FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	BIR/31UB/LIS/2018/0070
Properties	:	20 and 22 Co-operation Street, Enderby, Leicester, Leicestershire LE13 4NG
Applicants	:	Mr Stephen Andrew McLeod (22) Mr Darren Payne (20)
Respondent	:	Options East Midlands Ltd
Type of Application	:	(1) Application under section 27A of the Landlord and Tenant Act 1985 for the determination of the payability and reasonableness of service charges in respect of the subject properties (2) Application under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order relating to litigation costs pertaining to the subject properties (3) Application under section 20C of the Landlord and Tenant Act 1985 for an order for the limitation of costs
Tribunal Members	:	Judge David R Salter (Chairman) Mr Colin Gell FRICS (Surveyor)
Date of Hearing	**:**	None. Decision determined on written submissions.
Date of Decision	**:**	4 September 2019

DECISION

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Background

1 This is a decision made in respect of an application ('the Application') by Stephen Andrew McLeod ('Mr McLeod'), who, together with his wife, Vanda Elizabeth McLeod ('Mrs McLeod'), is a leaseholder of 22 Co-operation Street, Enderby, Leicester, Leicestershire LE13 4NG, which was dated 23 November 2018 and received by the Tribunal on 26 November 2018.

In the Application, Mr McLeod seeks the following: first, under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act), a determination of the payability and reasonableness of service charges in respect of 22 Co-operation Street (*'Section 27A application'*) for the service charge years 2013/2014, 2014/2015, 2015/2016, 2016/2017 and 2017/2018; secondly, under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 an order relating to liability to pay "a particular administration charge in respect of litigation costs" i.e. contractual costs in a lease (*'2002 Act application'*); and, thirdly, under section 20C of the 1985 Act an order for the limitation of costs incurred by the Respondent in connection with these proceedings to the extent that all or any of those costs are not to be taken into account in determining the amount of any service charge payable by Mr McLeod (*'Section 20C application'*).

2 Directions were issued by the Regional Judge on 13 December 2018. In those Directions and following an application by Mr Darren Payne ('Mr Payne'), the leaseholder of 20 Co-operation Street, to be added as a party to the Application, the Regional Judge in exercise of his powers under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 granted Mr Payne's application. Thereafter, the Regional Judge specified the processes to be followed by the parties in the preparation and submission of statements of case and related documents in furtherance of the Application. The Regional Judge also directed that the Tribunal should carry out an inspection of the properties which are the subject matter of the Application.

3 Subsequently, the Respondent submitted a document described as a Statement of Fact dated 7 January 2019 through its Managing Director, Mr Andy King (a practice that was followed, latterly, with all of the Respondent's correspondence and submissions) in which, *inter alia*, the Respondent described, briefly, the Co-operation Street development, its responsibilities in relation to that development, the division of the service charge between each of the flats and included, save in the case of insurance, a numerical breakdown of the costs which had been challenged in the Application. The Respondent also provided a summary of service charge expenditure dated 10 October 2018 that was prepared by Robert Whowell and Partners, Chartered Accountants ('Whowell & Partners'), covering service charge expenditure for the service charge years from 2012/2013 to 2016/2017 together with various invoices and documents denominated as a service charge expenditure report, a sample bookkeeping invoice submitted by HHL Accounting Services Limited, sub-contractors invoices, insurance documents and invoices respectively.

4 In furtherance of the Directions, Mr McLeod filed a statement of case dated 22 January 2019 which was received by the Tribunal on 24 January 2019. This was accompanied, principally, by copies of e-mail correspondence between Mr McLeod and the Respondent, letters, invoices and insurance documents. The e-mail correspondence included requests from Mr McLeod for information and to see invoices and supporting documents which had been submitted to the Respondent between 2015 and 2018.

5 Thereafter, the Respondent submitted a response to Mr McLeod's statement of case dated 28 January 2019 and entitled Statement of Fact Response together with copies of the documents which had been submitted with the Statement of Fact and correspondence

relating thereto. This Statement of Fact Response was supplemented by a letter dated 6 February 2019 in which the Respondent alluded to matters which had been omitted, erroneously, from that document.

6 In a letter dated 10 February 2019, which was received by the Tribunal on 12 February 2019, Mr McLeod referred to the Respondent's Statement of Fact Response and, in so doing, revisited and raised matters relating to the disputed repairs and insurance. At Mr McLeod's request, the Tribunal wrote to the Respondent in relation to these matters and the Respondent replied in a letter dated 18 February 2019.

7 No statement of case was filed by Mr Payne.

8 Following the Tribunal's inspection of the properties (see, paragraph 11 below) and its initial deliberations, the Tribunal wrote to the Respondent on 8 March 2019 seeking the following information and documents – year end accounts (1 January – 31 December) for the years 2013/2014 to 2017/2018, an explanation of the service charge costs apportioned to 22 Co-operation Street, a specific breakdown of the Accountant's fees for the properties for each of the relevant years, evidence of interim charges for the properties for the relevant years and copies of the insurance policies for the properties for each of the relevant years.

9 The Respondent replied to the Tribunal's request in letters dated 14 and 15 March 2019. These letters included an explanation of the apportionment of service charge to Mr and Mrs McLeod of 14.38%. This apportionment was based, as with the percentages for the other properties in the Co-operation Street development, on the square footage of their property and had been adopted because of a perceived error in the lease of 20 Co-operation Street relating to the apportionment of the service charge which provided for an apportionment of one-ninth when there were only eight properties in the development.

The Respondent also submitted copies of the Accountant's Report, profit and loss account and balance sheet relating to Vanst UK Limited for the years ending 30 November 2015, 30 November 2016, and 30 November 2017 together with invoices for professional services rendered by Whowell & Partners (accountancy fees) and policy documents relating to insurance. In due course, Mr McLeod made further representations on these matters in an e-mail dated 7 May 2019 to which the Respondent responded in an e-mail dated 8 May 2019.

10 Mr Payne did not submit any evidence that was pertinent to the issues raised in the Application. However, he did confirm in an e-mail of 8 May 2019 that his service charge payments were 'up to date'.

Inspection

11 The Tribunal carried out an internal and external inspection of 22 Co-operation Street in the presence of Mr McLeod on 4 March 2019. It is a first floor flat with two bedrooms within a building that has been converted into four flats. This building is located in a development ('the development') in Enderby town centre which comprises a further building containing three flats and a discrete self-contained single flat. The eight flats are served by a gated courtyard which occupies a central position within the development and provides parking for the leaseholders. Following its inspection of 22 Co-operation Street, the Tribunal conducted an external inspection with Mr Mcleod of the other properties within the development, including 20 Co-operation Street. Neither the Respondent nor anyone acting on its behalf was present.

In the Application, Mr McLeod stated that the building within which 22 Co-operation Street is situate had been constructed in 1914 and was converted into flats in 2006. He added that the other buildings within the development were constructed contemporaneously with the conversion.

Hearing

12 A Hearing was not requested by any of the parties.

The Lease

13 Mr and Mrs McLeod are the leaseholders of 22 Co-operation Street under the terms of a lease ('the lease') granted to them by Blue Pyramid Investments Limited. The Respondent is the successor in title to Blue Pyramid Investments Limited.

14 The tenants' (leaseholders') covenants in the lease with the landlord and with the landlord and other tenants (leaseholders), which are germane to the Application, follow:-

"3. THE Tenant covenants with the Landlord as follows

3.14.

To pay all proper costs charges and expenses (including legal costs and fees payable to the Landlord's surveyor) incurred by the Landlord in or in contemplation of any proceedings under sections 146 and 147 of the Law of Property Act 1925 in respect of the Flat notwithstanding forfeiture is avoided otherwise than by relief granted by the court…'

4. THE Tenant covenants with the Landlord and with and for the benefit of the owners and lessees for the time being of the other flat or flats in the Building as follows

4.2.

to contribute and pay to the Landlord as a maintenance and service charge ("the Service Charge") the Tenant's Proportion specified in paragraph 6 of the Particulars of the amount of the annual costs expenses and outgoings incurred by the Landlord in complying with the obligations contained in the fourth schedule and of the other matters which without prejudice to their generality are set out in the fifth schedule".

15 Paragraph 6 of the Particulars in the lease provides that the tenants' (leaseholders') proportion of the service charge for 22 Co-operation Street is one ninth (1/9th).

The following clauses in the lease provide for the calculation and payment of the service charge.

"4.3.

The service charge shall be calculated and paid in accordance with the following provisions

4.3.1.

On each of the Payment Days the Tenant shall pay to the Landlord or his managing agents (as the case may be) in advance such sum as the Landlord or his managing agents shall specify at their discretion to be a fair and reasonable Interim Payment on account of the Tenant's liability under clause 4.2…

4.3.2.

As soon as possible after the end of each Accounting Period the respective annual costs expenses and outgoings of the matters referred to in clause 4.2 shall be calculated and if the Tenant's Proportion shall fall short of or exceed the aggregate of the sums paid by him on account of his contribution the Tenant shall forthwith pay to or shall be refunded by the Landlord the amount of such shortfall or excess as the case may be notwithstanding any devolution of this lease to the Tenant for the time being subsequent to the commencement of the Accounting Period to which such shortfall or excess (as the case may be) relates".

Paragraph 1 of the Particulars in the lease provides that the Accounting Period runs from 1 January to 31 December in any year.

16 Subject to the payment of the service charge, the landlord covenants

"6.1.

To observe and perform the covenants stipulations and obligations on his part set out in the fourth schedule...".

7.

To employ such persons as shall be reasonably necessary for the due performance of the covenants on his part contained in this schedule and for the purposes of management of the Building

8.

To keep or cause to be kept proper books of account for all costs charges and expenses incurred by the Landlord in carrying out his obligations contained in this lease and to make the same available for inspection by the Tenant".

17 The landlord's obligations in the fourth schedule, which are pertinent to the Application, follow:

"1. To keep the Reserved Property in good and tenantable repair and condition throughout the Term...

2.

To paint or otherwise decorate whenever the Landlord considers it reasonably necessary so to do such of the following as have previously been or would normally be expected to be decorated except in so far as they are specifically the responsibility of the Tenant or the lessee of any other flat in the Building

2.1.

The external wood and iron work and the stone work and outside rendering of the Building and any external boundary walls fences and railings and

2.2.

The external surfaces of any windows and window frames external doors and door frames and

2.3.

The Common Parts of the Building

3.

To keep the Common Parts of the Estate properly cleaned and to keep properly lighted such of the Common Parts as may be appropriate…

4.

At all times during the Term…to insure and keep insured the Buildings (including the Flat) and the Landlord's fixtures fittings furnishings apparatus and chattels in and about the Building and such of the Common Facilities as the Landlord shall think fit to its full reinstatement value in such insurance office as the Landlord may select against loss or damage by fire and such other risks as are normally covered by a policy of comprehensive insurance…and against such other risks as the Landlord may from time to time in his absolute discretion consider it desirable to insure in such sums as shall be considered necessary for these purposes and to pay the premium for such insurance…and whenever reasonably required so to do to produce to the Tenant a copy of the policy or policies of such insurance and the receipt for the last premium for the same…

18 Clause 1.16. of the lease defines the 'reserved property' as:

"…FIRSTLY the main structural parts of the Buildings including the roof the roof timbers chimneys and chimney pots foundations external walls boundary walls fences and railings balconies and other external parts of the Buildings (except such as may be specifically included in the demise of the Flat or within the equivalent definition of any other flat in the Building) SECONDLY all cisterns tanks boilers sewers watercourses drains pipes wires gutters ducts and conduits not used solely for the purposes of the Flat or any other flat in the Building THIRDLY the Common Parts and FOURTHLY the Common Facilities

19 Clause 1.6. and clause 1.7. of the lease define the 'common facilities' and the 'common parts' as follows:

"1.6.

"the Common Facilities" means any communal television aerial satellite dish door answering system the entry gates and other facilities provided by the Landlord for the common use of more than one flat in the Buildings

1.7.

"the Common Parts" means all and any communal paths passageways staircases refuse disposal areas roads parking areas gardens and any other areas included within the Buildings and the Estate used in common by or provided for the common use of the lessees of more than one flat in the Buildings and their licensees and not included within a demise the reversion to which the Landlord is entitled".

20 The fifth schedule sets out those expenses in respect of which the Tenant (leaseholder) is to contribute through the Tenant's (leaseholder's) proportion of the service charge. For the purposes of the Application, these include expenses of compliance with the landlord's

obligations in the fourth schedule, accountants' fees for the preparation of yearly statements and other work necessary in connection with the service charge accounts, and legal fees incurred in connection with management.

The fifth schedule also provides that the landlord will use his best endeavours to maintain the annual maintenance cost at the lowest reasonable figure consistent with the due performance and observance of his obligations under the lease. In this respect, the fifth schedule indicates that the tenant (leaseholder) cannot challenge any maintenance account or any expenditure included within that account either on the ground that the work or service in question should have been provided or performed at a lower cost or the expenditure should have been attributed to a maintenance account for a period other than the one in which it has been entered.

21 As far as the Tribunal is aware, Mr Payne enjoys leasehold rights and is subject to leasehold obligations in respect of 20 Co-operation Street that are akin to those of Mr and Mrs McLeod under the lease of 22 Co-operation Street.

Issues in Dispute

Section 27A application

22 As intimated above (see, paragraph 1), the issues in dispute relate to the service charge years 2013/2014, 2014/2015, 2015/2016, 2016/2017 and 2017/2018. Those issues were identified in the Application as follows:

Service charge year 2013/2014

Insurance £1,600.00
Repairs £1,047.00
Accountant fees £1,080.00

Service charge year 2014/2015

Insurance £1,600.00
Accountant fees £1,080.00

Service charge year 2015/2016

Insurance £1,600.00
Accountant fees £1,080.00

Service charge year 2016/2017

Insurance £1,600.00
Accountant fees £1,080.00

Service charge year 2017/2018

Insurance £1,600.00
Accountant fees £1,080.00

2002 Act application

23 The grant or otherwise of an order of the Tribunal which was sought by Mr McLeod in the Application, the *2002 Act application,* and which, if granted, would reduce or extinguish

the liability of himself and his wife to pay ‘a particular administration charge in respect litigation costs’.

Section 20C application

24 The grant otherwise of an order of the Tribunal which was sought by Mr McLeod in the Application, the *Section 20C application*, and which, if granted, would provide that costs incurred by the Respondent in connection with the proceedings before the Tribunal should not be included as part of the service charge payable by him and his wife.

Statutory frameworks

Section 27A application

25 Sections 18 and 19 of the 1985 Act provide:

18(1) In the following provisions of this Act ‘service charge’ means an amount payable by a tenant of a dwelling as part of or in addition to 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’ include 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.

19(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services for the carrying out of works, only if the services are of a reasonable standard;

and the amount 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.

26 Section 27A of the 1985 Act, so far as material, provides:

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-section (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were included for services, repairs, maintenance, improvements, insurance or management of any description, a service charge would be payable for the costs, if it would, as to –

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would payable.

27 The 'appropriate tribunal' is this Tribunal.

2002 Act application

28 Paragraph 1 of Part 1 of Schedule 11 to the 2002 Act, so far as material, provides for the meaning of "administration charge" as follows:

1(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly –
…

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

1(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither –

(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

29 Paragraph 2 of Part 1 of Schedule 11 to the 2002 Act provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable.

30 Paragraph 5A of Part 1 of Schedule 11 to the 2002 Act provides, so far as material, for the limitation of administration charges in respect of the costs of proceedings as follows:

5A(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

31 The First-tier Tribunal is a 'relevant court or tribunal'.

Section 20C application

32 Section 20C of the 1985 Act, so far as material, provides:

(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…the First-tier Tribunal…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.

(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.

Submissions

Section 27A application

Repairs

33 Mr McLeod stated in the Application that he had received an invoice dated 21 July 2015 from the Respondent which indicated that repairs had been carried out to the sum of £1,047.00 during the 2013/2014 service charge year. Further, Mr McLeod explained in the Application that he had challenged this sum as the Respondent would not supply supporting invoices for these repairs either because they were included with work done for other clients or because the Respondent's internal team had carried out the work and, therefore, there were no invoices to substantiate the repairs. He wished the Tribunal to determine whether the charges for these repairs are fair and reasonable.

34 In the Statement of Fact, the Respondent outlined the constituent parts of the sum of £1,047.00 as follows:

"**In 2013/2014** the following repairs were carried out

Remedial work and decoration Windows = **£140.00** (7.3.13) (inclusive of materials)
Remedial work and decoration Windows = **£350.00** (28.2.13) (inclusive of materials)
Remedial work and decoration Windows = **£210.00** (14.3.13)
Replacement of lights to the courtyard 3No = **£131.68** (inclusive of materials)
Lock issue No 28 = **£87.50** plus vat (19.11.13)
Lock issue No 22 = **£72.50** plus vat (23.12.13)

Administration cost for each of the 6 jobs listed is approximately **£9.22** x 6 jobs = **55.32**

Total cost for works = **£991.68**
Administration Cost = **£55.32**

Grand total for the period = **£1,047**."

35 The Respondent also attached copies of invoices to the Statement of Fact. These were submitted to the Respondent by DN Howell in respect of the work undertaken on the windows and dated 28 February 2013 (£350.00), 8 March 2013 (£140.00) and 14 March 2013 (£210.00) respectively and by Lockmasters Mobile (National Accounts) Ltd for work on specified locks which were dated 2 December 2013 (£87.50 plus VAT) and 23 December 2013 (£72.50 plus VAT).

36 In his statement of case, Mr McLeod stated that the invoices relating to the work undertaken on the windows were invoiced and paid for within the 2012/2013 period. Their respective dates of 28 February 2013, 8 March 2013 and 14 March 2013 are not within the disputed period (2013/2014). Further, he submitted that the cost of this work

was subsumed within a provision for remedial work in an invoice dated 30 September 2013 received by himself and his wife from the Respondent. An accompanying letter from the Respondent of the same date referred to a sum amounting to £3,461.53 for repairs carried out, namely 'render repairs – decoration of windows, gutter repairs.' Mr McLeod adduced the invoice and the letter in evidence.

Mr McLeod also stated that no work was done on the lights at the development other than the replacement of bulbs the cost of which had been covered in the maintenance charges for the 2012/2013 period. However, he accepted the charges in the invoices submitted by the locksmiths. Mr McLeod concluded that he did not understand the administration cost that had been added to the cost of the specified repairs.

37 In the Statement of Fact Response, the Respondent suggested that the invoice for £1,047.00 may have been 'missed off' the invoice of 30 September 2013 and the sum added to the next year's charges. In his subsequent letter of 10 February 2019, Mr McLeod referred to and adduced in evidence an e-mail dated 21 November 2018 which he had received from Mr King which alluded to various works that had been carried out. Mr McLeod noted that there was no mention in this e-mail of missed invoices or to the replacement of lights in the courtyard. In a subsequent letter dated 13 February 2019 sent by the Tribunal to the Respondent, at Mr McLeod's request, the Respondent was asked to forward copies of all invoices in support of the sum for repairs of £3,461.53. In its letter of 18 February 2019, the Respondent indicated 'Unfortunately, we cannot find any of these documents requested, for various reasons these are unobtainable at present.'

Accountancy fees

38 In the Application, Mr McLeod stated that he had asked for invoices to substantiate the sum of £1,080.00 which had been charged to the service charge account for accountancy and professional fees in each of the service charge years included in the Application, namely 2013/2014, 2014/2015, 2015/2016, 2016/2017 and 2017/2018, and indicated that he had received an e-mail from the Respondent in November 2018 to which invoices to Options (East Midlands) from Robert Whowell & Partners relating to the preparation of accounts and tax returns for Options (East Midlands) were attached. These invoices made no reference to the Co-operation Street development. Further, Mr McLeod opined that the number of invoices issued in each of the service charge years would have been eight. He wished the Tribunal to determine whether the charges for the Accountant's Fees in each of the service charge years were fair and reasonable.

In the Statement of Fact, the Respondent explained that the accounts are reviewed every year by Robert Whowell and Partners and indicated that this firm draws up the annual financial accounts for Companies House. Thereafter, the Respondent set out the work undertaken in respect of the fees which had been challenged by Mr McLeod and the manner in which those fees are calculated as follows:

"Their charges [Robert Whowell and Partners] are approximately **£730.00** per hour, in addition the book keeper and management go through the accounts collectively at the end of each year.
£730.00 + **£225.20** = **£955.20**, creation of accounts and updated spreadsheets and preparing correspondence additional cost of approximately **£124.80** = grand total of **£1080.00**."

The Respondent added that the work done can vary and be time consuming when payments have been misplaced or not received.

39 In his statement of case, Mr McLeod stated that the accountant costs were incurred for the Respondent as a company. He adduced in evidence copies of three invoices relating to

2015 (dated 29 January 2016), 2016 (dated 26 May 2017) and 2017 (dated 23 February 2018) which were addressed to the Respondent by Whowell & Partners for £1,800.00 (plus VAT), £1,550.00 (plus VAT) and £1,790.00 (plus VAT) respectively. The professional services rendered for these fees are variously described in each of these invoices as 'payroll services re 2014/2015, tax returns for directors for 2015, company secretarial matters, preparation of draft company accounts for the year to 31 August 2015', 'preparation and finalisation of financial statements for the year ended 31 August 2016 including submission to Companies House and HMRC', and 'preparation of accounts for the year ended 31 August 2017, preparation of tax returns for the directors'. Mr McLeod added that he was aware that the Respondent's manage a number of properties and he failed to understand why the Co-operation Street development was being charged over 60% of Whowell & Partners fees. He continued that he had sought a breakdown of the fees from both Mr Peake of Whowell & Partners and Mr King. Mr King had replied in an e-mail dated 21 November 2018, which Mr McLeod adduced in evidence, as follows:

"After discussing with Brad [Peake] he has confirmed how the charges are broken down
RWP - £480
BOOK-KEEPER - £600
This cost can vary subject to work load involved."

Mr McLeod pointed out that the service charge expenditure report shows that the accountancy fees have been the same for each of the service charge years.

40 In the Statement of Fact Response, the Respondent stated that the accounts are carried out monthly and year end by qualified accountants and that it was confident that the accounts are correct.

41 In furtherance of the Tribunal's request for a breakdown of the Accountancy fees, the Respondent provided copies of four invoices presented to Vanst UK Limited by Whowell & Partners. The Respondent explained that this company was set up to administer the management charges relating to Co-operation Street and adduced in evidence the annual reports and financial statements of that company for the years ending 30 November 2015, 30 November 2016, and 30 November 2017. The Respondent also stated that figures for 2014 were included in the documents for 2015 and that the annual report and financial statements for the year ended 30 November 2018 were yet to be prepared.

The above-mentioned invoices dated 27 February 2015 and 26 August 2016 relate to professional services rendered for the preparation of financial statements including the filing of accounts at Companies House for Vanst UK Limited. In each instance, the fee charged is £825.00 (plus VAT). The latter two invoices dated 25 August 2017 and 23 February 2018 relate to professional services rendered for the preparation of financial statements/accounts for the same company. The fees charged are £475.00 (plus VAT) and £600.00 (plus VAT) respectively.

42 In his e-mail dated 7 May 2019, Mr McLeod questioned the rationale for setting up Vanst UK Limited and pointed out that as all invoices relating to the service charge were sent in the name of the Respondent he did not understand how the documents relating to Vanst UK Limited were relevant to the Application. The Respondent re-iterated that Vanst UK Limited had been set up to facilitate the monitoring of the Co-operation Street development and indicated that this company's bank account only deals with matters relating to Co-operation Street.

Insurance

43 Mr McLeod stated in the Application that in October/November 2018 he received invoices for £1,600.00 relating to insurance for each of the service charge years included in the Application. The invoice for the service charge year 2013/2014 was accompanied by several pages of a policy schedule. He indicated that he had tried to obtain information about the insurance cover from the Respondent since 2015. Further, he informed the Tribunal that for the service charge years 2013/2014, 2014/2015, and 2015/2016 the insurance broker was the Independent Insurance Bureau Ltd. which was based in Ashby-de-la-Zouch, Leicestershire. Mr McLeod added that he contacted this broker. As a consequence, he believed that, whilst insurance was in place through them for 2013, 2014 and 2015 with an insurance company called ERGO, the sum charged in the invoices was approximately double the insurance cost billed. For the service charge years 2016/2017 and 2017/2018, Mr McLeod informed the Tribunal that the insurance was secured through the insurance broker Anthony James of Loughborough and that insurance policies for those years were issued by the insurance companies LV and AXA respectively. Mr McLeod added that when he contacted this broker they had no record of invoices dated 2 November 2018 (with the same reference number) that had been raised in relation to insurance for these two service charge years. He wished the Tribunal to determine whether the charges for insurance in each of the service charge years are fair and reasonable.

In the Statement of Fact, the Respondent stated that each year 'the best insurance policy available at an acceptable cost' is sought and that cost, which is 'collectively charged', covers the insurance and administration for each of the eight properties. The Respondent added that the charge is broken down according to the size of the property and in relation to Mr and Mrs McLeod the cost is 14.38% of the overall cost of any works carried out and insurance. The Respondent adduced in evidence copies of various documents, including schedules, relating to insurance taken out with ERGO between 2012 and 2015 and invoices headed Anthony James dated 2 November 2018 relating to insurance taken out with the Liverpool Victoria Insurance Company Ltd in 2016 and Axa Insurance UK plc in 2017. For each of these years, a total cost of £1,600.00 is shown in both the schedules and the invoices.

The Respondent also submitted the following documents with the Statement of Fact. They were addressed to Mr and Mrs McLeod, namely an invoice dated 31 January 2015 (Invoice No. OEM5015) relating to management and service charges for the period 31 October 2013 to 31 October 2014, a letter dated 21 July 2015 setting out, *inter alia*, the cost of insurance for 2014/2015, an invoice dated 31 January 2016 (Invoice No. OEM310116/AK/22) relating to management and service charges for the period 31 October 2014 to 31 October 2015, an invoice dated 31 January 2017 (Invoice No. OEM310117/AK/22) relating to management and service charges for the period 31 October 2015 to 31 October 2016, and an invoice dated 12 January 2018 (Invoice No. OEM120118/AK/22) relating to the management and service charges for the period 31 October 2016 to 31 October 2017. In each of these documents, save for the first invoice in which the cost of insurance is not included, the total cost of insurance is recorded as £1,600.00.

44 Mr McLeod re-iterated in his statement of case that he had contacted the brokers responsible for placing the insurance for these periods, namely the Independent Insurance Bureau Ltd and Anthony James respectively. He adduced in evidence a quotation dated 16 January 2019 that he had obtained from the Independent Insurance Bureau Ltd for the properties in the development. The quotation of a premium of £768.98 (inclusive of insurance premium tax at 12%) was for cover identical to the cover taken out by the Respondent. As a result, he questioned the authenticity of some of the insurance documents and the cost for insurance charged by the Respondent which he said was always £1,600.00, and which, in his opinion, was considerably in excess of the actual premiums paid. Mr McLeod also included an invoice from Arthur J. Gallagher and

an insurance schedule issued by NIG Insurance relating to the period 18 November 2018 to 17 November 2019 which showed a premium of £467.00 and insurance premium tax of £56.04 which he had received from the Respondent.

45 In the Statement of Fact Response, the Respondent stated that insurance details are issued every year and that the costs of insurance, which included its administration costs, are not inflated. The Respondent refuted any suggestion that the insurance documents had been altered. In addition, the Respondent attached an e-mail dated 28 January 2019 from Independent Insurance Bureau Ltd which confirmed that a policy of insurance for the properties in the Co-operation Street development was held through ERGO from 18 November 2011 to 18 November 2016 with an unchanged policy number (E/11773226) throughout that period and a letter dated 28 January 2019 from Anthony James which confirmed that a policy of insurance (PTY00181251) with Liverpool Victoria Insurance Company Ltd covered the properties for the period 18 November 2016 to 17 November 2017 and that a policy of insurance (AC LAN 4203065) with AXA Insurance UK plc covered the properties for the period 18 November 2017 to 17 November 2018.

46 In his letter of 10 February 2019, Mr McLeod stated that the fact that insurance was taken out was not disputed. His concern, following his conversations with each of the brokers, was that the copies of the schedules and invoices provided by the Respondent were not copies of the schedules and invoices that had been sent by the brokers to the Respondent. Mr McLeod added that there were errors in these documents which he would not expect an insurance company to make. Thus, the renewal date on one of the schedules was incorrect and the rate of insurance premium tax applied in each of the schedules and the invoices was incorrect. By way of response, the Respondent stated its letter of 18 February 2019 '…we choose the insurance and they issue the Policy to us and we forward to the property owners, we have no other involvement. What is on their documents is what they have issued, i.e. phone numbers, policy numbers.'

47 In furtherance of the Tribunal's letter of 8 March 2019, the Respondent provided copies of policy number E/11773226 issued by ERGO for the periods 2011/2012 through to 2015/2016 with his letter of 15 March 2019. The schedules to these policies showed that the annual premiums and insurance premium tax were as follows:

2011/2012:
Annual premium - £665.50
Premium tax - £39.93

2012/2013:
Annual premium - £685.73
Premium tax - £41.14

2013/2014:
Annual premium - £720.30
Premium tax - £43.22

2014/2015:
Annual premium - £741.18
Premium tax - £44.47

2015/2016:
Annual premium - £764.02
Premium tax - £72.58

The Respondent also provided with this letter copies of policy number PTY00181251 issued by the Liverpool Victoria Insurance Company Ltd ('Liverpool Victoria') for the period 2016/2017 and policy number AC LAN 4203065 issued by AXA Insurance UK plc ('AXA') for the period 2017/2018. Neither copy was accompanied by a schedule.

2002 Act application

48 No evidence was adduced by Mr McLeod in support of this application.

Further, the Respondent did not present any evidence of legal costs which it had incurred in relation to the matters raised in the Application. However, in the letter to the Tribunal dated 18 February 2019, which was mainly concerned with matters relating to the disputed repairs and insurance (see, paragraph 6), the Respondent drew the Tribunal's attention to the service charge accounts of the leaseholders of each of the eight flats at that time to which reference was made in the letter and set out in an accompanying spreadsheet.

These accounts showed that two of these service charge accounts were in arrears, including the account of Mr and Mrs McLeod in respect of which £3,428.52 was outstanding. No service charge payments were due from Mr Payne.

In addition, the Respondent stated in this letter that the arrears represented payments (including any interest) that should have been made in accordance with the lease and that the Respondent wished to recoup the legal expenses incurred in pursuing the payment of these arrears.

Section 20C application

49 No evidence was presented or submissions made by Mr McLeod in support of the making of an order by the Tribunal under section 20C, whilst the Respondent did not adduce any evidence or make any submissions in relation to the grant or otherwise by the Tribunal of an order under section 20C.

Determination

50 In making its determination, the Tribunal considered, carefully, the written evidence presented by the parties and took into account the evidence gleaned from its inspection of the properties in the development.

51 Its findings in relation to each of the issues raised in the Application follow.

Section 27A application

The payability and reasonableness of service charges

52 The above-cited sections 18, 19 and 27A of the 1985 Act (see, paragraphs 25 and 26) contain important statutory provisions relating to the recovery of service charges in residential leases. In the ordinary course of events, payment of these charges is governed by the terms of the lease which sets out the agreement that has been entered into by the parties to the lease. However, these provisions in the 1985 Act provide additional protection to the leaseholders in this instance, broadly, through the application of the test of 'reasonableness'.

53 It is established that the construction of the lease is a matter of law and the 'reasonableness' of the service charge or otherwise for the purposes of the 1985 Act is a

matter of fact. There is no presumption either way in deciding the 'reasonableness' of a service charge.

If a leaseholder provides evidence which establishes a *prima facie* case for a challenge to a service charge, the onus is on the landlord to counter that evidence. Consequently, a decision is reached on the strength of the arguments made by the parties. Essentially, a Tribunal decides 'reasonableness' on the evidence which has been presented to it (*Yorkbrook Investments Ltd v Batten* [1985] 2 EGLR 100).

54 With regard to the test of establishing whether a cost was reasonably incurred, the usual starting point is the Lands Tribunal decision in *Forcelux Limited v Sweetman* [2001] 2 EGLR 173 ('*Forcelux*'), which concerned recovery of insurance premiums through a service charge, in which Mr PR Francis said:

"[39]...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

[40] But to answer that question, there are in my judgment, two distinctly separate matters I have to consider. First, the evidence, and from that whether the landlord's actions were appropriate and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

55 Subsequently, in the Lands Tribunal decision in *Veena v Chong* [2003] 1 EGLR 175, Mr PH Clarke FRICS observed:

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

56 Recently, the Court of Appeal analysed the concept of 'reasonably incurred' in section 19(1) of the 1985 Act in *The London Borough of Hounslow v Waaler* [2017] EWCA Civ 45 ('*Waaler*') in the course of considering whether the cost of replacing windows by Hounslow was reasonable where those windows could have been repaired at a cost that was substantially less than the cost of replacing the windows. The court said that in applying the test of establishing whether a cost was reasonably incurred the landlord's decision making process is not 'the only touchstone'. A landlord must do more than act rationally in making decisions, otherwise section 19 would serve no useful purpose. It is particularly important that the outcome of the decision making process is considered. As HHJ Stuart Bridge said in the later Upper Tribunal decision in *Cos Services Limited v Nicholson and Willans* [2017] UKUT 382 (LC):

"[47] If, in determining whether a cost has been 'reasonably incurred', a tribunal is restricted to an examination of whether the landlord has acted rationally, section 19 will have little or no impact for the reasons identified by the Court of Appeal in *Waaler*. I agree with the Court of Appeal that this cannot be the intention of Parliament when it enacted section 19 as it would add nothing to the protection of the tenant that existed previously. It must follow that the tribunal is required to go beyond the issue of the rationality of the landlord's decision-making and to consider in addition whether the sum being charged is, in all the circumstances, a reasonable charge. It is, as the Lands Tribunal identified in *Forcelux*, necessarily a two-stage test.

[48] Context is, as always, everything, and every decision will be based upon its own facts…"

57 In approaching the question of 'reasonableness' in relation to the issues raised in this case, the Tribunal is also mindful of the Upper Tribunal decision in *Regent Management Limited v Jones* [2010] UKUT 369 (LC), and, in particular, to the following cautionary words of HHJ Mole QC:

"[35] The test is whether the service charge that was made was a reasonable one; not whether there are other possible ways of charging that might have been thought better or more reasonable. There may be several different ways of dealing with a particular problem…All of them may be perfectly reasonable. Each may have its own advantages and disadvantages. Some people may favour one set of advantages and disadvantages, others another. The LVT *[The Tribunal]* may have its own view. If the choice had been left to the LVT, it might not have chosen what the management company chose but that does not necessarily make what the management company chose unreasonable."

58 In light of sections 18, 19 and 27A of the 1985 Act and this judicial guidance on the interpretation and operation of these provisions, the Tribunal's discussion and findings in respect of each of the issues follow.

Repairs

59 It is clear from the lease that repairs fall within the landlord's obligations in the fourth schedule to the lease, particularly the obligation to keep the Co-operation Street development in 'good and tenantable repair and condition', and that the landlord may employ such persons as 'shall be reasonably necessary for the due performance' of its obligations. In turn, the tenant is obliged by clause 4(2) to contribute through the service charge the tenant's proportion of 'costs, expenses and obligations' relating to repairs.

In respect of the contested 'repairs' in this case, it is incumbent on the Tribunal, initially, to determine, on the evidence, in which service charge year the costs incurred in undertaking those 'repairs' were incurred. Thereafter, with regard to those costs incurred in the service charge year 2013/2014, the Tribunal is required to consider and find whether those costs were reasonably incurred and reasonable in amount.

The summary of service charge expenditure for the period ending 30 November 2014, that is the period 1 December 2013 to 30 November 2014, has an entry of £1,047.00 for repairs. This is the sum contested by Mr McLeod in the Application and in respect of which the Respondent provided a breakdown in its statement of fact. Broadly, the costs were incurred on works, which were carried out on a number of visits, relating to windows of properties in the development, the replacement of lights in the courtyard, and work on the locks on communal and entrance doors. The Respondent suggested that costs included in this sum may not have been included in the provision for repairs in the summary of service charge expenditure for the period ended 30 November 2103 i.e. the period from 1 December 2012 to 30 November 2013, which was £3,461.53.

This suggestion is particularly apposite to the costs of the work on the windows in respect of which the Respondent submitted three invoices to the Tribunal from DN Howell which were dated 28 February 2013, 7 March 2013 and 14 March 2013. To the extent that those invoices related to the Co-operation Street development, the costs incurred were £350.00, £140.00 and £210.00 respectively - a total of (£700.00). However, the Respondent presented no evidence to the Tribunal about the composition of the global sum of £3,461.53 for the period ended 30 November 2013 (the reason for which was explained in its letter of 18 February 2019) and no evidence that the above-mentioned costs for the work on the windows, which according to the dates of each of the invoices

otherwise fell within the 2012/2013 period, were carried forward. Accordingly, the Tribunal finds that for the purposes of the Application these costs were not incurred in the service charge year 2013/2014.

In the breakdown, the Respondent included a cost of £131.68 for replacement of lights in the courtyard of the development, but this was unsupported by any substantive evidence. Consequently, there is no basis upon the Tribunal may make a determination that this cost was incurred in the service charge year 2013/2014, and it so finds.

Further, the dates of the invoices for the work carried out by Lockmasters Mobile (National Accounts) Ltd, namely 2 December 2013 and 22 December 2013, place the cost of these works within the period ended 30 November 2014. There is no evidence to suggest that these works were not carried out to a reasonable standard. The Tribunal notes that these costs were 'accepted' by Mr McLeod. Accordingly, the Tribunal finds for the purposes of the Application that the costs of these works, namely £87.50 (plus VAT) and £72.50 (plus VAT), were reasonably incurred and reasonable in amount.

Finally, the Tribunal observes in passing (as this is not a matter before the Tribunal) that the breakdown of the sum of £1,047.00 includes an undefined 'administration cost' of £55.32. It is unclear to the Tribunal on what basis this charge is made bearing in mind that the summary of service charge expenditure provides, specifically, for a management fee.

Accountancy fees

60 The fifth schedule to the lease provides for the landlord to incur accountant's fees for the preparation of yearly statements and any other work necessary in connection with the service charge accounts to which the tenant is obliged under clause 4(2) to contribute through the service charge the tenant's proportion.

In this case, the evidence shows that the Respondent employed Whowell & Partners to render professional accountancy services and HHL Accounting Services Limited for bookkeeping. The summary of service charge expenditure for the service charge periods ended 30 November 2013, 30 November 2014, 30 November 2015, 30 November 2016 and 30 November 2017 states that the cost incurred in respect of accountancy and professional services for each of these periods was the contested sum of £1,080.00, and such expenditure was incurred by the service charge company i.e. Vanst UK Limited for the property, Co-operation Street, Enderby. In the statement of fact, the Respondent sought to explain the rates at which these services were charged. Further, Mr King in his e-mail of 21 November 2018 to Mr McLeod indicated that the breakdown of the £1,080.00 was £480.00 for Whowell & Partners and £600.00 for bookkeeping.

The difficulty for the Tribunal is that the evidence submitted by the Respondent in support of each of these sums of £1,080.00, namely disparate invoices presented by Whowell & Partners and the single invoice from HHL Accounting Services Limited do not relate, specifically, to the service charge for the Co-operation Street development. Indeed, the former, which were submitted with Respondent's e-mail of 8 March 2019, were addressed to Vanst UK Limited and concerned the rendering of services which ensured that statutory requirements relating to the preparation and filing of financial statements for that company were met. Presumably, this explains the submission by the Respondent of the various financial statements relating to this company rather than final end of year service charge accounts for each of the relevant service charge years as requested by the Tribunal. Similarly, the invoices from Whowell & Partners that were adduced in evidence by Mr McLeod, whilst addressed to the Respondent, do not relate specifically to the service charge for the Co-operation Street development and were concerned, principally, with the provision of services relating to the preparation and/or filing of financial

statements for the Respondent and the preparation of tax returns for its directors. As a consequence, it was neither possible for the Tribunal to reconcile the figures in these documents with the contested sums nor to extrapolate any amounts which were referable to the service charge for the Co-operation Street development or any of the individual properties within that development.

In these circumstances, the Tribunal accepts that, on the evidence, some accountancy and bookkeeping services were rendered in respect of the service charge for the Co-operation Street development during the relevant service charge years, and, in the absence of any compelling evidence to the contrary, it determines, using its knowledge and experience as an expert tribunal, that a sum £300.00 (plus VAT) is a reasonable amount for such accountancy fees (including bookkeeping) in each of the service charge years specified in the Application.

Insurance

61 Broadly, the fourth schedule of the lease (paragraph 4) provides that the landlord is to place insurance for the Co-operation Street development with insurance office of repute and to produce, whenever reasonably required to do so, a copy of the policy or policies of insurance to the tenant together with a receipt for premiums. Further, as was the case with the repairs and accountancy fees, the tenant is obliged to pay through the service charge the tenant's proportion of the landlord's 'costs, expenses and outgoings' relating to, in this instance, the landlord's obligations in the fourth schedule.

In this case, the Respondent engaged insurance offices of repute, namely Independent Insurance Brokers Ltd and Anthony James, to place insurance for the Co-operation Street development. It is not disputed by Mr McLeod that insurance was taken out in each of the service charge years covered in the Application. However, Mr McLeod questioned the cost of £1,600.00 for insurance entered in the summary of service charge expenditure for each of those service charge years and included in service charge invoices which on the information available prior to the making of the Application it was not possible to dissemble.

The Tribunal was presented by Mr McLeod and the Respondent with an abundance of copies of insurance documents, but not, on the part of the Respondent, with complete copies of documents that were requested by the Tribunal and which are material to this decision. In the event, the most telling of those documents for the purposes of the Application were the copies of the policies, including schedules which set out the premium and insurance premium tax paid, issued by ERGO for the Co-operation Street development relating to the service charge years 2013/2014 through to 2015/2016 which were adduced in evidence by the Respondent with his letter of 15 March 2019. The premium and insurance premium tax paid in each of these service charge years can be found in paragraph 47 of this decision. It was also instructive that the 'alternative' quotation procured by Mr McLeod from Independent Insurance Brokers Ltd showed a premium and related insurance premium tax liability that was lower than the premiums paid under the ERGO policies but not markedly 'out of line' with those premiums. The Respondent also provided copies of the policies issued by Liverpool Victoria and AXA relating to the latter two service charge years but did not include the schedules to those policies. These policies were commissioned by Anthony James, presumably, with the yearly rises in the premiums of the ERGO policies, with the intention on the part of the Respondent of securing lower premiums. However, this is mere surmise. It is clear, however, that where evidence of the premiums and related insurance premium tax is available in relation to the service charge years 2013/2014 to 2015/2016 the costs involved in each year are not compatible with the constant figure of £1,600.00 recorded for insurance in the summary of service charge expenditure for these years and charged by the Respondent in invoices. On the other hand, it is not clear to the Tribunal on what

basis this disparity can be justified – a position which is compounded by the Respondent's admission that it simply chooses the insurance and once the policy is issued it is forwarded to the tenants without any further involvement on its part (see above, paragraph 46).

In these circumstances, the Tribunal's approach to the question of the reasonableness, or otherwise, of the insurance costs for each of the relevant service charge years was dictated, principally, by the availability of pertinent and compelling evidence. In this respect, the Tribunal's resolution of the question of the reasonableness of the insurance costs for each of the policies issued by ERGO for the service charge years 2013/2014, 2014/2015 and 2015/2016 was relatively straightforward in that, as has been seen, the Respondent adduced in evidence the cost of the premiums and insurance premium tax paid in relation to the insurance policies for each of these years, namely £763.52 (including £43.52 insurance premium tax) for 2013/2014, £785.65 (including £44.47 insurance premium tax) for 2014/2015 and £836.60 (including £72.58 insurance premium tax) for 2015/2016. This evidence was complemented by Mr McLeod's 'alternative' quote of £768.98 (including £80.79 insurance premium tax), which, although, representative of a retrospective assessment of the insurance costs for the afore-mentioned years and, consequently, limited by an inability to capture, fully, those factors which influenced the issue of each of the pertinent policies, nevertheless, provided the Tribunal with a useful indicator of what might be regarded as reasonable insurance costs for the Co-operation Street development in these years. In this regard, the Tribunal also noted that the mean of the insurance costs incurred in these years, namely £795.26, does not differ, significantly, from the 'alternative' quote of £768.98.

This evidence suggests, without more, that the premiums and related insurance premium tax paid in respect of each of the insurance policies for the service charge years 2013/2014 through to 2015/2016, whilst possibly not the cheapest available, fell, in all probability, within the range of costs which may be regarded as reasonable for the cover provided. Further, it is evident that the Respondent acted prudently and in accordance with the terms of the lease in employing a broker of repute to advise on the insurance taken out in respect of the Co-operation Street development in each of these years.

Accordingly, the Tribunal finds that the insurance costs comprising the premiums and related insurance premium tax paid in respect of the policies issued by ERGO for the Co-operation Street development relating to the service charge years 2013/2014, 2014/2015 and 2015/2016 were reasonably incurred and reasonable in amount.

The position pertaining to the insurance costs relating to the service charge years 2016/2017 and 2017/2018 is more problematic in that whilst the Respondent submitted the policies of insurance for these years these policies were not accompanied by schedules from which evidence relating to the premiums and related insurance premium tax paid could have been gleaned. As the evidence shows, each of these policies was secured through a broker of repute albeit one other than the broker employed in respect of the policies for 2013/2014 through to 2015/2016 presumably, as the Tribunal has already speculated, because the premiums for the ERGO policies had risen each year and with a view, therefore, to obtaining a lower premium. The absence of evidence relating to the premiums and insurance premium tax paid in respect of each of these policies does not mean, of course, that such obligations to pay were not met and consequent insurance costs were not incurred. Indeed, it has not been argued that this was the case. Undoubtedly, however, the absence of this evidence hinders the Tribunal's determination of the extent to which such payments, which it accepts were reasonably incurred, may be regarded as reasonable in amount. In this circumstance, the Tribunal relying on its knowledge and experience as an expert tribunal determines by extrapolating from the evidence relating to insurance which has been submitted by the parties and by making some allowance for the fact these were 'new' policies rather than renewals that an

insurance cost not in excess of £750.00 (inclusive of premium and insurance premium tax) and £720.00 (inclusive of premium and insurance premium tax) for the service charge years 2016/2017 and 2017/2018 respectively may be regarded as reasonable in amount.

Applicants' contribution to relevant costs

62 The Applicants' contributions to each of the relevant costs determined by the Tribunal shall, in the absence of any variation of the leases pertaining to 20 and 22 Co-operation Street respectively of which no evidence has been presented to the Tribunal, be the proportions of the service charge specified in those leases whatever the pragmatism of adopting an alternative apportionment based upon the square footage of each property may be. In the case of Mr and Mrs McLeod, the lease provides that their contribution to the service charge shall be one-ninth.

2002 Act application

63 In the Application, Mr McLeod also applied to the Tribunal under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the *2002 Act application)* for an order to reduce or extinguish the liability of himself and his wife to pay an "administration charge in respect of litigation costs".

64 The lease includes provisions upon which the Respondent might seek to rely in order to recover legal costs which it has incurred (see, clause 3.14 set out, above, in paragraph 14 and the reference in paragraph 20, above, to the expenses in the fifth schedule to the lease to which the Applicants contribute through their proportion of the service charge). The operation of such provisions is a matter of interpretation and their application or otherwise is determined within the context of a given case.

65 Paragraph 5A of Schedule 11 was introduced to give Tribunals the power, in appropriate circumstances, to regulate landlord's legal costs, particularly, in relation to service charge disputes such as the disputes which have arisen, in this instance, between Mr McLeod and the Respondent.

66 However, it was not clear to the Tribunal on what basis the *2002 Act application* was made in that Mr McLeod did not identify any legal costs incurred by the Respondent in relation to the Application which he wished to challenge. Moreover, the Respondent's evidence did not reveal that any legal costs had been incurred in relation to the matters raised in the Application, and, independently thereof, whilst the Respondent's evidence suggested that legal costs might be incurred in pursuing those leaseholders with responsibility for arrears of service charge there was no evidence that such costs had been incurred.

67 In these circumstances, the Tribunal makes no order under the *2002 Act application*.

Section 20C application

68 Finally, Mr McLeod sought an order of the Tribunal under section 20C of the 1985 Act by virtue of which all or any costs incurred by the Respondent in connection with the proceedings before the Tribunal should not be taken into account in determining the amount of any service charge.

69 The wording of section 20C makes it clear that the making of an order by the Tribunal under that section is a matter of discretion. It is a discretion which may be exercised having regard to what is just and equitable in all the circumstances of the particular case.

70 Guidance on the exercise of that discretion was given in *Tenants of Langford Court v Doren Limited* (LRX/37/2000). In that case, HHJ Rich said:

"In my judgment the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all the parties as well as the outcome of the proceedings in which they arise.

…there is no automatic expectation of an order under section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

In my judgment the primary consideration that the LVT *[The Tribunal]* should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes its use unjust…its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them."

71 Further guidance is given in the Upper Tribunal decision in *Conway and Others v Jam Factory Freehold Limited* [2013] UKUT 0592 in which Martin Rodger QC observed that it is important to consider the overall financial consequences of making an order under section 20C, and, in particular, that an order made under the section will only affect those persons specified. He also said:

"[75] In any application under section 20C it seems to me to be 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."

72 As this judicial guidance makes clear, a Tribunal should not in deciding whether or not to exercise its discretion under section 20C stray from the principle which underlies exercise of that discretion, namely whether it is just and equitable in all the circumstances of the case to do so.

73 In considering whether to exercise its discretion under section 20C in this case, the Tribunal took into account all the prevailing circumstances, but, particularly, the following.

74 At the outset, the Tribunal reviewed the circumstances which prompted Mr and Mrs McLeod to make the Application, namely a perception on their part gleaned from their dealings with the Respondent over a four year period prior to the Application and evidenced by the copies of the e-mail correspondence with Respondent adduced in evidence that the Respondent was unwilling and/or unable to respond to their inquiries and requests for information about aspects of the service charge and, more particularly, the contested costs specified in the Application, and, consequently, had failed to comply with obligations under the lease and the 1985 Act. This may also explain, but not justify, the decision of Mr and Mrs McLeod to withhold payment of some of the service charge.

The Tribunal was also mindful of the tenor of the exchanges between Mr McLeod and the Respondent that often revealed a strained relationship and one which was not conducive to a satisfactory resolution of the disputed matters.

Further, the Tribunal acknowledged, in accordance with the above judicial guidance, that the outcome of the Application, which was predominantly in favour of the Applicants,

whilst relevant was not determinative of the question of whether or not it should exercise its discretion under section 20C. However, it also noted that its pursuit of this outcome was not helped by the Respondent's inability to provide evidence (repairs), its submission of evidence to which the Tribunal accorded little weight (accountancy fees), and incomplete evidence (insurance).

The Tribunal was not provided with any evidence relating to the financial consequences of the making of an order under section 20C for any of the parties. However, the Tribunal was alerted to the possibility in the Respondent's letter of 18 February 2019 and its e-mail of 8 May 2019 that the Respondent may wish to dispose of its interest in the properties in the development following the determination of the Application, but it was unclear to what extent, if at all, this was motivated by financial considerations.

In the light of all the circumstances and the backdrop to the issues addressed and determined by the Tribunal in relation to the Application, the Tribunal in exercise of its discretion under section 20C determines that it is just and equitable to make an order in favour of the Applicants that the Respondent's costs, if any, in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants in this case.

Judge David R Salter

Date: 4 September 2019

Appeal Provisions

75 If any party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such appeal must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

76 If the party wishing to appeal does not comply with the 28-day limit, the party shall include an application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

77 The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the application is seeking.