PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/00BN/LSC/2023/0043**
Property	**:**	**8 King Street Manchester M2 6AQ**
Applicants	**:**	**MATTHEW WARNER Flat 5, Marc Morrell Flat 17, Alison Lancaster & Russell Brady Flat 21, Olga & Vladimir Falko Flat 13, Joseph Wai Kwong LAM &Ms Chui Ngo Nheung Flat 16, Hugh Lee Flat 20, Herjit Sehgal Flat 1, David Warren Flat 5, Benjamin Thomas Lewis Flat 6 Michelle Marks Flat 4and Mark Gallagher Flat 2**
Respondent	**:**	**STRATHCLYDE PENSION FUND, GLASGOW CITY COUNCIL**
Representative	**:**	**Katie Helmore of Landmark Chambers**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge J White and valuer S Latham**
Venue	**:**	**Northern Residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**
Date of decision	**:**	**21 March 2024**
Date of determination	**:**	**16 May 2024**

DECISION

Decisions of the tribunal

(1) The cleaning and M&E contracts in dispute are not Qualifying Long Term Agreements.
(2) Cleaning costs for the years 2018 and 2019 are payable. Cleaning costs for the years 2020 to 2023 are unreasonable. They are reduced as set out at paragraph 58 and in accordance with the proportions in Appendix 1.
(3) The M&E costs for 2019-2023 are unreasonable. They are reduced by a third as set on at paragraph 68 and in accordance with the proportions in Appendix 1.
(4) The disputed roof works for years 2029-2023 are not qualifying works. They are not payable as set out in paragraph 78. The other maintenance costs in 2023 in Appendix 2 are payable.
(5) The Respondent to re pay the lead Applicant the £200 tribunal fee.
(6) Any litigation costs are extinguished.

The Application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 2018, 2019, 2020, 2021, 2022 and 2023 for 8 King Street Manchester M2 6AQ (the "Property"). The Applicants are Mathew Warner of Flat 5, Marc Morrell Flat 17, Alison Lancaster & Russell Brady Flat 21, Olga & Vladimir Falko Flat 13, Joseph Wai Kwong LAM &Ms Chui Ngo Nheung Flat 16, Hugh Lee Flat 20, Herjit Sehgal Flat 1, David Warren Flat 5, Benjamin Thomas Lewis Flat 6, Michelle Marks Flat 4, and Mark Gallagher Flat 2.

2. The Applicants seek an order under section 20C of the 1985 Act that none of the landlord's costs of the tribunal proceedings may be passed to any of the lessees through any service charge.

3. The Applicants seek an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). that none of the landlord's costs of the tribunal proceedings may be passed to the Applicant as an administration charge.

4. The Tribunal issued Directions. In accordance with those Directions both parties submitted statements of Case, schedules, and documents, though neither party submitted a witness statement.

Introduction

5. The Applicants are the long leaseholders of the Flats ,2,4,5,6,7,13,16,17,18,20 and 21 within the Property. The Property is a Grade 2 listed mixed commercial and residential building. The residential parts were converted in or around 2016 and comprise twenty-one apartments on the first, second and third floors with a shared lobby at ground floor and bin store in the sub-basement. The commercial units are mixed retail units.

6. Since 16 April 2018 the Respondent has been the registered freehold proprietor of the Property. The Respondent has appointed DTZ Investors UK Limited ("DTZI") as its fund managers to manage the Respondent's real estate assets. In turn, DTZI has appointed Cushman & Wakefield Debenham Tie Leung Limited ("C&W") to provide property management services across a variety of properties in its managed portfolio, including the Property (although C&W do not carry out this role across every fund managed by DTZI). DTZI and C&W have the same parent company, though have separate legal entities with defined and regulated roles in relation to the Property. The parent holding company is DTZ Worldwide Limited. DTZI is a subsidiary of DTZ Investors (Holdings) Limited, which is a subsidiary of DTZ Worldwide Limited. C&W is a subsidiary of DTZ Europe Limited, which is a subsidiary of DTZ UK Holdco Limited, which is a subsidiary of DTZ Worldwide Limited.

7. For the year 2024, following a s20 consultation, RMG was appointed as managing agents, though part of the role that affected the whole Property, was maintained by C & W.

8. For the service charge years 2018 the only disputed items are the cleaning costs and reconciliation or balancing charge.

9. For the service charge years 2019, 2020, 2021, 2022 and 2023 a number of items were disputed. These included the management commission; facilities management resource; help desk fees; water rates; cleaning contract and costs; mechanical & electrical maintenance and miscellaneous(M&E); lift maintenance apportionment; maintenance and external repairs relating to roof works; electricity charges; insurance; and internal fabric repairs.

10. The main issues related to the high costs due to the commercial style contracts and close connection between the companies, that the costs had not been apportioned properly across the residential and commercial leaseholders, lack of consultation when required (service contracts and works), and repeated leaks from the roof area.

11. The apportionment of the residential service charges for the Applicants are contained in Appendix 1 and are not in dispute.

12. On 14 March 2024 the Respondent submitted an agreed bundles that ran to 9 lever arch files (1048 pages in the core digital bundle and 2522 in a supplemental bundle). These contained statements of case, a schedule and supporting documentary evidence, though no witness statements. The Respondents statement of case set out that some of these items for some of

the years in dispute were not payable. These were items that had been budgeted for, though not undertaken and where the demands had not complied with section 21B of the Act. Following video evidence from the Applicants, agreement had also been reached that lift maintenance should be shared with the commercial leaseholder for the years in dispute.

13. On 19 March 2024, the Respondent sent a skeleton argument where it was said that the matters in dispute had narrowed considerably, the items which remain in dispute were purely legal arguments in relation to the a. Cleaning Contract: b. The Mechanical & Electrical Maintenace Contract; c. M & E Miscellaneous and External Maintenace and Repairs.

14. The Tribunal directed that the parties clarify the position as the Applicants Statement of Case and schedule had clearly set out that they were disputing reasonableness in relation to these items and expressed concern that the Respondent had not provided a witness statement nor were they intending to attend the hearing to provide oral evidence. The Applicant confirmed that they were still disputing the reasonableness of the items. The Respondent confirmed that the Respondents were not attending to provide witness evidence.

The Law

15. Section 18 of the 1985 Act provides: (1) in the following provisions of this Act "service charge" means "an amount payable by a tenant of a dwelling as part of or in addition to the rent (a) which is payable directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and (b) the whole or part of which varies or may vary according to the relevant costs. (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable. (3) For this purpose (a) "costs" includes overheads, and (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

16. Section 19 provides: (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly. (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction, or subsequent charges or otherwise.

17. Section 21B (1) provides a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

18. Section 27A provides: (1) an application may be made to an appropriate tribunal for a determination whether a service charge is payable and, if it is, as to (a) the person by whom it is payable (b) the person to whom it is payable (c) the date at or by which it is payable, and (d) the manner in which it is payable. (2) Subsection (1) applies whether or not any payment has been made. (3) ..... (4) No application under subsection (1) ...may be made in respect of a matter which – (a) has been agreed by the tenant..... (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

The Leases

19. The leases for all flats at the Property are in the same or substantially the same form for a term of 250 years commencing on and including 1 January 2015 (the "Lease").

20. By clause 3.1 of the Lease the Tenant covenant with the Landlord "*to observe and perform the Tenant's Obligations to the Landlord contained in Part 1 of Schedule 5*". Paragraph 16 of Part 1 of Schedule 5 to the Lease provides "*16. Service charge and services The Tenant mut observe and perform its obligations contained in Schedule 7*".

21. Paragraph 2.5 of Schedule 7 to the Lease provides that "*for each financial year the Tenant must pay the Service Charge Percentage of the Landlord's Expenses*". Percentage is defined at clause 1.1.18 of the Lease as a fixed percentage and varies for each leased based on the floor area.

22. By paragraph 2.1 of Schedule 6 the Landlord covenanted as follows:
"If the Tenant pays the service charge and observes his obligations under this Lease the Landlord must use reasonable endeavours to provide the Services (as listed at the date of this Lease in Schedule 7 paragraph 3 and subject to the provisions of paragraph 2.2 below)"

23. Landlord's Expenses are defined at clause 1.1.10 of the Lease as *"1.10.1 the costs and expenditure- including all charges, commissions, premiums, fees and interest- paid or incurred, or deemed in accordance with the provisions of Schedule 7 paragraph 2.3 to be paid or incurred, by the Landlord in respect of or incidental to all or any of the Services or otherwise required to be taken into account for the purposes of calculating the Service Charge, except where such cost and expenditure is recovered from any insurance policy effected by the Landlord pursuant to Schedule 8 paragraph 2;"*

24. *The service charge includes at 1.4 of schedule 7 "The Plant' which "means all the electrical, mechanical and other plant, machinery, equipment, furnishings, furniture, fixtures and fittings of ornament or utility in use for common benefit from time to time on, in or at the Building, including lifts, lift shafts, equipment, cleaning equipment, fire*

precaution equipment, fire and burglar alarm systems, door entry systems, closed circuit television, and all other such equipment, including stand-by and emergency systems." And services include at 3.3 of operating, maintaining, and repairing the Plant.

25. *The services include services connected to the Common Part inside the Building. Building means "all that building known as 8 King Street" (1.1.2) and Common Parts means " the areas and amenities of the Building available for use in common by the tenants and occupiers of the Building and all persons expressly or by implication authorised by them, including the pedestrian ways, forecourts, entrance halls, landings, lifts, lift-shafts, staircases, passages and areas designated for the keeping and collecting of refuse"*

The Property and Inspection

18. The property is a Grade 11 listed former office building situated in the St Anne's Conservation Area. The former offices on the first, second and third floors were converted in and around 2016 into 21 apartments, 7 on each floor. The 9-ground floor commercial units remained. The Property is situated in a prominent, central location at the junction of Kings St and Deansgate. It is bound by Ridgefield Street to the east and South King Street to the south.

19. The main access to the residential areas is via 8 King Street into a communal hallway with stairs and lift accessing off it. The basement areas are accessed via 8 King St and retail units.

20. It is built of part solid brick and part ashlar stone leaf. It benefits from ornate cornices, pilasters, and moulds to the entrances. Windows are single glazed timber.

21. The roof was not inspected but is described as a replacement slate and timber trussed construction. The internal finish to the residential communal areas comprises painted plastered walls and some suspended ceiling tiles combined with painted plaster ceilings. It is understood that mains water, gas and electric serve the building and there are no external areas.

22. Finishes were to a high standard and the Property caters to a higher end of the market.

The Hearing

23. Mathew Warner attended the hearing for the Applicants. Despite the Tribunals concerns raised prior to the day of the hearing and evidential

issues in dispute, no one from the Respondent or their managing agents attended on behalf of the Respondents. They were represented by Katie Helmore of Counsel. Also in attendance was their instructing solicitors. At the start of the hearing, the Tribunal again warned that without the Respondent having provided any witness statements or attending the hearing to give evidence, it was unclear how they were going to show their decision-making process or provide adequate reasons for their decisions to support documents provided. The Applicants had provided a prima facia case that had to be addressed. Though, in addition there were legal arguments on some issues, it was clear that there were also evidential issues to be addressed. The Tribunal gave the Respondents an opportunity to request an adjournment, as we did on a number of occasions during the hearing. They declined to so and wished to proceed.

The Tribunal's decision

Qualifying Long Term Agreements

24. The Applicants contend that the Cleaning Contract and the Mechanical & Electrical Maintenance Contract are qualifying long term agreements. This is because the contracts are expressly for a 3-year period and are renewed as part of a larger contract for their commercial property portfolio.

25. The Respondent contends that neither of these contracts are qualifying long term agreements because they are determinable at any time before the end of the 3 years.

26. A qualifying long-term agreement ("QLTA") is "*an agreement entered into, by or on behalf of the landlord or a superior landlord for a term of more than twelve months*" section 20ZA (2) of the Act. The consultation requirements apply to QLTAs if the relevant contribution of any tenant in respect of an accounting period is more than £100: reg 4(1) Service Charges (Consultation requirements) (England) Regulations 2003 (the "Consultation Regulations").

27. The deciding factor in determining whether an agreement is a QLTA is the minimum length of the commitment:

> *"36. The issue the court is invited to decide is whether it is determinative, for the purposes of assessing whether an agreement is for a term longer than a year, that an agreement involves a commitment to twelve months or more (as contended by the appellant), or that the maximum possible length of the period is greater than a year (as submitted by the respondent).*
>
> *37. If it were necessary to do so, I would agree with the appellant's approach to this issue: the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was)*

assumed in Paddington Basin Developments Ltd v West End Quarry Estate Management Ltd [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted.

"30. Although the estate management deed has no fixed term, it is incapable of determination by West End Quay Estate Management Ltd until the expiry of twenty- five years. Accordingly, it is an agreement for more than twelve months." (emphasis added)

38. I would disagree with the approach of the respondent that the deciding factor is the maximum length of the period. HHJ Marshall QC was correct in Paddington Walk at paragraph 49 that the deciding factor is the length of the commitment. That must be read as the 'minimum commitment'. Adopting the language of clause 5 itself, the issue is the duration of the "term" the parties have "entered into" in the "agreement".

39. If this interpretation is correct, it would follow that HHJ Gerald was wrong in Poynders Court. Whether the agreement is for a term exceeding 12 months is not about the substance of the management agreement and its various obligations. Rather, it is about whether it is an agreement for a term which must exceed 12 months. In Poynders Court, whilst the managing agent may have been "intended" to provide the services for a period extending beyond 12 months, the relevant clause as to the term of engagement did not secure that they were under contract to do so for the period of more than twelve months. The requirement that the contract be for a term of more than twelve months cannot be satisfied simply by the contract being indeterminate in length but terminable within the first year."

Corvan (Properties) Ltd v Abdel -Mahmoud [2018] H.L.R.36 per McFarlane LJ at paragraphs 36-39.

28. ***Bracken Hill Court at Ackworth Management Company Ltd v Dobson*** [2018] UKUT 333 established that the fact that parties to the contract may have expected that in all likelihood it would be renewed or that as a matter of history the contract was in fact renewed annually does not turn an agreement for a period of less than 366 days into a QLTA.

29. ***The Cleaning Contract*** The cleaning contract between the Respondent (as client) and Atlas Contractors Limited (as supplier) dated 1 April 2019 was for a term of 3 years (the "Cleaning Contract") [***Digital 426 and paper 419-459]***. By clause 22.4 the Respondent had an unrestricted right to terminate the Cleaning Contract upon 30 days written notice: "*Notwithstanding any other provision in the Services Agreement the Client may terminate the Services Agreement by providing the Supplier with 30 days' written notice*".

30. By extension letter dated 31 March 2022 and signed 14 April 2022 ***[467/460-461]*** the Cleaning Contract was extended from 1 April 2022 to 31 March 2023 at a new contract rate but otherwise on the terms of the Cleaning

Contract. That is, with a minimum commitment of 30 days, and is not therefore a QLTA.

31. The Applicant contended that the Respondent clearly intended the contract to last the 3 years and beyond and had no intention of looking for another cleaning contract. It appeared to be renewed without any consideration and certainly The Respondent has not attempted to set out any reasons for the renewal. The costs were clearly more than the market rates as established by the rates of similar properties and the new cleaning company that had started in 2024 with the appointment of RMG. This was because of the commercial nature of their portfolio and that contracts were entered into for commercial purposes. Mr Warner did not rely on any legal argument.

32. ***The Mechanical and Electrical Maintenance Contract:*** The Respondent contends that the contract between the Respondent (as client) and H.F.L Building Solutions Limited (as supplier) for the provision of mechanical and electrical services dated 28 May 2020 was for a term of 3 years from 1 May 2019 (the "M & E Contract") ***[366/359-415]***. However, by clause 22.4 the Respondent had an unrestricted right to terminate the M&E Contract upon 30 days written notice: "*Notwithstanding any other provision in the Services Agreement, the Client may terminate the Services Agreement by providing the Supplier with 30 days' written notice*".

33. The minimum length of commitment under the M&E Contract was therefore 30 days and it is not therefore a QLTA. The M&E Contract was maintained on a rolling purchase order basis on the same terms. It was continued for the period 1 December 2023 to 30 November 2024 on the same terms as set out in a letter dated 30 November 2023.

34. The M&E Contract was maintained on a rolling purchase order basis on the same terms. It was continued for the period 1 December 2023 to 30 November 2024 on the same terms as set out in the letter dated 30 November 2023.

Our Determination

35. Both the Cleaning and M&E contracts are not LTQA's and therefore, no consultation was required, and the recoverable cost is not limited to £100 per leaseholder.

Reasons

36. There is no factual issue in relation to the contracts interpretation of the terms are consequently accepted by the Tribunal.

37. The Respondent correctly sets out the legal position in relation to both the LTQA's. Though, we expressed some concern that these cases were not on all fours with this case, in that the term of these contracts were clearly expressed as 3 year contracts and therefore over 12 months, the fact that the agreements were terminable at any time before and for any reason, on 30 days' notice, meant that the minimum length of the contract was 30

days and consequently did not exceed 12 months. The fact that the parties did not intend to terminate before 3 years and in fact resigned the contracts after the initial 3 years, is not a relevant consideration here, though is when looking at reasonableness.

Qualifying Works

38. The Applicants contend that roof works under the budget heading Maintenance External Repairs are qualifying works in respect of which no consultation was undertaken or dispensation obtained and therefore their share was limited. This was because the Respondent had intended to undertake major roof repairs but had instead spent the funds on reactive repairs following successive leaks. An email from Anna Mrozowska at C&W dated 12 January 2021, had clearly said that the Landlord would be responsible for roof renovations as part of capital works. They do not contend that any individual item is over the threshold required for Qualifying Works. Roof repairs in dispute covers all high-level works, including to the stonework, flashing.

39. The Respondent had mistakenly believed that the Applicants were contending that the Mechanical and Electrical Miscellaneous items were also Qualifying Works.

40. The Respondent contends that there are no qualifying works. The statutory consultation requirements apply to works if the relevant costs incurred on carrying out the works results in the contribution of any one or more tenants being more than £250: section 20(3) of the Act and regulation 6 of the Consultation Regulations.

41. Qualifying works should be identified by applying a "sets approach" that is by identifying a particular set of works and considering whether the cost of that set of works exceeds the statutory threshold: ***Phillips v Francis*** [2015] 1 WLR 741. Identifying a single set of works is:

"a multi-factorial question the answer to which should be determined in a common- sense way taking into account all relevant circumstances. Relevant factors are likely to include (1) where the items of work are to be carried out (whether they are contiguous to or physically far removed from each other); (ii) whether they are the subject of the same contract; (iii) whether they are to be done at more or less the same time or at different times; and (iv) whether the items of work are different in character from, or have no connection with, each other. I emphasise that this is not intended to be an exhaustive list of factors which are likely to be relevant. Ultimately that will be a question of fact and degree" per Lord Dyson MR at [36].

Our Determination

42. None of the works identified are qualifying works and as such are not limited to £250 per leaseholder.

Reasons

43. The Respondent correctly sets out the legal position in relation to Qualifying Works. The Applicant said at the hearing that he was unsure of the legal position but was concerned that they were paying for capital work as ad hoc reactive repairs to the roof following numerous leaks. Mathew Warner could not point to any item or group of items listed in the schedules that showed they were part of a larger program or set of works. As set out below each item were clearly reactive in nature and were not large enough in itself or together with related items to reach the threshold of £250 for any of the applicants.

Reasonableness

The Applicants case

44. The Applicant contends that the service charge as a whole is disproportionate for the size and type of the building. It was only redeveloped in 2016 and had intended to be serviced short term let holiday apartments. For this reason, the way the services and contracts were set up were on a commercial basis and services were not separated from the commercial properties on the ground floor. This was compounded by entering into contracts with their subsidiaries, or as part of their larger commercial portfolio. This created a service charge that was much greater than comparables in the immediate vicinity.

45. Apartment 17 has been unable to sell and has been advised by the estate agent that prospective purchasers are put off by the size of the service charge. They have provided evidence, including an email from the estate agent to this effect [543/536]. They have also provided comparators for each item in dispute.

46. In addition, the Respondent has consulted on the appointment of a new managing agent. A nominee of the Applicants, Gunson, had provided them with guidance on the service charge costs and considered applying to become the managing agents. They did not want to proceed due to the allocation of roles and responsibilities. They have provided documentary evidence including emails from Gunson [for example at 586/579]. Since RMG appointment some service charge items have been considerably reduced.

The Respondents case

47. The Respondents contend in general that the disputed charges are payable: (a) only to the extent that they are reasonably incurred, and (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard: s.19(1) of the Act.

48. There is a two-stage test to reasonableness i) was the decision-making process reasonable? and ii) is the sum to be charged reasonable in light of market evidence? (***Forcelux v Sweetman*** [2001] 2 EGLR 173 paragraphs 39 and 40). A landlord is not obliged to prefer the cheapest

option (***Waaler v Hounslow LBC*** [2017] 1 WLR 2817 per Lewison LJ at paragraph 37).

49. In order to challenge the reasonableness of a charge a tenant must produce some evidence of unreasonableness. It is not open to the Applicants to simply state that items are unreasonable, as the Applicants have in this case:

"It *is well established (see for example Schilling v Canary Riverside Development Ptd Limited [2005] EWLands LRX_26_2005) that a tenant's challenge to the evidence that the charge is unreasonable. Of course, the burden is on the landlord to prove reasonableness, but the tenant cannot simply put the landlord to proof; he or she must produce some evidence of unreasonableness before the landlord can be required to prove reasonableness." (**Wynne v Yates*** [2021] UKUT 278 (LC) per Judge Elizabeth Cooke at [11])**.**

Findings

50. In general, the Tribunal finds the Applicants, though litigants in person, presented a cogent and credible case, well supported by documentary evidence. Mathew Warner was to the point during the hearing and assisted the Tribunal where he was able. They had clearly established a prima facia case. In contrast, the Respondent has misconstrued the Applicants case, responded to very specific points raised either in a very general way or not at all. The bundles were unwieldy, there were no witness statements and were difficult to navigate. Katie Helmore was generally limited to legal submissions and identifying relevant documents.

Cleaning Costs

Findings not in dispute

51. The cleaning costs are calculated by reference to and in accordance with the Cleaning Contract [262/255]. The details of the cleaning service provided is in the Recommended Specifications document and includes 1 cleaner for 10 hours a week based on 2 hours a day for 5 days a week at minimum wage and 1 bin store operative for 2 hours a week on minimum wage, 3 window cleans a year (at a current cost of £1,611.24 per clean) and the cost of various cleaning products [448/441]. There are additional costs including management and admin and overheads. The total costs for each year in dispute are not entirely clear. The Tribunal has accepted the figures as set out in the skeleton argument as they have not been disputed. They include 2018 £5,124,28, 2019 £6955.04, 2020 £9,914.83, 2021 £12,332.77, 2022 budget of £16,500 and 2023 budget of £15,267.

52. In 2024 the RMG budget was £9,185 (2.5 hours 3 times a week plus additional ad hoc costs) and £1600 window cleaning (allowance for monthly cleaning) [649/656].

The Applicants case

53. The Applicants contend that the Respondents have renewed the contracts without thought whenever they come up for renewal. They are contracts primarily for their commercial portfolio and consequently have associated higher commercial costs. The layers of subcontracting have added to the managing and admin costs, which are not reasonable. C&W contract Atles who are based in Reading, are not a cleaning company, and so subcontracted to a cleaning company. In addition, it is unclear if the costs include elements of cleaning the commercial part of the premises. The same workers clean both parts, including 2 toilets, and the cleaning equipment is kept in a storeroom in the commercial part of the premises. They had recently admitted that the electricity costs were in fact partly supplying the commercial part of the building. This had been denied until after the Statement in Response. The lift had also been serving the commercial premises, and again this was denied until recent video evidence. The lift has now been disabled to prevent it going to the basement area.

54. The communal areas are small, and include an entrance lobby and hall, bin store, stairwell, lift (at the relevant time), landings on three floors. The flooring is a mixture of hard floor on the ground floor and luxury vinyl elsewhere.

55. Their average budget cost in 2022 was £785 annually. They have obtained comparator service charges.

a. Manera Apartments is at the corner of Deansgate and King Street West and a similar converted old building over 4 floors. There are fourteen apartments. The ground floor is retail. For 2022-3 their budgeted costs were £1500 window cleaning and £1,100 cleaning costs providing an average annual cost of £185[162/169].
b. The Chambers Chaple Walk is a similar building two hundred metres away. It has fourteen apartments over 3 floors, refurbished with commercial units on ground floor. The 2021 budget is £4,195 including bin rotations, and £1998 for six window cleans a year. This averages £442.35 annually per apartment. The managing agents are RMG [244/251]

56. In addition, since RMG have taken over as managing agents of the Property and have obtained a new contractor Prime Cleaning Company. The hourly rate is £20 per hour is now reasonable, though could have come down more. They clean for 2.5 hours a day three times a week. The Applicants contend that two to three times a week for 2.5 hours each time is reasonable. The window cleaning is not reasonable as £1,611.24 only covers three cleans a year, though the new RMG rate of £1,600 covers monthly cleans.

The Respondents case

57. The Respondent contends that the increase in cleaning costs are a result of minimum wage increases of 6.2% in April 2020. Counsel contended in oral submissions that it is up to the landlord to arrange the cleaning contract however they like, as long as the quality and amount is reasonable. Just because

there is a cheaper alternative, does not make it unreasonable. There is a broad range of reasonableness. The quality was not at issue. The comparators may not be true comparators, as may not include all costs. Counsel could say no more without instructions, and she did not know what the admin and managing costs were, apart from that contained in the service specification [450/444] and in the statement case, which sets out management costs at £2234.28, overheads at £464.42 and profit of £458.23. [114/122].

Our determination

58. The Tribunal has determined the costs of each year in dispute to be 2018: £5,124,28 (payable), 2019: £6955.04 (payable), 2020: £8309.72 reduced from £9,914.83, 2021: £7775 reduced from £12,332.77, 2022 budget: of £9074 reduced from £16,500. 2023 budget: of £10281.22 reduced from £15,267. This is because the costs are unreasonable.

59. The amount payable is calculated in reference to the Properties cleaning costs for 2024 of £9185 plus £1600 window cleaning. This is calculated at £23.55 per hour three time a week in accordance with the current Prime Cleaning Contract plus window cleaning of £1600. We have calculated the previous years based on relevant RPI figures.

Reasons

60. The Applicants have provided credible, and measured evidence that the cleaning costs are not within a reasonable range, taking into account the type, makeup and age of the building compared to comparable local costs. Their comparators are of a similar type and age, though slightly smaller. Though the costs are lower, it is not clear what is included. Window cleaning costs are around the same level. They also have the direct comparator of the new contract for the Property. They have clearly set out a prima facia case.

61. The Respondent had not provided any witness evidence in relation to their decision-making process, reasons, or response to the Applicants evidence. In particular they have not said why this commercial style contract and subcontracting is reasonable, as it adds additional costs, and why do they contend its reasonable as costs have substantially reduced since RMG have become managing agents.

62. In light of this, the Tribunal is persuaded by the Applicants evidence and submissions. We have calculated the cleaning costs by the current contract and additional cleaning required as set out above. This is supported by the inspection that showed a good standard of cleaning based on three times a week for 2.5 hours, which is reasonable for the size, type, and specification of the building. We have added a small amount each week for the additional ad hoc cleans, management, admin, and materials. This amounts to £23.55 per hour with an annual budgeted cost of £9185 plus £1600 for window cleaning. It equates to the current 2024 figures for the Property, which is the most direct comparable. It was

agreed by Mathew Warner in oral submissions and more in line with the Applicants comparables. We have then used the RPI figures to recalculate the costs for each year.

Mechanical and Electrical Maintenance Contract and M&E Miscellaneous

63. The costs are 2019: Contract £7,849.92 and Misc. £4,967.25; 2020: Contract £8,742.27 and Misc. £3,603.20; 2021: Contract £9,031.99 and Misc. £5,727.47; 2022 budget: Contract £7,000 and Misc. £7,000; 2023 budget: Contract £10,000 and Misc. £10,000.

The Applicants case

64. The Applicants contend that the table of items describe similar costs, and these have spiralled out of control. The contract specification is very detailed [388 onwards] and covers items detailed in the M & E miscellaneous. There is no explanation on what these are and why they are not covered by the contract terms that state at 1.3.4 that there will be no charge up to a threshold, though do not appear to set out what that threshold is [393]. As this is a commercial style contract, it has similar issues to the cleaning contract. In the same way, it has not been reviewed so is higher than if renegotiated with a residential building contractor. In addition, it covers services that relate purely to the commercial side such as roller shutters and doors.

65. Their average budget cost in 2021 was £430 plus £272.73 (£702) annually. They have obtained comparator service charges.
    a. Manera Apartments is £371.21[162/169].
    b. The Chambers Chapel Walk is £441 annually per apartment.

The Respondents case

66. The Respondent states M&E Miscellaneous include repairs to the M & E services to the residential building communal areas, including the building management system, fire alarm extinguishers, emergency lights, heat pumps, communal boilers, lighting, distribution boards, C.C.T.V, door access system, extractor fans, air handling units. Apart from their general submissions set out above, they have not addressed the issue of the cost of the M & E Contract or whether there is any overlap.

67. The Respondent's contend that the increase was a result of an annual RPI uplift of 3% in line with good estate management and industry practice. Counsel maintained that the costs were reasonable, there was no issue with quality or that work was not reasonably required. The cost was

within a reasonable range, though she could not assist with any evidential matters.

Our determination

68. The costs for years 2019-2023 are reduced by 33.3% (one third) for each year in dispute.

Reasons

69. The Contract [381/388-415/422] specifies that the supplier should deliver a planned preventative service as well as a 24-hour reactive maintenance service. In addition, "mechanical, electrical and other technical services will be inspected, maintained and repaired by the Supplier according to the condition of the assets and the standards set out in this Contract" [397], as wall lighting, water, drainage, and heating, ventilation, and fire safety systems. They are responsible for inspecting and clearing gutters, at least annually. They are required to report and liaise as well as provide various certificate of compliance. They are only responsible up to a threshold and can charge for services or maintenance not covered by the threshold or contract.

70. The cost to the occupiers of 8 King St is higher than the market comparators. Though the residential leaseholders may benefit from the higher specification and response times expected on the commercial tenants, the cost has not been sufficiently justified by the respondent. Insufficient evidence refuting allegations of overlap of the commercial and residential service charge has been provided by the respondent. The contract specifications can only be described as comprehensive. It is more suitable for the commercial properties and not for the whole of a mixed-use building. It is not within a reasonable range and the Respondent has not explained their decision making process or why they considered this type of contract was reasonable as set out above. In light of this, the Tribunal considers that a reduction of a third is reasonable and in line with the comparators provided These are of a similar age, type, size, quality and location.

External Maintenance

71. External maintenance service charge costs were 2019: £14,676.65, 2020: £4,227.96, 2021:8786.07, 2022 budget £7,000 with no final cost, 2023: £10,000 budget.

The Applicants case

72. As well as the arguments set out above the Applicant contended that since 2018 that had been numerous leaks to the Property Flats, due to defects in the roof, some of which were significant and prolonged. There had been

around nineteen leaks between August 2018 and June 2023. One of which was caused by uncleared gutters (8/12/2021) [621].

73. Some of the leaks were recovered from the insurance where there were notes re lack of maintenance [622 and 626]. Their written evidence included a chronology of the leaks, screenshots of messages, emails, photos, notes on schedules.

74. The Respondent was aware of the extent of the defects and had since at least January 2021, being intending to undertake major roof repairs, that they say would be treated as capital works and not part of the service charges.

75. Evidence was given that the roof was completely overhauled, a glass feature installed and renovated in 2016 as part of the major refurbishment works. There was a 6-year guarantee in place signed on 6 November 2015 by the architect and that guarantee covers the roof. A new or overhauled roof should not be leaking. The Respondent should have claimed on the guarantee instead of charging as part of the service charge. Other items, including the leak from the guttering were covered by a settled insurance claim. None of the items connected to repair to the roof were consequently recoverable.

76. In addition, they contend that it was unclear whether the whole of the cost of external repairs and maintenance was being recovered through the service charge, as no invoices have been provided. They have already established that other shared costs, such as electric and lift maintenance were being recovered solely from the residential leaseholders.

The Respondents case

77. The Respondents provide a schedule of invoices relating to external works (Appendix 2) that are split 50% between the commercial and residential tenants. This is more than fair as the residential parts are larger. They did not respond to any of the Applicants submissions or provide additional evidence. Counsel for the Respondent submitted that each reactive repair following the leak was a reasonable response, the Applicant had not provided any expert evidence that patch repairs were not a reasonable response, nor provided alternative quotes, and had not raised a prima facia case in this regard. In terms of the guarantee, she could not say whether it covered the work and there was no one to give evidence in that regard. Clause 1 of the guarantee would not necessarily cover these repairs.

Our determination

78. All the external maintenance items in dispute as set out in Appendix 2 are unreasonable and consequently not payable:

    a. All the 2020 invoices listed as they relate to external roof repairs and are covered by guarantee.

b. All the 2021 invoices listed, relating to external roof/structural repairs as are covered by guarantee. The 50% (being the residential leaseholders share) invoices 193760 (£2976.60), 201527 (£1505.46) and 201548 £2014.66 are payable as they are connected with lighting and the replacement of the safety walkway are payable as not likely to be covered by guarantee and no issue has been raised relating to the standard of works
c. All the 2022 invoices listed as they relate to external roof repairs and were covered by guarantee. Though each repair in itself was a reasonable response, they were not undertaken to a reasonable standard. In addition, the Applicants liability is extinguished by equitable set off.

79. All the 2023 invoices listed, are payable in a 50% share (if not already split), if not already reclaimed from the insurance. They relate to clearing of gutters and general maintenance as would be expected in day-to-day maintenance.

Reasons

80. We accept the Applicants evidence as to the extent and nature of the leaks, as it is clear and supported by other evidence.

81. Though, the Applicants raised these points in their written statement and schedule it had not been specifically dealt with by the Respondent who also chose not to participate in the hearing to provide evidence.

82. The only items in dispute relate to the roof repairs resulting in water penetration into the property. We find that defects to the roof area and structure resulted in leaks into the building should have been investigated and undertaken under the guarantee as opposed to ad hoc reactive repairs. As the roof area was only completely refurbished in 2015/16, it should not have had any defects for a considerable number of years. The life of a new or refurbished roof, including the stonework, flashing and associated works, is in excess of 20 years. The extent and frequency of the leaks, after the first few, should have alerted any reasonable person that the roof was defective, and refurbishment had not been undertaken to an adequate standard. The frequency and extent of the leaks also clearly show that any patch repairs were not undertaken to an adequate standard. The frequency of leaks from the guttering also throws doubt on the efficiency of the works covered under the responsibilities of gutter cleaning under the Mechanical and Electrical Maintenance Contract and M&E Miscellaneous.

83. The Respondents promise to the tenants in January 2021 that these works were being investigated and would be covered through capital works, was also not specifically disputed.

84. **Sheffield CC v Oliver [2017] EWCA Civ 225** held that, a landlord was required to give credit to leaseholders for any funds

received from third parties when recovering the costs of repairs and improvements, so as to avoid double recovery as was not a "fair proportion" as required by the Lease.

85. In ***Continental Property Ventures Inc v White***, 2006 WL 1078956 (2006) the FTT concluded that where works were covered by guarantee, to carry out those works at a cost to leaseholders was to incur the cost other than reasonably. It was held that the only basis upon which it was arguable that the FTT was wrong as to the cost of the guarantee works would be where evidence was obtained that those costs could not or would not have been carried out, either in part or at all, under the guarantee. That was a matter of fact, which the landlord had decided not to dispute. It also held that where there was historic neglect, the correct approach was to assess any equitable set off in a claim for nonpayment of service charges as opposed to deciding the costs of subsequent repairs were not reasonably incurred.

86. The guarantee for the property is in the form of a professional consultant's certificate for the Property dated 24 November 2015. Mark Whitfield (the architect) confirms that *"1.I have visited the site at appropriate periods from the commencement of construction to the current stage to check generally: (a) progress, and (b) conformity with drawings, approved under the building regulations, and (c) conformity with drawings /instructions properly issued under the building contract….. 6. I will remain liable for a period of 6 years from the date of this certificate. Such liability shall be to the first purchasers and their lenders upon each sale of the property the remaining period shall be transferred to the subsequent purchasers and their lenders. 7. I confirm that I have appropriate experience in design and/or monitoring of the construction or conversion of residential buildings…."* He is covered by professional indemnity insurance up to £5m. He has inspected the property periodically during the development [620/627].

87. Paragraph 1 of the guarantee relates to visits during the construction phase, as opposed to liability. The Respondents have not provided evidence on cover or whether they have made any claim under the guarantee. The Tribunal finds that this guarantee covers all work to the roof of the building as it clearly covers all the works that were part of the redevelopment. Mark Whitfield was involved in the design and was monitoring and signing off the conversion works. He is covered by professional indemnity insurance at an appropriate level. Mathew Warner provided evidence that the conversion included major renovation to the fabric and structure of the building, including a new glass feature. The cause of the leaks is said to be from the roof, which was part of the refurbishment. It is reasonable to expect that the roof should have a life of at least 20 years. The guarantee only covers any work up to 23 November 2021. As a consequence, the guarantee covers all defects to the roof, causing the water penetration and the Respondent should have made a claim against this, as opposed to recovering through the service charge.

88. Although the Applicants have not provided expert evidence as to the quality of the repairs, we find that they have not been undertaken to a reasonable standard. This is because of the very nature, extent, and frequency of

the leaks (that can only be described as substantial and excessive), as evidenced by the Applicants description, photographs, emails, messages, and other documentary evidence. There are 8 in 2021 alone, spread throughout the year. They continue into 2023, the largest affecting fifteen flats on 18 June 2023.

89. In addition, there are two grounds for equitable set off, after the period of the guarantee. The undisputed promise that some structural works were capital works, that would not be recharged to the tenants is supported by an email dated 12 January 2021 stating "PBS will need to carry out a thorough survey of the stonework in order to establish a full cost we have allowed a small amount to cover the cost of the investigation. It could be quite extensive, and repairs completed as capital costs" [610]. This was said to be high level stonework and that investigations had subsequently been undertaken. Secondly, this email, along with the other evidence, shows that the Respondent was aware that more extensive works were required as early as 12 January 2021, if not before and continued to undertake reactive repairs. The leaks would not have continued but for this failure to address the clearly defective roof. Any equitable set off is limited to the service charge costs for these items. Mathew Warner confirmed that they were not seeking any other damages as part of this application.

Costs and refund of fees

90. The Respondents had made the following written submissions:

91. Section 20C of the LTA 1985 provides as follows:
"(1)A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(2)…
(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

92. The Tribunal has a broad discretion whether to make an order under section 20C. In particular:
"*In considering a section 20C application the Tribunal's discretion is wide and unfettered save that regard must be had to what is just and equitable in all the circumstances and there is no automatic expectation of an Order under section 20C in favour of a successful tenant:* ***The Tenants of Langford Court v Doren Ltd*** LRX/37/2000 Lands Tribunal

93. It is essential to consider:
"[75] what will be the financial and practical 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".

94. ***Conway v Jam Factory Ltd*** [2013] UKUT 592 (LC) per Martin Rodger QC

"*27. 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 those affected by it and all other relevant circumstances".*

95. ***Re SCMLLA (Freehold) Limited*** [2014] UKUT 0058 (LC) per Martin Rodger QC Paragraph 5A of Schedule 11 to the 2002 Act provides as follows:
"(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable."

96. It is submitted that the principles set out above are also applicable to the Tribunal's broad discretion when considering the Para 5A Application.

Our Determination

97. None of the litigation costs are recoverable from the Applicants either as an administration charge or through the service charge. In addition, the Respondents are to pay the Applicant, Mathew Warner, the Tribunal Fees of £200.

Reasons

98. At the end of the hearing the Respondent invited the Tribunal to reach a decision on costs without any further submissions from the parties. Though they had reached an agreement on the majority of the issues prior to the hearing, they had not necessarily made any concessions. They were agreed at less than the amount claimed in the service charge accounts. They did not wish to make any oral submissions on the agreement reached. Mathew Warner said their agreements had meant that the Respondent owed them a refund, and much was conceded at the last minute.

99. Having considered the submissions from the parties and taking into account the determinations above, the Tribunal orders the Respondent to refund the £200 paid by the Applicant. It is also just and equitable to extinguish any litigation costs that may be claimed either through the service charge for the parties or as administration charges. This is because the Applicants were largely successful in relation to most items claimed, though not in the legal arguments relating to LTQA's and Qualifying Works. In addition, the Respondents lack of participation, and failure to address evidential matters, meant that the volume of documentary evidence was out of proportion to the issues. They had misled the Tribunal, about what was at issue and failure in their duty to cooperate as required by the overriding objective, by simple denials, as opposed to properly answering the issues raised.

Name: J White **Date: 16 May 2024**

Rights of appeal

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

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

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

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.

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

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

Appendix 1

Flat Number	% contribution to service charge
1	4.29
2	4.03
4	5.24
5	4.99
6	6.44
7	3.88
13	6.04
16	3.81
17	4.95
18	5.28
20	6.22
21	3.84

Appendix 2 External Repairs

2023

Invoice Date	Invoice Ref	Creditor Name	Narrative	NET	VAT	GROSS
06/01/2023	97713	J Mills (Contractors) Limited	winter gutter hopper clean preventative	£2,711.31	£0.00	£2,711.31
30/06/2023	99381	J Mills (Contractors) Limited	remove vegetation from stonework and par	£625.85	£125.17	£751.02
11/08/2023	99783	J Mills (Contractors) Limited	remedial works to mortar on flashing sou	£565.50	£113.10	£678.60
04/08/2023	99737	J Mills (Contractors) Limited	reactive call outs, investgated and clear gutter	£1,387.50	£277.50	£1,665.00

2022

Invoice Date	Invoice Ref	Creditor Name	Narrative	NET	VAT	GROSS
22/04/2022	95197	J Mills (Contractors) Limited	de humidifier for apt 17 from roof leak	£655.00	£131.00	£786.00
04/02/2022	94165	J Mills (Contractors) Limited	job 752904 leak to apt 17 party wall fro	£845.00	£169.00	£1,014.00
01/04/2022	94896	J Mills (Contractors) Limited	re occurrence of leak into apt 18 from roof	£930.00	£186.00	£1,116.00
22/07/2022	218193	HFL Building Solutions Ltd	check leak above go falafel	£171.00	£0.00	£171.00
27/05/2022	95589	J Mills (Contractors) Limited	job 789371 - roof leak apt 15	£1,531.20	£0.00	£1,531.20
04/01/2023	97657	J Mills (Contractors) Limited	repairs to external flashing deansgate e	£1,239.50	£247.90	£1,487.40
08/03/2023	98302	J Mills (Contractors) Limited	leak by window apt 19 investigate	£309.60	£61.92	£371.52
08/03/2023	98300	J Mills (Contractors) Limited	investigate repair leadwork above apt 20 deansgate elevation	£865.68	£173.14	£1,038.82
08/03/2023	98304	J Mills (Contractors) Limited	leak into apt 5 from roof	£580.50	£116.10	£696.60

2021

			protection earth mats			
19/03/21	90665	J Mills (Contractors) Limited	further leak to ceiling apt 20 elog job investigation	580.00	116.00	696.00
26/03/21	90726	J Mills (Contractors) Limited	windows won't close apt outer windows	488.64	97.73	586.37
23/08/21	92308	J Mills (Contractors) Limited	external leak to apt 11	1,562.50	312.50	1,875.00
30/09/21	92752	J Mills (Contractors) Limited	install felt overlay to parapet for leak above apt 20	741.00	148.20	889.20

Inv Date	Invoice Ref	Supplier	Narrative	Net	VAT	Gross
31/01/20	86605	J Mills (Contractors) Limited	Bathroom Ceiling, Leak coming through the light. Flat 13. The issue may be coming from Flat 20 directly above us.	149.83	29.97	179.80
10/06/20	87759	J Mills (Contractors) Limited	leak to apt 20 near window facing onto Deansgate Rd apartment access	188.48	37.70	226.18
30/07/20	88273	J Mills (Contractors) Limited	Residential costings Summary: Roofing works following reactive call out	585.50	117.10	702.60
27/08/20	88581	J Mills (Contractors) Limited	Check roof void for leak and check with no 20 as reported wall feels wet and feels leak may still be coming into building	245.00	49.00	294.00
02/10/20	88920	J Mills (Contractors) Limited	the repairs recently completed to the lead flashing and pointing don't seem to have resolved the leak to apt 20, please re investigate	244.00	48.80	292.80
24/09/20	88857	J Mills (Contractors) Limited	Roof repairs - tiles flashing pointing & leadwork to Flat 16 Works	2,815.15	563.03	3,378.18
20/12/19	86295	J Mills (Contractors) Limited		905.70	181.14	1,086.84