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

Tribunal Case reference	:	CHI/00MW/LSC/2024/0106
County Court claim number	:	K69YX150
Property	:	78 Sylvan Drive, Newport, IOW, PO30 5FL
Applicant	:	Goodwyn Realty Limited
Representative	:	Mr Jones, counsel instructed by PDC Law
Respondent	:	Mr Malcolm Fellender Hector
Representative	:	---------
Type of application	:	Transferred Proceedings from County Court in relation to service charges and ancillary applications
Tribunal member(s)	:	Judge J Dobson Ms C Barton MRICS Ms T Wong
Date of hearing	:	9th December 2024
Date of Decision	:	16th January 2025

TRIBUNAL DECISION AND COUNTY COURT JUDGMENT

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Summary of the Tribunal Decision

1. **The Tribunal determines that none of the service charges demanded by the Applicant from the Respondent for the period 25th March 2020 to 24th March 2023 are payable.**

2. **In respect of costs for the Tribunal proceedings, the Applicant's costs not already disallowed from recovery on 14th October 2024 may not be recovered against the Respondent as service charges or administration charges.**

Summary of the Court Judgment

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

4. **As to costs, the parties shall bear their own costs of the Court proceedings.**

5. **In respect of costs for the Court proceedings, the Applicant's costs may not be recovered against the Respondent as service charges or administration charges.**

   The relevant provisions are set out in the separate Order of the County Court.

Background

6. The Applicant is the freeholder of the block containing 78 Sylvan Drive, Newport, IOW, PO30 5FL ("the Property"), and additionally flats 72, 74, 76, 80, 82, 84 and 86- so eight flats in total- ("The Building"). Also of two other blocks (those and the Building collectively "the Estate"). The Respondent is the lessee of the Property since 2005.

7. The Building is a purpose- built block of residential flats built in the 1980s. The Property is a ground floor flat.

8. Property Fusion Limited (a limited company is identifiable only from the bank details for a payment including the word 'Limited' [124], although this is not the time to dwell on whether anything wider arises from that) were appointed as managing agents to manage the Building. That was in 2016 according to the witness statement of the Respondent but 2018 from the Applicant's oral evidence- but in either case before the period involved in these proceedings. There were previously other managing agents.

Procedural history

9. The original proceedings were issued in the County Court under Claim No. K69YX150 by way of a Claim Form, Particulars of Claim and attachments [3- 49] in August 2023, claiming the sum of £3,434.83.

The Respondent filed a Defence making an admission of owing £500.00 (albeit not specifically what that £500.00 related to), which partial admission was not accepted by the Applicant. The proceedings were subsequently transferred to the Tribunal by District Judge Hay by Order dated 8th May 2024 [64] for the Tribunal to determine the matters within its jurisdiction and for the Tribunal Judge to determine the remaining matters as a Judge of the County Court. Tribunal Directions were given on 27th June 2024 [not in the bundle] and a County Court Order was made both in the same document. The case was listed for final hearing.

10. However, at that intended final hearing on 14th October 2024, the case was unable to proceed. It was identified that the Respondent had at various times requested copies of invoices for the service costs on the basis of which service charges were demanded of him and those had not been provided prior to the claim and had still not been provided by the intended final hearing date. Directions were given [66- 71] which adjourned the hearing to enable provision of the invoices to take place but on the basis that the Applicant may not recover any costs incurred in dealing with the Tribunal proceedings up until 14th October 2024- and it is apparent including that date- as administration charges.

11. A bundle was directed to be provided for use at the adjourned final hearing. A bundle was provided, containing 174 pages of which 151 onwards are the additional documents pursuant to the October Directions. Where the Court or Tribunal refers to specific pages from the bundle, the Tribunal does so by numbers in square brackets [ ], with reference to PDF bundle page- numbering.

The Hearing

12. The hearing took place in person at Havant Justice Centre on 9th December 2024. The Applicant was represented by Mr Daniel Jones of counsel. The Respondent, Mr Hector, represented himself. In addition, Ms Dawe, the Managing Director of the Applicant's managing agent, and Ms Ansted attended.

13. The Tribunal and Court heard oral evidence from Ms Dawe and Mr Hector and was in receipt of their written witness evidence [72- 79] and [150- 153] and then [148- 149] respectively. The Tribunal asked a number of questions of both witnesses in addition to the questions asked by the opposing side, more so it should be said of Ms Dawe given that Mr Hector was not represented and in respect of matters which he indicated in his case, or which arose out of his questioning. For completeness, the Tribunal records that it recalled Ms Dawe to give further evidence about the management fees and cost of insurance to the extent raised by Mr Hector in his evidence but not matters which had been put to Ms Dawe. The Tribunal did so in order that Ms Dawe could respond to those matters and so that the Tribunal had both parts of the picture.

14. Mr Jones informed the Tribunal that the Applicant no longer pursued the amount of £75.45 which related to the period 2020 to 2021. It was not clear to the Tribunal how that figure had been arrived at but in the event, nothing turns on that. On that note, there was another sum of £10.00 between one figure and another where the explanation was not clear to the Tribunal despite Ms Dawe's best efforts, but nothing is affected by that either and indeed the Court and Tribunal considered limited time merited spending and may have been disinclined to address such a small sum in any event.

15. In addition, Mr Hector informed the Tribunal that he no longer challenged the amounts of the service charge items except the managing agent fees for managing and the separate fee for bookkeeping. That said, during the course of oral evidence, Mr Hector also asked questions of Ms Dawe and commented himself on the cost of insurance. As explained below, those three elements were not in the event the limit of the matters which became relevant.

The Lease

16. A copy of the lease of the Property ("the Lease") was provided within the bundle [13- 35]. It had been suggested by the Respondent that the Lease may be for a different property by way of referring to Plot 58 but the Tribunal and Court understand it to be accepted that is simply the original plot numbering overtaken by the actual numbering of properties later.

17. The Particulars of Claim rather unhelpfully states that the Applicant relies on the Lease generally for its full terms and effect. It does not identify any specific provisions within the Lease as it might be expected to do. That is at least unsatisfactory.

18. The Lease is dated 3rd November 1987. The term of the lease is 99 years from 25th December 1986. The Lease includes a defined parking space. Rent is payable of £100.00 per year by two instalments, one on 24th June and the other on 25th December. The Property (in Part I of the Schedule) and the wider Building and Estate are defined.

19. The Respondent covenanted to observe and perform various covenants contained in the Lease and in particular within clauses 2 and 3 and Part V of the Schedule to the Lease. The Applicant agreed in clause 7. to perform various covenants in particular contained in Part VI. Some of the provisions merit setting out because a lot will turn on them as revealed below, although most need not be.

20. As to the relevant clauses, at clause 2. (5), the Respondent agreed:

> "To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the landlord for the purpose of or incidental to the preparation and service of a notice under sections 146 and 147 of the Law of Property Act 1925 notwithstanding that

forfeiture may be avoided otherwise than by relief granted by the Court"

21. At clause 3. (e), the Respondent covenanted to:

> "Contribute and pay on demand a proportion of all costs charges and expenses from time to time incurred or to be incurred by the Landlord in performing and carrying out the obligations and each of them under part six of the said Schedule in connection with the Buildings and/or the Estate as set out in the notice mentioned in paragraph 10 of the said Part VI PROVIDED THAT the proportion payable hereunder shall be the proportion which the Rateable Value from time to time of the demised premises bears to the total rateable value of all the flats in the Building AND PROVIDED FURTHER THAT the Tenant shall on 24th June and 25th December each year pay to the Landlord the sum of £50 (or such other sum as the Landlord may notify under paragraph 10 of Part VI of the Schedule) on account of the charges of the Landlord hereinbefore referred to"

22. That is therefore the service charge provision.

23. At clause 4. (d) the Applicant covenanted to keep the Building insured against comprehensive risks as particularly provided for and to "whenever reasonably required" produce insurance policies and receipt for the last premium. At clause 5. (2), the Applicant is given the right of re- entry into the Property if rent is unpaid (which does not include service charges) or if there is a breach by the Respondent of any covenants or agreement on the part of the Respondent. The obligations on the Applicant under Part VI of the Schedule are in general in the usual sorts of terms, including decoration, maintenance, cleaning and similar.

24. However, at paragraph 8. to 10., the Applicant covenants as follows:

> "8. The Landlord shall keep proper books of account of all costs charges and expenses incurred by it in carrying out its obligations under this part of the Schedule and account shall be taken on the Thirty- first day of March in each year during the continuance of the demise of the amount of the said costs charges and expenses incurred since the date of the commencement of the term here by demised or of the last preceding account as the case may be
>
> 9. The account taken in pursuance of the last preceding clause shall be prepared and audited by a qualified accountant who shall certify the total amount of the said costs charges and expenses (including the audit fee of the said account) for the period to which the account relates and the proportionate amount due from the Tenant to the Landlord or vice versa under this Lease
>
> 10. The Landlord shall within two months of the date to which the said account is taken serve on the Tenant a notice in writing stating the said total and proportionate amount certified in accordance with the last preceding paragraph giving credit for any sums due to the Tenant and an estimate of the amount required for the following year stating

> the amount required to be paid on account in accordance with Clause 3 (e) hereof"

25. 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."

26. 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."

27. The Court and Tribunal had careful regard to the above when construing provisions in the Lease.

<u>DECISION OF THE TRIBUNAL</u>

The jurisdiction of the Tribunal

28. 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. The power arises from the provisions of the Landlord

and Tenant Act 1985 ("the 1985 Act"). 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."

29. 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 cost 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 costs which the charges sought are said to be the lessee's contribution to. The amount payable is limited to the relevant portion of sum reasonable.

30. In particular, in relation to on account service charges, no more than a reasonable amount is payable. In relation to such estimated demands, the question is essentially one of whether the sums demanded were reasonable on the basis of the information available at the time.

31. The Tribunal commonly sets out matters relating to the basic payability and reasonableness of service charges at greater length than above but considers that there is no need to do so in this instance.

32. In respect of administration charges, the Tribunal's jurisdiction is found in paragraph 5(1) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). That provides the Tribunal with the power to determine by whom, to whom, how much, when and how a charge is payable.

33. An administration charges is defined in paragraph 1 of the Schedule and includes an amount payable "in respect of a failure ....to make a payment by the due date to the landlord ....", although here is no ability to demand estimated administration charges.

34. Given that the matter was raised in the statement of the Respondent [149] it merits identifying that the obligation on the Applicant to permit inspection of documents by the Respondent and the payability of service charges (and administration charges) are separate matters and there are different penalties for the failure to facilitate the former.

Findings of Fact, application of the law and consideration

35. This Decision seeks to focus on the key issues and does not cover every last factual detail. The omission to therefore refer to or make findings about every statement or document mentioned is not a tacit acknowledgement of the accuracy or truth of statements made or documents received. 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. In particular, much of the historic correspondence and statements of account do not require mention in light of other matters addressed below. Findings have not been made about matters irrelevant to any of the determinations required. Findings of fact are made on the balance of probabilities.

Estimated service charges v actual service charges

36. The Particulars of Claim claimed unpaid service charges of £,1785.83, described as being "Service Charge and Year End Deficit" although that figure is subject to deduction of £75.45 pursuant to the concession made on behalf of the Applicant by Mr Jones.

37. The Tribunal noted the observation of Mr Jones that the actual service charges figures are known. The Tribunal accepted that. However, there were surpluses each year on the budgeted figures as compared to actual figures- see further below. Consequently, there never were, at least demonstrably on the basis of the documents in the bundle, demands for actual service charges.

38. Rather there were demands for estimated on- account service charges and there were balancing accounting exercises undertaken following the production of certified accounts for the given year. Expenditure fell below budgeted sums, the evidence indicates. The Respondent described the budgets as "very safe" and not the best estimate possible. Ms Dawe partially explained why budgets had been set at the levels they were. Reference was made to the budget figure for insurance increasing whereas actual cost had not, at least within the relevant period. The Tribunal could understand in principle the Applicant expecting the cost of insurance to increase, as the Tribunal is aware from other cases it has, although the invoices from the brokers were dated mid- June each year and so if demands had been made when they ought- see below- the cost would have been known either precisely or very likely in at least fairly accurate terms. The estimated demands took the form of an "Anticipated Summary of Expenditure" for the given service charge year and a Service Charge Budget [e.g. 80 and 81].

39. The amount of the consequent claim was affected by credits posted, the Tribunal accepted, and the sum claimed reduced by the credits posted which necessarily impacted on the balance. Reference was for example made by Ms Dawe in her oral evidence to a credit note dated 24th March 2021 [172]. She said sums were apportioned in line with the service charge schedules for the different properties/ blocks in the Estate.

40. However, the claim cited four service charge demands and the Tribunal is required by the Court to determine the payability of those. The Tribunal does not undertake an accounting exercise. It determines the reasonableness of the service charges demanded and not the accounting outcome of those and other account entries. The jurisdiction in a case such as this is to specifically determine the service

charges referred to it by the Court, rather than anything else. The Tribunal considers that it cannot within the confines of the case transferred to it seek to determine what would have been the payable amounts of demands for actual service charges if any demands for actual service charges had been made within the period in question. That would be to undertake a different exercise.

41. For completeness, whilst the claim is therefore expressed to include "Year End Deficit"- which would be the shortfall of payments made for estimated charges as against higher sums due for actual charges- there was no identification of any such amount and so the Tribunal does not dwell on that specifically.

42. Given the determination below with regard to estimated service charges made below, it may be that actual charges are relevant more widely than this claim. That said, the costs incurred for the three service charge years were incurred a significant time ago and that will be relevant. The Tribunal does not dwell on the specific arguments which may arise if they are now demanded as actual service charges.

Are the service charges payable pursuant to the Lease?

43. The Tribunal determined that the answer to this question is that they are not.

44. The Respondent in oral evidence and in response to questioning from Mr Jones referred to paragraph 10. The requirements of the Lease in Part VI are specific at paragraph 10. Following the end of a service charge year, the Applicant must, within two months, provide a notice in writing stating the total amount of expenditure that year and the lessees proportion and that must be certified by an accountant and the Applicant must give an estimate of the amount required for the following year, stating the amount required to be paid on account.

45. All of that is found within the same clause. There is no room for doubt that the elements are intended to be parts of the same whole. The Tribunal determines that the correct construction is the middle "and" goes to demonstrate that there are two elements, and both must apply.

46. Ms Dawe said in her witness statement that a budget is prepared by the agents each year "based on expenditure in the preceding year (if available) along with any known costs of the forthcoming year" [74], and indeed repeated in her 2nd statement in identical terms and indeed in respect of each separate year. It said that demands are sent and that at the end of the financial year, accounts are prepared and a demand is issued for the relevant proportion of the deficit (if any). It also identified that the arrears were £1,785.00 as at 13th December 2022 following a payment by the Respondent of £2,075.00, so almost the sum claimed in the proceedings (although by 83 pence not the same). The difference was not explained but in the context of this case as a whole, the Tribunal has not troubled itself about that small difference. For the avoidance of doubt, the larger sum which had been contended to be due prior to that

payment is not therefore relevant to these proceedings, save insofar as any debt collection fees might be affected, and none of the conclusions reached below about the payability of service charges or any administration charges intend to affect a sum already accepted or admitted by the Respondent and paid.

47. It was accepted on behalf of the Applicant that the estimated demands were not made in conjunction with the provision of certified accounts for the actual service charges for the year which had last ended. The estimated service charges which have been demanded have not been demanded in accordance with the requirements of the Lease. That is entirely clear to the Tribunal.

48. In contrast, the service of an estimate for the next service charge year and the provision of accounts for the previous service charge year have been undertaken as entirely separate, and not demonstrably in any way related, tasks.

49. It is apparent from the evidence received by the Tribunal that there has not been an agreed variation of the Lease. There has not on the evidence ever been a conscious intention to vary the provisions of the Lease. That includes by the Applicant.

50. Rather there has been a substantial failure to identify the requirements of the Lease and to follow it. It is indeed difficult to see that the Lease has ever been properly considered at all prior to the hearing.

51. The Applicant relies on the Lease for an entitlement to demand service charges from the Respondent. However, the Applicant has not in respect of the demands provided to the Tribunal issued those demands in the manner required of it. It has not done so with certified accounts for the previous year. The Lease provides that it “shall”. The Tribunal determines that the requirement is sufficiently clear as being mandatory that it does not allow for demands for service charges on account in the absence of certified accounts of actual service charges for the year just recently finished and it does not require the lessees to pay otherwise.

52. The Tribunal does not know the reason for the provision in the Lease. There is no evidence of the intention of the contracting parties beyond the words used in the Lease. In any event the subjective intention of them is not the relevant matter, so it matters not why the provision was expressed as it was, simply that in fact it was.

53. Nevertheless, it cannot be avoided that the approach set out in the Lease makes perfect sense. The accounts for the previous year and estimate for the current year and to be provided within two months, so by 31st May pursuant to the Lease, and the first instalment of the estimated on- account service charges is due on 24th June. Hence the previous year’s accounts and the estimate are received by the lessee a reasonable time in advance of a payment being required.

54. It is logical that the Lease intended that lessees of whom charges were demanded on account would be able to consider those in light of the actual figures from the previous year and identify similarity and difference. The demands on account as actually made cannot be considered by a lessee in conjunction with certified accounts for the previous year because there is no connection between timing of the accounts and the demands.

55. It is equally logical that the landlord would demand service charges knowing what had been certified for the previous year and able to consider how charges for the next year should relate to that. For example, if there was a surplus for any given lessee in the service charge account, the amount demanded for the current year to meet the service costs anticipated could be adjusted accordingly.

56. To repeat, as to whether that was in fact the intention of the contracting parties is not known and, as explained above, is not the determinative point. The key is the wording used was capable of simple understanding applying its natural meaning and so there is no uncertainty created which might require other consideration of the appropriate construction.

57. Insofar as Ms Dawe in her statements refers to "expenditure for the preceding year (if available)", it will be appreciated from the above that if the Applicant and its agent complied with the requirements of the lease the expenditure for the preceding year would always be available. Similarly, in oral evidence she said that unless the agent had the year end figures, the budget could only be the best estimate. That is obviously true in itself but perhaps encapsulates the distinction as well as the Tribunal could otherwise express it.

58. Simply, the Lease entitles the Applicant to seek payments on account of charges for the next service charge year in a specific manner and specific information shall be provided. If the Applicant does so, it is entitled to make the demands, subject to compliance with other requirements: if the Applicant does not do so then it is not entitled under the provision in the Lease to make the demands.

59. Or to put matters another way and perhaps more strictly accurate pursuant to the service charge mechanism in the Lease, the Respondent must pay service charges where they are demanded in accordance with paragraph 10 of Part VI of the Schedule. Clause 3. (e) which creates the service charge liability makes two explicit references to that paragraph.

60. That is and must be the end of the matter for estimated service charges. They are not due under the provisions of the Lease, where the requirements for making the demands or perhaps more accurately the amounts in the demands becoming payable have not been met.

61. However, the Tribunal considers it also worthy of mention that demand dates were 25th March and 29th September, so the first in any service

charge year was 25th March [e.g. 85 and 86]. Clause 3. (e) in contrast provides for payments on 24th June and 25th December each year.

62. The Tribunal accepts that if demands could be made on 25th March and 29th September as Mr Jones argued in closing, for sums payable on the dates provided in the Lease. Although that is provided firstly, that there had been a budget provided together with certified accounts for the previous year somehow by 25th March- which seems implausible when the service charge years does not end until 24th March or 31st March but that difference is left aside just for now (instead see below) - and secondly, that the Applicant accepted that payment would not be due for approximately 3 months. However, even if it had been possible for the Applicant to make demands on such a basis, that was not what the Applicant sought to do and the Tribunal considers that in fact the dates used go to further demonstrate a lack of consideration for and/ or understanding of the requirements of the Lease. As touched upon above, it also resulted in unnecessary inaccuracy in the amounts of the estimated demands because the estimated service costs were unnecessarily inaccurate, at least in terms of the cost of insurance where the cost was known by mid- June and very likely able to be estimated with a fair degree of precision by earlier in June, whereas it is apparent the sum was wholly unknown in March.

63. In contrast, the accounts for the year ended 25th March 2021 [95- 99] were not certified until 2nd August 2021, those for 2022 were not certified until 30th September 2022 [100- 106] and those for 2023 were not certified until 27th May 2023 [107- 113]. The Tribunal does not seek to suggest those periods are necessarily excessively long from a wider perspective and indeed the last is relatively short. That said only the last is within two months assuming an actual end of year of 31st March or none are assuming an end of year of 24th March. So, on the year adopted, in no instance were certified accounts provided by the period in the Lease. In any event, the dates were long after the estimated service charge demands were made.

64. The Tribunal adds that with regard to the dates, the oral evidence of Ms Dawe was that she had made demands in March and September because that is what had been done prior to the instruction of Property Fusion. She did not know that there had been any conscious decision taken previously or why. She imagined that the freeholder Applicant had instructed those dates, but it was apparent that was speculation. There was no suggestion that she had queried the dates, and it was implicit that she had not.

65. Mr Hector considered six- monthly demands to be unreasonable, as he confirmed in oral evidence. They had previously- the Tribunal understood some years back- been annual. However, that argument would not have succeeded. Mr Hector accepted that the Lease require six- monthly payments, he correctly said in June and December.

66. The Tribunal is mindful that it has rather expanded upon a point only touched on by the Respondent. The Tribunal is very much aware of a need for caution in doing anything which might be seen as venturing into the arena. The Tribunal carefully considered its approach.

67. However, the Tribunal is an expert tribunal and in what have been described as the honourable traditions of specialist bodies it is entitled to and indeed expected to utilise that expertise. It is the case that the Tribunal has been required by the Court to determine the service charges due. It is fulfilling that obligation.

68. The point is not one taken anew in making this Decision. Rather the matter was very clearly highlighted to the Applicant at the hearing and an applicant represented throughout by solicitors who regularly represent in litigation in this field and who instructed counsel for the hearing. Counsel was fully able to make submissions insofar as there were submissions to make. Mr Jones did so.

69. In summary, those submissions were the change to the dates adopted by the Applicant made the process more efficient and workable and he argued for an implied term that the date could be varied for business efficacy. However, the Tribunal did not find them persuasive and considered the provisions of the Lease entirely workable as written and the change to be a negative step for reasons variously explained in the Decision. In fairness to Mr Jones where the provision of the Lease was so specific and the departure from it so marked, the arguments open to him with regard to the Lease itself may have been limited.

70. The Tribunal is mindful that one possibility and one argument sometimes advanced is founded on one or other species of estoppel. That is to say broadly that the Respondent could not argue the service charges not to be payable where they had previously been demanded in the same manner over a period of time. However, Mr Jones did not argue that. The Tribunal is content that counsel would have advanced a not uncommon argument if considered of merit. The Tribunal determines that the argument would not have been a good one in this instance with various of the matters mentioned above contributing to that but does not dwell further on the reasons why where the argument had not been advanced.

71. The Tribunal is entirely content that it was able to and properly did raise a point which was absolutely fundamental where a party sought to rely upon the terms of a Lease to demand money and hence must expect to be required to comply with the provisions of the Lease which would, if complied with, enable it to do so by making the other party liable to pay.

72. The Tribunal does address the question of the relevant service charge year, briefly. The Lease is very clear that the service charge year ends on 31st March. The budgets within the bundle and prepared by Property

Fusion on behalf of the Applicant are for a period 25th March to 24th, so one week different to the time provided for in the Lease.

73. It was not apparent to the Tribunal that any thought had been given to the provision of the Lease, any more than any other related provision, in providing that different date for the end of any given year. Ms Dawe also said in oral evidence that the 25th to 24th had been the period used prior to the instruction of her company and they continued in the same manner. The question of whether that was appropriate does not seem to have been considered. That tended to further reinforce the failure to follow the Lease and because of lack of regard to it rather than any intention to vary it, still less any agreed variation.

74. Mr Jones in closing argued the difference to be minimal, to be in the contemplation of the contracting parties and for it be able to be implied that variation of the date was possible. He suggested that the wording of paragraph lent some support. The Tribunal was not persuaded but it is a modest issue in the context of the wider matters and as nothing else will be usefully added by discussion of this aspect in the circumstances, the Tribunal does not embark on any further one.

75. To repeat, that is the end of the matter in terms of the estimated service charges on which the claim is based being payable. They are not.

Would service charges in dispute in principle be payable

76. Whilst the Tribunal has determined that no service charges are payable in light of the requirements of the Lease and the failure of the demands to meet those requirements, in case it may be subsequently decided that the Tribunal was wrong in its determination about the payability of the service charges, the Tribunal also addresses the service charges which were raised in the hearing.

77. The Tribunal notes that in general terms the proportion of the service costs which are provided for by the Lease as payable by the Respondent relates to rateable values. In practice, it was common ground that the service charges were divided as between the blocks in the Estate and the number of flats in each block [e.g. 80] and it was not clear if that exactly allied to rateable values. However, no issue was raised in relation to that and so there is no determination on that matter required from the Tribunal. In addition, whilst the starting point in clause 3. (e) is the sum of £100.00 by two instalments in respect of service costs, the Applicant can notify of different sums. No issue arose in respect of that.

78. For completeness, given the specific provisions of the Lease that there be certification and audit by an accountant, the argument that the Respondent had advanced in correspondence [60] that there was no need for the instruction of an accountant would have been rejected by the Tribunal had that remained a live point.

79. The written evidence of Ms Dawe in general terms described a general- incorrect- process and made general comments about service costs being reasonable. If anything had turned on precision of the Applicant's case, the written evidence would not have assisted it.

80. This is an imperfect point at which to mention the following matter but there is no perfect one, so here must suffice. That matter is that Mr Jones argued in effect that the lessees must pay the service charges for the landlord's repairing and similar obligations under the Lease to arise. However, the Tribunal rejects that, considering that the provisions of the Lease do not create a condition precedent as they would have to. Often that is of significance and there may be much discussion in the decision of the caselaw regarding conditions precedent. In this case it matters little to the particular dispute given the other more relevant matters.

i) Managing agent fees

81. Firstly, in respect of management fees, the Tribunal determined that the service costs, being the fees incurred and which came to be charged as £250 plus VAT per flat, are at a level in principle reasonable. That simple position is not the end point.

82. The Tribunal noted the evidence of Ms Dawe that other potential managing agents charged at a rate of £350 plus VAT per flat or above that, although equally the Tribunal noted that there was no documentary evidence to back up those figures. In contrast, the Respondent relied upon the charges of the previous managing agent which he said were £170 (it was not wholly clear whether that was plus VAT and the Respondent thought there had not been a VAT invoice but in general VAT being added would be the more likely) pre-2017. It is right to say that there was no documentary evidence of that either- Mr Hector said that he had it at home, but that did not assist.

83. Whilst the Tribunal was cautious about the potential comparative prices advanced by the parties, the Tribunal is more than used to considering the level of management fees generally. From that perspective, the service costs incurred in respect of those management fees broken down flat by flat were by no means at an obviously unreasonable level.

84. The Tribunal was also mindful that in general terms smaller developments can often attract higher sums per flat, because of the lack of advantages which may come from economies of scale in larger blocks and because any development will be likely to require a certain amount of time and effort in any event. In addition, the Tribunal did not consider that the charges of a different managing agent employed some years previously were that helpful, accepting Mr Jones submission. On the basis that the evidence was that the current agent had commenced in 2017, which both sides said they agreed, the last of the charges from the previous managing agent had been at least three years earlier than

the first year in question for determination by the Tribunal. The Tribunal noted that in those years there had, almost inevitably, been inflation and there had been an increase in the cost of various expenses related to properties.

85. In any event, the question was not one of the lowest price which might have been obtainable but rather whether the actual charges were reasonable. It was for the Applicant to decide who to appoint as managing agents and there may be a range of figures for fees of such agents all of which were reasonable. The Tribunal was content that the cost of this managing agent fell within a reasonable range and to that extent the fees and the level of those fees would give rise to payable service charges. Provided of course that the service was performed to a reasonable standard.

86. The Respondent in his Defence [54] had indicated that he considered the fees to be unreasonable because of the perceived limited tasks required- "their input is mainly insurance and maintenance of the grounds" but the Tribunal did not consider that assertion added anything. The Respondent maintained a similar position in oral evidence, asserting the agents dealt with little things taking little time. However, there was, the Tribunal considered, no evidence that the agents did less than other agents in respect of other similar developments for similar fees.

87. The Tribunal was able to identify in general terms the sort of matters that the agent had attended to from the evidence of Ms Dawe and from the items in the accounts. That evidence was particularly Ms Dawe's oral evidence when questioned by the Respondent about the work undertaken, her response listing the sorts of matters which would be expected, save that she specifically said that the agents did not source insurance, which in the Tribunal's experience agents do in some instances. The Tribunal was therefore able to identify that the sorts of things which would be expected of an agent appeared in general terms to have been dealt with. Although the Respondent challenged the approach to management on the basis of only two visits to the Estate in the 2020 to 2021 year, the Tribunal would not have been persuaded of any specific issue with that. However, the above was the high point for the Applicant on the managing agent fees. Further, that does not alter the fact that the evidence was some way less than wholly satisfactory.

88. However, secondly, it should be identified that the Tribunal did not specifically consider in precise terms the question of the impact on those charges produced by the fact that the service charged demands were not made in accordance with the Lease- see below

89. Ms Dawe in her witness statement made what was in the circumstances a rather bold assertion that the agent abides by the Lease. As explained above, that was patently incorrect. The Tribunal considers that it may very well be arguable that there was a failing in the service provided which ought to lead to a reduction in the level of service costs and therefore charges given the issues identified. Given the suggestion from

Ms Dawe that the agent had proceeded as instructed by the freeholder, although her evidence was not the clearest on the point and she said that she did not remember the reason why the period did not run to 31st March, it was not completely clear whether any failing was one on the part of the agent or the agent followed the incorrect instructions of its principal. The question of impact on the fees of the agent was not raised by Mr Hector and is right to say also not specifically raised by the Tribunal in the hearing amongst other matters.

90. Some caution is needed with speculation about any communications between Applicant and agent which may have taken place. However, Ms Dawes' bold assertion implies that the agent had not identified that the Lease was not being followed and been instructed to proceed nevertheless but rather that she had not identified that the Lease required anything different. Hence, the criticism of the agent as well as the Applicant made elsewhere in this Decision.

91. Thirdly, it very much merits recording that the Tribunal was not in receipt of any management agreement from the managing agents, as Ms Dawe accepted. The Tribunal found that rather surprising. The management fees were not only the principal issue indicated by the Respondent in the hearing itself but were also a matter which were obviously in issue based on his Defence and witness statement. It must have been obviously apparent to the Applicant that payability of the service charge related to the agent's fees was a live issue. Evidence of the contract entered into, the level of fees to be charged and the basis for those fees, including any additional fees beyond any basic rate and the tasks to be undertaken for both any basic fees and any additional fees, was quite patently something which ought to have been provided as evidence to the Respondent and to the Tribunal. The agreement in setting out the services provided by the managing agents would, or at least unquestionably should, have contained information relevant to the level of fees.

92. Fourthly, there were no invoices provided for the managing agent's fees, other than the book-keeping referred to below. There was an account statement showing that £450.00 per month had been paid by the Applicant but that was the limit of the evidence.

93. Bearing in mind the Tribunal found the fees to be a reasonable level in principle but not payable in the event, the Tribunal is content to leave matters there. There is no need to assess what the agents did for the fees in detail- nor whether advice on the Lease fell within the instruction, nor whether any agreement did set out the relevant fees.

94. Whilst the Tribunal did not need to determine the actual fees payable and so nothing determined rested on such lack of evidence, having determined that no service charges were payable, if service charges in respect of the managing agents fees had been, at least potentially, payable, the lack of the contract would have taken on greater significance.

95. The Tribunal cannot therefore go beyond determining that the level of the fees was reasonable as service costs in principle if there were a reasonable service and subject to the provisions of the contract. The Tribunal can identify that it would have reduced the fees by a fair percentage to reflect the failures to comply with the Lease but cannot and need not reach any specific determination.

ii) Bookkeeping fees

96. The absence of the contract with the managing agent became more pertinent considering the bookkeeping fees which had been charged by the managing agent separate to the management fee.

97. The Tribunal noted those fees were only £200.00 plus VAT per year [e.g. 156] and that the Respondent was only liable for a portion of the service costs by way of his service charges. It was suggested that was in the region of £12.00. The Respondent said that there had been no separate charge prior to 2020 and the charge had then commenced in addition to management fees increasing. He contended the fee for such work was usually part of the wider fee.

98. The sum involved was a modest one. The Tribunal does not consider it necessary or proportionate to seek to identify any alternative exact figure which would be reasonable for a small element of service charge it has determined not payable in any event. The Tribunal would have accepted the amount as being within a reasonable range if demonstrated to be payable.

99. The key point in relation to the managing agent contract is that it is not apparent as to whether the bookkeeping was included in the other management charges pursuant to the managing agent's agreement or not. The suggestion from the evidence of Ms Dawe is that the fee for bookkeeping did not form part of other matters charged for under the basic management fee. She suggested the different clients had different preferences as to whether or not they required bookkeeping to be undertaken by the agent.

100. However, the evidence that Ms Dawe gave about what was termed bookkeeping largely related to dealing with the sending out of demands and the receipt of money in as payment. Whilst the Tribunal has no reason to doubt the evidence of Ms Dawe that some of her clients do not wish that service, the Tribunal did not identify that as anything other than standard management company activity which would usually fall within the general charge for the work of a managing agent and the Tribunal has treated as doing when commenting about fee levels above. It is also at first blush a little unusual to exclude such work from standard fees where the work is just the sort of activity that would be expected to be included in a management fee and not to be the subject of a separate charge, to the client. It is not what would usually be understood by the term "bookkeeping".

101. In the event of receipt of the management agreement and the opportunity to consider the provisions, the Tribunal may or may not have been persuaded that it was reasonable to make a separate charge. However, the Tribunal might also have considered whether there ought to be any reduction in the more general fees to reflect those not having included an element which they would normally be expected to include. In the absence of the management agreement and any clear indication of how the role and the charges for it were structured, the Tribunal was not prepared to allow a separate, albeit modest, additional charge for what appeared at first blush to be a normal management activity usually included in normal management fees.

102. Hence even if any service charges had been payable, on the available evidence the Tribunal would have disallowed this element.

iii) Insurance premiums

103. The other specific cost challenged was the cost of Insurance for the Estate. The Defence contended that service charges insofar as they related to a proportionate contribution to insurance had been paid.

104. The additional documents provided by the Applicant following the October 2024 Directions included invoices from the insurance broker to the Applicant [154, 161 and 165]. Ms Dawe in evidence said the estimate for 2020- 2021 reflected claims and she "imagined" a 10% increase. So too in 2021- 2022. That may have been reasonable when making an estimate and on the best information which is and ought to be available at the time.

105. The points discussed above as to the Lease requirements will be identified as key. There is no merit in repeating those matters. The relevant outcome in terms of the reasonableness of the service cost relates to the demands being for the estimated sums in the budget. As stated above, there has not, on the evidence provided, been a demand in the relevant period for actual service charges including the actual cost of insurance.

106. The Tribunal finds that the estimated service charges were not reasonable insofar as they exceeded the actual cost of the insurance by at most 10%. If the demands had been issued in accordance with the provisions of the Lease, so at the point in the year when the accounts for the preceding year had been produced and the lessees became obliged to pay the estimated service charges, the cost of insurance would have been known or likely to be able to be accurately estimated and so the correct or close to correct sum could have been demanded.

Administration charges

107. The Applicant has also claimed within the £3434.83 the sum of either £414.00 or £569.00 by way of administration charges for fees of Property Debt Collection Limited as a debt collection company. The uncertainty as to the figures stems from paragraph 10 of the Particulars

referring to £414.00 and no other sum being identified elsewhere in the body of the document until paragraph 15 when the money judgment sought is expressed to include £569.00 for administration fees.

108. As to how the sum changed from £414.00 to £569.00 is not specifically revealed. The Tribunal perceives that the difference is a sum of £155.00 referred to on a Statement [45] and described as "Client Admin Fee". The implication is that is a standard fee but beyond that nothing is revealed to the Tribunal. Correspondence [123] indicates the fee to be one charged for work undertaken by Property Fusion. Given the identified lack of any contract between the Applicant and its agent, the entitlement to charge £155.00 or any other sum and what a "Client Admin Fee" is as compared to any charges provided for beyond the basic fees in the contract are wholly unknown to the Tribunal.

109. It is not strictly necessary to say anything about administration charges other than potentially the legal costs claimed. Mr Jones conceded that such other charges had not been demanded and so could not properly be claimed as administration charges. It necessarily follows that they ought not to have been. However, the Tribunal does wish to make some observation all the same.

i) Ms Dawe identified in her statement what the £240.00 element of the debt collection charges relates to, although it was not apparent that she actually had first-hand knowledge- the wording appears as standard.

ii) The administration charges for debt collection do not, the Tribunal considers, fall within the previous disallowance of recovery of costs as administration charges made on 14th October 2024.

iii) The concession was a wise one. Otherwise, the Tribunal would have determined that the administration charges are not payable. Firstly, the fees were incurred by the Applicant in respect of the attempted recovery of service charges which have been determined not to be payable.

iv) Secondly, even if there had been any sum for which a debt recovery company could properly be instructed, the Tribunal would not have determined the administration charges to be payable. In order for administration charges to be payable, they must be validly demanded. The demand must identify the charges and must be accompanied by a Summary of Tenants' Rights and Obligations. The charges would then fall due for payment. In the absence of that, there is no valid demand, and the charges are not payable. There would be a period within which payment must be made, whether as prescribed by the given lease or otherwise a reasonable time.

v) The Particulars of Claim includes an assertion that letters were issued requesting payment of the service charges but not that there were demands for the administration charges, still less valid demands. The letters did not amount to valid demands. The Particulars failed to identify a basis for a claim.

110. It is also not necessary to address the argument by the Respondent that communications were sent to the wrong address [59]. That is to say to the Property as opposed to the Respondent's home address. It was asserted that costs were incurred which were avoidable for that reason. The Applicant denies that correspondence was sent to the wrong address [78]. In addition, the question of whether the Respondent would have paid if he had been provided with the invoices he had requested (and where he had said he would pay if satisfied the sums were reasonable [61]) would have arisen.

111. In addition, the claim includes a claim for legal costs and in the figure of £1080.00.

112. A claim for legal costs as part of the substantive sum would also require them to have fallen due for payment by the time of issue of the proceedings, which is to say that they have been demanded from the Respondent by the Applicant as being a sum payable and have not been paid within a reasonable time or any prescribed time of that demand.

113. The Particulars of Claim does not assert that the legal costs included in the claim were administration charges. Assuming that legal costs had been demanded as administration charges, the payability of them both in principle and in amount would fall within the jurisdiction of the Tribunal in the same manner as the broadly debt collections fees. In this case there is no hint within the claim that the legal costs are claimed on that basis.

114. The Tribunal determines on balance that the Applicant is not asserting the costs to be administration charges which had been demanded. Hence, the Tribunal's jurisdiction was not engaged. The question of whether legal costs are payable as part of the substantive claim is therefore a matter for the Court. That said, it is not obvious at least to the Tribunal on what basis the costs could form part of the substantive claim otherwise.

115. In the event that it may be determined that the Tribunal was wrong with regard to the above and that in fact the legal costs were claimed as being administration charges, the Tribunal addresses the position, firstly, in the event that the costs are asserted to be payable and due as administration charges or secondly, that they are subsequently so demanded.

116. The Tribunal determined that if the amounts which the Applicant claimed as contractual costs were said by it to be payable as administration charges, they were not so payable.

117. Leases can provide for contractual costs of proceedings or other steps to be payable such that they are payable as administration charges (or if appropriate, service charges). However, as with any other sum payable as a service charge or administration charge and as identified above, there has to be a demand for it and it must be demanded in accordance with the provisions of the Lease and statute- the demand has to be a valid demand. The protections for lessees apply to charges related to legal costs and similar just the same as they do for any other such administration (or service) charges.

118. No demands were included in the bundle. There is no hint in any document that demands had been made. There could not therefore be valid demands. There has on the evidence been nothing to make any administration (or service) charges in respect of legal costs of the Tribunal proceedings payable.

119. The Tribunal turns to the second element, being whether the Applicant may be entitled to payment of legal costs incurred in respect of the proceedings pursuant to the provisions in the Lease on which the Applicant relied in the event that the Applicant does demand them as administration charges (or service charges).

120. The Tribunal identifies that the only provision within the Lease which refers to legal costs is clause 2. (5) as quoted above.

121. That is specifically related to proceedings or anticipated proceedings for forfeiture. There are no current proceedings for forfeiture. There is evidence of the Applicant's claim of contemplation of such proceedings insofar as the Applicant seeks a determination pursuant to section 81 of the Housing Act 1996. That is to say a determination by a court or tribunal that the amount of a service charge or administration charge is payable and which the lessee has failed to pay and hence the landlord may exercise a right or re- entry or forfeiture. The Particulars seeks such a determination.

122. Hence, it appears likely- and without seeking to make a final determination- that in the event that legal costs were to be validly demanded as administration charges (or service charges) they would in principle be payable, subject to the jurisdiction of the Tribunal to determine whether the costs involved were reasonable, and assuming recovery not to be disallowed. The failure in this instance for there to be any service charges payable in relation to which the legal costs were incurred inevitably would carry heavy weight. So too, the poor preparation of the claim.

123. It scarcely needs saying that the Applicant could not of course be entitled to payment of the legal costs of the Tribunal proceedings incurred up to and including 14th October 2024 as those have already been disallowed as recoverable. Given that the £1080 legal costs pre-date 14th October 2024, if in fact the basis on which they are said to be

due were to be that they are properly administration charges, then if any relate to Tribunal proceedings, they have already been disallowed.

Other service charges for the years 2020 to 2022

124. As identified above, the Respondent's challenge had been reduced to particular elements of the service charges. It follows that the Tribunal has nothing before it as to the amount of any other element of the service charges and hence those would have been payable as demanded had any service charges been payable at all.

125. However, as no service charges are payable for the period claimed for the reasons explained above, that is the end of the matter for the purpose of these proceedings in any event.

Decision

126. The Tribunal accordingly determines that the estimated on- account service charges demanded by the Applicant from the Respondent for the period 25th March 2020 to March 2023 are not payable.

Costs in the Tribunal proceedings

127. As identified above, given that the proceedings are expressed to be taken in contemplation of the exercise of the right of forfeiture for non-payment of service charges or administration charges, there is in principle a contractual right to recover costs on the part of the Applicant and that may include the costs of the Tribunal proceedings, save insofar as such recovery has already been prevented by the determination on 14th October 2024.

128. The Tribunal uses the term "may" because the costs position in respect of mixed Court and Tribunal proceedings remains less than completely clear- cut and notwithstanding case authorities which have sought to specifically address the issue and others which are regularly argued to have a bearing on the issue. Nevertheless, for these purposes there is no need to debate any complexities of the law and it is sufficient to identify that the Lease provides for recovery of legal costs where the provision applies.

129. Section 20C (3) of the 1985 Act, provides "the … Tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances". The Tribunal is given a wide discretion. The provisions of paragraph 5A of the 2002 Act are equivalent and for practical purposes the test to be applied to each limb of the applications that costs of the proceedings should not be recoverable is the same.

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

> "although [the First-tier Tribunal] has a wide jurisdiction to make such order as it considers just and equitable in the circumstances" (at paragraph 25), "an order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances" (at paragraph 27).

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

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

132. To re- iterate, notwithstanding that the above cases relate specifically to section 20C applications, the bases of them apply just the same to administration charges under paragraph 5A and that has been recognised in many previous decisions.

133. Whilst there is that caselaw in respect of general principles, in practice much will depend on the specific circumstances of the particular case. The outcome of the proceedings is not the determinative factor in relation to whether or not costs of the litigation may be recovered as service charges or administration charges, the exercise is not one of a costs award in the manner made in the courts. That said, the outcome will never be irrelevant and will always play a part in the wider consideration of whether disallowance is just and equitable.

134. It is starkly obvious that the Applicant failed entirely before the Tribunal. The outcome is therefore immediately apparent and the fact that any costs were incurred in litigation which ought not to have been pursued is inevitably a factor to be given some weight. So too the fact that the Applicant and its agent apparently failed to understand and comply with the Lease but also that it was at least not obvious- although the Tribunal does not know for certain and can put matters no higher- that the representatives properly read and advised about the provisions. It is at least difficult to envisage them having done and so the Applicant continuing with a claim without any reference to the actual terms of the Lease.

135. The fact that the Respondent had, the Tribunal accepts, repeatedly sought sight of invoices and those had not been provided prior to proceedings but only on the intended final hearing date and when specifically ordered by the Tribunal, was also very relevant. The Tribunal determines that matters may have been agreed between the parties if those invoices had been provided in advance of proceedings.

136. The effect of disallowance, assuming any costs to be recoverable in any event, is that the cost will be borne by the Applicant. The financial

consequence will be the loss of the money required to pay the legal costs. The consequence to the Respondent will in effect be nil- he will have to bear nothing. It is not irrelevant that disallowance may impact on the other lessees, assuming those costs to be recoverable from them, rather than a portion being payable by the Respondent.

137. Taking matters together and weighing them, the Tribunal determines that the costs of the proceedings not already disallowed as being recovered as administration charges may not be recovered as service charges or administration charges against the Respondent.

JUDGEMENT OF THE COUNTY COURT

138. The County Court issues have been considered by Judge Dobson alone. The Court has had regard to the determinations of the Tribunal. The Court has noted the provisions of the Lease between the parties as identified and/ or quoted in the determination of the Tribunal. It does not repeat those.

139. As identified above the amount of the claim as issued amounts to £3,434.83. That sum merits highlighting because there is a "Statement of sums instructed" appended to the Particulars of Claim [45] containing a total of £3,719.83. As to what "instructed" means is unclear. In any event, there is a further £285.00 included in that which does not form part of the amount of the issued claim. Two of the sums listed can be added to get £285.00- the £80.00 legal cost on issue and £205.00 for the Court fee. The Court surmises that is the difference.

140. The Court notes the determination of the Tribunal that no service charges or administration charges were payable. The Court relies on that specialist determination and adopts the reasoning. It necessarily follows that those elements of the claim which comprised service charges and administration charges, save any legal costs which may be either, were not owing and due and hence the claim of them must be and is dismissed. That is the end point for approximately 70% of the claim.

141. The Court notes that determination of the Tribunal that the element of the claim that related to contractual costs was not on the evidence provided a claim for administration charges which had been demanded and hence did not fall within its jurisdiction. It was therefore a matter to be decided by the Court. The Court does therefore need to reach a decision about that aspect of the substantive claim.

142. The claim is for contractual costs as a sum already due by the time of the issue of the claim: it is not a claim made for legal costs as costs of the litigation and sought pursuant to the provisions of the Civil Procedure Rules in respect of such costs. Rather, it is expressed to form part of the substantive claim and the amount forms part of the value of that claim for the purpose of the calculation made of the total amount

of the claim on the Claim Form and the applicable issue fee. The amount claimed is £1,080 as previously identified in this document. It should be added for completeness that the Particulars identifies that the Claimant would continue to incur legal costs which it asserted to be contractually payable. However, there is no contention that any legal costs which would be incurred after the issue of proceedings formed part of the actual substantive claim.

143. The Court holds that none of the legal costs claimed as part of the substantive claim were owing and due. The part of the claim which relates to them also fails.

144. The Court agrees with the Tribunal that there is in principle a contractual entitlement to legal costs as provided for in the Lease at clause 2. (5). The Court adopts the reasoning of the Tribunal that in the event that legal costs were to be validly demanded as administration charges (or service charges) they would in principle be payable, subject to the jurisdiction of the Tribunal (or the Court) to determine whether the costs involved were reasonable, and assuming recovery not to be disallowed. The Court considers whether such costs can form part of the substantive claim in the circumstances of this case.

145. There is no evidence that the sums claimed of costs as part of the substantive claim have been notified to the Respondent and demanded from the Respondent. In the Court's judgment, very simply, if the sums have not been demanded and indeed validly demanded (see below), they have not become payable. There has consequently been no need for the Respondent to pay any such costs and there has been no failure to pay sums payable.

146. The Applicant's claim must rely on there being a cause of action, whether in contract or in tort or otherwise. On the face of the claim, in this instance the claim is brought on the basis of there having been a breach of contract on the part of the Respondent. Hence, the reliance of the terms of the Lease.

147. However, the Respondent is not in breach so as to give a remedy for an amount of legal costs simply by not paying service charges and where the Applicant then incurs legal costs. There are two elements to that.

148. Firstly, the Tribunal has determined there to be no service charges payable. Hence there was nothing owed by the Respondent which justified any legal costs being incurred. Secondly, even where those service charges are payable, which in this case they were not, there has to be something more than the Applicant incurring the costs. The something more is that the Respondent has to fail to pay costs which it should have paid. The Respondent has to have been made aware of the legal costs and the basis of the claim for them. The Respondent has to then have failed to pay legal costs which he is contractually obliged to pay. Then, and only then, the failure to pay a sum payable under the terms of the contract becomes a breach of the contract. Whilst it may

be possible for legal cost to flow automatically from non- payment of service charges and avoid the above sequence, at the very least, this Lease cannot be construed so as to do so.

149. In contrast, if the sum is not one which the Respondent is asked to pay, it is hardly a surprise that he does not pay it- he has not been made aware of anything which he ought to pay (assuming that he ought). He cannot be in breach of contract by way of failure to pay a sum of which he is unaware because he has not been asked to pay it. There cannot be a breach of contract by failure to pay a sum not known about and which has not been requested. There cannot be a cause of action in favour of the Applicant in such a circumstance.

150. In any event, the Court considers that given that the contract is a lease and the Respondent a lessee, the leaseholder protections must apply. Any legal costs which would be recoverable from the lessee as a substantive sum would have to be, the Court considers, administration charges or service charges and so must be demanded validly as such. They would fall to be considered by the Court, or by the Tribunal whether on a transfer to the Tribunal or by originating proceedings in the Tribunal, on that basis. Demands which are valid as demands for administration charges or service charges are necessary not only in themselves but because if the charges are not then paid within the relevant time for payment, then and only then they are owing and due and the lessee is in breach of the contract (lease) for not having paid them.

151. The legal costs cannot, the Court considers, be payable other than as administration charges or service charges. The Court additionally, although nothing turns on this in the event, cannot identify on what basis a demand could ever be made for a residential lessee to pay legal costs as part of a substantive sum owing if it were not a demand for administration charges, or less commonly service charges. In order for costs to be payable other than as costs of the proceedings, they must be demandable as something else due under the Lease. There is simply no other basis available which the Court can identify for such sums being due from a lessee- and that is to say as a wide principle. The Court certainly cannot identify anything within the provisions of this particular Lease, so even if it is wrong about the wide principle, that has no impact in the particular instance.

152. Therefore, whilst the Tribunal has determined that it has no jurisdiction in the absence of a demand for the legal costs as administration charges or service charges, that does not give the Court some other basis on which it could determine there to be a breach of contract and so a cause of action.

153. In contrast and perhaps to unnecessarily labour the point, if the sums have not been validly demanded as administration or service charges and remain unpaid beyond such period as the Lease provides or, in the absence of such a period, a reasonable time, there has still been no

breach of covenant by the lessee. The lessee cannot be in breach for failing to pay something which he or she has not been validly asked to pay and is not obliged to pay as such charges.

154. The claim for contractual legal costs as part of the substantive claim necessarily fails there.

155. It should be added that Mr Jones contended that the debt collector fees could be recovered as part of the legal costs, being disbursements and expenses. The Court rejects that. The sums were not incurred by the solicitors but pre- date their instruction.

156. The request on the part of the Applicant for a determination pursuant to section 81 of the Housing Act 1996 necessarily fails. There are no unpaid service charges or administration charges which were due and payable.

157. Any claim for interest also necessarily fails where there is no sum held by the Court to be payable on which interest could arise.

Cost and expenses of the Court proceedings

158. The Court noted that the bundle included a Skeleton Argument, as termed, from the Applicant's solicitors in respect of costs. Mr Jones also made arguments that the Applicant should recover its costs in the event of success on the substantive claim. The Respondent said that each side should bear their own costs.

159. In the fast track, Part 44 would have required a series of decisions as to awarding costs and as to the amount of the costs. However, in the normal course there would be no order for costs in proceedings in the small claims track. The usual exception would be in the event of a finding of unreasonable conduct on the part of the paying party.

160. The Court identified that the costs of the proceedings which the Applicant claimed to be contractually due could be claimed as legal costs in addition to the substantive claim, rather than as part of the claim, as presented. In the event of a contractual entitlement to costs, that would potentially provide another exception to the usual position in the small claims track.

161. However, the fact of a contractual costs provision does not and cannot subvert the wider jurisdiction of the Court in respect of costs per section 51. Rather the contractual costs provision is one matter for the Court to consider when determining how to exercise its discretion in respect of costs. The agreement reached by the contracting parties must be very relevant, but it is by no means the end of the matter. It is right to identify that Mr Jones specifically relied upon *Chaplair Limited v Kumari* [2015] EWCA Civ 798 in which the above principles were identified, an authority regularly presented to the Court in circumstances of small claims track cases where contractual costs clauses exist.

162. The Applicant failed completely and that is naturally of substantial relevance. Leaving aside the contractual costs provision, there would be no discernible prospect of costs recovery on the part of the Applicant in any track. Set against the outcome, the contractual provision is insufficient for the Court to exercise its discretion to award costs to the Applicant.

163. Firstly, there was nothing to incur costs about- nothing was owed, there was no contractual right to enforce- so there could be no costs properly incurred under the contract. If still relevant in light of that, the incurring of costs was also unreasonable- so the costs were unreasonable expenses- given there was no sum which the Applicant was entitled to pursue.

164. In contrast, if the Respondent had claimed costs, the award would be in favour of the Respondent if anyone. That said, the Respondent, without the benefit of a contractual costs provision, would be in the same position as any other party in proceedings allocated to the small claims track. However, the Respondent has not at any stage indicated making any application for costs in his favour and the Court is not aware that he has incurred any costs.

165. For completeness, the potentially thorny question of whether the costs of the Tribunal proceedings could have been awarded by the County Court pursuant to the contractual costs clause- as *Chaplair* indicates but where the answer is still less clear cut than it could be- does not arise. The Court awards the Applicant no costs, so that is that.

166. The problem of the Applicant's solicitors providing only one schedule of costs across the two different sets of proceedings such that it could not be identified which costs related to which proceedings does not require resolving in the circumstances, although it is a regular and frustrating occurrence which ought to be avoided.

167. The Applicant had also paid a fee for the issue of the Court proceedings and potentially other fees. However, it is a very simple decision to disallow recovery of those and sufficiently obvious not to require comment.

168. There is therefore no order for payment of costs as between the parties.

169. The Court determines that, for completeness, it is appropriate to make the same orders in respect of any potential recovery of costs of the Court proceedings as service charges or administration charges as has been made in the Tribunal proceedings and for the same reasons, which the Court has read and does not consider it necessary to repeat.

170. The Applicant may not therefore recover any of the legal costs of the Court proceedings as administration charges or service charges.

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.