so there is nothing for the Tribunal to deal with in that regard. It should be said that in the Defence, there was a more general objection to the Applicant's expenses being increased by the employment of a managing agent, but the Applicant was entitled to

employ one, and a rather general assertion that the fees were high. There was not, on the other hand, a challenge to the specific fees or any argument that any given level of fees was or was not reasonable. The Tribunal determined that no unreasonableness in the level of the managing agent's fees had been demonstrated.

58. The Tribunal noted that the Estate has experienced previously difficulties with managing agents. The Applicant's representatives accepted in writing [105] that there had been problems to the extent that the Property Ombudsman had ordered previous agents to refund some of their charges. However, that was not relevant to the period of claim that remained and so the service charges falling to be considered by the Tribunal. The Tribunal makes passing note that the accounts to 28th September 2021 included managing agent fees for £1710.00 whereas the previous year they had been £3130 (but for the Respondent's purposes fell within the sums struck out save for any potential element in respect for the days 21st September 2020 to 28th September 2020).

59. The Tribunal identified that no issue had been taken by the insurance company with the appropriateness of the claim to it, whereas the insurance company was capable of assessing any insurable loss and determining whether to pay out on the claim and to what extent. The insurer obtained the report of a surveyor [208- 215]. In any event, whilst it was very likely that the fact of a claim had some impact on the level of insurance premium payable, there was neither evidence to show the relative impact of any given level of claim or indeed evidence of the extent of any increase in premium at all.

60. The Tribunal was troubled by the Respondents assertion of fraud or collusion in fraud in respect of the insurance claim. Not only did the insurance company reach a decision but there was no evidence on which a Court or Tribunal could possibly have found fraud to the relevant criminal standard for such an allegation or even if the civil standard of proof had applied. Such allegations are not to be made lightly and in the absence of strong evidence to support them, which was lacking.

61. It was also said by the Respondent that he himself had incurred some expense in relation to the Estate. He has also, he said, paid for his own insurance on the basis of having a flying freehold, although the Tribunal explained that he did not have that and was not entitled to take out his own separate building insurance- contents insurance being a different matter. It was not suggested by the Respondent that any such work by him or other expenditure had been authorised by the Applicant or that any refund of any cost had been agreed.

62. There was no specific argument that any such costs should be set- off against the service charges demanded, nor that any lack of maintenance had any impact on the Respondent which gave any right to set- off. The

Tribunal determined that there was no impact on the level of service charges payable.

63. Whilst the Tribunal accepts that the Respondent was seeking to do his best for the Estate by seeking to ensure that what he regarded as necessary maintenance works were undertaken, the Tribunal rejected that as being a basis for lack of payment of the service charges in question. Those charges were for work undertaken, rather than work not undertaken. The fact that another matter was not dealt with and there were no service charges charged for it did not result in there being a basis to challenge the service charges for items which were attended to. The Tribunal did not accept that the Respondent could withhold payment because other works he considered required attention had not been dealt with.

64. Whilst it is not therefore strictly a matter for the Tribunal to address, the Tribunal considers it reasonable to observe that there appeared to be some wider merit in the Respondent's position that maintenance work ought to be undertaken to the buildings. The photographs revealed that the fascia is in a poor condition, for example. The Tribunal equally accepted the point made by Ms Gell in evidence that purely aesthetic work, such as in relation to the moss, was less important that more essential building works. Plainly those works will involve cost and will require service charges to be levied to meet that cost. The Tribunal accepts that if the Applicant does not receive the necessary funds, for example because service charges are not paid by the Respondent, inevitably that will impact on work being undertaken.

65. If the Applicant's contractor did not attend to the ivy then arguably it ought to have done. However, it was not clear when the report to the director was made or over what timeframe the plant had extended from the boundary to the balcony and beyond. Some such plants can grow rapidly. There was not enough on which the Tribunal could reach any conclusion, if indeed it needed to. In the event, there was no identifiable impact on service charges demanded. The bushes apparently overgrown [286], looked rather less so when viewed from greater distance [336] and so it was at least unclear if their appearance could be said to amount to lack of maintenance. The hardstanding area did not look in inadequate condition from the photographs provided and neither did, if imperfect, the path.

66. The Tribunal also noted in the hearing and asked Ms Gell about the fact that the accounts showed a large surplus for the last two years to 28th September 2021 and 2022. She explained that the bank account does not hold such a surplus, the apparent surplus being debtors i.e. unpaid service charges. The Tribunal observed that does not of itself mean that the demands as service charges were reasonable, given that in the absence of debtors there would be an actual surplus, indicating more was being demanded than the expenses required. However, no person who may perhaps have paid any sums which should be returned to

them was a party to the proceedings and, as identified above, the Respondent did not challenge the level of service charges themselves.

67. There was nevertheless a particular matter identified by the Tribunal, which related to tree care services charged for in respect of the pollarding of two lime trees at an overall cost of £2232.00.

68. In respect of the works to the lime trees, the Tribunal noted that the trees were described in the relevant invoice [233] to be described as being located in unregistered land at the rear of 21-24 Bluegates. It was established that they were situated behind the rear wall to the Estate. Ms Gell was asked whether that was part of the Estate and replied that it was not.

69. The Applicant's position was that the trees needed dealing with and the Tribunal accepts that. The Applicant's case was that the Council was approached but that the Council said that it would not undertake the work and further that if the Applicant wanted the trees attended to the Applicant would have to do that. As to quite on what basis except to save the Council that cost would be incurred is difficult to discern. The Applicant decided, according to Ms Gell, that it would deal with the trees because branches were overhanging and they were causing the boundary wall to break. She added that the insurance company required the work to be undertaken, that the Applicant was entitled to deal with overhanging parts and that it made little difference to do a bit more.

70. However, the question is not one of whether the Applicant thought the work would be beneficial but one of whether the Applicant was demonstrably entitled to undertake it and, most pertinently, the Applicant was entitled to charge for it as service charges. In response to the Tribunal's suggestion that the Applicant was not entitled to charge for the work, Ms Gell replied "That's true."

71. Mr Rowan contended that the raising of the point at the hearing was procedurally unfair. The Tribunal disagrees. The Applicant, its solicitors and its Counsel are aware of the claim brought and the invoices relied on and as well able to read them as the Tribunal. The Tribunal considers that the point is a simple enough one and ought to have been identified by the managing agents and then the lawyers and that there was ample time for that to have happened. Indeed, it is a matter that the Applicant or its agents ought to have considered before any work was undertaken. In addition, when the very specific matter was raised, that matter was one raised with a party represented by Counsel who ought to have been, and was, able to respond. It is not apparent that there was anything substantive which the Applicant would have been likely to additionally raise which would have impacted on the outcome had the matter been raised by, say, the Respondent.

72. Mr Rowan submitted that notwithstanding the clear evidence, there were a number of arguments as to whether the unregistered land

actually belongs to the Applicant or not. He suggested that the Applicant may have adversely possessed the land or that the boundary was not located where the wall had been built. It was also suggested that the work may fall within the service charge machinery in any event as being preventative work in respect of repair or maintenance and that it had led to a reduction in the insurance premium.

73. The Tribunal does not accept any of that. The Estate was only purchased long after land required registration on a purchase, if not already registered, and the registered freehold title should be clear. If not, there was ample time to address that, including when the freehold was obtained by the Applicant. The Tribunal considers it very unlikely that the contractor would have taken it upon himself to decide about whether land was registered or unregistered. The far more likely scenario is that he was told that the land was not registered- and probably about the issues with the Council- and that the Applicant wished the work undertaken.

74. The Tribunal determines that whilst the Applicant is entitled to charge as service charges for matters within its responsibilities in the Lease insofar as the land or buildings in question fall within the Estate, the Applicant is very definitely not entitled to charge for undertaking work outside of the Estate as service charges. For the avoidance of doubt, the Tribunal accepted that the Applicant would have been entitled to seek the contractor to attend to over- hanging branches but does not consider the work actually undertaken was only a bit more than that or that would be relevant. In any event, removal of the branches was not the work undertaken.

75. The service charges claimed against the Respondent in respect of the lime trees is therefore disallowed as not payable, being 1/8 of £2232.00, namely £279.00.

76. As touched upon above, the Claim Form included what were said to be contractual costs as part of the claim, although confusingly the Particulars referred to such costs as ongoing. Nothing was said in the hearing about such costs being anything other than costs, so as being part of the claim.

77. Equally, there was no demand in the bundle which demonstrated that any legal costs had been demanded as service charges and so could be payable as such. The costs could only, the Tribunal determined, form part of the substantive claim itself if they had been demanded as charges and then been unpaid. There was therefore no basis on which the Tribunal could find those costs to be payable as service charges.

78. Accordingly, the Tribunal finds that no service charges were payable in respect of such asserted contractual costs, which fall to be dealt with as costs if claimed as such- as to which see below.

79. For completeness, the Tribunal also records that the Respondent made a number of mentions, particularly in his written case, about being a person of significant control in respect of the company. He had submitted a form to Companies House. However, that appeared to be on the basis of a 25% interest, whereas the Respondent's share was one of eight given that the Applicant is the freeholder of the Estate as a whole. There was some questioning of Ms Gell by the Respondent, in response to which she said that the Respondent was not entitled to lodge such a form. In any event, the Tribunal considered that had no impact on the Applicant's ability to demand service charges from the Respondent and on the Respondent's obligation to pay those.

80. The Respondent also referred to himself as a joint freehold owner of the Estate but that is not correct. Whilst it is not an uncommon misconception on the part of members of companies such as the Applicant and in respect of land owned by the given company, it is the company alone which owns the freehold. The Respondent and others in a similar position are not owners of the land, rather they own one or more shares in the company.

Administration Charges

81. For the avoidance of doubt, the Tribunal was provided with no evidence that any sums claimed as contractual costs had been demanded, at all and certainly not validly, as administration charges prior to the issue of proceedings. Similarly, there was no evidence that any subsequent costs had been demanded as administration charges.

82. The Tribunal determined that no sums in respect of costs were payable as such charges.

The County Court issues

Claim in relation to service charges under the Lease

83. The County Court issues have been considered by Judge Dobson alone, having regard to the findings and determinations of the Tribunal in respect of the Residential Lease service charges.

84. The claim was allocated to the small claims track.

85. The answer in respect of this aspect of the claim is relatively simple. The Tribunal has determined on the evidence presented that the service charges were payable and reasonable in the sum of £3230.73.

86. However, the claim included £18.65 which related to the period 21st September 2020 to 29th September 2020, but which had been demanded on 23rd March 2020. As identified above, a large portion of the originally made claim had been struck out, more particularly charges during a period to 20th September 2020.

87. It was not apparent to the Court whether the strike out related to any charges demanded during the period or only to such of the charges demanded during the period as related to that period, so that charges which had been demanded during the period, but which included charges for a, short, time beyond that period were also struck out or were not. It was abundantly clear that the Applicant's position was the latter. However, the Applicant had commenced proceedings including a majority of claim which it was not able to bring, so did not start from a strong position, and had not explained anything about the terms of the Order and why it was asserted the charges were still payable.

88. At £18.65, the sum was very small and the Court considered did not merit any detailed attempt to discern the Applicant's reasoning if not clearly identifiable. The Court determined that irrespective of it otherwise being reasonable, it was for the Applicant to demonstrate that sum survived the strike out of much of the claim and had failed to and so the Court disallowed that part of the claim.

89. The Applicant succeeds in the balance sum of £3212.08. .

90. The Court notes that the claim made for interest related to the period from 29th September 2020 in respect of sums invoiced on that date and then from the later dates of other invoices, a revision of the original claim for interest the majority of which was on the part of the original claim struck out. The claim was made in the Claim Form on the original claim at the rate of 8% per year. There was no contractual rate provided for in the Lease.

91. As Mr Rowan accepted, the question of whether to award interest and at what rate is within the discretion of the Court. The Court considers it appropriate to allow interest in principle. In that regard, it should be recorded that the Respondent argued that the Applicant should not be entitled to interest on the basis that the claim ought to have been resolved earlier. However, that argument is not accepted. The sums were outstanding and payable.

92. For some time now, the most common rate awarded by the Court has been 2%, reflecting very low base rates, although those have risen during the last quite a number of months and including a fair proportion of the period for which interest is claimed. It is not practical to adjust the claim for interest for each particular rise, rather a broad approach is appropriate.

93. Taking matters overall, the Court would allow a rate of 2.5%, although that would be on different sums demanded at different times and so attracting different periods of interest. However, given the modest sum involved, the Court considers the most appropriate approach to provide for a round figure for interest. The Court awards the Applicant interest of £200 from September 2020 or where later appropriate and to date.

94. Therefore, the Applicant is entitled to judgment for £3412.08.

Costs and fees- Court and Tribunal

95. There are different jurisdictions of the County Court on the one hand and the Tribunal on the other hand in respect of costs, although both have a jurisdiction pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in respect limiting or preventing the recovery of legal costs of litigation as on the one hand service charges and on the other hand administration charges.

96. That aside, the regimes in respect of awards of costs as between parties are quite different. The Tribunal's jurisdiction falls to be exercised by the Tribunal members as a whole: the Court's jurisdiction is a matter for the Judge alone. The two were kept distinct. There are a number of elements to address such that the costs issue forms a considerable part of this Decision, which objectively it ought not to need to.

Matters regarding costs in respect of the Tribunal proceedings

97. The matter taken first in the hearing was an application for costs to be paid by the Respondent to the Applicant of the Tribunal proceedings pursuant to rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013. However, that was not the element considered first and this Decision takes costs matters in the order of their consideration by the Court or Tribunal as the case may be.

98. The matter first considered was whether to grant the section 20C and paragraph 5A applications. Those were made orally by the Respondent in response to the Tribunal asking the Respondent whether he wished to make them and having indicated the Tribunal's powers. The Tribunal took that approach with a little caution bearing in mind that the Respondent had not made any written application and had not otherwise mentioned the matters. The Tribunal was also mindful that the Directions had said such applications must be made by a specified date. However, the Tribunal did not consider those bound them. Equally, the Applicant made the rule 13 application first orally at the hearing and the Tribunal considered there was not reason to prevent the Respondent doing the same and being aware of enough to decide whether to do so.

99. The Respondent said that he always wanted to reach an agreement and there was no logic to him stringing matters out but the parties had gone round and round. The Applicant replied that the Respondent had sought to make a point about the work he wanted doing and that it would be inequitable for the costs to solely fall on the other seven lessees.

100. The Tribunal refuses the Respondents applications in respect of costs after 10th May 2023 but grants it in respect of any costs of Tribunal proceedings prior to that date, if any.

101. Section 20C (3) of the 1985 Act, provides "the … Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A are equivalent although not identical and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

102. The provisions of section 20C were considered in *Re: SMCLLA (Freehold) Ltd's Appeal* [2014] UKUT 58, where the Upper Tribunal held in paragraph 27 that:

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances".

103. In *Conway v Jam Factory Freehold Ltd*, [2014] 1 EGLR 111 the Deputy President Martin Rodger QC suggested that, when considering such an application under section 20C, it was:

> "essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make".

104. 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, which is the position here. Another may be which party succeeded and to what extent, although that is only one factor and not determinative. Whilst there is caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case.

105. The position in this case is that the Applicant succeeded in respect of most of its claim as reduced and there are only 8 lessees, 7 excluding the Respondent. Such costs as are charged by the legal representatives will have to be paid by the Applicant and the Applicant will have to obtain the funds for that from the lessees and/ or members- in practice the same people. The effect of the applications being granted would be to remove or reduce the contributions of the Respondent but not to reduce the costs themselves and so would be likely to increase the contributions of others.

106. The costs claimed by the Applicant against the Respondent as a party were those following the strike out of much of the original claim and so deal with the reduced claim. That is not of course the entirety of the legal costs which are likely to have been incurred- work was undertaken prior to the issue of the Claim Form and in the early stages of the dispute. Whilst there were no Tribunal proceedings at that time, as the

Tribunal cannot be certain that there were no costs which could possibly be treated as Tribunal costs, the Tribunal deals with any such costs prior to the strike out for the avoidance of doubt. As ¾ of that original claim has fallen, the Tribunal considers that it is just and equitable for any costs which may be regarded as costs of the Tribunal proceedings and were incurred prior to the strike out to be disallowed from being recovered pursuant to section 20C and paragraph 5A.

107. The Tribunal considers that it is just and equitable not to prevent recovery as service charges or administration charges any subsequent costs.

108. Turning to the Applicant's rule 13 application, that is refused, for the reasons explained below.

109. The basic power of the Tribunal to award costs is found in section 29 of the Tribunals, Courts and Enforcement Act 2007, which states that costs shall be in the discretion of the Tribunal but subject to, in the case of this Tribunal, the Rules. The Rules then proscribe that discretion substantially.

110. Rule 13 provides that:

> The Tribunal may make an order in respect of costs only –
> a) where there are wasted costs
> b) if a person has acted unreasonably in bringing, defending or conducting proceedings……

111. The leading authority in respect of the rule 13 (b) is the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Alexander (and linked cases)* [2016] UKUT 290 (LC) (referred to below as "*Willow Court*"). The Upper Tribunal decision provides guidance rather than any firm rules or tests. It was explained in a further decision of *Laskar v Prescot Management Company Ltd* [2020] UKUT 241 (LC), that Willow Court suggested "an approach to decision making which encouraged tribunals to work through a logical sequence of steps, it does not follow that a tribunal will be in error if it does not do so." The question is "whether everything has been taken into account which ought to have been, and nothing which ought not, and whether the tribunal has explained its reasons and dealt with the main issues in such a way that its conclusion can be understood, rather than by considering whether the Willow Court framework has been adhered to". The Upper Tribunal emphasised:

> "That framework is an aid, not a straightjacket."

112. In *Willow Court*, the Upper Tribunal suggested three sequential stages should be worked through, which is summary amount to the following:

> Stage 1: Whether the party has acted unreasonably. If there is no reasonable explanation for the conduct complained of, the behaviour

may properly be treated as unreasonable and the threshold for the making of an order will have been crossed.
Stage 2: Whether the tribunal ought (in its discretion) to make an order for costs or not. Relevant considerations will include the nature, seriousness, and effect of the unreasonable conduct.
Stage 3: Discretion as to the amount of the costs order. Again, relevant considerations include the nature seriousness and effect of the conduct.

113. Whilst it is not strictly necessary to work through those stages, the Tribunal considers that in this instance, and indeed in most instances, taking up the suggestion of the Upper Tribunal is the appropriate course to adopt, starting then with stage 1.

114. The burden is on the applicant for an order and orders are to be reserved for the clearest cases. Rule 13(1)(b) is quite specific that an order may only be made "if a person has acted unreasonably in … defending or conducting proceedings". Under the Tribunal Procedure Rules, the word "proceedings" means acts undertaken in connection with the application itself and steps taken thereafter (rule 26). Such an application does not therefore involve any primary examination of a party's actions before an application is brought (although pre-commencement behaviour might be relevant to an assessment of the reasonableness of later actions in "defending or conducting proceedings").

115. So, has the Applicant demonstrated such unreasonableness? The Tribunal determines not.

116. It is right to say that the matters argued by the Respondent were not successful in reducing service charges payable and that the only reductions were the point identified by the Tribunal in respect of the lime trees any extent to which contractual costs had been claimed as service charges or administration charges. The Tribunal considers that it is not correct for it to be asserted on behalf of the Respondent that he could do little other than dispute the reasonableness of service charges. The dispute could have been much more limited, or potentially avoided entirely. The Tribunal proceedings of course followed the majority of the original claim being struck out.

117. However, there is some distance between, on the one hand, running some arguments about points that are not successful and, on other hand, defending proceedings in a manner which is unreasonable. Failure to pay does not constitute unreasonableness in relation to the particular proceedings at stage 1 of considering a Rule 13 application (although it may have been relevant at stage 2).

118. The other point made by Mr Rowan was that he said the Respondent had broadly conceded in saying that he would accept the money to be due and payable albeit the Respondent had not said that the full sum was reasonable. The Tribunal did not regard that as an entirely correct summary of the Respondent's position, which had rather been an offer

to pay on certain conditions being met but was otherwise that he, perhaps reluctantly, would now pay going forward rather than a specific acceptance of the charges to date. Whatever other relevance that may have, the Tribunal did not find it created unreasonableness in defending the proceedings.

119. The application for Rule 13 costs against the Respondent falls at stage 1 of the steps referred to in Willow Court. The other stages do not require consideration. In terms of fees, there were none for the Tribunal proceedings and so no determination is required.

120. It merits stating, in light of the determinations by the Court in respect of Court costs and of which the Tribunal is aware, that no application was made on behalf of the Applicant that the Tribunal should consider an award of costs on any other basis.

Matters regarding costs in respect of the Court proceedings

121. In relation to the section 20C and paragraph 5A applications, the Court adopts the same approach and for the same reasons as the Tribunal. It is not necessary to repeat the matters set out in the Tribunal costs part of this Decision.

122. The only point which requires any additional comment is with regard to costs prior to May 2023, which the Court considers are likely to be predominantly costs of the Court proceedings (see above as to the possibility of some costs which could be regarded as Tribunal costs). Those costs related to the attempt to bring a claim including claims previously struck out and at a far higher value than the sum remaining after the strike out- and more so the sum in which the Applicant succeeded. For that reason, the Court considers it just and equitable that costs of and incidental to the Court proceedings incurred prior to May 2023 are disallowed in full as being recoverable, whether as service charges or administration charges.

123. In relation to whether there ought to be an award of costs as between the parties to the County Court proceedings awarded as costs of those proceedings, the Court has first considered how to exercise its discretion as to costs, applying the Civil Procedure Rules ("CPR"), including whether to make an order as to costs and, if so, in what manner. That is not without its difficulties as the length of this part of the Decision indicates.

124. The Court has determined that it is appropriate to make an order as to costs. The Court moves on to consider which party was successful and whether there is a reason to depart from costs being awarded to that party and in particular CPR 44.2 (4). It is apparent that the Applicant succeeded in the large majority of its claim as reduced, where no claim is made for costs incurred prior to that reduction. The Applicant is determined by the Court to have been the successful party.

125. The Court has considered whether there is any reason to depart from the successful party being entitled to costs. The Court identified no other factor, most obviously but not exclusively conduct, supporting taking a different approach. Whilst the Court is mindful that the Applicant has not received everything claimed in its claimed as reduced after the strike out, it has succeeding with the substantial majority and the Court does not consider it appropriate to make an order for payment of a percentage of the overall costs.

126. The Court determines that the Respondent shall pay the Applicant's costs of the Court proceedings, the amount of which is assessed below.

127. In terms of the amount of those costs, the first matter of relevance is that the claim has been allocated to the small claims track and the overwhelming likelihood is that it would always since the strike out have been allocated to that track. Even if the Court had not decided at the hearing to allocate, it could have restricted costs to those payable on the small claims track pursuant to CPR 46.13. If the claim had been allocated prior to the strike out and not then re- allocated, the Court would have considered that and the appropriate value of claim which ought to have been brought but that is not relevant in the event. The Applicant would in the normal course therefore only receive the level of costs applicable in the small claims track. Pursuant to CPR 27 (2), that would be the appropriate level of fixed legal costs, only £100.00 plus VAT, on issue of proceedings and the court fee, together with some expenses where appropriate, unless a party had behaved unreasonably.

128. Mr Rowan submitted that the costs award should not be limited to that in light of a contractual entitlement to costs, relying on an oft- quoted authority of *Chaplair v Kumari* [2015] EWCA Civ 798. The Court has also borne in mind the earliest often quoted authority about contractual rights to indemnity costs, *Gomba Holdings Ltd v Minories Finance* [1993] Ch. 171 CA, which involved different circumstances but essentially said that the contractual right takes priority.

129. That prompts two matters to address- is there such an entitlement and if so, what effect does it have?

130. The Court agrees with Mr Rowan that paragraph 2 of Schedule 4 enables the Applicant to recover costs incurred "for the purpose of or incidental to the preparation and service of a Notice under section 146" and that is ample to cover the court proceedings. The Court notes that the Applicant's representatives have made several references to potential forfeiture arising from the Respondent's breach of covenant in failing to pay service charges, for example in their correspondence [92, 106, 164 and 168]. It follows that there is an entitlement to contractual costs.

131. One particular matter raised by Mr Rowan was that the provision in the Lease refers to "all costs….."and he submitted that meant that the costs should be assessed on an indemnity basis, that is to say that proportionality should not apply and that costs should be assumed to

be reasonable unless the contrary is demonstrated. The Court accepts that the provision says nothing about reasonable costs or even all reasonable costs, although the emphasis would then be on all and not on reasonable in any event. The Court accepts that the provision therefore requires the Respondent to pay the Applicant's costs on an indemnity basis, so that where there is doubt that should be determined in favour of the Applicant (CPR 44.3(3). The Court further accepts that proportionality does not apply (CPR 44.3(2).

132. That is not however, the end of the assessment. The contractual provision is not the be all and end all. It is instead a factor for the Court to take account. The Court's discretion remains intact- it is not trumped by the contractual provision- and the Court retains a power to depart from the contractual position. The costs order is made pursuant to section 51 of the Senior Court Act and not the contract. However, the discretion should ordinarily be exercised so as to reflect the contractual right (and here also in the manner it must be exercised in relation to indemnity costs).

133. So, the question is what sum should be awarded to the Applicant in respect of costs of the Court proceedings, bearing in mind the allocation to track and the other circumstances but taking account of the contractual provision. To what extent should the contractual provision result in a variation of the usual very modest provision in the small claims track by way of making appropriate an increase in the costs which should be awarded? The Court has considered CPR 44.3, although it is not practical to go through all of the factors set out and so only the most pertinent are mentioned below.

134. Mr Rowan also argued that the costs of the court proceedings include for these purposes the costs of the proceedings in the Tribunal, relying again on *Chaplair*. That is a more difficult argument.

135. The Court is mindful that the interplay of Court proceedings and Tribunal proceedings in respect of legal costs awards has nevertheless had a troubled history. However, it has been established in The Court of Apeeal *The Mayor and Burgesses of the* London Borough *Of Tower Hamlets v Khan* (2022) EWCA Civ 831 (and apparently resolving a conflict between two decisions, *Avon Ground Rents Ltd v Child* (2018) UKUT 204 (LC) and *John Romans Park Homes Limited v Hancock [2018] UKUT 249 (LC))* that Court proceedings and Tribunal proceedings are different, notwithstanding that within Court proceedings a matter which could be determined by a Court- the payability and reasonableness of service charges- is transferred for determination by the Tribunal.

136. The usual position is that the separate costs provisions for each of the Court- section 51- and the Tribunal- section 29 of the Tribunals, Courts and Enforcement Act 2007- apply to the respective proceedings before each body. And only the Court can deal with costs of Court proceedings: similarly, only the Tribunal can deal with costs of Tribunal proceedings.

That is not now unduly complex, except where contractual costs provisions apply. There it remains quite problematic.

137. Case decisions make it clear that the County Court has in given instances assumed that where there is a contractual right to costs, the Court has the power to give effect to that by an order that, applying the approach to this case, the Respondent pay the Applicant's costs of the proceedings before the Tribunal in addition to an Order in respect of the costs before the Court.

138. The Court of Appeal in *Chaplair cited the following passage from Gomba:*

> "In my opinion, it is not a proper exercise of a judge's discretion to refuse to allow a successful litigant to recover his contractual entitlement to costs because the judge considers that a lessor has an unfairly strong bargaining position or it is desirable that the courts keep a careful control of costs in undefended possession claims. Of course a landlord cannot by contract provide that he should recover a greater sum by way of costs than the costs that he has actually and reasonably incurred"

139. It then said in paragraph 37 as follows:

> In my judgment, it follows that the judge had power to make an award of costs having regard to the terms of the lease. Moreover in the present case the judge went on to exercise that discretion. He was entitled to take into account the costs before the LVT because they formed part of the costs covered by the contractual right. He was also entitled to take into account the costs occurred in pursuing the claim on the SCT. Because Chaplair had a right to all its costs, it was not restricted to the fixed costs which can be awarded under the CPR in a case on SCT."

140. That addresses the right to rely on the contractual entitlement in respect of costs of Court proceedings but would also suggest that the Court can take account of the costs of the Tribunal proceedings. The suggestion is that the Applicant has a contractual right to costs and in failing to pay them the Respondent is in breach of the lease and so the Applicant in entitled to damages for breach of contract. Hence there would not be a claim for costs but rather a claim for breach of covenant, where it just happens that the sums claimed relates to legal costs.

141. However, it is also not clear that sits well with *Khan*. It is inconsistent with the two separate sealed boxes created by *Khan*. It requires the Court to have an ability to deal with Tribunal costs which *Khan* holds the Court does not have.

142. It is right to say that the Applicant has framed a claim for an amount of costs as a contractual one. However, that is for a fixed sum, a sum not previously demanded- and so a sum which the Respondent has not obviously failed to pay- and a sum which related to a much larger claim most of which has been struck out and finally where Mr Rowan said that the Applicant only claims costs since the strike out Order. So, the

costs which formed part of the original contractual claim at issue are no longer pursued (and if they were, there is no apparent breach by the Respondent at the time of issue of proceedings). In *Avon,* various other potential issues were identified (see e.g., paragraphs 35 and 36). The Court does not consider that *Chaplair* identified those issues, still less answered them.

143. The Court determines that it may be in due course that the Applicant will demand costs as service charges or administration charges and those will be payable by the Respondent subject to his entitlement to apply for a determination of their reasonableness and a determination of that. There may of course be costs incurred in those proceedings and a desire to subsequently recover them, creating the potential for a never- ending series of cases about cost incurred in pursuing the previous case. That can only be regarded as utterly unattractive. In the wider world, a better solution is required but is not currently identifiable.

144. Returning to the immediate situation, the Court determines that the Applicant has not demonstrated a claim for breach of contract in respect of non- payment by the Respondent of the costs of the Tribunal proceedings which enables the Court to make any Order in respect of those costs. Therefore, the boxes remain sealed and the Court can only make an Order in respect of costs of the Court proceedings.

145. There is an additional practical problem, which is that the Applicant's solicitors have provided a single schedule of costs. There is no hint of the extent to which the costs related to matters in the Court proceedings on the one hand and to costs related to matters in the Tribunal proceedings on the other hand. The Court is left to do the best it can with that on the information that is available.

146. Whilst the Court does that, it should also be made very clear that the very firm expectation is that parties will produce a schedule of costs for the Court elements on the one hand and the Tribunal element on the other. Parties should not expect any favour if there is uncertainty whether costs were costs of Court proceedings or of the Tribunal proceedings where that affects the amount which may be awarded.

147. In that regard, the Court notes that for the large majority of the time since the strike out of much of the claim the proceedings have principally proceeded in the Tribunal. The judgment of the Court in respect of the claim has been predominantly determined by the assessment made by the Tribunal of the payability and reasonableness of the service charges, the decision by the Court being almost inevitable. That also reflects how the hearing proceeded. There was the minor adjustment of £18.65 but some way under 1% of the sum in question, so inconsequential for this immediate purpose. The Court accepts that there has also been interest to consider and there is likely to have been some limited other work separate to Tribunal matters.

148. Doing the best that it can, the Court therefore determines that 85% of the case since the transfer has related to Tribunal matters and 15% to the Court proceedings.

149. The starting point for the assessment of costs of the Court proceedings is therefore 15% of the sum sought on behalf of the Applicant on the statement of costs, namely £8572.42. Given the need to approach the costs by applying a percentage of the overall figures, the Court proceeds to consider the costs as a whole and then to apply 15% of the figure arrived that. The Court emphasises that is not by way of undertaking an assessment of the costs of the Tribunal proceedings, such that a different view may be taken by a Court or Tribunal (as the case may be) subsequently but by way of identifying the appropriate sum for the 15% to be.

150. The Court has noted the excessive and not reasonable fee earner grade- grade A in a small claim and someway even from the highest ones of those. The Court has noted the points made by Mr Rowan about the effect on the Estate of the lack of payment by the Respondent but considers that they pale against the actual amount of the claim. The Court is in no doubt as to lack of reasonableness. The case would be entirely appropriate for a grade C fee earner supported as much as possible by a grade D fee earner and that is the most that the Court considers were not be unreasonable. The Applicant can employ a grade A fee earner if it wishes but that does not make it appropriate to award the costs of one. Mr Rowans gallant attempt to suggest that instruction of a grade A fee earner was appropriate because Counsel had not been instructed until the final hearing and the fee earner had drafted documents could only fail in the circumstances of the case.

151. The charging rate for that fee earner of some £285 per hour was also excessive and not reasonable, being even some way above the relevant Grade A rate where grade A is appropriate but need not be dwelt on. The relevant grade C rate would be £178 per hour if it were appropriate to consider the costs on an hour- by- hour basis, which the Court determines may be doubtful as the suitable approach given the size of the claim but of course doubt must determined in favour of the Applicant and so the grade C rate is accepted for work above grade D level. That rate alone demonstrates that the claim as made would have been substantially reduced for the above reason alone and irrespective of anything else. No issue arises with the grade D rate for some of the work, although if an assessment had been undertaken on the usual standard basis it may have been considered that more work at grade D level and less even at grade C level was appropriate for a claim of this size.

152. In terms of work undertaken, in general the Court accepts that as not unreasonable, although it does find the amount of time on Applicant's submissions and replies to be more than the maximum time not unreasonable given the case as already pleaded in the County Court and the limited actual challenges raised by the Respondent.

153. The Court has determined that the effect would be to make the appropriate award one of £2500.00 plus VAT of solicitors' costs. The Court sets out some particular factors it regarded as relevant in arriving at that figure and accepting that CPR 44.4 (2) requires regard to be had to a number of factors, which the Court has done.

154. The Court notes the amounts involved were relatively low, which is relevant; the Court does not regard there to have been particular complexity or novelty and hence to have required (or otherwise there to have been a requirement for) specialist knowledge; the Court does not regard there to have particular responsibility involved on the part of the solicitors, in which regard Mr Rowan's submission that there was because of limited involvement of Counsel was somewhat optimistic given the size and nature of the case, but does also note that the matter had some importance to the parties. In addition, the regard to be had to the factors is in the context of indemnity costs and that context is relevant.

155. The net effect is that taking matters overall, the large majority of the Applicant's solicitors time is allowed and so the large majority of the costs at the reduced rate which is found not unreasonable. The reduction overwhelmingly relates to those charging rates.

156. Counsel's fees are also determined to be much too high. Counsel is 2022 call, so not unduly senior and indeed could have been more senior and entirely reasonable for the case, which is by no means to suggest that anyone more senior than Counsel instructed was required. The fees may be regarded as reasonable in the right case even for someone of such call. However, they are, alone and particularly allowing for VAT, not far off the amount the Applicant has recovered.

157. The fixed advocacy fees for a fast- track case valued between £3,000.00 and £10,000.00 are £690.00 plus VAT, necessarily including appropriate preparation. Those do not specifically apply of course because the case did not proceed in the fast track. Instead, it proceeded in a lower track and is only just within (to the bottom end) the band quoted. Even by that most rudimentary of measures and accepting the indemnity basis not the standard basis, the fees are not reasonable for the circumstances of the case. The Court determines that the most which can be considered not to be unreasonable in the circumstances is £1000.00 plus VAT, so £1200,00 in total.

158. The total of those sums for solicitor's costs and Counsel fees is £4200.00. 15% of that is £630.00. That is the amount of the costs order made in favour of the Applicant and payable by the Respondent.

159. In respect of the Court fee, the position is different. The fee was payable in full for the Court proceedings. That is not to say that it is properly payable as claimed.

160. The Court awards the sum which would have been payable if the Applicant had issued proceedings for the correct sum or thereabouts. The claim is for the fee to issue the original claim but that cannot be regarded as appropriate where the majority of the claim was struck out or was not properly service charges or administration charges (the contractual costs claimed as part of the claim). Hence the fee awarded is £205.00. .

161. There is no need to revisit any of the above to consider whether the figures are proportionate given the indemnity basis of assessment. The Court notes that the total of the sums, even after significant reductions, exceed the level of the claim itself, although that is not the be all and end all of proportionality. The relevant percentage is considerably less in any event.

162. The Applicant's costs and fees of the Court proceedings are therefore summarily assessed in the overall sum of £835.00.

163. For the avoidance of doubt, the Court echoes the determination of the Tribunal that the Respondent did not behave unreasonably, in this instance within the meaning of that for the purpose of CPR 27 (2) but equally cannot identify that would take matters further than the effect of the contractual costs provision in any event.

Concluding comments

164. The Court and Tribunal were told that the Respondent had said that he would pay the full sum in the claim (as reduced by the strike out) on certain provisos, as he termed them. Those were that he was copied into everything from the agents and that the bins were moved from their current location and the gates attended to. However, it is important to emphasise that the Court and Tribunal put that out of their minds when considering the appropriate decision. The Court and Tribunal are well- versed in parties and lay representatives, although not to the complete exclusion of professional representatives, mentioning such matters and needing to put them to one side. The Court and Tribunal did not in those circumstances consider that they were unable to continue to reach the Decision.

165. In relation to this dispute arising, the Court and Tribunal consider that the Respondent has been unrealistic about the amount of say he can properly expect to have in relation to the management. He is one of eight lessees and not a director of the Applicant company. He is entitled to his say but not to dictate the outcome.

166. However, the Applicant is not without any responsibility for the situation because communication does not appear to have been all that it ideally would be. On both sides, it is vital to remember that the Applicant manages a small set of properties with a small set of lessees. The proper operation of that management will require the relevant contributions to be made by all lessees. A situation in which the lessees

better understand and all parties can work better together is only sensible. Ensuring that the lessees are informed as much and as clearly as practicable will assist. That is within reason, of course. A lessee's expectations must be realistic and not involve undue strain on management time and fees. However, within that limit, the better course is likely to be the provision of information rather than lack of it, the latter having potential to involve as much or greater time in correspondence about the refusal to provide information than the time to provide it.

167. The Tribunal urges the parties to work together to ensure the most effective and efficient management of the Estate. Time and expense in litigation, whether before the Court or the Tribunal, are in no-one's best interests. No more needs to be said in this Decision other than to express the hope that the parties take these observations on board.

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decision

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

2. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

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

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

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

5. A written application for permission must be made to the court at the Regional Tribunal office which has been dealing with the case. The date that the judgment is sent to the parties is the hand-down date.

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

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

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

    2. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the Regional Tribunal office within 21 days after the date the refusal of permission decision is sent to the parties.

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

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

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