FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BZ/LSC/2021/0053**
Property	**:**	**6 Lee Close, Rainhill, Prescot, Merseyside, L35 0QT**
Applicant	**:**	**Mr James Wood**
Representative	**:**	**Mr David Wood (McKenzie Friend)**
Respondent	**:**	**Quarry Park Management Company Limited**
Representative	**:**	**Mr Christopher Larkin (Counsel)**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s27A** **Landlord and Tenant Act 1985 – s20C** **Commonhold and Leasehold Reform Act 2002 – Schedule 11 para 5A**
Tribunal Members	**:**	**Tribunal Judge L. F. McLean** **Tribunal Member Mr H. Lewis FRICS**
Date of hearing	**:**	**22nd June 2023**
Date of decision	**:**	**13th July 2023**

DECISION

Decisions of the Tribunal

(1) The sum of £1320.040 is payable by the Applicant to the Respondent by way of service charge for the service charge financial year 2020-2021.

(2) The sum of £3000.00 is payable by the Applicant to the Respondent by way of service charge for the service charge financial year 2021-2022.

(3) The sum of £3000.00 is payable by the Applicant to the Respondent by way of service charge for the service charge financial year 2022-2023.

(4) The Tribunal is unable to determine the amount payable by the Applicant to the Respondent by way of service charge for the service charge financial year 2023-2024.

(5) Under Section 20C Landlord and Tenant Act 1985, no costs incurred by the Respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

(6) Under the Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A, any liability of the Applicant to pay any administration charges is extinguished in respect of litigation costs relating to these proceedings.

(7) Under Rule 13(2) of the Tribunal Procedure (First tier Tribunal)(Property Chamber) Rules 2013, the Tribunal orders the Respondent to reimburse to the Applicant the whole of the amount of any Tribunal fees paid by the Applicant in relation to these proceedings which have not been remitted by the Lord Chancellor.

The application

1. The Applicant has sought a determination pursuant to s.27A Landlord and Tenant Act 1985 as to whether he is required to pay to the Respondent certain sums by way of service charge.

2. In the original application, dated 16th July 2021, the Applicant referred to the service charge financial years set out below:-

    a. 2020/2021 - £1320.04
    b. 2021/2022 - £3000.00

3. At that time, the applicant also sought determinations for what were then the future service charge financial years of 2022/2023 and 2023/2024. During the course of proceedings, the amount of service charge demanded for

2022/2023 was confirmed to be £3000.00. The amount of service charge demanded for 2023/2024 was not clarified during the latter stages of the proceedings.

4. The Applicant seeks an order under Section 20C Landlord and Tenant Act 1985 that all or any of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings before the First-tier Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

5. The Applicant seeks an order pursuant to Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A, reducing or extinguishing the Applicant's liability to pay administration charges in respect of litigation costs.

Background

6. The Respondent is the current registered freehold proprietor of a development at Lee Close, Meade Close and Sumner Close, Rainhill, Prescot, Merseyside, L35 under HM Land Registry title no. MS156512 ("the Property"). Situated on each of Lee Close, Meade Close and Sumner Close are one or more purpose built blocks of flats. In total, there are 70 flats across the three sites.

7. The premises which are the subject of this application are located in the block of 18 flats known as Lee Close ("the Building").

8. The Applicant is the tenant of Flat 6 Lee Close, which is a 2-bedroom flat within the Building, as the current registered proprietor of a lease granted on 31st December 1981 for a term of 125 years from the date thereof, which was originally made between (1) the Quarry Park Housing Society Limited, (2) James Andrew Orr & Andrew Jonathan Orr, and (3) the Respondent ("the Lease"). The Respondent was originally merely a management company, but Quarry Park Housing Society Limited – the original landlord under the Lease – subsequently transferred its reversionary freehold interest to the Respondent.

9. The Lease provides for the Respondent to provide certain services, set out at clauses 5.1 to 5.10 and 6.1 to 6.2 inclusive. The Lease also provides for the Applicant to pay a service charge in relation to the Respondent's costs so incurred, and the method of calculation of the same is the core issue in dispute in this matter.

10. The final hearing took place remotely on 22nd June 2023 via the HMCTS Video Hearings Service. The Applicant appeared in person and was assisted by his father, Mr David Wood ("Mr Wood") as a McKenzie Friend. The Respondent was represented by Counsel.

11. The members of the Tribunal considered the parties' oral and written submissions and evidence and documents filed in accordance with the Tribunal's directions, which were comprised within an agreed hearing bundle of 250 pages.

Grounds of the main application

12. The Applicant's grounds of his application were set out in his initial statement of case which was originally dated 11th August 2022. In essence, the Applicant disputed the calculation of the service charges for the years in question, because he asserted that in relation to several of the services provided, the wording of the Lease meant that he was only required to pay towards the Respondent's costs incurred in relation to providing the services for the Building, not for the Property. The application particularly turned upon Paragraph 1(a) of the Fourth Schedule to the Lease, relating to roof repairs and whether the Lease provided for him to contribute towards the costs of repairs at the other buildings within the Property.

13. The Applicant also applied for orders under Section 20C of the Landlord and Tenant 1985 and Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A.

14. The Respondent initially submitted a statement of case in response, to which the Applicant submitted a short reply. In essence, the Respondent's case was that the Lease had to be interpreted in such a way that it required the Applicant to pay 1/70th of the Respondent's costs incurred in relation to providing all of the services for the whole of the Property.

15. The matter was previously listed for final hearing on 9th March 2023. Shortly before that hearing, the Respondent filed and served substantial additional evidence and a skeleton argument which raised novel grounds for opposing the application, notably estoppel by convention. In granting an adjournment, the Tribunal gave permission at that hearing for the Respondent to rely upon the additional evidence and directed the Respondent to prepare an amended statement of case, which it did. The Applicant was permitted to file and serve an amended reply and evidence in response to that. The parties resolved the issue of the costs of the adjournment between themselves without the Tribunal being required to make a ruling, but for future reference the Tribunal takes the opportunity to mention that (subject to any further submissions) it probably would have made an order for the Respondent to pay the Applicant's costs of the adjournment under Rule 13.

Issues

16. The issues which the Tribunal had to decide were:-
    a. In the Fourth Schedule to the Lease, is the Applicant required to pay towards the Respondent's costs of providing services for the Property rather than just the Building? In particular, in Paragraph 1(a) of the Fourth Schedule to the Lease, is the Applicant required to pay 1/70th of the Respondent's costs of carrying out repairs to the roofs across the whole of the Property?
    b. Alternatively, is the Applicant estopped from asserting that Paragraph 1(a) of the Fourth Schedule to the Lease requires him only to pay 1/70th of the Respondent's costs of carrying out repairs to the roof of the Building?

c. Is it just and equitable to preclude the Respondent from recovering its legal costs of the application through the service charge?
d. Should the Tribunal reduce or extinguish any administration charges sought from the Applicant by the Respondent?

Relevant Law

17. The relevant sections of the Landlord and Tenant Act 1985 read as follows:-

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

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

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

19 Limitation of service charges: reasonableness
(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

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

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

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

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

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

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

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

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

18. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides as follows:-

Limitation of administration charges: costs of proceedings
5A(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

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

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

Evidence

Agreed documents

19. Documents common to the parties included copies of service charge budget breakdowns and explanations for the Property from 2020 to 2022, copies of corresponding quarterly demands for payment, a copy of the lease dated 31st December 1981 for Flat 6 Sumner Close, a copy of the lease dated 31st December 1981 for 11 Meade Close, Land Registry Office Copies for the Property and the Lease, a copy of HLM's newsletter dated 19 January 2021, and a document entitled "Final Responses to Leaseholders".

20. Pursuant to clause 3.5.1 of the Lease, the Applicant is obliged "To contribute and pay one seventieth part of the costs expenses outgoings mentioned in the Fourth Schedule hereto".

21. Pursuant to clause 5 of the Lease, the Respondent covenants that it "will out of the money payable to it by virtue of clause 3.5 hereof provide for the general maintenance and upkeep of the Property".

22. The Fourth Schedule of the Lease sets out the "[c]osts expenses and outgoings and matters in respect of which the lessee is to contribute", including "[t]he expenses of maintaining repairing redecorating and renewing… the main structure and in particular the roof gutters walls and rainwater pipes of the Building".

23. The First Schedule of the Lease provides the definition of the "Building" in these terms:

> "...the flat (hereinafter called "the Flat") numbered 6 on the First floor of the Building (hereinafter called "the Building") known as Lee Close..."

24. The terms of each lease granted in respect of each of the 70 flats on the Property are identical, except for the address of the individual flat.

Applicant

25. The Applicant adduced a witness statement dated 12th April 2023, consisting of 21 paragraphs, together with two exhibits. Exhibit JW1 comprised a trail of emails passing between the Applicant and the Respondent's managing agents HLM; and Exhibit JW2 a trail of emails passing between the Applicant and the Respondent's debt collection solicitors Swaine Allen. The Applicant was questioned by Counsel for the Respondent.

26. The Applicant agreed that from when he purchased the Lease in 2016 until March 2021, he did not engage in any dispute about the apportionment of service charge costs under the Lease.

27. It was put to the Applicant that during that time he would have received budget breakdowns. The Applicant conceded that this was probably the case although he had no particular recollection. There was disagreement about the significance and implication of the layout of these budget breakdowns. It was suggested by Counsel for the Respondent that the breakdowns were obviously in relation to the whole of the Property whereas the Applicant identified that this was not expressly stated.

28. When questioned about this by the Tribunal, the Applicant said he was not sure what some of the figures meant or how they were arrived at. He said that most of the invoices submitted on behalf of the Respondent are illegible and he could not understand them. He added that he had spent time ringing up the Respondent's agents, HLM, to ask if he owed anything because he could not interpret the invoices and in his view they would make no sense to anyone. The Applicant also explained that he did not initially receive the notice of the increase of the service charge from £75pcm to £110pcm. He also said that he kept paying at £75pcm but did not receive any payment reminders. The Applicant said that HLM's employee, Laura Barry, had admitted to him on the phone that a few other leaseholders did not receive those letters either because it had not been a priority for them. However, the increase in service charge and / or the problem with the arrears caused him to lose a prospective sale of his flat. The Applicant's evidence was that he had assumed that the service charge demands had been prepared correctly, and he had no reason to look into it because the sums appeared to be about right. He asserted that he had no idea that the Respondent would be charging him for repairs to the other buildings on the Property until he looked more closely at the detail of the Lease and obtained advice on it. He also clarified that when he was informed of the increase verbally he initially paid £125pcm as this was what he had been told to pay, and then he was told he was in arrears so he paid extra

to catch up the payments. However, he then reduced the payment back to £75pcm in line with previous payments.

29. The Applicant disagreed with Counsel's suggestion that since he purchased the Lease, he had the chance to challenge the apportionment of service charge costs at the time and had never disagreed with it. His evidence was that he never gave it a second thought, but only that it was a reasonable amount for the maintenance of the Building and the insurance, so he never thought about whether it covered major works to the other buildings on the Property.

30. The Applicant conceded that he had legal representation when buying the Lease and at that time he had the chance to get advice on its provisions, but said that he had not personally reviewed it as a layman until it came to the current dispute.

31. Counsel for the Respondent suggested that the only way for the Lease to work was for the Applicant and all other leaseholders to pay 1/70th of all of the costs combined. The Applicant disagreed. The Applicant agreed with Counsel that it was in his interests for his flat and certain of the communal areas of the Property to be maintained, although he disagreed that it was in his interests for the whole of the Property to be maintained including the other buildings.

32. The Applicant also disagreed that the Respondent's "10 year plan" for the Property showed that the contributions of all of the residents of the Property would be balanced out and proportionate over time – he instead asserted that the 10 year plan showed only that certain works needed to be done and he considered that the works to the Building were included as a late addition.

33. It was also put to the Applicant that he was only seeking to raise the current dispute because the costs had escalated, whereas in the past he had reaped the benefits of the equal distribution of costs across the Property. The Applicant disagreed and said that he was not previously reaping the benefits because he did not think there were any.

34. There was also some questioning by the Tribunal around the likely respective costs of the different roof profiles of the various buildings on the Property. The Applicant considered that the roof for the Building was a larger square footage than at Sumner Close, whereas the overall roof at Meade Close was quite similar as it consisted of three smaller buildings. However, the Building is a row of 2 storeys so the roof is lower than the other blocks and so less scaffolding might be needed, and the impact of differing or uneven ground levels on cost was also difficult to estimate. It was also noted by Counsel for the Respondent that no exact measurements had been taken and any estimates were based on a visual assessment only of aerial plans.

35. The Applicant criticised the Respondent for preparing a 10 year plan for major works, as he considered it absurd to make cost estimates 10 years in advance where there was no detailed property condition survey in place. He conceded that he had not produced any evidence of his own as to the likely future costs of the works in question.

Respondent

36. The Respondent relied upon the witness statement of Callum Maxwell, dated 6th March 2023 and consisting of 9 paragraphs. Mr Maxwell testified in his capacity as a Property Manager employed by HLM Property Management Limited, the appointed managing agents for the Respondent in respect of the Property. He also adduced Exhibit CM1 which included a copy of the Respondent's aforesaid "10 year plan" and accompanying documents. Mr Maxwell was questioned by Mr David Wood.

37. At the outset of the cross-examination, Mr Maxwell conceded that he had no first-hand knowledge of the issues in dispute prior to January 2022 when he had entered the employment of HLM. Prior to that, the account for the Property was managed by Laura Barry and was transferred to him accordingly and so his knowledge of why the Respondent's "10 year plan" was created was based on conversations with the Respondent's directors and others. However, HLM had managed the Property for many years.

38. Mr Maxwell accepted that part of the 10 year plan involved works to roof of Meade Close which was already underway, along with health and safety door replacements at Sumner Close which was in process. He went on to confirm that the main reason for preparing the roof maintenance element of the 10 year plan was because some repair works to one of the roofs, carried out in 2012, had failed and a structural survey on the remaining roofs identified the need for replacement. It was also agreed that the health and safety works had been identified as necessary in the wake of the Grenfell Tower disaster.

39. Mr Wood put it to Mr Maxwell that, in contrast, it was stated in the Planned / Preventative Maintenance Schedule prepared by Lambert Smith Hampton dated 22nd June 2021 their surveyor was unable to gain access to the roofs of the Property, and suggested that the need for the roofline works to the Building was speculative. Mr Maxwell conceded that the roofline of the Building had not been inspected but he surmised that it would be coming to the end of its anticipated lifespan due to the age and character of the Building. Mr Wood suggested that it was not possible to say that the proposed works would be carried out, to which Mr Maxwell replied that the works were scheduled to be undertaken in accordance with the Respondent's directors commitment to the repair and maintenance of the property.

40. Mr Wood challenged Mr Maxwell regarding the historic form of the service charge budget sheets upon which the Respondent relied. Mr Maxwell agreed that for the 2021-2022 service charge budget, there was no indication as to which buildings the costs related or on which fund had been spent, and that leaseholders of the Building had no way of knowing that there was a massive amount of expenditure elsewhere on the Property. Mr Maxwell asserted that there was only one schedule because there was one set of charges based on a 1/70th apportionment. Mr Maxwell pointed to the sums involved and identified that the payment multiplied by 18 properties did not add up to the total, which indicated that the costs related to the whole development.

41. Mr Wood questioned Mr Maxwell about the manner in which the Respondent handled the dispute before the Tribunal proceedings began. Mr Wood pointed out that the Applicant first wrote to the Respondent's agents in March 2021, clearly setting out the disputed interpretation of the Lease, but the first indication of the Respondent's position on the legal dispute was not until the Respondent's Statement of Case was submitted some 18 months later. Mr Wood suggested that it would have been better to address the Applicant's dispute rather than to ignore it. However, Mr Maxwell said he was unable to comment on the handling of the dispute prior to his own appointment in January 2022.

42. When questioned by the Tribunal, Mr Maxwell was unable to confirm if the Respondent had known about the potential disputed interpretation of the Lease prior to the Applicant's letter of 21st March 2021.

43. Mr Maxwell also conceded the point raised by the Tribunal that there was no evidence presented as to the format which the service charge budgets had taken before 2020, and he was not himself in a position to give that evidence. He accepted that the 2020-2021 budget gave no labels or description as to how the sums were arrived at, the 2021-2022 budget provided slightly more information, but that there was no explicit mention of the 1/70th apportionment until the 2022-2023 budget.

44. When questioned about the budgeting principles of the Respondent's 10 year plan, Mr Maxwell conceded that the current estimate of £120,000 for the roof replacement for the Building was likely to be too low and that a figure of around £200,000 might be more accurate. He also confirmed that there was no sinking fund in place when the 2021 Planned / Preventative Maintenance Schedule was prepared, but that it was envisaged that a sinking fund will be accumulated in time for the works to take place. Mr Maxwell conceded that the sinking planning had been wholly inadequate until 2021. It seemed apparent that the current service charge contributions would have to increase even further if adequate provision is to be made for future costs of repair and renewal.

Submissions and Discussion

Applicant

45. The Applicant's starting point was that on wording of the Lease itself, from a combination of clause 3.5.1, the Fourth Schedule and the definition of "Building" in the First Schedule, the result is that the Applicant cannot on the face of the document be liable for repairs other than the Building only, and nowhere does it say he should pay for repairs to other buildings.
46. The Applicant disputed the Respondent's argument that, in effect, whatever the Lease actually says, everyone should pay a 1/70th share. Mr Wood asserted that if that's what the grantor of the Lease had wanted, they could easily have added that at the opening recital in the Lease, for example "comprising 3 blocks of flats known as MC, LC and SC (hereinafter 'the Buildings')…". Equally, Mr Wood noted that if the Lease had referred to Flat 6 Lee Close without then defining "the Building", and if the in Fourth Schedule

had actually referred to "the Buildings", then it would have been crystal clear to anyone buying the Lease that one had an obligation towards the cost of all 70 flats and the definition would not pose a problem.

47. Mr Wood asserted that it was not common to have developments where there are several blocks and people are asked to contribute towards all of them equally. He submitted that due to the very different constructions of the different blocks, most people would be concerned to discover they are liable to pay to cover works to other buildings which are bigger and which would have higher maintenance costs.

48. Mr Wood also observed that most people buying leases of flats would not have had adequate skills or knowledge on property matters and so would rely on legal advice from their conveyancing solicitors. He highlighted the relevance of this because the leading case law authorities in this area refer to commercial common sense in negotiations between commercial organisations; whereas here there was no negotiation as demonstrated by the identical lease terms across the different blocks.

49. Mr Wood referred to the service charge budgets in evidence before the Tribunal. He said that these do not generally make a clear apportionment of the costs and there was no evidence that this had ever been done since 1981. He also suggested that most residential leaseholders do not spend time checking their demands to make sure that they have been correctly demanded in accordance with their lease. It appeared that by chance there never was an occasion where there was a drastic or serious problem causing major cost only impacting one of the buildings, until 2020 when the roof repairs to Meade Close suddenly meant that a great deal of money had to be found, even though the leaseholders of the Building get no benefit from it.

50. Mr Wood drew the Tribunal's attention to the conduct of the Respondent's agents in 2020-2021 and their refusal to engage meaningfully with the Applicant's dispute as to interpretation and instead referred the matter to debt collectors. They did not engage with the legal merits of the dispute until October 2022. He suggested that this was relevant to the issue of whether the Respondent "comes to equity with clean hands" in relation to estoppel by convention.

51. On the issue of estoppel, Mr Wood said that the Applicant had done nothing to mislead the Respondent, whereas it is of the essence that the Respondent has to show that the Applicant has acquiesced in the Respondent's mistaken belief and that as a consequence the Respondent has been disadvantaged. Mr Wood said that the Respondent has suggested that creating the 10 year plan was a disadvantage, but that it was hard to see in any way that this has been encouraged by the Applicant because if works are needed then they are needed. He said that nothing the Applicant had done has remotely influenced what the Respondent has been doing, that they had had every opportunity to resolve the dispute, they had buried their heads in the sand and ended up with a contested application which was their responsibility alone.

52. Mr Wood further submitted that the Applicant has not sought to make any profit or gain over the years from his charges being less. He said it would appear that for many years everything trundled along with no one property being disadvantaged over another.

53. Mr Wood accepted that the wording of the Lease was problematic and questioned whether the Tribunal was able to rectify this somehow.

Respondent

54. Mr Larkin submitted that the Applicant had overly concentrated on the current cost issues in the budgets, but that the challenge goes well beyond the current situation. He suggested that the advantage and disadvantage of contributing to different costs of the various blocks will sway back and forth over the lifetime of the Lease, but the Applicant cannot stay quiet when this suits him and then jump up and down when it does not. Mr Larkin also identified the irony that the Applicant's position is in fact detrimental to his own interests, because if he were to succeed then this would lead to a permanent and severe shortfall in the service charge income and, in turn, significant neglect of the Building as well as the wider Property. Mr Larkin submitted that although the Tribunal cannot re-write the Lease, the Tribunal can look at it as a whole to give effect to the parties' clear intentions.

55. In that regard, Mr Larkin pointed out that the Building is part of a bigger development and the provision for a 1/70th split in clause 3.5.1 of the Lease clearly refers to all of the flats across the Property. Accordingly, he said that the original parties to the Lease must have intended that the service charge would pay for all parts of the Property equally. In contrast, he said it could not have been intended by the parties that the residents would pay for only part of the costs of any works, as this would not be acceptable to anyone.

56. Mr Larkin submitted that, reading the Lease as a whole, clauses 3.5.1, 5.3 and 5.8 and Schedule 4 are inextricably linked. The Respondent's obligations under Clause 5 relate to the upkeep of the Property, not just the Building. The contribution is clearly calculated by reference to all of those works and the Applicant is only obliged to contribute 1/70th, meaning that all costs of all works must be apportioned to each leaseholder at 1/70th. If the Applicant can enforce the terms at clause 5, then the Respondent must be able to do the same under clause 3.5.1. The Tribunal was also referred to the limitation in clause 5.8 of the Lease, that the obligation to repair is limited to the funds available, meaning that a permanent shortfall in service charge income relieves the Respondent of the obligation to carry out repairs.

57. Mr Larkin set out that the definition of "the Building" is only distinct from "the Property" in that "the Property" includes the common areas of the development, an argument which was already well developed in his skeleton argument and considered in more detail below.

58. Mr Larkin turned to the issue of estoppel by convention. On the subject of whether the Respondent was "coming to equity with clean hands", he

suggested that any failure to engage constructively with the Applicant's dispute fell short of "unclean hands".

59. He then dealt with the length of time which had elapsed. He noted that the Lease was granted over 41 years ago and the unexpired residue of the term created thereby was purchased over 16 years ago. He said that these were two significant periods of time. It was accepted that there had never previously been an issue raised or any query made of the 1/70th proportion. Although much was made of the view that the Applicant wasn't aware of the 1/70th apportionment, Mr Larkin submitted that the documents say otherwise. He suggested that although certain definitions did not appear in the service charge budget, there was more than enough to alert the Applicant to what was happening in that the calculations do show a division of the costs by 70 in 2020 and 2021. He further identified that the 2022-2022 budget expressly referred to the cost "per flat" and a division by 70 but that this was arguably unnecessary because it was obvious.

60. Mr Larkin referred the Tribunal to the case authority of *Jetha and another v Basildon Court Residents Company Ltd* [2017] UKUT 58 (LC). He said there was a common assumption that each leaseholder pays 1/70th and referred to the budget breakdowns as an example of how that was communicated. He reminded the Tribunal that there doesn't have to be a concluded agreement – just an assumption which is communicated and relied upon. Mr Larkin said that the Respondent's evidence was that it has continued to manage the Property on this basis and collected monies on this basis. It has dealt with repairs and maintenance including the preparation of the "10 year plan". He said it would be extremely detrimental to the Respondent if the Applicant is not estopped, both in terms of the 10 year plan and also general maintenance obligations.

61. During the course of debate with the Tribunal members, Mr Larkin courteously invited the Applicant to reconsider whether he wished to press the Tribunal to reach a binding decision, which both he and the Tribunal members had already identified could be seriously detrimental to his long-term economic interests under the Lease if the Tribunal found in his favour on the narrow issue of the Lease interpretation, or whether on reflection he wished to withdraw his application. The Tribunal permitted a short adjournment for the Applicant to consider. However, when the hearing was reconvened the Applicant confirmed that he wanted the Tribunal to make a determination.

Determination

In the Fourth Schedule to the Lease, is the Applicant required to pay towards the Respondent's costs of providing services for the Property rather than just the Building? In particular, in Paragraph 1(a) of the Fourth Schedule to the Lease, is the Applicant required to pay 1/70th of the Respondent's costs of carrying out repairs to the roofs across the whole of the Property?

62. Clause 3.5.1 of the Lease is the only provision in the Lease which sets out the proportion of the contribution required by the leaseholder towards the cost of repairs.

63. The Applicant asserted in his statement of case that he is not responsible for repairs to Meade Close (and, presumably, Sumner Close) because of the Fourth Schedule, as it only makes him responsible for repairs to Lee Close, being "the Building" as defined in the Lease.

64. It follows that if there were any maintenance, repairs, redecoration or renewal of the main structure (hereinafter referred to as works) of Lee Close, the Applicant would only be responsible for 1/70th of the costs, expenses and outgoings in relation to the Building, even though there are only 18 leaseholders.

65. It was agreed between the parties' representatives that on a literal reading of the Lease, the inevitable outcome was that if works were carried out to any one of the buildings, the landlord could only ever recover a small proportion of the total cost because only the leaseholders of that particular building would be liable to contribute to it, and the contribution would therefore always be a fraction of the total. The Applicant's case has focused on his liability to contribute towards the costs of works at Meade Close. However, taking his argument to its logical conclusion, if there were any works to the Building then the Respondent could still only recover 18/70th of the costs, with the Applicant's contribution being 1/70th.

66. Pursuant to clause 5.8 of the Lease, the Respondent's repairing obligations are "…limited to the amount of the monies received by it under the provisions of Clause 3.5…". A permanent shortfall in the costs recoverable from the leaseholders relieves the Respondent from complying with its obligations pursuant to clause 5.

67. Accordingly the Tribunal is required to interpret the provisions of the Lease and reach a conclusion on how the Applicant's proportion of the costs of works etc. is calculated. The leading case authority on the interpretation of contracts, including leases, is *Arnold v Britton* [2015] UKSC 36.

68. At paragraph 15 of *Arnold v Britton*, Lord Neuberger said:

> 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".
>
> […]
>
> And it does so by focussing on the meaning of the relevant words … 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.

69. Counsel for the Respondent drew the Tribunal's attention to the following further key points at paragraphs 16 to 24 of the judgment:

> "Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made." (paragraph 19).
>
> "When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties." (paragraph 21)
>
> "… in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SCLR 114, where the court concluded that 'any . . . approach' other than that which was adopted 'would defeat the parties' clear objectives', but the conclusion was based on what the parties 'had in mind when they entered into' the contract …" (paragraph 22)

70. The Tribunal is, however, also bound to consider the following strong observation of Lord Neuberger at paragraph 20 of the judgment:

> "Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

71. In that regard, the Tribunal observes that the definition of "the Building" in the First Schedule to the Lease is sufficiently clear that there is no room for

ambiguity in respect of the actual words used. The question is whether the Tribunal is able to read an intention into the wording of the Lease which is actually different from the words which were in fact used.

72. The parties' representatives put forward two competing approaches to interpretation of the intentions of the original parties to the Lease.

73. We will analyse the Respondent's suggestion first because it is the simpler of the two. It was put in these terms in the Respondent's skeleton argument:-

> *27. The reference to "Building" in the Fourth Schedule of the Lease must be read to refer not only to Lee Close, but also to Meade Close and Sumner Close "Buildings" – such that each leaseholder is responsible for one seventieth of the costs of the works to the "Buildings".*
>
> *28. R's obligations pursuant to clause 5 of the Lease relate to "the general maintenance and upkeep of the Property" and refer to "the Property and the Buildings", not any singular "Building". The service charge is therefore applied when there are works carried out to Quarry Park and calculated by reference to the whole of those works.*
>
> *29. A is only obligated to contribute one seventieth towards the costs of any works, pursuant to clause 3.5.1 of the Lease. The service charge is therefore apportioned to each leaseholder (including A) as one seventieth.*
>
> *30. If A can enforce the terms of the Lease in respect of the Property (and therefore Lee Close, Meade Close and Sumner Close) as per clause 5, it follows that the Respondent must be able to do the same, as per clause 3.5.1 and the Fourth Schedule.*
>
> *31. In the Fourth Schedule of the Lease, "Building" is only distinct from "Property" in that both refer to Lee Close, Meade Close and Sumner Close, but "Property" also includes the common parts. It is not intended to partition Lee Close, Meade Close and Sumner Close or the cost of any works carried out to the same. As above, the service charge is therefore applied when there are works carried out to Quarry Park and calculated by reference to the whole of those works.*

74. The Tribunal is grateful to Mr Larkin for the elegant manner in which this attractive argument is put forward. It was nonetheless observed that this still requires the Tribunal to notionally read the word "Building**s**" instead of "Building" whenever this appears in the Fourth Schedule, and that this involves effectively re-writing the Lease to correct an obvious error, even if the edits required are minimal. We will return to this consideration further below.

75. Mr Wood took issue with the suggestion that the Lease could be re-interpreted in this way and asserted that *Arnold v Britton* prevents the Tribunal from doing so. Rather, he suggested that the Tribunal should exercise some power or other to vary the Lease in terms which were more favourable to the

Applicant. Specifically, Mr Wood argued that the Applicant's proportion should be re-calculated such that it remained at 1/70th whenever there was a reference to the Property and 1/18th whenever there was a reference to the Building.

76. In support of this argument, Mr Wood's view was that a simple 1/70th split of all costs of the whole of Quarry Park equally could not have been the parties' intention at the time that the Lease was entered into. He considered that it was unfair for the Applicant to pay towards works from which he derived no benefit at all. In response, the Respondent's case is that the situation will inevitably be reciprocated over the lifespan of the Lease, in that there will be situations where works will be carried out to Lee Close and the Applicant would only have to bear 1/70th of those costs, rather than 1/18th.

77. The Tribunal was not at all convinced by Mr Wood's submissions on this point. The members of the Tribunal are aware from their own professional experiences that there may be situations where parties to a lease are required to contribute to certain costs in pre-determined proportions which do not bear any direct relationship to the extent of the benefits actually derived from the works or services in question. A leaseholder on the ground floor may have contractually agreed to contribute an equal share of the costs of a roof, lift or stairwell even though they only derive a much lesser benefit compared to leaseholders on the top floor. But there are advantages in having a degree of certainty over such proportions. The submissions on this point were to some extent clouded by Mr Wood's apparent misunderstanding of the difference between the Applicant being required to contribute a proportion of the costs of certain works as against who was actually legally responsible for ensuring that those works are carried out.

78. With respect, the Applicant's position on lease interpretation also lacks logical coherence and internal consistency. The Tribunal does not see how it can be improper to re-interpret the Lease at one party's request but entirely appropriate to re-interpret it at the other's. The Tribunal also pointed out that whilst such a power might be exercisable under an application pursuant to Section 35 of the Landlord and Tenant Act 1987, it is not exercisable under the current application which is made pursuant to Section 27A of the Landlord and Tenant Act 1985. Further, in order to be effective, simultaneous applications under Section 35 of the 1987 Act would have to be made in respect of all of the leases at Quarry Park.

79. The Tribunal has thus found itself with something of a dilemma. Lord Neuberger's judgment in *Arnold v Britton* cautions against re-writing the Lease in the manner advanced by the Respondent, but the Applicant's assertion that *Arnold v Britton* prevents the Tribunal from re-writing the Lease would instead have disastrous financial consequences for the Respondent (which would therefore ultimately be to the significant detriment of all of the leaseholders of the Property, not just the Applicant). When this was put to the Applicant, he suggested that the Respondent could request voluntary donations from the residents of each building to make up any shortfall in funds, which the Tribunal did not consider to be in any sense a viable solution.

80. The Tribunal considers it important to compare the facts of this application to the facts which resulted in their Lordships' judgment in *Arnold v Britton*, in order to understand the nuances in how that judgment should be applied in practice. In *Arnold v Britton*, the problem was that the amount of service charges had been fixed at an initial rate of £90 *per annum*, which was to increase by a specific pre-determined rate of compound inflation of 10% *per annum* in some cases, such that by 2072 the service charge for a lease granted in 1980 would be a fixed sum of over £550,000 *per annum*. The leaseholders in that case argued that the parties could not have intended such a result, when considering that inflation since the year 2000 was usually around 3% *per annum* and was sometimes negative. However, in dismissing that argument, Lord Neuberger placed great emphasis on the fact that when many of those leases were granted, inflation was running at a very high rate and so there was in effect a shred of rationality in entering into such an arrangement, even if the wisdom of it was questionable even at the time it was concluded. The key point was that the economic sense of the bargain should not be re-evaluated with the benefit of hindsight when the contextual circumstances change. The intention of the bargain must be interpreted as at the date when it was made, and the mere fact that it turned out to be a gamble which backfired is not a reason to engage in historical revisionism.

81. In that regard, there must however be a qualitative difference between "imprudent drafting" in the sense of a failure to anticipate future developments, compared to what can only be considered manifestly erroneous drafting which can never have been truly intended despite the apparent clarity of the words used.

82. The Tribunal are mindful that clause 3.5 appears on page 7 of the Lease whereas the Fourth Schedule begins on page 16 of the Lease. Although that is a minor detail, it is instructive that the two provisions would not ordinarily be read side by side unless a conscious effort was made to do so. It is common ground that applying the literal wording of the Lease terms leads to an inevitable shortfall in funds from day one. No competent solicitor could ever intentionally draft a lease which would lead to their own client's inevitable insolvency within a matter of months. The Tribunal is sure that the wording of the Fourth Schedule, by referring to "Building" instead of "Buildings", is a glaring drafting error arising presumably from the draftsman's failure to cross-refer the two provisions side by side. The Applicant's contention that the draftsman's use of the word "Building" was intentional and that such costs should have been shared equally among the leaseholders of Lee Close is unsustainable, since clause 3.5 very clearly refers to a 1/70th share and the expression "1/18th" appears nowhere in the Lease. This is underscored by the fact that the Respondent's repairing obligation towards the Applicant under clause 5.3 expressly extends to the whole of the Property, not just the Building. The Fourth Schedule is clearly the anomalous provision. The Tribunal has no doubt that had this error been drawn to the draftsman's attention before the Lease was executed, they would have rectified it immediately and without hesitation. It is only remarkable that the error was not identified for some 40 years.

83. The Tribunal is, accordingly, persuaded by the Respondent's argument on this point.

84. In relation to the actual amounts sought, although the Applicant engaged in some criticism of the Respondent's motivation in seeking a sinking fund contribution to future repairs, and the way in which these future repairs had been budgeted for, the Applicant did not produce any better evidence than the Respondent. The Tribunal finds that the sums demanded so far are payable inasmuch as costs already incurred are reasonably incurred and insofar as they relate to on-account demands for future costs, the sums demanded are reasonable (subject to the requirement that after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise).

85. The Tribunal takes this opportunity to observe that the sinking fund for the Property has not been properly managed and the amount reserved to the sinking fund element of the recent service charge demands appears to be wholly inadequate – and so the question remains open as to reasonable figures for contributions in future years.

Alternatively, is the Applicant estopped from asserting that Paragraph 1(a) of the Fourth Schedule to the Lease requires him only to pay 1/70th of the Respondent's costs of carrying out repairs to the roof of the Building?

86. In light of the Tribunal's conclusions on the interpretation of the Lease, this issue does not need to be determined. However, the Tribunal takes the opportunity to set out what it would have decided if it had reached a different conclusion on the issue of contractual interpretation.

87. The Tribunal finds that there is insufficient evidence to conclude that a common assumption existed which had been communicated between the Applicant and the Respondent regarding the 1/70th apportionment of all costs incurred by the Respondent in providing services to the whole of the Property. Although the Applicant has held the Lease for 16 or more years, there was a surprising absence of any evidence from the Respondent as to the form or contents of the service charge budgets prior to 2020. Even those which were presented to the Tribunal were very unclear and made no mention of a 1/70th apportionment until 2022, which was after this application was made to the Tribunal. This makes it more likely than not that any demands prior to 2020 were similarly lacking in detail.

88. The Applicant's consistent evidence was that he found that the Respondent's service charge budgets were confusing, and the Tribunal agrees that this was a reasonable position. The Tribunal also accepts the Applicant's evidence that he did not address his mind to the appropriate apportionment of the charges in the budgets / demands until the dispute arose in March 2021. Lord Steyn in *Republic of India v India Steam Ship Co Limited* [1998] AC 878 (cited by Judge Behrens in *Jetha*) observed that "It is not enough that each of the two parties acts on an assumption not communicated to the other". The Tribunal finds that whilst the assumption might have existed in the minds of the

Respondent's officers or agents, it was not in fact communicated to the Applicant in such a manner that he could acquiesce in it.

Is it just and equitable to preclude the Respondent from recovering its legal costs of the application through the service charge?

89. Subject to any particular considerations of an individual case, the Tribunal will usually hold that it is just and equitable to grant a tenant's application under Section 20C Landlord and Tenant Act 1985 if the tenant is substantially successful in their main application.

90. Mr Larkin submitted that there was nothing in the Applicant's written or oral submissions which presented a case in support of how the costs application should be dealt with, such that it cannot be found just and equitable to make the order. He also referred to the Fourth Schedule to the Lease which he said includes an "all costs and expenses" clause sufficient to recover the costs of the application.

91. The Tribunal is still able to reach its own conclusions on the appropriate order to make under Section 20C even in the absence of any specific submissions by the Applicant. The Tribunal considers that the grounds of such an application are self-evident in this case, even where the Applicant has lost on every issue. Although the Tribunal is grateful for the Respondent's submissions and skeleton argument, the Tribunal agrees with the Applicant that the Respondent's wholesale failure to engage with the substance of the dispute until deep into the litigation is lamentable, to such an extent that it justifies an exceptional departure from the usual approach. Although the costs of the adjourned hearing of 9th March 2023 have been dealt with separately, the events leading up to that adjournment are nonetheless characteristic of the Respondent's overall attitude to this dispute. The Tribunal agrees that the Respondent largely seems to have hoped that the problem would go away of its own accord until it was far too late. Although the Applicant also demonstrated a degree of rigid thinking once the Respondent's case was clearly explained to him, the Respondent missed a significant opportunity to set out its case much earlier. Had it done so, the Tribunal's decision on this issue may well have gone the other way.

92. For the same reasons, the Tribunal accordingly exercises its discretion, of its own motion, to order the Respondent to reimburse the Tribunal's application fee (and, if applicable, the hearing fee) to the Applicant.

Should the Tribunal reduce or extinguish any administration charges sought from the Applicant by the Respondent?

93. Likewise, subject to any particular considerations of an individual case, the Tribunal will usually hold that it is just and equitable to grant a tenant's application under Commonhold and Leasehold Reform Act 2002, Schedule 11, Paragraph 5A if the tenant is substantially successful in their main application.

94. However, for the same reasons as apply to the Tribunal's considerations under Section 20C (and additionally noting that the Respondent's conduct in referring a genuinely disputed service charge account to debt recovery solicitors was particularly cavalier), the Tribunal exceptionally considers that the Applicant should not have to bear any of the costs of litigation or penalties for failure to pay service charges.

Tribunal Judge L. F. McLean
13th July 2023

Rights of appeal

1. By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

2. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

3. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

4. 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.

5. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

6. If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).