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

Tribunal Case reference	:	CHI/00MR/LSC/2024/0078
County Court claim	:	K33YX063
Properties	:	Flat 3, Burlington Lodge, 89 Victoria Road South, Southsea, Hampshire. PO5 2BU
Applicant	:	89 Victoria Road South Limited
Representative	:	Daniel Milner of counsel instructed by Biscoes Solicitors
Respondent	:	Mr Ziad Said
Representative	:	Mrs Booy Said
Type of application	:	Transferred Proceedings from County Court in relation to Service Charges and related
Tribunal member(s)	:	Judge J Dobson Mr C Davies FRICS Ms T Wong
County Court Judge	:	Judge J Dobson
Date of Hearing	:	2nd September 2024
Date of Decision	:	26th September 2024

DECISION

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

Summary of the Decision of the Tribunal

1. **The Residential Lease service charges claimed by the Applicant in the proceedings have not been demonstrated to be payable.**

2. **As to costs, representations will be directed in relation to the Respondent's applications that the Applicant's costs of the proceedings should not be recoverable as service charges pursuant to section 20C of the Landlord and Tenant Act or as administration charges pursuant to paragraph 5A to schedule 11 of the Commonhold and Leasehold Reform Act 2002 and in respect of any other aspect of costs or fees of the Tribunal proceedings.**

Summary of the Decision of the County Court

3. **The Applicant's claim is dismissed.**

4. **As to costs, representations will be directed in relation to any application that the Applicant's costs of the proceedings should not be recoverable and any application by either party for an award of costs or fees in their favour. Any costs or fees determined to be payable by one party to another will be summarily assessed if not agreed following receipt of any representations from the parties.**

Background

5. The Applicant is the freeholder of Burlington Lodge, 89 Victoria Road South, Southsea, Hampshire, PO5 2BU ("the Building"), under registered title HP190172. The Respondent is the lessee of Flat 3, Burlington Lodge ("the Property"), having become so on 24th December 2002.

6. The Building is predominantly a block of self- contained flats. However, Flat 3 is a stand- alone annexe at the rear of the block containing the other flats. There are nine dwellings in total. The Applicant is a lessee-owned company in which there are nine shares. Eight of those have been issued to lessees, including one to the Respondent. The Applicant employs a managing agent to manage, Cosgroves.

7. There have been a few previous sets of proceedings between the parties, most recently in County Court claim number HY01YY807, resulting in a Decision by Judge Whitney ("the May 2022 Decision" [287- 293]. Not

all related to service charges. The May 2022 Decision prompted the Applicant to re- issue a series of invoices accompanied by what is described as a "Surveyor's Certification".

Procedural History

8. In June 2023, the Applicant filed a claim in the County Court under Claim No. K33YX063 in respect of sums said to be due from the Respondent lessee. The claim related to "unpaid balancing and service charge". There was also a claim for interest and costs. The stated value of the claim on the Claim Form [10- 14] was £5,561.89, excluding the court fee and legal costs on issue. A Particulars of Claim [15- 16] accompanied that. The Respondent filed a Defence [17- 19], including an argument that items claimed had been the subject of previous Court and/ or Tribunal proceedings.

9. The case was transferred to the administration of the Tribunal and for the determination by the Tribunal of whether the residential service charges claimed were payable and a determination by the Tribunal Judge sitting as a County Court Judge of the Court elements, pursuant to the Order of District Judge Pain dated 4th April 2024 [32- 33]. There have since been three sets of Directions given [34- 40 the first of those and the only set contained in the bundle]. The last related to case management applications. The Applicant was directed to provide a bundle for the final hearing and did so. The bundle comprises, including the index, of 366 pages.

10. Notwithstanding the clear terms of the Directions with regard to the bundle contents, inexplicably the bundle contained two copies of at least the pre-action protocol letter, the Claim Form, the Particulars of Claim, the first set of the Tribunal's Directions and the Court Order dated 3rd May 2024, a letter from the managing agents dated 15th July 2022 and a witness statement from previous proceedings. There were also two previous determinations by the Tribunal about breaches of covenant applications aside from those about service charges and to which no reference was made in the hearing.

11. Whilst the Court and Tribunal make it clear that they have read the bundles in full, many of the documents are not referred to in detail, or in many instances at all, in this Decision, it being unnecessary to so refer. Where the Court and/ or Tribunal does not refer to pages or documents in this Decision, it should not be mistakenly assumed that they have been ignored or left out of account. Insofar as reference is made to any specific pages from the main bundle (that provided on behalf of the Applicant), that is done above and below by numbers in square brackets [ ], and with reference to PDF bundle page- numbering.

12. This Decision seeks to focus on the key issues and, not least given there are several different elements to this case, does not cover every last factual detail. Not all of the matters mentioned in the bundle or at the hearing require a finding to be made for the purpose of deciding the

relevant issues in the case. Findings have not been made about matters irrelevant to any of the determinations required. Findings of fact are made in the balance of probabilities.

13. It merits mention that the Respondent made applications dated 19th May 2024 on the relevant Tribunal forms that the Applicant's costs of the proceedings- although strictly the form only relates to the Tribunal proceedings- should not be recoverable as service charges pursuant to section 20C of the Landlord and Tenant Act [20- 28] or as administration charges pursuant to paragraph 5A to schedule 11 of the Commonhold and Leasehold Reform Act 2002 [188- 196].

The Lease

14. A copy of the original lease was provided within the bundle. That lease is dated 15th April 1969. The parties to this dispute were in neither instance the original contracting parties. The term of the lease is 150 years from 25th December 1968.

15. The Landlord's covenants are set out in clause 4 of the Lease. In the usual manner, the Applicant has obligations in respect of the Building and can charge service charges. Save for a possible issue about some window cleaning on which the Tribunal did not need to make a determination, for the reasons explained below, nothing in this case turned on the extent of the Applicant's obligations. Hence, there is no merit in setting out the related provisions of the Lease.

16. The Tenants covenants are set out in clause 3 of the Lease. The relevant obligations on the Respondent as to service charges provided for in clause 3 as follows (the remainder of the clause not being unnecessarily quoted):

> "(i) To pay the said respective yearly and other rents or sum of money hereinbefore reserved and made payable at the time and in the manner at and in which the same are respectively hereinbefore reserved and made payable without any deduction (except as aforesaid)
>
> (viii) at all times during the said term to pay and contribute on demand one equal ninth part of the costs expenses outgoings and matters referred to in the schedule hereto as certified by the Landlord's Surveyors which certificate shall be final and binding on all parties hereto Provided that the Tenant shall pay on demand on accounts of the money's payable pursuant to this clause a sum not exceeding Thirty Pounds per annum to be paid by yearly payments in advance on the twenty fifth December in every year the first payment to be made on the twenty fifth December next to be applied generally by the Landlord in or towards the said costs expenses and outgoing s or to be paid into a reserve fund to be held by the Landlord and applied as it thinks fit in the discharge of the said costs expenses and outgoings and the Tenant shall be given credit for any such payment in account in settling the amount due from the tenant under this clause."

17. There is therefore provision for a balancing credit or charge following the end of the service charge year once the actual "costs expenses outgoings and matters"- or as the Tribunal will term it 'expenditure' for ease, is certified by the Landlord's Surveyor, as termed, and for the balance of one- ninth of that beyond what at the time of the Lease was £30.00 paid on account.

18. In addition, clause 3 (vi) provides as a sum for the Respondent to pay, the following:

"to pay not the Landlord all costs charges and expenses (including legal costs and charges payable to a Surveyor) which may be incurred by the Landlord in contemplation of any proceedings under section 146 and 147 of the Law of Property Act 1925."

19. Clause 2, which contains provisions which might in other leases be referred to as "Regulations" or similar, includes the following to which specific reference was made:

"That in case at any time during the said term any dispute shall arise between the Tenants and other tenant of the building or of the Landlord relating to the property respectively demised to them or the party or otherwise lights drains watercourses or other easements rights or appurtenances whatsoever relating or belonging thereto or any repairs or decorations thereto or any nuisance or annoyance arising therefrom then and in every such case as such dispute (provided the other party thereto shall also have agreed or become bound so as to refer the same) shall be referred to the determination and award of the Landlord's Surveyor or such person as he shall appoint and the decision of the Landlord's surveyor or the person appointed by him shall be final and binding on all parties to the dispute"

The Construction of Leases

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

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

time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

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

> "the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

22. There are many examples of cases in which the principles have been applied but none of these require reference in this particular case.

The Hearing

23. The hearing was conducted in person at Havant Justice Centre.

24. Mr Milner of counsel represented the Applicant company. In addition, Mrs Berry, a director, and Mr Berry, her husband, were in attendance.The Respondent was not himself in attendance. He was represented by his wife, whom he had authorised to represent him.

Applications on behalf of the Applicant at the hearing

25. There were a number of applications made on behalf of the Applicant and so it is appropriate to deal with those first.

26. Mr Milner made an application to adjourn the hearing. The reason was that there had been no conference on any previous date and there had been insufficient time on the day for him to take instructions.

27. As cannot have been a great surprise, that application was refused.

28. The hearing was the final hearing of a case which had been issued by the Applicant in March of last year and ongoing for approaching eighteen months. The final hearing date had been set a few weeks earlier. Precious Court and Tribunal time would have been wasted.

29. Whilst in his particular circumstances, Mr Milner may not have had as much time as he might have wished to prepare having only returned from holiday on the Saturday before the Monday of the hearing date, the brief had apparently been accepted in the knowledge of his holiday dates and it was for him to ensure that he was prepared. Insofar as the

information provided to him had been insufficient, the Applicant had been represented throughout and there had been far more than ample time to attend to any matters. There had been no marked, or other obvious, change in the Respondent's case from that set out by him at the outset. As Mrs Said submitted, there had been plenty of the time for the Applicant to be prepared.

30. In the event, insofar as Mr Milner relied on the desire to clarify matters as to figures and accounts, those matters turned out not to be relevant.

31. The Tribunal retired to consider the submissions before giving its determination about the application above. The Judge did not consider it appropriate to therefore reach any different conclusion about the County Court case, which would be significantly affected by the Tribunal determination.

32. Mr Milner also applied to amend the claim to the correct name of the Respondent.

33. That application was granted by the Judge as a Judge of the County Court.

34. Mrs Said did not object. The error was a minor clerical one. There was no suggestion that the Respondent had in any way been misled or otherwise prejudiced and there was no other impact on the proceedings. That said, as was observed in the hearing, the incorrect spelling had been raised at a much earlier point and there ought to have been an application to amend then on an application form and with the required fee, rather than leaving the matter to an oral application at the final hearing itself. Further, no amended Claim Form and Particulars of Claim had been provided and so it could have been argued, but was not, that the amendment ought to be disallowed for that reason.

35. Service of an amended Claim Form and Particulars was dispensed with in the circumstances, despite the lack of other provision of the amended document.

36. After the lunch break, Mr Milner sought to persuade the Court and Tribunal to allow him to re-open the Applicant's case (which had concluded save for closing submissions before the lunch break following all questions anyone present sought to ask of Mrs Berry having been asked).

37. Mr Milner wished to ask Mrs Berry about matters related to estoppel by convention. That was to say that because there had not been certification of the costs and expenses prior to the period of the claim, that practice had been accepted and the Respondent could not argue the requirement for such certification after that in this case.

38. That application was refused by the Tribunal. That again cannot have been surprising.

39. As Mr Milner conceded, there was no reference in the Particulars of Claim to that estoppel argument. It is right to say that the Particulars of Claim is brief. It refers to sums said to be owed pursuant to the Lease and lists invoices. It relies on covenants in the Lease, quoting part of clause 3(viii) and contends that the failure to pay is a breach. That brevity is not problematic for the breach of contract argument, although not the usual. However, it is problematic insofar as it gives not even a hint at the Applicant continuing to argue estoppel by convention. There is also no mention of estoppel by convention in any witness evidence from Mrs Berry, as Mr Milner conceded (or indeed any other witness evidence). It is further not mentioned in the Applicant's Reply [29- 31]. Mrs Said opposed that application.

40. The Tribunal retired to consider the application and the approach to take to it before informing the parties that the application was refused. The Tribunal did not seek to explain the reasons at that point but does below.

41. The Tribunal finds that the case as transferred to the Tribunal for determination of service charges payable did not include an argument of estoppel by convention. Such an argument is not something on which the Tribunal had been asked by the Court to make a determination. The case before the Court had not been amended to include any such argument and the determination sought from the Tribunal had rather inevitably not been amended either. There was no apparent case set out to re-open, as was pointed out to Mr Milner.

42. The Tribunal further notes that estoppel by convention was mentioned in the letter before action in December 2022[4- 9] and then is not at any identifiable stage after that. It had been mentioned in correspondence dated 15th July 2022, so just after the May 2022 Decision, by Cosgroves [74- 79] in a manner indicating the Applicant to still pursue the argument and saying that the invoices were re- issued but contending they were not needed (despite the contents of the May 2022 Decision). The letter before action in December 2022 in contrast said, "The Company always asserted" as if that were in the past and then moved on to the issues of the invoices with the contended "Surveyor's Certification". The natural reading of the words used in the letter was that the estoppel argument was not being pursued any longer.

43. Whilst Mr Milner sought to argue that there would be no prejudice to the Respondent in the Tribunal hearing from the Applicant about estoppel by convention, the Tribunal rejected that.

44. The argument was an entirely new one in this case. The Respondent could not have anticipated having to address such a case and was not present to provide any evidence or any instructions to his wife representing him. Whilst it could be said that he could have resolved that last issue had he attended, he had no reason to anticipate a need to

in respect of estoppel by convention. There was no suggestion that the Applicant's desire to raise a case of estoppel by convention had been indicated to the Respondent at any time in advance of in the middle of the final hearing. The Respondent could not have predicted anything from the passing mention in the letter before action and indeed the most obvious inference from the argument being mentioned in the letter before action but apparently in the past tense and not in the Particulars of Claim or otherwise following the issue of the claim would be that it was not being proceeded with.

45. In addition, the question of estoppel by convention had been raised in the proceedings determined in 2022 in which Judge Whitney had said in the May 2022 Decision the following of the Respondent:

> "However in my judgement he is entitled to require the Applicant to comply with the lease terms and I find those sums referred to as 'Balancing Charges' not to be due and payable" .

46. Therefore, it was determined in that case that there was no estoppel by convention. The Decision records that Mrs Berry gave oral evidence and said that she did not believe that a surveyor's certificate as needed (paragraph 22). It also records (paragraph 38) the clause 3 (viii) specifically provides for a certificate. It notes that the term "Landlord's Surveyor" is not defined in the Lease.

47. Mr Milner pointed to the statement by Judge Whitney that, "I find that the Applicant did not produce any evidence as to their being an estoppel by convention". He sought to argue that the Decision was founded on that lack of evidence.

48. Given that the Applicant was not permitted to advance the estoppel by convention argument in the circumstances in which that was attempted, strictly there was no need for the Court to consider whether wording used by Judge Whitney stated that there was not estoppel by convention or that simply there had not been sufficient evidence presented on the matter in the previous proceedings. Hence whether the sentence beginning "However in my judgement he is entitled" was premised on the sentence beginning "I find that the Applicant did not".

49. However, it firmly merits recording that the Judge and the Tribunal did not accept that the decision of Judge Whitney was demonstrated to be predicated on that lack of evidence and limited to that. The matters in the previous paragraphs were more than appropriate reason to refuse the application, which ends there. If it had been necessary to go beyond that, and without forming a final conclusion having not heard full submissions, the preliminary view of the Court and Tribunal is that the determination of Judge Whitney was that estoppel by convention did not apply and that would have rendered an attempt to resurrect the argument doomed to fail.

50. The Court and Tribunal had been troubled by the reference in the correspondence from Cosgroves to estoppel by convention and the indication that the Applicant still relied upon that despite the May 2022 Decision. The argument advanced by Mr Milner in support of the application to amend arguably explained that- namely, that the Applicant believed the argument could still be run with sufficient evidence, although the letter before action and onwards did not so state. The Applicant may reflect on the May 2022 Decision and the above observations.

Substantive matters

51. Oral evidence was received from Mrs Berry and to a lesser extent from Mrs Said. The Tribunal asked various questions of witnesses seeking clarification of matters advanced.

52. The Court and Tribunal additionally received written evidence from those two witnesses Mrs Berry [103- 109] and Mrs Said [173- 174] and additionally from Mr Roger Hunt [98-102] on behalf of the Applicant (although that dated from 2017 and had nothing discernible to do with the service charges the subject of the claim) and from Mr Said [152-172], the Respondent. The Court and Tribunal accepted the evidence of Mrs Berry that the date of 2022 on her witness statement was an error.

53. Both Mr Milner and Mrs Said gave oral closing submissions.

54. Mr Milner, amongst other matters, raised the fact that the Respondent was not in attendance and therefore as to the impact on the weight which could be given to his evidence, suggesting that the Defence would thereby fail. Mrs Said did not seek to explain the reason for Mr Said's absence. The Court and Tribunal gave little weight to the evidence of Mr Said in the absence of his attendance and particularly the absence of any good reason being provided in the hearing for that, particularly any good reason which might have gone to increase the, still necessarily limited, weight which could potentially be given to the evidence of Mr Said despite his absence.

55. Mr Milner also raised the point that it was said English is not Mr Said's first language with a suggestion of a need for an interpreter. He queried how the witness statement had been taken, although as it had not been prepared by a lawyer it may be better to use the term 'written' than 'taken'. That had not been raised with Mrs Said. The Tribunal was also mindful that a need for an interpreter to participate fully as a witness in an oral hearing, does not equate to a similar need in order to prepare a written document. The particular position of Mr Said was not known. Given the bases for the Tribunal's determinations as explained below, in this instance it was not necessary to explore the point further and nor is it necessary to say more about it here.

56. Mrs Said did not make a like submission in respect of the weight to be given to the evidence of Mr Hunt but necessarily the same point arises.

No indication was given as to why Mr Hunt was not in attendance. The Court and Tribunal gave little weight to the evidence of Mr Hunt as not being of any discernible relevance (and of no assistance with regard to the issues) but would have done in any event in the absence of his attendance and particularly the absence of any good reason for that.

57. Mr Milner had also indicated earlier in the hearing that the Applicant would be seeking its legal costs in the event of success, although he was unable to provide the figure sought.

58. The Tribunal and Court are grateful to all of the above for their assistance with this case.

59. The determinations on the substantive matters are set out below.

The Tribunal matters

The jurisdiction of the Tribunal

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

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

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

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

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

64. It is also well established that a lessee's challenge to the reasonableness of a service charge (or administration charge) must be based on some evidence that the charge is unreasonable. Whilst the burden is on the landlord to prove reasonableness, the tenant cannot simply put the landlord to proof of its case. Rather the lessee must produce some evidence of unreasonableness before the lessor can be required to prove reasonableness (see for example *Schilling v Canary Riverside Development Ptd Limited* [2005] EW Lands LRX 26 2005 in relation to service charges).

65. The Tribunal is entitled in determining the service charges (or administration charges) payable whether any sum should be off- set in consequence of any breach by the lessor.

66. For the avoidance of doubt, the Tribunal does not have jurisdiction in respect of costs incurred which are not demanded as service charges, including costs claimed by a company against its members on other bases. For completeness, it was said that company costs had been removed from service charges, although had been in there in the past.

Are the Residential Lease Service Charges payable?

67. The Tribunal determines that the service charges are not payable.

68. As the Respondent argued in his Defence, the Lease requires the "costs expenses outgoings and matters referred to" to be certified by the Landlord's surveyor, or rather it is only those as certified which the Respondent is required to pay. The Respondent argued that a failure on the part of the Applicant for there to be certification amounted to a breach of the provisions of the Lease by it. The Respondent repeated and expanded on the points in his witness statement. Mr Milner argued that the Respondent had not denied certification (or at least purported certification) itself but had queried how Cosgroves were able to certify, although it was pointed out that the Respondent had in the Defence been replying to a very brief Particulars of Claim so the Tribunal considered some caution was needed in construing any matters stated too narrowly.

69. Meeting requirements of the lease is fundamental. A party relying on a right to demand service charges and recover unpaid service charges pursuant to the terms of a lease must demonstrate that the given lease permits the recovery of such service charges, irrespective of what the specific sum may be. The Tribunal is entitled, given service charges are

demanded based on an entitlement in the Lease to so demand them, to consider whether the requirements of the Lease have been shown to be met even if that is not specifically raised by a party. In this instance such requirements have very specifically been raised.

70. The Tribunal determines that when the Applicant issued demands for expenditure not certified and the lessees, including the Respondent who was then a director of the Applicant, paid, no issue arose. The service charges were admitted or accepted. The situation continued for a time. As to the exact time, that is unclear. It was asserted by the Applicant and not disputed by the Respondent that demands were issued in that manner from 2009 to 2014 but there is no evidence as to what happened before that.

71. However, as explained by Judge Whitney in 2022, the Respondent was entitled to insist on compliance with the Lease and if so, the Applicant where it sought to demand service charges was required to comply with the requirements of the Lease. Compliance with the Lease required the Landlord's Surveyor, as termed, to certify the 'expenditure' for the service charge year. The Applicant did not provide such certification.

72. Instead, and following the 2022 Decision, the Applicant's agent re-issued demands with its July 2022 letter to the Respondent and provided what was said to be a certification by the "Landlord's Surveyor" regarding the amounts in those invoices. That certification [78-79] says:

> "Acting as the Landlord' Surveyor……………..
>
> The costs demanded as part of the enclosed invoice are:
>
> Demanded appropriately in accordance with the terms of the lease.
> Represent an appropriate costs item to the service charge accounts………
> The actual monetary costs incurred to fulfil this obligation as required by the lease(s) is reasonable in sum.
> Works undertaken were actually requires and were not frivolous or unnecessary.
> Works undertaken were carried out by a suitably qualified and/or experienced person.
> The works undertaken were completed to a suitable standard."

73. That is not what the Lease requires.

74. Mr Milner sought to argue that the Applicant had acted in accordance with the May 2022 Decision of Judge Whitney. The Tribunal considers that argument is wrong.

75. Nowhere in the Lease is there reference to certification of the amounts in demands, still less ones issued some years after the service charge year. That is not certification of the year's "costs expenses outgoings and matters referred to". The certification required is explained above. The Tribunal does not repeat it.

76. Mr Milner advanced another line of argument being that many items in the service charges would be small items- he suggested de minimis- and items would not generally be structural. He submitted that it could not be common sense to require such matters to be certified by a chartered surveyor and so that provision should be read down such that certification could be given by someone capable of certifying the works involved. Mrs Berry said in oral evidence that for general maintenance, the Applicant would engage a professional surveyor where the works required that.

77. The Tribunal addresses the point about capability further below. More immediately, the Tribunal identifies that the requirement is to certify the expenditure as a whole. That does not convey with it a need every individual item of work to have been signed off in advance by a surveyor or for more than proportionate consideration of any given item following the end of the service charge year. The requirement is to certify expenditure as a whole following the end of the service charge year. In any event, the perceived need at this time for any given item requiring specifically to be certified is nothing like sufficient to read the Lease as if in fact certification of expenditure as a whole is not required from a surveyor at all, despite the Lease specifically providing for that.

78. The language of the provision is clear. It is also simple enough to comply with. The reasonable cost of such certification would at first blush be recoverable. There is no need for issues to arise.

79. It is clear that the Lease required that certification and then demands to be issued to the lessees for their share of the balance unpaid of those certified sums. That did not happen.

80. That in itself is the end of the matter.

81. However, as the Tribunal also raised queries about a number of other specific aspects in seeking to understand the Applicant's case about the certification argument raised by the Respondent, it is appropriate to address those.

82. It was said that Cosgroves had been appointed as the "Landlord's Surveyor" for the purposes of the Lease and provision of the certification. The Applicant's Reply also contended that the managing agent, Cosgroves, had been appointed as the "Landlord's Surveyor". The July 2022 letter from Cosgroves sending re- issued invoices refers to "Cosgroves as managing agent (and the Landlord's Surveyor)".

83. There was no letter or similar identifying the appointment of Cosgroves as the "Landlord's Surveyor". The Tribunal accepts that the Reply in which the appointment was stated to have occurred was signed by Mrs Berry- who is as identified a director of the Applicant company- and amounted to evidence and the Tribunal notes that the evidence was not challenged. Mr Milner submitted that the appointment had been at an

AGM, although of course he could not give evidence and he conceded any such AGM minutes were not contained in the bundle.

84. The Tribunal cautiously accepts that at some stage and in some manner, Cosgroves had been sought to be so appointed. In the particular circumstances that the service charges were not due for the reason explained above, it was not necessary to establish the exact details of that appointment.

85. It was accepted on behalf of the Applicant that Cosgroves is not a chartered surveyors practice and does not employ any chartered surveyors. Aside from Mr Milner's concession of that, Mrs Berry confirmed it in oral evidence. Mr Milner argued that surveyor is not a term of art.

86. It is right to say that there is no definition in the Lease of the term "Landlord's surveyor". Consequently, it is not said explicitly that person must be a chartered surveyor, or any other particular professional or range of professionals. That lack of definition is somewhat regrettable for the lack of clarity.

87. However, the Lease is a lease of property drafted in or about 1968. Construing the provision in the Lease and the term used in the context of the Lease as a whole, the Tribunal determines that the appropriate construction of the Lease is that the term "Landlord's Surveyor" meant an actual surveyor, that is to say a chartered surveyor.

88. It necessarily follows that purported certification by Cosgroves was not certification by the Landlord's Surveyor as the Lease requires it.

89. There was also no indication as to whom at Cosgroves provided the certification which was included in the bundle, what their status was and on what basis they were said to be able to provide that certification.

90. The certificate contained a signature above the typed words "Cosgroves". As far as the Tribunal could best discern, the signature did not appear to be an attempt to sign as "Cosgroves" but rather appeared to be a name and presumably that was of whoever the individual was who signed. Mr Milner conceded in submissions that the Applicant did not know who had signed the certificates and Mrs Berry repeated that in oral evidence. Mr Milner said that the Applicant assumed that it was someone from Cosgroves' building and maintenance department but that was plainly as high as the Applicant's case could go.

91. In respect of there only being one such certification, the Applicant's case was that the others are within the documents held by the Applicant. Mrs Berry said in response to a question from Mrs Said that they had not been included because the bundle guidance sought a bundle of not more than 250 pages and that inclusion of those certificates would have added to the length of the bundle.

92. The Tribunal accepts that the other certificates being added would have increased the size of the bundle. However, given that the guidance is just that, given that the actual bundle submitted was 466 pages and the 250 pages referred to in guidance did not obviously impact greatly and given that many pages in the bundle comprise duplicate documents, the reason given was not an especially good one.

93. On the basis that Cosgroves are not surveyors, and it was not identified by the Applicant that Cosgroves employ any surveyors, the Tribunal infers that the signatory was not a surveyor. That was an obvious problem if certification by surveyor was required. The Tribunal draws the same inference, with the same problem being created, in relation to the other certifications not included in the bundle.

94. However, even if it was not, for the certification to be meaningful it both had to be identifiable who the signatory was and that they had sufficient knowledge and experience to be able properly to certify.

95. The illegible signature from an unknown person was meaningless. It was not possible to discern who the signatory was. It was also not possible, significantly, to identify that they possessed the knowledge and experience to give the certification.

96. The Tribunal finds that there was not in consequence any actual certification at all on the evidence presented. An attempt to certify where it was impossible to tell who sought to certify and that they were properly able to do so, did not meet the requirements, properly construed, of the Lease. Therefore, even if the Applicant had not failed to comply for the various other reasons, there would be non-compliance to this extent.

97. The Certification given by Cosgroves also stated under the wording quoted above the following:

> "Where Cosgroves acting as Landlord's Surveyor are not suitably qualified to provide certification (such as accountancy services) in accordance with the terms of the lease(s) Cosgroves has nominated suitably qualified professionals and their report (on which certification is attached and relied upon) is available to view in Cosgroves offices."

98. There was no explanation as to which items Cosgroves, assuming them to have been the Surveyor pursuant to the Lease, were not suitably qualified to certify. There is reference to accountancy services but not to whether there may be anything else. The fact that there apparently were such items flew in the face of them being the "Landlord's Surveyor" as provided for. It also cast doubt on their ability to certify in any event. It ought not to be beyond a competent surveyor (or in other circumstances another suitably experienced professional) to identify a reasonable level of accountancy fees for accounts such as those required. Further, there was no indication of which items they were certifying and which they were not.

99. Even if the other problems with the purported certification had not arisen, the Tribunal considers this point would also have been fatal. A certification which is not really a certification because it does not certify the matters required by the Lease and does not indicate which elements it does and does not so certify is again meaningless.

100. Mr Milner also sought to pursue on behalf of the Applicant a line of argument which had been advanced in the Applicant's Reply, namely that the Lease enabled the certification to be given by a party other than the Landlords Surveyor. The Reply said the Lease "clearly states Surveyor or Appointed Persons".

101. Mr Milner relied on clause 2 (viii) quoted above, which makes reference to another person.

102. The Tribunal determines that rather than that provision assisting the Applicant, it detracts from the Applicant's case. The clause specifically sets out an alternative to the "Landlord's Surveyor".

103. In contrast, the clause 3 (viii) contains no such alternative. It refers solely to the "Landlord's Surveyor".

104. Given that the contracting parties were clearly alert to the potential to provide for an alternative to the Landlord's Surveyor and did so elsewhere in the Lease in clause 2 (viii), the fact that they chose not to do so in clause 2 (viii) lends strong support to the fact that by requiring the certification to be the Landlord's Surveyor in clause 3(viii), the contracting parties meant just that.

105. If that were not enough, the other person who could determine a dispute of the nature covered by clause 2 (viii) if not themselves the "Landlord's Surveyor" has to be "such other person as he shall appoint". The "he" provided for is the "Landlord's Surveyor".

106. So, the "Landlord's Surveyor" would have to specifically appoint the other person. There was not even a hint in the Applicant's case that it as argued that a person who in fact was the "Landlord's Surveyor" had then appointed Cosgroves to do something in their place.

107. Hence, even if the wording of clause 3 (viii) and clause 2 (viii) and the Lease as a whole had permitted a construction which enabled another person to certify, there was no evidence that such other person had in fact been appointed to do so.

108. Consequently, the Tribunal rejects the argument that the Lease permitted certification by any other person.

109. A further argument by the Respondent about the ability of Cosgroves to certify expenditure incurred prior to their appointment in November 2015 was irrelevant in the circumstances.

110. It merits contrasting the position in relation to certification of expenses and similar at year end with the position in relation to payments on account.

111. The Lease provides that those payments will be £30.00, a figure which might perhaps have seemed adequate when the Lease was entered into but even so, a figure which would have wholly failed to take account of inflation even ignoring anything else which may have been relevant. It is a figure which would be wholly unworkable as a payment on account by now. However, it had been accepted by all- including the Respondent- for several years that the payment on account needed to be much greater and a figure had been demanded and paid of £900.00. The Decision of the Tribunal [330- 339] in CHI/00MR/LBC/2015/0071 determined that the previous limit to £30.00 no longer applied due to what was described as "custom and practice". Other later decisions also referred to that one.

112. That is not a matter where there was a dispute. The entitlement to £900.00 had been agreed and the demands accepted and admitted, with payments being made. That agreement to one alteration to the Lease did not amount to agreement to one or more other alterations.

113. Where the Applicant has failed to demonstrate valid demands, the specific amount of any service charges payable and included in such demands and the applicable tests do not arise. However, the Tribunal would not have considered it appropriate to explore reasonableness beyond the limited issues raised in the Respondent's case.

114. In this instance, the Tribunal also declines to reach any determinations on any of the particular issues raised by the Respondents about elements of the charges- which included that they are not balancing charges, that some relate to works started but not completed and that they had been worked out incorrectly. Mr Milner made some submissions about a section 20 consultation, selection of a contractor and the lack of any need for a report from a surveyor for the Applicant to be able to select a contractor but nothing turned on any of that.

115. Whilst the Tribunal may sometimes set out the decision it would have made on issues if it is wrong on a more fundamental matter, for example the payability of any specific service charges in the event that any charges are payable, the Tribunal considers that it is unnecessary to do so here.

116. The Tribunal determination required arose in the context of a claim in the County Court. The sums claimed were either due in whole or part or they were not. There had been no free- standing application to the Tribunal for a determination generally as to whether service charges were payable- in a given sum if at all. The amount which the Tribunal might have found to be payable in other circumstances was of no

discernible relevance in the context of the Court proceedings and the task given to the Tribunal in those.

117. Given that the questions asked by Mr Milner of Mrs Said almost entirely related to reasonableness of particular service charges, there is no need to say anything about those or the responses of Mrs Said. The Tribunal identifies that there was an interesting point raised by Mrs Said that the Applicant may only be able to charge for communal window cleaning and not of those windows to individual flats. That particularly arose in the context of the Respondent having refused window cleaning of his windows where his flat is separate to the others. It may be worth the parties considering it further, although in saying that the Tribunal seeks to give no indication as to the determination it may have made which it did not consider.

118. The Tribunal does address one matter raised by the Respondent more generally, namely that the sums demanded have been the subject of previous determinations. That is correct to an extent. The extent is that the sums have been claimed in previous proceedings, and of course also now in these proceedings.

119. However, the Decision in the earlier previous decision related to service charges, CHI/00MR/LIS/2018/0056, had considered interim service charges and in the May 2022 Decision, there was not a determination of whether the sums could be payable if the provisions of the Lease were to be followed but rather the argument about estoppel by convention was rejected and where there had been no even attempted certification.

120. Hence, it is arguable that the Respondent is not correct in any assertion that the sums have been the subject of a determination such that the Applicant could not pursue them further. The Tribunal does not need to- and so does not seek to- determine that argument and so specifically whether the Applicant would by now be precluded from issuing further proceedings. The Court and/ or Tribunal will no doubt need to consider whether the Applicant can or cannot bring further proceedings at a later date in the event that the Applicant seeks to bring a third set of such proceedings and the Respondent seeks to defend deploying that argument again. The Tribunal does not seek to predict the outcome either way.

121. The Tribunal also touches on one other matter mentioned about the accounts. That is the fact that they are said to have been prepared by accountants, the accountant fees not being payable to Cosgroves, and it was said that they could ask for documents about the works undertaken. However, the Tribunal did not consider that assisted with the question of certification of the expenditure by a surveyor, which was a separate matter to the preparation of accounts. Insofar as other things were said about the accountants, no determinations were sought to be made in the circumstances.

General Comment

122. The Tribunal reaches the determination that the service charges are not payable with no great enthusiasm.

123. The Tribunal considers that the outcome was simple enough on the case presented. The Applicants have brought the particular situation on themselves. They have failed to comply with the Lease, despite being fully aware of the Respondent's arguments and despite the outcome of the 2022 Decision.

124. That said, the Respondent will be well aware that service charges are payable by the lessees and cannot fail to be aware that in the absence of payment, service charge funds must be lower than intended and hence the ability of the Applicant to incur expenditure on matters related to the Building is lower. Whilst it is right to say that the Respondent is under no obligation to pay unless and until the Applicant might finally manage to comply with its obligations under the Lease and issue valid demands, the Respondent's approach is not one which the Tribunal finds especially attractive.

125. It is difficult to see how it can be in anyone's benefit for there to have been sets of proceedings already or how it could be in anyone's benefit for there to be more. Leaving aside the costs which the Applicant company may throw away, there is considerable time and effort- and consequent stress and inconvenience- caused to all involved. That is against a background of a small development in which the lessees (or at least eight out of nine of them) are the members of the Applicant company.

126. The parties might wish to carefully consider all of the above and whether the parties might put aside any ill- feeling and history and might seek to resolve the situation about these historic demands on terms with which both sides can live, whilst neither may be entirely happy with them, and so bringing at least the historic matters to an end. The parties might consider that to any extent that does not achieve their ideal result, whether it may overall be preferable to the process of any further proceedings.

127. The parties might additionally reflect on the ongoing needs for expenditure on the Buildings pursuant to the Lease, on the need to ensure valid demands and the need for payment to be made, in the best interests both of the immediate parties and of the others with interests in the Buildings.

The County Court issues

Claim in relation to service charges under the Lease

128. The County Court issues have been considered by Judge Dobson alone, having regard to the findings and determinations of the Tribunal in

respect of the Residential Lease service charges. The answer in respect of this aspect of the claim is simple. The Tribunal has determined on the evidence presented that no service charges were payable.

129. The Court noted that the statement of Mrs Berry referred to "Company Costs" and liability of the Respondent for those as a member of the company. However, none of the Applicant's statements of case pursued a claim on that basis, claims being premised on the sums being service charges. The question of whether there were any such separate "Company Costs" and whether the Respondent would or would not be liable for them was not before the Court.

130. It follows that the claim fails and is dismissed.

131. The claim made for interest must fall with that. Interest was sought at 8% on the said to be due but as nothing has been found to be due, there is nothing to award interest on.

Costs and fees- Court and Tribunal

132. There are different jurisdictions which fall to be exercised by the Tribunal and by the Court. Costs were scarcely touched on in the hearing. It was identified in the hearing that practically dealing with costs would have to follow the issue of this substantive Decision.

133. The costs matters to be determined are whether any party claims costs against the other, whether the Respondent's applications under section 20C and paragraph 5A with regard to Tribunal costs should be granted, whether the Respondent seeks to make like application in relation to costs of the Court proceedings and what should happen in respect of Court and/ or Tribunal fees paid.

134. That raises the question of how best to deal with such costs. In principle, the allocation to track means that in the normal course there are no costs awarded as between the parties. However, if an application is made on the basis that the usual approach should not apply, the track and the length of hearing are such that there ought to be summary assessment of any County Court costs awarded, although it must first be determined to which party, if any, any such costs should be awarded. Submissions will therefore be required as to both the nature and amount of any costs orders. Consideration will also need to be given by the Tribunal to any powers in respect of costs and how to exercise those, prior to decisions being taken by the Court.

135. On balance and with a little reluctance the Court and Tribunal have concluded that written submissions should be required as to costs. Directions will be given in respect of both elements.

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decision

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

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

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

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

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

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

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

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

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

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

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

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

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