FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	**BIR/44UB/LIS/2023/0002**
Properties	**:**	**Charles Wills Court, Coleshill Road, Atherstone CV9 1BT**
Applicants	**:**	**(1) Lynda Makenzie** **(2) Christopher Riley** **(3) Joan Smith** **(4) Leanne Sutherland** **(5) Simon Greenfield** **(6) Matthew Sutton** **(7) Alan Jones** **(8) Phil Evans** **(9) Linda Tekegac** **(10) Simon O'Shaunessy**
Representative	**:**	**Mr Hugh Mckenzie**
Respondent	**:**	**Gateway Holdings (NWB) Limited**
Representative	**:**	**Mrs Coleman, Solicitor**
Types of application	**:**	**(1) Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985** **(2) Application for an order under section 20C of the Landlord and Tenant Act 1985** **(3) Application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 in respect of litigation costs**
Tribunal members	**:**	**Judge C Goodall** **Mr R P Cammidge FRICS**
Date and place of hearing	**:**	**17 July and 25 October 2023 at Centre City Tower, Birmingham**

Date of decision : 21 November 2023

DECISION

Background

1. This is an application dated 3 January 2023 under section 27A Landlord and Tenant Act 1985 ("the Act") by nine leaseholders of a twelve flat block of flats on Coleshill Rd in Atherstone ("the Property"). The leaseholders ask for a determination of the payability of service charges for the years 2019, 2020, 2021, and 2022, and for a determination of the amount payable as a budgeted sum in advance for 2023.

2. At the date of the application, the 2022 service charge year accounts had not been finalised, and the application was for a determination of the reasonableness of the budgeted expenditure. By the time of the hearings, the final accounts for 2022 had been produced and the parties agreed that the Tribunal should address actual expenditure in that year.

3. Following the provision of documentation directed to be provided, the application was listed for an oral hearing on 17 July 2023. A second hearing day was required, which took place on 25 October 2023.

4. Except for Mr Matthew Sutton, the Applicants are all long leaseholders of flats at the Property. They were represented by Mr Huw McKenzie, whose wife is of one of the Applicants.

5. The Respondent is the freehold owner of the Property and lessor to the Applicants. It has engaged Gateway Property Management Ltd to manage the Property on its behalf. The Respondent was represented by Mrs Coleman, Solicitor, who is an in-house solicitor for the Respondent's group of companies.

6. This is not the first time the Tribunal has been asked to make determinations of the service charges payable for the Property. In a decision dated 19 December 2017 ("the 2017 Decision"), determinations were made for the years 2011 – 16, under reference BIR/44UB/LIS/2016/0043. And in a decision dated 26 September 2019 ("the 2019 Decision"), determinations in respect of the 2017 and 2018 service charge years were made, under reference BIR/44UB/LIS/2018/0042 – 53.

7. Both members of this Tribunal were also on the tribunals that determined the 2017 and 2019 Decisions.

The issues

8. The following issues arose for the Tribunal to determine:

    a. An application by Mr Simon O'Shaunessy, lessee of Flat 6 at the Property, to be an additional Applicant;

    b. An initial procedural issue relating to the appropriateness of Mr Matthew Sutton being an Applicant;

c. Whether the service charges for the completed years 2019 – 2022 were reasonably incurred and of a reasonable standard;

d. Whether the proposed budgeted service charge for 2023 was reasonable in amount;

e. What reserves are held by the Respondent;

f. What sum was payable for major roof repairs (cryptically described in the application as the 2022 section 20 issue);

g. The application under section 20C of the Act for an order that the costs of this application should not be charged to the service charge payers;

h. The application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 limiting or extinguishing any charge for litigation costs arising from this application.

Procedural matters

9. Dealing first with Mr O'Shaunessy's application to become an Applicant in the case, there was no objection from Mrs Coleman, and we direct that Mr O'Shaunessy be added as an Applicant to the application.

10. The second procedural issue was consideration of the position of Mr Matthew Sutton as an Applicant. The Respondent informed the Tribunal that Mr Sutton had no interest in any flat at the Property. Mr McKenzie accepted this was the case. He therefore has no status to be an Applicant, and the Tribunal directs that he be removed from the application.

Law

11. Sections 18 to 30 of the Act contain statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e., the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

12. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

a. The person by whom it is or would be payable
b. The person to whom it is or would be payable
c. The amount, which is or would be payable
d. The date at or by which it is or would be payable; and
e. The manner in which it is or would be payable

13. Section 19(1) of the Act provides that:

> "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:
>
> and the amount payable shall be limited accordingly."

14. Section 19(2) of the Act provides that:

> "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."

15. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100 / Daejan Investments Ltd v Benson [2011] EWCA Civ 38*).

16. When interpreting a written contract, the Tribunal has to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand the terms to mean. We have to focus on the meaning of the words in their context and in the light of the natural meaning of the clause; any other relevant provisions; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense (*Arnold v Britton* [2015] UKSC 36).

17. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

> "39. …The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> 40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly

effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

18. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

> "103. …The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

The Leases

19. In these proceedings, no parties raised issues on the interpretation or application of the Applicants' leases to the matters in dispute. It is therefore sufficient to say that the leases define the whole residential block within which are the twelve flats as the Building, and the external area comprising the car park and gardens as the Development. The internal parts of the flats themselves belong to each flat owner.

20. The leases then require the Respondent to maintain, repair, clean, redecorate, replace, renew, and rebuild the "main structures, roofs, foundations, external walls, party walls and structures, boundary walls, fences and railings, window frames, doors and door frames of the Building" and the external areas, common parts, service installations, plant and equipment and gardens of the Development.

21. The leaseholders covenant to pay one twelfth of the cost to the Respondent of complying with its obligations of maintenance and repair and (from the Fifth Schedule to the leases) the following additional costs:

> "3. The cost of employing managing agents or other duly authorised agents for the general management of the Development
>
> 4. The cost of employing managing or other duly authorised agents, architects, surveyors, or other professional persons to arrange and supervise the execution of any works or the provision of any service in or on the Development
>
> 5. The cost of keeping the books and records of the expenditure comprised in the Maintenance Costs and of preparing and (if applicable) auditing and certifying the Maintenance Costs and the cost of maintaining the books and records of the Landlord and the cost of preparing and filing all necessary returns and accounts
>
> …
>
> 8. The cost of employing or engaging solicitors, counsel, and other professional persons in connection with the management of the

Development the administration and collection of the Maintenance Charge payable by the Tenant and by the other tenants in the Buildings

9. The cost of bringing or defending any action or proceedings and making or opposing any application"

22. A fuller identification of the key provisions of the leases in so far as they relate to service charges can be found in paragraphs 11 to 19 of the 2019 Decision.

Service Charges – 2019 - 2022

23. The process the Tribunal adopted at the hearing was to go through the contents of the Scott Schedule produced by the parties by asking the parties to explain / call evidence on the individual items in the Scott Schedule as we went through it. The parties' evidence and submissions are therefore contained within the discussion section below.

24. The Respondent's expenditure in each of the service charge years under consideration was set out in annual accounts provided to the Tribunal. The expenditure is shown in table 1 below:

Table 1 – service charge costs in the years in dispute

	2019	2020	2021	2022
Cleaning	270	378	777	1,076
Window cleaning	600	720	720	720
Electricity	5,425	-7,277	-361	597
Gate maintenance	330	348	-	1,164
Gardening	-	-	-	-
Repairs and maintenance	2,123	1,456	1,458	522
Out of hours service	342	360	360	432
Buildings insurance	2,928	3,160	3,455	3,806
Insurance valuation	-	300	-	-
Health & Safety	684	684	684	684
Fire alarm	384	384	504	384
Emergency lighting testing	-	-	432	337
Management fees	5,091	5,396	2,592	2,592

Accountancy fees	756	780	803	827
Account management fee	379	216	-	-
Bank charges	72	-	72	72
Postage	72	72	72	72
Legal expenses	1,200	-600	-	-300
Site inspections	-	120	360	432
Total	20,656	6,497	11,928	13,417

Discussion

Service charges 2019 - 2022

25. There are four items of expenditure across all four years which were compromised between the parties during the course of the hearings. Firstly, the annual cost of a health and safety report; secondly, management fees, thirdly, the cost of an out of hours service for reporting problems, and fourthly an annual charge called an "account management fee". Each of these four issues are considered in the next paragraphs.

26. An annual health and safety report is carried out for Gateway by an associated company, at a cost of £684.00 per annum. The parties agreed that this annual cost would be reduced to £600.00.

27. Mrs Coleman agreed to limit management fees to £175.00 plus VAT per flat for 2019 and 2020 (i.e., £2,520 per annum). The Applicants did not challenge the management fees for 2021 and 2022 at £180.00 plus VAT (i.e., £2,592 per annum).

28. The Applicants suggested that the out of hours annual cost should be limited to £288.00, as that had been agreed with Gateway in budget discussions and had been the amount determined to be a reasonable sum in the 2019 Decision. Mrs Coleman conceded that, so limiting the annual charge to £288.00 for the years in dispute.

29. An account management fee had been charged to the service charge in 2019 and 2020. Gateway had conceded in their statement of case that they would remove this charge.

30. We also noted that legal fees of £1,200.00 had been charged in 2019, with credits of £900.00 in 2021 and 2022. At the hearing, Mr McKenzie withdrew any challenge to these items.

31. Turning to consideration of the disputed service charge items, there are four areas of expenditure which it is most convenient to consider by category rather than chronologically, being:

a. Electricity costs

b. Expenditure on the roof;

c. Insurance

d. Accountancy

Electricity costs

32. In paragraphs 74 to 124 of the 2017 Decision and paragraphs 100 – 102 of the 2019 Decision, the Tribunal identified that there was a real issue concerning the correct recording of the cost of electricity charged for supply to the common parts at the Property in those years. Hence in those decisions, the Tribunal only allowed an estimate of the cost to be charged to the service charge.

33. Gateway's Statement of Case strongly suggests that the issue over recording of actual consumption has now been resolved. Mr McKenzie had suggested a fixed sum of £750.00 per annum whilst the meter reading issue was being resolved. The parties accepted at the hearing that the electricity recording issue had now unwound.

34. It will be noted that the amounts actually charged in the service charge accounts over 2019 – 2022 for electricity show a net credit to the service charge account. We therefore do not disturb the figures in the accounts, all of which are allowed. It is to be hoped that future years' electricity charges can now be based on real recordings of the actual electricity consumption.

Expenditure on the roof

35. Within the charges for repairs and maintenance are four invoices for various reports on the condition of the roof, being:

	Description	Amount (£)
2019		
	Internal inspection on 27 June 2019 and report by NEMS	180.00
	Internal inspection on 29 July 2019 and report by Dovetail	156.00
2020		
	External inspection and report by NEMS using cherry picker on 27 January 2020	1,032.00
2021		
	Drone survey of roof by Men at Work! Carried out on 1 April 2021	420.00

36. Gateway's documentation showed that there was a report of a roof leak by the owner of flat 6 sometime before June 2019. They instructed NEMS to investigate, which they did by an internal inspection on 27 June 2019.

NEMS reported by email on 28 June 2019 that there was some minimal water ingress into the flat. They thought that water was probably flowing in via a blocked or damaged gully. They recommended a series of minor works to the roof, with access to the roof being gained via a cherry picker. They quoted £1,200 plus VAT for hire of the cherry picker, inspecting, clearing out of the gullies, and carrying out various minor repairs to the roof. They considered that the chance of major works to the roof being required was very slim, and they said that they would provide a report with photographs within the scope of their quote.

37. Gateway then decided that a second opinion was required, so they engaged Dovetail to carry out the second internal investigation. Dovetail too were told there was a report of a roof leak. Gateway's case is that a second report was required as it is reasonable to instruct more than one contractor to quote for works that may exceed the threshold for consultation under section 20 of the Act. In their view, both contractors were qualified to carry out the inspection.

38. Dovetail reported back to Gateway that they also observed a water leak. They said "the only way to identify and resolve the leak" was by carrying out a roof inspection.

39. Mr McKenzie's case is that there had been complaints about the state of the roof causing water ingress into flats since 2014, with little or no action by Gateway to resolve this, and the 2019 investigations should be seen in the context of there being an ongoing issue about the condition of the roof. He also alleges that the companies who carried out the inspections in 2019 are not specialist roofing contractors and not qualified to opine on what works are needed. He submitted that to carry out two inspections in 2019 was unnecessary. The Applicant's should not have to pay for either inspection.

40. The Tribunal's view is that it was reasonable to instruct an appropriately qualified contractor to investigate the report of a leak in around June 2019. We were not provided with sufficient evidence for us to conclude that Gateway should already have known of the specific problems of water ingress into the flat such that an investigation following a report of a leak would not have been justified. NEMS are described as providers of building maintenance services, and we have no basis for finding that they were not competent to carry out the inspection in June 2019. We find that their invoice for £180.00 is properly charged to the service charge.

41. We do not consider that it was reasonable for Gateway to engage a second contractor to carry out a further internal inspection of the water ingress problem. NEMS had already advised that there was a leak which was coming from the roof and repair work on the roof was necessary. The logical and obvious next step was to carry out the repairs recommended, or at least have a proper survey and analysis of the roof problems undertaken via contractors accessing the roof. We do not accept that at this point there was any risk that the report and minor works on the roof

might require consultation. The quote from NEMS was well within the section 20 thresholds at that point.

42. If Gateway were at that point concerned to obtain more than one estimate for some roof works, other contractors could have been asked to quote for inspection and minor repairs of the roof, based on the NEMS analysis and feedback from their internal inspection.

43. We therefore disallow the cost incurred in engaging Dovetail to carry out the second inspection in 2019, costing £156.00.

44. The next charge is for £1,132, being the cost of accessing the roof and carrying out an inspection on 27 January 2020. This is the work which NEMS quoted for in their report of 27 June 2019.

45. Gateway's documents include the report that NEMS prepared following their inspection. They inform Gateway that in fact they did not carry out any repair work as they discovered that "the issue causing water ingress was for more serious than first thought". There is a short, but reasonably competent written report. It states that the roof is a pitched roof with artificial slate, with a low parapet wall to the external façade of the Property. There are gullies to drain rainwater from the roof, finished with asphalt. NEMS concluded that the integrity of the asphalt had been breached in a number of places. The manner in which the asphalt had been fixed underneath the tiles could not be determined. NEMS said sufficient tiles would need to be removed to allow removal and replacement of the old asphalt along approximately 110 metres of gulley. They would provide a quote, but they would sub-contract to specialist roofing contractors. No photographs were provided.

46. The Tribunal was not provided with the quote, but Mr McKenzie told us it was in the region of £19,000.00.

47. There are some issues with the NEMS report. They did not do the work they were contracted to carry out (which may be the reason their invoice was for less than originally quoted), and they did not provide photographs. Nevertheless, in our view, there was strong evidence that there were leaks from the roof into some flats, and it was reasonable for Gateway to arrange an inspection and report. Until a proper inspection took place, nobody could know whether the leaks required minor or substantial works. Around half of the cost of the report was for hiring of a means of access to the roof which would always have been required. We allow the cost of the NEMS inspection and report in the sum of £1,132.00.

48. However, we do not allow the cost of the drone survey undertaken in 2021. It provided photographs, which no doubt were of assistance to those providing advice and quotations for the scope of roof works required, but as has been seen above, photographs could and should have been provided by NEMS from their inspection in January 2020. The sum of £420.00 for that survey incurred in 2021 was not reasonably incurred.

Insurance

49. As can be seen from Table 1, premiums for insurance cover range from £2,928.00 to £3,806.00 for the years under consideration. In the 2019 Decision, the Tribunal allowed £1,780.00 for 2017, and £1,880.00 for 2018. Mr McKenzie's challenge was that premiums should be charged at levels similar to those previously determined by the Tribunal (which had been based on competitive quotes), adjusted for inflation.

50. Taking out insurance is the obligation of the freeholder under a covenant in paragraph 6 of Part II of the Fifth Schedule to the leases. Gateway instructs an insurance broker called Associated Insurance Services Ltd ("AISL") to place the cover. Mr McKenzie told us he believed this company is part of the Gateway group. Gateway have accepted this is the case in previous decisions. Mr McKenzie suspects that the leaseholders are being charged inflated insurance premiums in order to unjustly enrich the Respondent.

51. In the 2017 Decision, there was also a challenge to the cost of the insurance premiums charged to the service charge account. On that occasion, Mr McKenzie had provided quotations for insurance cover well below the cost of the premiums charged to the service charge payers in the years in dispute. Gateway had not provided evidence that it regularly tested the market. Faced with no evidence from Gateway, and reasonably persuasive evidence from the leaseholders, the Tribunal had substantially reduced the premiums charged to leaseholders.

52. In this application, the Applicants did not provide any updated insurance premium quotations. However, Gateway did provide evidence, through its statement of case, to explain the process it undertakes to test the market for insurance. AISL carries out a re-broking exercise each year. The names of the companies who were asked to quote in each year were provided together with the headline premium quoted. Between 4 and 6 companies were asked to tender each year. AISL disclosed an annual fee ranging from £354 to £484 across the years 2019 to 2021.

53. The Tribunal had no evidence that could support the suggestion that insurance premiums are inflated in order to financially penalise the leaseholders. The methodology by which insurance is placed is entirely standard. AISL is a regulated business. If skulduggery is at work, the Tribunal would have needed evidence of it.

54. We determine that the insurance premiums charged in the accounts under consideration in this application are reasonably incurred. The reason this determination appears to depart from the approach taken in the previous decisions is that in those decisions there had been no evidence of the reasonableness of the premiums charged from Gateway, and some evidence from the leaseholders that the sums charged were excessive in the marketplace. On this occasion, the evidence is the other way round. Additionally, using an inflation measure to determine a reasonable

insurance premium becomes increasingly unreliable over time, as the insurance market does not necessarily move in line with inflation; it is more affected by changing attitude to risk.

Accountancy

55. Gateway's accountancy fee comprises an internal charge levied by Gateway and a fee charged by its accountants to produce accounts. The apportionment of those charges is as set out below:

Year	Gateway fee (£)	Accountants (£)	Total (£)
2019	120.00	636.00	756.00
2020	420.00	360.00	780.00
2021	365.00	438.00	803.00

56. In paragraph 128 of the 2017 Decision, the Tribunal disallowed Gateway's internal cost on the basis that it is a core function of any managing agent that it has the facility to keep accurate financial records. Production of data to enable the accountants to prepare accounts should be within the scope of that core function. In that Decision, Gateway's internal cost was disallowed in full.

57. It is manifestly the case that for 2019, Gateway has charged on the same basis as it did for the years under consideration in the 2017 Decision. We determine, to follow the logic of that Decision, that the Gateway internal cost of £120.00 for 2019 is disallowed. The accountant's fee appears to us to be reasonable and is allowed in the sum of £636.00.

58. The determination of the 2019 accountants charge was complicated by the presence of an email from the accountants in the bundle of documents confirming that their charge for the year to 29 February 2020 was £360.00. Mr McKenzie therefore argued that the 2019 accountants fee should be that sum. In fact, the Tribunal is satisfied that the reference to a charge of £360.00 must have been intended to be a reference to the accountants charge for 2020, and the email must have contained a dating error. We therefore do not agree that the 2019 accountancy charge should be limited to £360.00.

59. The position is not quite so straightforward for the years 2020 – 2022. Gateways case is that they changed their approach to the preparation of accounts and took a significant part of the work of actually preparing the accounts in-house. They therefore sought to justify making an internal charge as there was a concomitant reduction in the external cost of producing accounts.

60. Our view is that Gateway are entitled to adjust the apportionment of internal and external work and cost as long as the overall outcome is within reasonable bounds.

61. We are guided by the cost the external accountants had charged in previous years, and allowing an increase for inflation, we determine that the reasonable accountancy cost for 2020 is allowed in the sum of £650.00, for 2021 in the sum of £670.00, and for 2022 in the sum of £690.00.

62. Having concluded discussion and decisions on items that crossed all years under consideration, we now turn to challenges to individual items of expenditure in 2019 - 2022.

63. The challenges were:

2019

a. To expenditure of £330.00 on gate maintenance, charged within repairs and maintenance. The parties agreed that this would be reduced to £165.00.

b. To a charge of £144.00 within repairs and renewals for investigation of the fob system for opening the main gates to the car park. The facts are that the cleaners reported that their fob did not work. Gateway commissioned a survey by an engineering company who reported that "a cheap imported system has been used". Consequently, they were unable to determine the frequency of the fob signal and recommended the installation of a new additional stand-alone system. The Applicant's case is that the battery in the cleaner's fob just needed to be replaced, which they organised for them. In our view, this is an example of a situation where management of the Property is too remote from the situation on the ground. This is a small unit with active leaseholders, and the cost of the investigation would have been avoided had Gateway had a sufficient working relationship with the leaseholders to discuss the problems being experienced on site prior to an external contractor being instructed to prepare a report which, with hindsight, was unnecessary. Some form of response would have been required however, and we allow £40.00.

2020

c. Gateway agreed in their statement of case that they would remove the charge of £348.00 for gate maintenance.

d. A charge was introduced in around November 2020 (as a result of new legislative requirements) of £30.00 plus VAT per test for monthly testing of the emergency lighting system. Mr McKenzie challenged:

i. The charge for December 2020 as he said two tests had been carried out in that month;

ii. the need for such test to be carried out monthly anyway;

iii. the quantum of the charge, as he said it took only a short time to test each unit. Gateway's case is that the tester (who is the cleaner) has to test two systems, and record and report the results of the test for both.

e. Our determination is to allow the charge for testing on the basis:

i. that when considering the invoices from Dovetail Group dated 14 and 26 December 2020, it is likely that the first test was carried out in November 2020, and the second in December, so there were not two in one month (see the reference on invoice 33519 to "November 2020" which persuaded us to adopt this interpretation);

ii. that as a matter of good practice, the test ought to be carried out monthly (see BS5266); and

iii. when considering how a test should be carried out, from BS5266, it is apparent that it is more time consuming than Mr McKenzie suggested, and bearing in mind the reporting obligations and the responsibility for testing, a charge of £30.00 plus VAT per test is a reasonable charge.

f. Gateway agreed to remove the charge for a site inspection in 2020 in the sum of £120.00.

<u>2021</u>

g. A charge was included within repairs and maintenance of £300.00 for repairing Sky receiving equipment. Mr McKenzie suggested this charge was excessive. The parties compromised this at the hearing by agreeing the charge would be reduced to £250.00.

h. Repairs and maintenance charges also included emergency lighting testing in the sum of £432.00. The Applicant's issues were the same as those discussed in sub-paragraphs d. – e. above. For the reasons given there, we reject the challenge and determine that the sum of £432.00 was reasonably incurred.

<u>2022</u>

i. Mr McKenzie challenged the charge for gate maintenance in the sum of £1,164.00 including VAT. It is common ground that the gates had not operated properly and had remained open since around the end of 2019. The invoice being challenged was for repair and replacement parts. Mr McKenzie's challenge was on the basis that Gateway had allowed the gates to deteriorate since 2019.

j. Our determination is to allow this charge. Gateway are obliged to repair and maintain the gates and the cost of necessary repairs falls to the leaseholders. We accept their submission that the delay in carrying out repairs, which may have meant the cost in 2022 was higher than it might have been, was substantially caused by the pandemic which resulted in putting a stop to non-urgent repairs.

k. Within repairs and maintenance is a charge of £180.00 for replacing a fence panel. Mr McKenzie provided quotes for the purchase of a panel showing the cost for supply of the panel would have been in the region of £62.00. His submission was that no more than £110.00 should be allowed.

l. We are satisfied that expenditure of £180.00 was in fact incurred. Our view is that this was a reasonable sum for the work involved. The panel needed to be sourced, collected, transported to the Property, and then fitted. It would have required two men in our view, together with associated vehicles and equipment. We allow this charge.

m. Also, within repairs and maintenance is a charge of £343.20 for fire signage, being two zone charts (£90.00 each), 6 fire exit directional signs (£90.00 in total) and 2 fire action signs (£16.00 in total). VAT is payable in addition.

n. Mr McKenzie submitted that some signage was not required, and the overall cost for signs should be much lower. Gateway submitted that they had been advised by the operative carrying out routine fire equipment maintenance that the signage was required.

o. Mr McKenzie asked us to take account of a Home Office publication called "A guide to making your small block of flats safe from fire". This confirms that there is no requirement for fire exit signs in the Property if a stay put policy is adopted, as there is only one exit for each block. But the document was only published in March 2023 so is of limited use in assessing whether the signage was required.

p. We prefer to rely upon Gateway's own fire risk assessments, which were provided to us in their bundle. The FRA for 2021 (the latest FRA prior to the invoice) states clearly on page 26 that directional signage is not required. Furthermore, the FRA makes no recommendations for the provision of any additional signage.

q. Our view is that Gateway have not established that it was reasonable to charge the leaseholders for additional fire signage. We realise that the maintenance engineer recommended additional signs, but it would have been prudent and appropriate

to refer to their most recent FRA / check with Gateway's FRA adviser before incurring the cost. We were not persuaded on the evidence that all the new signage was legally required. Mr McKenzie submitted the cost of the signage should be limited to £150.00 and we agree. Only that amount is allowed out of the invoice under consideration.

Budget service charge 2023

64. An overall budget for 2023 was provided to the Tribunal, showing anticipated expenditure of £15,005.00 (£1.250.42 per leaseholder).

65. This decision is being issued in November 2023. Our view is that there is little value in carrying out a detailed review of the budget at this late stage. We take the view that, in the round, the proposed expenditure figure is in the right region. Nothing stands out as outrageous. We would not wish to cheese pare it at this late stage.

66. We therefore approve the proposed budgeted expenditure for 2023 in the overall sum of £15,005.00. The Applicants may of course challenge the actual expenditure in due course under section 27A of the Act.

Reserves

67. The Applicants are keen to know what reserves are held for expenditure at the Property. In our view, this is a legitimate question and within our jurisdiction because without knowing what reserves exist, and in particular what amount of the reserves is represented by cash, a Tribunal cannot determine what amount might be payable for service charges, by whom and to whom, when and in what manner.

68. The short answer to this question, on the basis of the evidence presented to us, is that we do not know what reserves exist.

69. In one sense, it ought to be straightforward to ascertain the reserves. They ought to be such sum as has been demanded from service charge payers over a period of time, but not spent on services. In this case, the amount demanded can include an amount reserved for future expenditure (see Part 3 of the Fifth Schedule to the leases), so that sum, if collected, should be transferred to reserves at the end of a year. There is a note in the accounts for each year from 2020 – 2022, in each of which there was a surplus even before this decision, showing the reserves have increased by the surplus for each year. At the end of 2022, they are stated to be ££8,155.00.

70. The complication is that in 2017, service charge expenditure was £16,216.00 with income of £15,467.00 leaving a shortfall of £749.00, which was taken from reserves. However, in the 2019 Decision, the Tribunal determined that the reasonable service charge for 2017 was £12,581.00. There therefore should have been a surplus of £2,886.00.

71. Then in 2018, the accounts show that expenditure was £20,189.00, which was greater than income of £16,092.00, so a balancing charge of £3,121.00 was levied. Even then, there was still a shortfall of £976.00, which was taken from reserves. We do not know if the balancing charge additional payments were paid, but the upshot was that the reserves were zero at the end of that year.

72. However, in the 2019 Decision, the Tribunal determined that the reasonable service charge for 2018 was the sum of £10,560.18. So, the outturn for that year taking account of the 2019 Decision arguably should have been a surplus of £5,531.82.

73. Then in 2019, there was again a deficit on the service charge account. This time, there is no balancing charge shown. But there is a credit to the service charge account of £3,697.00 described as a "transfer from reserves". It is difficult to understand this in the light of the 2018 accounts showing the reserve fund as zero at the year end.

74. In the 2019 accounts, there is also a negative "brought forward adjustment" on the statement of the reserve fund of £5,650.00. The Tribunal asked Gateway to explain this. They said the adjustment was a result of reversing all transfers to and from reserves between 2011 and 2018. This was, they said, required as a result of the Tribunal requesting, in a direction made within the course of the case leading to the 2019 Decision to:

    "produce a statement … showing the impact of the year end adjustment contemplated by paragraph 4.4 of the Sixth Schedule to the leases. …"

75. Paragraph 4 of the Sixth Schedule requires the Landlord to produce a yearly certificate of Maintenance Costs showing:

    "the Maintenance Charge payable by the Tenant in respect of the [service charge year] and … the amounts (if any) by which the Maintenance Charge exceeds or falls short of the aggregate of the payments received by way of Interim Maintenance Charge and Supplemental Interim Maintenance Charge."

76. Putting aside the issue of whether the Direction really asked Gateway to make the accounting adjustment that it did make in 2019, what we understand Gateway did was in effect to move the end of year surpluses and deficits from the reserve fund (which, although there is no balance sheet with the accounts, in our view would normally be shown on a balance sheet) to the individual service charge payers accounts. In accounting terms, we surmise that the relevant corresponding double entry would be to vary the debtors leger in the accounts, but debtors are not shown in the accounts.

77. During the hearing, the question of how the 2017 Decision had been dealt with in terms of the impact upon individual service charge payers was

raised. Mrs Coleman informed the Tribunal that direct cash refunds had been paid to them representing the benefit of the determinations in their favour in that Decision. We do not know, however, how the 2019 Decision was dealt with.

78. There is a relevant Code of Practice produced by the RICS which gives guidance on the issue of accounting for reserves. Paragraph 7.10 advises that if the lease does not specify the form and content of service charge accounts, they should be prepared in accordance with accountancy standard TECH 03/11. In that standard, there is an illustrative set of accounts for service charges showing a balance sheet reflecting the "other side" of the balance sheet by giving figures for debtors, deficits recoverable from service charge payers, and cash at bank. Were the accounts in this case made up in this form (and this is not a determination that they should have been – that point has not been argued before us), it would be much easier to determine what the reserves actually are.

79. There is no evidence before us of any malpractice on the part of Gateway in relation to the preparation of the accounts. We strongly suspect that the solution to what is undoubtedly something of a confusing position is to be found through an analysis and understanding of the position of each individual service charge payer's own ledgers. In other words, if Gateway were to provide more information to the Applicants, the matter might resolve.

80. As stated in paragraph 68, we cannot provide an answer to the Applicant's legitimate question on reserves, and we have tried to explain why in the preceding paragraphs. To take the question further would require sight of the demands and receipts for service charges and statements of the state of the accounts of individual service charge payers. Some accountancy evidence would also be of considerable value; possibly a jointly instructed expert accountant's report. More hearing time would be required, with associated costs to both parties.

81. This decision should therefore be regarded as a final decision (subject to the provisions of Part 6 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013), on all issues except determination of the reserves. If the Applicants are unable to resolve this with Gateway, they should request the Tribunal to consider the issue further by applying in writing within 21 days of the date of this decision for a ruling on the reserves position, whereupon further Directions will be issued. Unless such an application is made, this Decision should be regarded as final in all respects.

2022 Section 20

82. Within the application form, the Applicants applied for a determination of the amount they should have to pay for roof repairs, which they described as the "section 20 issue". Their case is basically that the cost of

roof repairs has increased significantly because of delay on the part of Gateway in attending to the repairs.

83. There is nothing in the application form or the Applicants statement of case challenging the consultation process which we understand Gateway have gone through relating to their proposed contract to undertake roof repairs. So the application under this head does not in fact appear to relate to section 20 issues.

84. No documentation on the proposed roof repairs, apart from the invoices for inspections and reports discussed above, has been provided. We were told that no contract has been placed yet for roof works, and no work has been done. No copies of the demands for a service charge contribution for roof works were provided, though we were informed that they have been issued and most have been paid. Our view is that this challenge is premature, and the material supplied by the Applicants is insufficient for us to determine it anyway.

85. The way forward, for the Applicants, is to dispute liability to make payment for the roof repairs when the cost is finally identified, under section 27A of the Act. If their claim is to be based on historic neglect, they should take into account that they must prove they were entitled to damages for breach of the repairing covenant in an amount that reflected the additional cost arising from delay. That would be likely to require expert surveyors advice, and the Applicants may also wish to take legal advice on how to present the claim.

86. The Tribunal declines to determine this question in this application.

Summary

87. Bringing the decisions made above together, the service charges for the 2019 – 2022 years set out in Table 1 above, need to be revised as follows. Changes are identified in bold:

	2019	2020	2021	2022
Cleaning	270	378	777	1,076
Window cleaning	600	720	720	720
Electricity	5,425	-7,277	-361	597
Gate maintenance	**165**	**0**	-	1,164
Gardening	-	-	-	-
Repairs and maintenance	**2,019**	1,456	**988**	**328.80**
Out of hours service	**288**	**288**	**288**	**288**
Buildings insurance	**1,967**	3,160	3,455	3,806

Insurance valuation	-	300	-	-
Health & Safety	**600**	**600**	**600**	**600**
Fire alarm	384	384	504	384
Emergency lighting testing	-	-	432	337
Management fees	**2,520**	**2,520**	2,592	2,592
Accountancy fees	**636**	**650**	**670**	**690**
Account management fee	**0**	**0**	-	-
Bank charges	72	-	72	72
Postage	72	72	72	72
Legal expenses	1,200	-600	-	-300
Site inspections	-	**0**	360	432
Total	**16,218**	**4,671**	**11,169**	**12,858.80**

Costs

88. The Tribunal has to determine the applications relating to costs under section 20C of the Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

89. The parties are invited to make written submissions setting out what orders they each consider the Tribunal should make on the two costs applications within 21 days of the date of this decision. The Tribunal will then determine those applications on the basis of the written submissions and without a further hearing unless either party requests a further hearing.

Appeal

90. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)