In the FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case Reference	**:**	**LON/00AJ/LSC/2023/0018**
Property	**:**	**42, 58 and 152 Haven Green Court, Haven Green, London W5 2UY**
Applicants	**:**	**Anup Garg** **Shikha Garg**
Respondent	**:**	**Haven Green Court Ltd**
Representative	**:**	**Rradar Ltd**
Type of Application	**:**	**Payability of service charges**
Tribunal	**:**	**Judge Nicol** **Mrs A Flynn MA MRICS**
Date and venue of Hearing	**:**	**9th, 10th and 11th October 2023** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**25th October 2023**

DECISION

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(1) The service charges challenged in these proceedings are reasonable and payable by the Applicants to the Respondent.

(2) There is no order in relation to the Applicants' costs applications.

Relevant legal provisions are set out in the Appendix to this decision.

Reasons

1. The Applicants are the lessees of 3 flats in a 5-storey purpose-built block of 80 flats: Flat 42 since March 2010, Flat 152 since September

2013 and Flat 58 since April 2015. They are buy-to-let investors and have always sub-let their flats at this block.

2. The Respondent has been the freeholder of the block since 1996 and is a company owned by the lessees of the flats, including the Applicants. The First Applicant is also a director of the Respondent company but has taken "a leave of absence" while he brings this application.

3. The Applicants applied on 12th January 2023 for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the reasonableness and payability of service charges for the 8 years 2015-2023.

4. The Tribunal heard the case on 9th, 10th and 11th October 2023. The attendees were:

- The First Applicant, representing himself and the Second Applicant
- Mr Mark Loveday, counsel for the Respondent
- The Respondent's witnesses:
  - Mr William Heneker, BSc (Hons) FRICS FIRPM, Lamberts Chartered Surveyors
  - Mr Christopher Lubbock, Estate Manager
  - Mr Gary Medazoumian, Director
- Mr Stephen Taylor, Director
- Ms Lucy Taylor, trainee solicitor, Rradar Ltd

5. The documents before the Tribunal consisted of:

- A trial bundle of 830 pages;
- A skeleton argument from each party;
- A bundle of authorities from Mr Loveday;
- One authority from the Applicants (*English Rose Estates Ltd v Menon*, provided on the third day along with a summary); and
- A letter dated 12th October 2023 from the First Applicant – the Tribunal would have excluded this from their consideration because it was received the day after the close of the hearing but it simply repeated submissions already made in the papers on a couple of the issues the First Applicant had failed to address in his oral submissions.

6. The trial bundle contained a witness statement on behalf of the Applicants from Ms Vivien Moseley, a fellow lessee. The First Applicant had intended to call her on the final day by video link but Mr Loveday confirmed he had no questions in cross-examination and so her attendance was excused. The Tribunal read the statement and took due notice of it in making this decision.

7. As directed by the Tribunal, the parties sought to identify the issues in dispute between them using a Scott Schedule. Although separate provision was made for each year in the Scott Schedule, the Applicants' objections were identical for each year and so the Tribunal has considered below the issues by each service charge challenged.

Managing agents' fees

8. The Respondent's arrangements for managing the property are relatively unusual. Lamberts Chartered Surveyors are the managing agents but the Respondent also employs an Estate Manager, a Porter and a cleaner. Some tasks normally undertaken by a managing agent have been carried out by the Respondent's employees. Mr Heneker, the principal of Lamberts, described his and his firm's role as more of a consulting one. Lamberts's fees are accordingly lower – they charge £4,000 (plus VAT), or £50 per flat, plus additional charges, including for out of hours attendance at lessee meetings, which bring the total charge to around £100 per flat. This contrasts with charges of around £200-350 per flat which the Tribunal knows, from its own experience and from the Applicants' evidence of alternative quotes, other managing agents would have charged.

9. Despite the low charge, the Applicants alleged that Lamberts had not provided the services they contracted for. The management agreement dated 7th May 2015 between the Respondent and Lamberts listed a number of functions in Appendix II. The First Applicant discussed this list with Mr Heneker in July 2022, from which he concluded that Lamberts had not actually carried out some of the listed functions. He argued that, therefore, Lamberts's fees should be reduced proportionately.

10. The problem here is that the Applicants have misunderstood the management agreement. The list of functions was not a list of matters Lamberts had undertaken to do but a list of matters they would be obliged to do if the Respondent asked them. As already referred to, the Respondent has arranged for some management to be carried out through their own employees and, inevitably, there are some things within the normal remit of a managing agent which they do not ask Lamberts to do. The reasonableness of Lamberts's fees must be judged by whether what they have actually done justifies their fees, not on what they could or might have done from the list in Appendix II.

11. Mr Heneker gave examples of their work: recommendations of service contractors; advice on addressing leaseholder issues and complaints; enforcing breaches of the lease, such as instances of antisocial behaviour; preparing S.20 Notices for major works projects; the collection of rent and service charge arrears; and sometimes assisting the Estate Manager and the Respondent's Board with the drafting of correspondence to leaseholders and their lenders. Also, on the passing of the previous company secretary, Lamberts were appointed to carry out those duties. The Tribunal is satisfied that Lamberts carry out work at least to the value of their fees.

12. The Applicants accused Lamberts of exploiting a conflict of interest. When the Respondent needed a survey carried out, Lamberts would do it, not least because they employ chartered surveyors and the firm has the requisite expertise. The Applicants listed 6 surveys carried out

between 2015 and 2023. They accused the Respondent of going "full throttle on the spending spree" arising from the surveys. However, they provided no evidence to support this generalisation. They did not point to any projects as being unnecessary and did not provide alternative quotes or other evidence to suggest that any more money was spent than was reasonable on those projects.

13. Lamberts's surveys included ones for Planned Preventative Maintenance in the year of their appointment, 2015, and in 2023. The Applicants challenged Mr Heneker's assertion that good practice required such surveys every 3-5 years. Mr Heneker explained that the building is old and plans for ongoing large-scale maintenance needed to be reviewed on that timescale to ensure that they were appropriate and up-to-date.

14. The Applicants pointed out that Lamberts financially benefited from the surveys as they charged separately for them. They implied that this was somehow unethical or dishonest. This is nonsense.

15. The provision of such surveys was expressly provided for in the management agreement. Lamberts were employed partly because they had the expertise to provide such a service. This is standard business practice. The possibility that a managing agent might be tempted to increase their fees by providing unnecessary services is counteracted by the professionalism of the agents, including the ethical and other regulatory requirements of their professional organisations, such as the RICS, and by legal requirements for decisions as to the provision of services to be rational and reasonable. The fact is that these protections worked precisely as they were supposed to in this case – the Applicants were unable to show any instance in which Lamberts had provided unnecessary or unreasonably expensive services.

16. Instead, the Applicants had a tendency to make exaggerated claims which could clearly be seen to be untrue. For example, they alleged that Mr Heneker charged for acting as an over-qualified stenographer at the Respondent's Board meetings, taking minutes but otherwise contributing nothing. Just a brief glance at the Board's minutes show Mr Heneker making regular contributions from his position as the managing agent for the building. The First Applicant has been a director of the Respondent since mid-2022 and, having been in a position to observe Mr Heneker's contributions for himself, has no excuse for making obviously false claims.

17. The Applicants also alleged that Mr Heneker and Lamberts had failed to provide expert advice on a number of issues, including:

    (a) The interpretation of the lease,
    (b) Auditing the accounts, and
    (c) The treatment of end-of-year surpluses or deficits on the service charge accounts.

18. However, the Respondent never wanted nor asked Mr Heneker to provide such advice. For example, in relation to the auditing of the accounts, Mr Medazoumian is a chartered accountant and the Respondent was content to rely on his input and that of the accountants they used to certify the annual service charge accounts. It was not Mr Heneker's role to spend potentially unremunerated time unilaterally initiating and voluntarily carrying out tasks which no-one had asked him to do.

19. Further, the Applicants were actually wrong in these instances as to the need for the advice, as considered further below.

Interpretation of the lease and the employment of staff

20. The leases at the property, including the Applicants' three, are in identical form save for the amount of the fixed service charge percentage and the fact that only some leases come with a parking or garage space. The Applicants pointed to paragraph 5 of Schedule 1 which requires the Respondent, amongst its other services,

> To employ at the Landlord's discretion the Agent to manage the Building and to discharge all proper fees charges and expenses payable to the Agent including the cost of computing and collecting the Service Charge and the employment of such staff as is necessary to carry out the services

21. The Applicants asserted that the normal meaning of the words in paragraph 5 of Schedule 1 is that all the matters listed after the first mention of "the Agent" are functions of the Agent. This would mean that the employment of staff mentioned at the end could only be done by the Agent so that the Respondent could not employ its own staff such as the Estate Manager, Porter and cleaner.

22. The Tribunal disagrees that this is the normal meaning of the words. In the Tribunal's opinion, paragraph 5 provides for two functions:

(a) To employ the Agent; and
(b) To discharge fees, etc.

23. Further, "payable to the Agent" does not so qualify "all proper fees charges and expenses" so as to exclude any not incurred by or through the Agent. Therefore, the two items specified at the end, namely the cost of computing and collecting the service charge and the employment of staff, are not matters in the exclusive province of the Agent. The Respondent has the power within paragraph 5 to incur such expenditure without the involvement of an agent.

24. Lease terms are to be interpreted in the context of the rest of the lease and the circumstances at the time the lease was created (see *Arnold v Britton* [2015] UKSC 36; [2015] AC 169). Such matters reinforce the Tribunal's interpretation:

(a) The lease term is 999 years. The lease terms should be interpreted where the words allow in such a way that accords the parties a flexibility commensurate with the extent of changes to be expected over such a long period. The Applicants' interpretation would severely limit the options available for the delivery of services.
(b) It makes no commercial sense to limit the provision of all services through an agent. Direct employment of staff has advantages and disadvantages compared to using an agent. Further, the lease provides for a power to employ an Agent, not an obligation. Therefore, the Respondent has the power not to employ an Agent but, according to the Applicants, this would leave the building without anyone with the power to provide any services.
(c) The landlord's employment of an estate manager, porters and cleaners to provide services to the building started long before the current leases were granted in 2006 and 2007. According to the Applicants, the previous leases expressly permitted such employment. However, also according to the Applicants' interpretation of the new leases, the parties implemented a hugely significant change when introducing the new leases by which all existing employees would have had to be fired and all functions switched to a managing agent. Instead, there is no evidence of any such change being contemplated. On the contrary, the granting of the new leases saw no changes in the arrangements at all.

25. Therefore, contrary to the Applicants' assertion, paragraph 5 permits the Respondent to employ the Estate Manager, Porter and cleaner. Further therefore, Lamberts cannot be criticised for failing to provide advice to the contrary.

Auditing the accounts

26. Paragraph 7 of Schedule 1 to the lease required the Respondent "to cause proper audited accounts to be kept". The Applicants asserted that this contradicted the statement given by the accountants, Paul Ng & Associates, in the annual accounts:

> You have stated that an audit of the service charge accounts in accordance with International Standards on Auditing is not required under the terms of the lease for property.

27. When making his oral submissions, it became clear that the First Applicant had failed to appreciate the relevance of the words, "in accordance with International Standards on Auditing". He seemed to think that the accountants were saying that no auditing of any kind was required or carried out in relation to the leases. There is a standard called TECH 03/11 formulated specifically for the needs of service charge accounts rather than complex corporate accounts. The accountants' statement said their work was carried out with regard to that standard. The Respondent, as guided by Mr Medazoumian and Paul Ng & Associates, regarded compliance with that standard as sufficient compliance with the lease. The Tribunal is more than satisfied

that neither Mr Heneker nor anyone else could be criticised for advice to that effect or for failing to provide contrary advice.

End-of-year surpluses

28. The Applicants objected to the Respondent putting surpluses on the service charge accounts into the reserve fund. They pointed to guidance in the RICS Residential Management Code that a reserve fund should not be used as a "float" for surpluses and deficits to pass in and out of.

29. The lease does not provide for what happens to end-of-year surpluses or deficits. The Respondent's approach was as follows. With Mr Heneker's help, they would calculate how much should be in the reserve fund in the light of any future planned maintenance. In practice, such sums were larger than any surplus. Therefore, the Respondent would put the previous year's surplus towards the reserve fund and ask lessees to pay the balance of what was estimated to be required for the coming year. They could have done it differently, e.g. by returning the surplus to lessees and then charging them the full reserve fund contribution, but that would just have been shuffling money around. It was easier and more expedient not to send the money out only to ask for it back. Moreover, and more crucially, there was nothing in the lease or elsewhere that said they couldn't do it this way. The Applicants alleged that the transfers into the reserve fund constituted overpayments of service charges but there is no evidence anyone overpaid as a result of them.

Consultation

30. The Applicants alleged that Mr Heneker had missed, and so failed to advise on, the need for consultation with the lessees under section 20 of the Act in relation to a contract for the supply of electricity and the provision of gardening services. They alleged that the two contracts satisfied the definition of "qualifying long term agreement" which, according to section 20ZA (2) of the Act, is an agreement entered into, by or on behalf of the landlord, for a term of more than twelve months.

31. The first problem is that the First Applicant appeared to be under the impression that any contractual arrangement which happened to continue for more than 12 months comes within the definition. That is not correct. The contract must be one which is going to run for more than 12 months from the start. The gardening contract was clearly not such a contract. Darias Stachurshi agreed verbally to attend 2 days a week at £170 per day. There was no commitment for it to last as long as 12 months.

32. In July 2020 the Respondent entered into a 3-year electricity supply agreement because the offered price of 15.7p per unit was significantly lower than the price they had been paying under the previous contract of 19.1p. The subsequent substantial increase in energy prices has only made the contract look even better. The Respondent did not believe consultation was required but anyway sought and obtained

dispensation under section 20ZA of the Act by Tribunal order on 26th June 2023 (the Applicants did not oppose this).

33. Again, there was no basis for criticising Mr Heneker for his supposed lack of advice about consultation in relation to either matter.

Estate Manager's salary

34. As referred to above, the Applicants asserted that the lease does not permit the Respondent to employ an Estate Manager but the Tribunal has concluded that it does. The Respondent employs Mr Lubbock who is also the lessee of Flat 34 and was a director from 2004 until he took up the post of Estate Manager in 2012. His role includes managing staff and contractors, organising repairs and maintenance, being available for emergencies, carrying out monthly fire and emergency lighting checks, checking the communal central heating and hot water systems, carrying out minor maintenance and/or temporary repairs, service charge budgeting, raising service charge demands and arranging collection, and paying supplier invoices.

35. The Applicants alleged that Mr Lubbock operated by "questionable standards, work ethics and a series of breaches in delivery of services". For the reasons set out further below, the Tribunal has no hesitation in rejecting these serious allegations. Such allegations should not be made unless supported by compelling evidence. Instead, the Applicants were unable to identify any circumstances which could justify questioning Mr Lubbock's ethics or professionalism.

36. The Applicants raised the following matters:

(a) The Respondent did not give Mr Lubbock a specific spending limit so that he had the power to spend significant sums of money without the Board's express prior approval. While it is understandable why it should be thought that such a control would be prudent, this would only be relevant to these proceedings if there were any evidence Mr Lubbock had abused this power so as to affect the service charges. On the contrary, there is no evidence that the Board were ever in the dark about or objected to any of Mr Lubbock's expenditure. The Applicants did not identify any objectionable expenditure either.

(b) The block is heated by an oil-fired communal system. Part of Mr Lubbock's job is to buy the necessary oil to fuel it. He has been doing so from Barton Patroleum. The First Applicant said he did a "quick survey" of heating oil prices and suppliers from which he concluded that the oil could be bought more cheaply. He criticised the Respondent's Board for providing insufficient oversight so as to address this issue. Mr Lubbock responded that he did check the market but the price charged by a supplier identified by the Applicants, Crown Oil Ltd, varied – sometimes it was cheaper but sometimes not. Also, Barton's price for new customers was higher than they would charge the Respondent as a regular, long-term customer. There was no reason

to think another supplier would be cheaper over any significant period of time.

(c) In relation to insurance, the Applicants pointed out that the premium had increased over the years and they were unaware of Mr Lubbock obtaining alternative quotes. In fact, the Respondent used a broker to source insurance and they, of course, tested the market before recommending what the Respondent should do. Market testing has resulted in changes in insurers, as happened in 2017 and again in 2021. Mr Lubbock pointed out that it is not advantageous to change more frequently as building loyalty with an insurer helps maintain stable premiums in the event of a large claim.

(d) On a separate point, the lease requires the Respondent to produce to lessees evidence of policy terms and the premium paid. The Applicants seemed to think that this meant that the Respondent should send them out to all lessees annually. In fact, the Respondent complies with the lease by providing them when requested. It is an unnecessary administrative burden and expense to send them to all lessees every year.

(e) Ms Moseley alerted the Applicants to a problem she had had for years with water pressure in her top floor flat. She attended one AGM to raise the issue and apparently broke down in tears. The Applicants claimed that Mr Lubbock had failed to address the issue in the 5 years since Ms Moseley first raised it. Mr Lubbock explained that it was not a simple issue. It only affected a minority of flats, not even all those on the top floor, and was principally associated with flats where the internal plumbing arrangements had been changed to install more modern fittings – those flats which had retained the original fittings did not have the same problem. A number of alternative remedies were tried, including the installation of air release valves and of larger pipes to the water tank, not least in order to keep the relevant costs down so that service charges would not have to go up. Now a survey has been commissioned to look for further remedies. The Tribunal could not identify any deficiency in Mr Lubbock's service sufficient to justify a reduction in the service charge relating to his salary.

(f) Mr Lubbock had used his personal credit card for some expenses which he then recovered from petty cash, including Amazon Prime deliveries and his mobile phone. The Applicants seemed to think that there was something scandalous about this but the Board knew of and were content with such expenditures. The Applicants had no evidence that any improper expenditure resulted. When the First Applicant raised the issue with the Board, Mr Lubbock was given a company debit card which he has used since for such expenditure.

(g) The Applicants questioned Mr Lubbock's paying the service charges for one flat. The First Applicant claimed that they were paying him in cash, raising questions in relation to money-laundering. Mr Lubbock explained that he had an arrangement with the owners of the flat opposite his who live abroad and have no bank account in the UK. He pays their bills for them and they refund him by bank transfer. There is

nothing wrong with this arrangement. These allegations exemplify the Applicants' tendency to assume not just the worst but serious criminal conduct when the problem is actually just their ignorance of the full facts.

(h) Until April 2019 Mr Lubbock served as a director of a local property agency, Match a Property. The Applicants claimed that Mr Lubbock used his position as Estate Manager to obtain a significant proportion of rentals and sales on the estate. However, there was no allegation that any work for Match a Property distracted Mr Lubbock from his duties as Estate Manager. Neither the Respondent nor their Estate Manager has any obligation to ensure a fair and open market for sales and rentals and lessees can make up their own minds as to which agency to use. There was no suggestion that Mr Lubbock applies any undue pressure on any lessee to use his agency. Indeed, there was no evidence that he even markets his agency to residents on the estate.

37. The Applicants appear to have taken umbrage that, when these issues were raised, the Respondent's Board did not make all the changes they wanted to Mr Lubbock's practices. The Tribunal got the impression that the Board resides a significant amount of trust in Mr Lubbock because he is a long-term lessee and resident himself in the building and they are happy with the job he is doing. The Tribunal could not identify anything in the Applicants' complaints about Mr Lubbock which could affect the reasonableness of any service charges.

38. The Applicants termed the Respondent's employment of a Managing Agent and an Estate Manager "a very strange and awkward management arrangement", rather than using only a managing agent. The Tribunal agrees that such an arrangement is uncommon in this day and age, particularly with the employment of a Porter as well. However, it has been the Respondent's clear choice to use this arrangement, even if it costs more money, in order to provide a higher quality of service. If a landlord chooses a course of action which leads to a reasonable outcome, the costs of pursuing that course will have been reasonably incurred even if there were another cheaper, reasonable outcome: *Hounslow LBC v Waaler* [2017] EWCA Civ 45; [2017] HLR 16.

39. In the Respondent's eyes, this is a high-quality residential block which needs the services which accord with such a status. The Applicants dispute just how high-quality the property is but that is a matter of opinion outside the Tribunal's purview. The Respondent is not required to go for the cheapest option but to behave reasonably and rationally. The Respondent's approach does not appear to face opposition from anyone but the Applicants. If the Applicants wished to switch to a different approach, they would need to persuade other lessees to join them in electing different directors.

Porter's salary

40. The Tribunal has already disposed of the Applicants' argument that the lease does not permit the employment of a Porter. However, the

Applicants also questioned what the Porter actually does for his salary. The First Applicant insisted on repeating an allegation that the only thing he does is clear rubbish disposal chutes on the basis that this is the only thing he has personally ever seen the Porter doing. This is a silly approach. As a non-resident lessee, the First Applicant should not expect to see the Porter doing much at all on his few visits to the property as the likelihood is that, at any given time, the Porter would be engaged on tasks out of the First Applicant's sight. The block has a number of entrance doors and the Porter's lodge (a small room containing the CCTV hub) is in Block 4 (where the entryphone has a special button for the Porter), which contains none of the Applicants' flats. There is also a small staff room at the side of the building.

41. Mr Lubbock explained that the Porter's duties include removing rubbish and recycling from the flats' dumb waiters and chutes, checking drains for blockages, daily checking of lights, checking fire alarm panels and the CCTV, clearing rubbish in the common areas of the estate, assisting with minor maintenance work, and assisting residents with routine tasks such as changing light bulbs. The Tribunal is satisfied that the Porter carries out work befitting his status and salary.

Cleaner's salary

42. Again, the Tribunal has already disposed of the Applicants' argument that the lease does not permit the employment of a cleaner. However, the Applicants also obtained quotes from external cleaning contractors and suggested that a suitable cleaning service could be obtained for around £4,000 rather than the sums of £8,676 to £9,973 which the Respondent has paid for the cleaner or £8,000-£10,000 if the Porter's cleaning tasks were included. Again, however, the Respondent has made a clear choice to provide a higher quality service even if that means higher charges. The Tribunal has extensive experience of lessees complaining about an inadequate level of cleaning which the Tribunal holds is reasonable for the price paid. In this case, the Respondent has chosen a different compromise between cost and quality which they are entitled to do.

Gardening

43. As well as the argument about consultation already addressed above, the Applicants claimed that, because the lease contains no express reference to gardens, garden maintenance or gardening costs, service charges for gardening are not recoverable. Given that there are 3 areas of garden around the estate, it would be surprising, to say the least, if the lease did not provide for their maintenance. The Building is defined at clause 1.5 of the lease to include appurtenant land. There is no reason to exclude the garden areas from this definition. The obligations to maintain the Building therefore extend to the garden areas.

44. The gardener, Darius, was employed from 2014 after concerns had been raised at that year's AGM about the state and condition of the gardens.

How satisfied the Respondent and the lessees have been with his work is demonstrated by the fact that he has been continuously employed since. Both parties had provided photos of the garden areas which appeared to be attractive and maintained to an immaculate standard. The Applicants asserted that the charges of around £18,000 per year were excessive and questioned why the gardener should continue coming in the winter when there might be less work expected. Again, the Respondent has made the reasonable decision to pay more for a higher quality of service. The Applicants' alternative quotes show the gardening could be done for less money but there is no reason to think that the service would meet the same standard. The Tribunal is satisfied that the cost of gardening is reasonable for the service delivered.

Window cleaning

45. The window cleaning service provided by Rose Property Services on behalf of the Respondent extends to the windows of the flats as well as the communal windows, despite the former being demised to the lessees so as to come within the lessees' own covenants. This has apparently been the practice since around 2009. The Respondent explained that this is done to ensure the building retains a good appearance without having to spend managerial resources in chasing down those who don't comply with their window cleaning obligations. Mr Loveday pointed to the "sweeper clauses" in the lease:

> FIRST SCHEDULE
>
> The Services
>
> 6 To do or cause to be done all works installations acts matters and things as in the absolute discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Building
>
> SECOND SCHEDULE
>
> The Service Charge Provisions
>
> 4 The Landlord may withhold add to extend vary or make any alteration in the rendering of the Services or any of them from time to time if the Landlord at its reasonable discretion deems it desirable to do so

46. There is no express provision in the lease for the Respondent to impose a service charge for the cleaning of the flat windows. The Applicants tried to argue that the requirement for any expenditure to come within the lease terms means that, if it is not express, it cannot be charged. Also, they argued that terms have to be mutually exclusive so that, if they provide for lessees to clean the windows, there cannot be a provision which also allows the Respondent to clean them.

47. The Applicants have misunderstood the principles of lease interpretation. Given their strong criticism of the Respondent for failing to take advice when required, it is somewhat surprising that the

Applicants did not themselves take legal advice so that they could understand the relevant law. The fact is that, as long as the lease permits a landlord to take certain action, there is no absolute principle which requires it to be express or exclusive.

48. The Applicant pointed to authorities (*Liverpool Quays Management Limited v Moscardini* [2012] UKUT 244 (LC); *Dell & Dell v 89 Holland Park* [2022] UKUT 169 (LC)) which indicated that sweeper clauses do not necessarily allow for everything that their wide words might encompass, being limited by the context of the lease. However, the sweeper clauses in this case are drafted widely enough to include a service such as the cleaning of the flat windows without going outside the limitations in the lease. The fact that the windows are included in the lessee's demise is not by itself sufficient reason to interpret them other than by their plain wording. Further, there is no reason to think that the lessees are being asked to pay more than they would do if they themselves were cleaning the windows of their own flat – logic would suggest they would be paying less.

Insurance

49. The lease provides that the cost of insurance premiums may be collected as Insurance Rent rather than as part of the service charges as the Respondent has been doing. The Applicants made the bold suggestion that this meant their share of the insurance premiums was not payable. However, the lease states at clauses 8.2.1 and 11.3 that the insurance rent is payable simply "on demand". A demand for service charges including the insurance would satisfy this requirement.

Service charge apportionment

50. The Applicants asserted that the service charge apportionment fixed by the lease (1.18% for flat 42, 1.36% for flat 58, and 1.2% for flat 152) was unreasonable in that it was not proportionate to floor area. The First Applicant seemed to think that there was some rule requiring apportionment to relate to floor area but there is no such rule. Instead, there are many different ways of calculating apportionment, including rateable values and number of bedrooms. In any event, as he was informed previously by Judge Dutton in a letter dated 9th February 2023, the Tribunal has no power to alter apportionments fixed at a particular percentage in the lease outside an application for to vary the lease in accordance with the Landlord and Tenant Act 1987 which has not been made in this case.

51. The Applicants pointed to the case of *Williams v Aviva Investors Ground Rent GP Ltd* [2023] UKSC6; [2023] AC 855 which addressed the power of Tribunals to consider and vary apportionment. However, that power only arises where the landlord is empowered under the lease to set or vary the apportionment and purports to exercise that power. There is a power under paragraph 5 of the Second Schedule to the lease to vary apportionment but it only applies in limited circumstances,

namely on an event such as more flats being added to the building, which the Applicants do not claim apply here.

Reserve fund

52. The Applicants pointed out that the Reserve Fund has grown over recent years and contained more than was required to meet the costs of the most recent project of roof works. They alleged that the amounts collected for the Reserve Fund were excessive and that the funds were collected on a speculative basis without any spending plan or immediate need.

53. When collecting a Reserve Fund, it is not reasonable for a landlord or their agent to collect random sums such as might happen to appear as a surplus at the end of the year. There must be a plan as to what the money is to be used for and how much is needed for that purpose. Of course, it is preferable, for the sake of accuracy and transparency, that the plan should be set out in written form by someone suitably expert. This is what Mr Heneker's PPM reports are for. His latest PPM report, produced in January 2023, predicts that around £1.2m is needed over the next 10 years. However, even before the latest report was produced, the Respondent was entitled to make an educated estimate as to what might be needed, subject to adjustment on receipt of the report.

54. The Tribunal is satisfied that the Respondent, as advised by Mr Heneker and Lamberts, have gone through a sufficient process in calculating Reserve Fund contributions. This includes regular updates, at least once a year, of the reserve fund cash flow forecast document that Mr Heneker prepares for the Board. It is unrealistic to expect the Reserve Fund to reduce to somewhere around zero after each major project. There is always the next project to collect for. It is also worth remembering that money in a Reserve Fund is never lost to the service charge payers – all balances are used to offset service charge expenditure, in the future if not in the present.

55. The Applicant complained that the Reserve Fund had been used to pay for "day to day" expenditure. In particular, he pointed to the sum of £1,511 paid for electrical works and included in the 2019 accounts as expenditure from the Reserve Fund. He seemed to think that the Reserve Fund must be exclusively reserved for large items of expenditure and asserted that "£1,500 is not major works". The Respondent's witnesses were somewhat puzzled by the First Applicant's questions about this – as far as they were aware, the sum was for capital expenditure suitable for payment from the Reserve Fund. The Tribunal cannot identify anything wrong with accounting for this expense from the Reserve Fund.

Costs

56. In their application form the Applicants sought orders under section 20C of the Act prohibiting the Respondent from putting their costs of these proceedings on the service charge and under paragraph 5A of

Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that the Respondent should not be permitted to bill them directly for those costs. However, the application having entirely failed, there is no basis for making either order.

Name: Judge Nicol **Date:** 25th October 2023

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(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.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions 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.

Section 20C

(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 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 a county court;
  (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if

the application is made after the proceedings are concluded, to any residential property 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 a 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.

Section 27A

(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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

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

Schedule 11, paragraph 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.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.