FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT at
GLOUCESTER AND CHELTENHAM

Tribunal Reference	**:**	**BIR/47UC/LIS/2018/0072** **BIR/47UC/LLD/2018/0001**
Court claim number	**:**	**E76YX486**
Property	**:**	**Elgin House, 75 Graham Road, Malvern WR14 2HX**
Applicant	**:**	**Elgin House Management Company Limited**
Representatives	**:**	**Mr Ben Stimmler (6 March 2019) and Mr Paul Sweeney (1 May 2019) (both of counsel) instructed by JB Leitch Ltd, solicitors**
Respondent	**:**	**Mr H K Baghbadrani**
Representative	**:**	**Crystalight Ltd**
Tribunal Members	**:**	**Judge C Goodall** **Mr R Bryant-Pearson FRICS**
In the County Court	**:**	**Judge C Goodall sitting as a County Court District Judge**
Date and venue of Hearings	**:**	**6 March and 1 May 2019 at Worcester Combined Court Centre**
Date of Decision	**:**	**14 May 2019**

DECISION

Summary of the decisions made by the Tribunal

1. That the sum of £4,603.48 is payable by Mr H K Baghbadrani to Elgin House Management Company Limited by 28 May 2019 as a service charge by way of Special Contribution.

2. That the costs of £11,064.91 assessed in the County Court for the Tribunal proceedings (see para 4 below) should be reduced to the sum of £6,638.95 pursuant to Schedule 5A of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

3. That no costs incurred by the Applicant in these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Summary of the decisions made by the County Court

4. The Applicant's legal costs under clause 2(b) of the Third Schedule of the leases were assessed at £13,139.91.00, of which £2,075.00 were costs incurred in the County Court and £11,064.91 were costs in the Tribunal (but see paragraph 2 above and 5(i) below in relation to the impact of decisions under paragraph 5A of the 2002 Act).

5. The following sums are payable by Mr H K Baghbadrani to Elgin House Management Company Limited by 28 May 2019:

    (i) Costs in the County Court in the sum of £1,245.00 being the proportion of the County Court costs of £2,075.00 determined to be payable pursuant to Schedule 5A of the 2002 Act;

    (ii) Interest at 4% calculated in the case of service charge demands from 7 May 2018 to the date of judgment is payable by the Respondent in the sum of £180.61;

    (iii) £4,603.48 special contribution as determined by the Tribunal;

    (iv) £6,638.95 costs of the Tribunal proceedings.

6. The total judgement sum is therefore £12,668.04.

Background

7. The Applicant issued proceedings against the Respondent on 3 August 2018 in the County Court Money Claims Centre under claim number E76YX486. The respondent filed a Defence dated 6 September 2018, in response to which the applicant filed and served a Response to Defence dated 27 September 2018.

8. The proceedings were then transferred to the County Court at Gloucester and Cheltenham and then to this tribunal by the order of District Judge Hebblethwaite dated 11 October 2018, for consideration of the reasonableness and payability of the service charges concerned.

9. The tribunal issued directions and the matter eventually came to a hearing on 6 March 2019 and 1 May 2019.

10. Elgin House on Graham Road in Malvern ("the Property") is a substantial residential property which has been converted into six leasehold flats. Two flats (numbers 2 and 3) were demised to one or other or both of Col & Mrs Peter and Honor Walker by long leases for terms of 125 years from 1 October 2005. Subsequently, Col and Mrs Walker acquired the leasehold interest in flat 6. The other three (flats 1, 4, and 5) were demised to Heshmatollah Kaveh. They are now owned by Hekmat Kaveh Baghbadrani ("the Respondent"). Under the leases, the Lessor was Cedarbranch Limited and a management company called Elgin House Management Company Limited (the "Applicant") was also a party to the leases to assume the responsibility of management of the Property.

11. The Tribunal has been informed that Col & Mrs Walker have subsequently acquired a controlling interest in the Applicant, and that the Applicant has purchased the freehold of the Property. The Applicant is therefore both the freeholder and the management company, and it is owned or controlled by Col & Mrs Walker who also own three of the six flats in their individual capacities, as lessees.

12. The County Court Claim is for:

    a. A money sum of £7,700.12, made up of:

        i. £6,339.30 demanded on 9 April 2018 under three separate invoices as an on account contribution towards proposed external decoration works said to be due from the Respondent by virtue of the terms of his leases of Flat 1 Elgin Court (for which £2,704.54 was demanded, Flat 4 (for which £1,818.34 was demanded) and Flat 5 (for which £1,816.42 was demanded) (" the Service Charge Demands")

        ii. £1,360.82 demanded as administration charges, being three demands of £120 for each flat for a "legal fee" claimed on or around 30 August 2017, of which there was said in the claim form to be an unpaid amount of £93.61 for flats 1 and 4 and £93.60 for Flat 5) and demands of £360 per flat for an unspecified further fee on unspecified dates (together the "Administration Costs Demands").

    b. Interest pursuant to section 69 County Courts Act 1984

c. Contractual legal costs which at the date of the second hearing were quantified as £19,446.26, and

d. Further or in the alternative, costs.

13. There are also before the Tribunal applications by the Respondent for a determination that none of the costs incurred by the Applicant should be regarded as relevant costs to be included in a service charge demand, under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act"), and for an order under paragraph 5A of the 2002 Act reducing or extinguishing the obligation to pay legal costs payable by the Respondent.

14. All First-tier Tribunal ("FTT") judges are now judges of the County Court. Accordingly, where FTT judges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues relating to ground rent, interest or costs, that would normally not be dealt with by the tribunal.

15. By directions issued on 6 December 2018, Regional Judge Jackson, sitting also as a County Court Judge directed that the case would be decided under the provisions of a Civil Justice Council pilot scheme for flexible deployment whereby the Tribunal Judge sitting in the case (sitting as a District Judge) would determine all outstanding matters in the County Court (including costs and interest), and the Tribunal would determine the matters which fall to be determined by the Tribunal.

16. Judge Goodall therefore presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court. He sat alone when considering matters within the exclusive jurisdiction of the County Court.

17. This decision will act as both the reasons for the tribunal decision and the reasoned judgment of the County Court.

18. The following issues need to be determined:

a. The reasonableness and payability of the Service Charge Demands

b. The reasonableness and payability of the Administration Charge Demands

c. The amount of the costs payable under the contractual provisions in the leases

d. The amount of interest payable (if any)

e. Whether to reduce or extinguish the legal costs incurred in the county court which would otherwise be payable by the Respondent under paragraph 5A of the 2002 Act

f. Whether to reduce or extinguish the costs that would otherwise be payable for costs incurred in the conduct of the Tribunal proceedings under paragraph 5A of the 2002 Act

g. Whether to grant an order preventing the costs incurred in either forum from being included within a service charge demand pursuant to section 20C of the 1985 Act

19. Items a, b, f, and g above are within the jurisdiction of the Tribunal. Items c, d, and e are within the jurisdiction of the County Court.

The hearing

20. On 6 March 2019 the Tribunal held a hearing at Worcester Combined Court Centre to determine the issues arising in this case. The hearing was preceded by an external inspection of Elgin Court. At the hearing, the Applicant's case was presented by Mr Stimmler, with evidence being given by Mr Alan Freedman from Bright Willis (a property management firm) who are the managing agents for the Property. The Respondent represented himself with the assistance of Mrs Sharon Reen from Crystalight Ltd, in which company the Respondent was said to have an interest. Crystalight operates partly as a property management company and it manages the three flats owned by the Respondent.

21. In the event, on 6 March 2019 the Tribunal had insufficient time to deal with all matters, and a second hearing day was held on 1 May 2019.

The inspection on 6 March 2018

Orientation

22. For the purposes of orientation, the elevation facing the Graham Road is referred to as the East elevation consequently the side elevation where the main entrance door to the building is located is the North elevation

General Description

23. Elgin House comprises what was originally a large Victorian dwelling house which has subsequently been converted into six flats. The building is located on the West side of Graham Road bounded by stone walls with some hedges. The site is quite steeply sloping, downwards from west to east towards the road. The building is largely obscured from the road by hedges both along the front boundary and at the side of the drive. The communal gardens comprise mostly lawn areas, that at the back being terraced with a retaining wall because the sloping site. The tarmacadam drive has been extended to provide car parking for each of the flats and for visitors. In recent years a double garage with a room over has been constructed in the north west corner of the plot.

24. The exterior of the building does not appear to have been significantly altered since it was originally constructed with stucco/cement rendered solid stone/brick walls and ornate stone window surrounds etc. all of which have been painted with a proprietary masonry paint. The chimney stacks are likely to be of brick construction and have similarly been rendered and painted. The house retains most of the original sash windows and replacements/alterations have been in keeping. The roof slopes visible from ground level appeared to be slate covered but over the central part of the building it would appear that there is an area of flat roof which is probably lead covered. The design of the property is such that there are significant eaves overhangs with wooden barge boards, fascia board and soffit (underside of projections) boards the latter being up to about 300 mm wide, all of which have been painted. Guttering is of white plastic (unpainted).

Condition of exterior decorations

25. The Tribunal did not gain internal access to Elgin House and thus mainly limited its inspection to considering the external condition of the decorations to the main building.

East Elevation

26. Painted rendered/stone surfaces. Particularly at lower ground floor level masonry paint has deteriorated exposing bare cement in places as well as cracking/lamination to the masonry paint. Where new/altered window openings etc have been formed galvanised steel angle bead reinforcement has been used on the reveals, as is common practice. Lack of maintenance by repainting has contributed to corrosion to the corner edges of the beading and thus surface rust detracts from the appearance.

27. Exterior Joinery. Some deterioration was noted to the painting to the first-floor windows in particular and the more modern joinery at lower ground floor level is vulnerable to early deterioration if not kept properly painted as is now necessary.

North Elevation

28. Painted rendered/stone surfaces. The appearance is marred by a considerable amount of algae type growth but the cement paint beneath appeared to be in generally fair order for its age but is now beginning to deteriorate particularly to the cornice areas at first-floor level and to the balustrading and cornice above the main entrance.

29. Exterior Joinery. The joinery to this elevation appears particularly neglected in places where bare wood is exposed due to the paint having cracked and fallen away. Were these windows not such good quality considerable deterioration to the timber would have occurred.

West Elevation

30. Painted rendered/stone surfaces. The appearance is marred by rust marks and some algae type growth but otherwise the masonry paint appears to be performing adequately.

31. Exterior Joinery. The painted surfaces have peeled to the sash windows, where bare wood is now exposed, and to some of the barge boards and soffits.

South Elevation

32. Rendered/stone surfaces. The masonry paint appears to have performed quite well to date although there is some algae growth and surface rust where corner beading has become exposed.

33. Joinery. A neglected appearance is presented particularly to the dormer windows where the paint has pealed badly revealing bare wood.

The Chimneys

34. The cement paintwork to the chimneys as seen from ground level has started to deteriorate quite badly revealing bare render in places.

Guttering, downpipes external soil pipes etc.

35. The white plastic rainwater goods appear to be in generally satisfactory order and will only require cleaning at the time of redecorating. Other external pipework is partly of painted plastic and partly of painted metal, the latter showing some signs of surface corrosion. Thus, the external pipework which has been painted should be repainted when redecoration takes place

The claim for payment of the Service Charge Demands

36. These demands were issued in order to fund the proposed external redecoration of the Property. By way of background, the Tribunal was informed that proposed external redecoration had been proposed in 2013, and at that time the Applicant had conducted a section 20 consultation process to select a contractor. For reasons that were not wholly explained to the Tribunal (and which are probably not relevant to the issues before us), the proposed works in 2013 did not proceed, but some payments for proposed external redecoration were collected, so that around £8,000 was set aside in a reserve fund for future external redecoration. It was the Applicant's case that collection of the Respondent's contributions towards that reserve had not finally been resolved until 2017.

37. The Applicant's case was that the Service Charge Demands were payable as a result of the contractual obligations in the leases. Under the leases:

a. The Lessee covenanted:

   i. 3.2 In respect of every Maintenance Year to pay the Service Charge to the Company by two equal instalments in advance on the half-yearly days …

   ii. 3.3 To pay the Company on demand a due proportion of any Maintenance Adjustment pursuant to paragraph 3 of Part II of the Fourth Schedule

   iii. 3.4 To pay to the Company on demand any due proportion (calculated on the basis of the proportions specified in clause 3.2) of any Special Contribution that may be levied by the Company

b. "Service Charge" is defined as being "a sum equal to the aggregate of the proportions set out in this lease (or such other proportions an may be determined pursuant to Part I of the Fourth Schedule) of the Annual Maintenance Provision for the whole of the Block and the Estate for each Maintenance Year (computed in accordance with Part II of the Fourth Schedule)

c. "Annual Maintenance Provision" is defined as being a sum calculated in accordance with the Fourth Schedule Part II

d. "Special Contribution" is defined as "Any amount which the Company shall reasonably consider necessary for any of the purposes set out in the Fifth Schedule hereof for which no or inadequate provision has been made within the Service Charge and for which no or inadequate reserve provision has been made under the Part II of the Fourth Schedule paragraph 2(ii)

e. Clause 2 of the Fourth Schedule provides that "The Annual Maintenance Provision shall consist of a sum comprising (i) the expenditure estimated as likely to be incurred in the Maintenance Year by the Company for the purposes mentioned in the Fifth Schedule…"

f. The Fifth Schedule is headed "Purposes for which the Service Charge is to be applied". Paragraph 1(a) in Part I of the schedule describes the first of those purposes as "As often as may in the opinion of the Company be necessary to prepare and decorate in appropriate colours with good quality materials and in a workmanlike manner all outside rendering wood and metalwork of the Block usually decorated"

g. In the lease definitions section (clause 1), the percentage of the Annual Maintenance Provision attributable to the Block for the

services set out in Part I of the Fifth Schedule which the lessee is to pay is defined as the Service Charge Proportion. Each lessee is to pay two separate sums. Firstly, a specific proportion of the costs of providing the services set out in Part I of the Fifth Schedule, and secondly a specific (and different) proportion of the costs of providing the services set out in Part II of the Fifth Schedule. Part I relates to external maintenance and grounds maintenance; Part II deal with the internal common parts.

h. The proportions are:

2. Flat number	3. 5th Schedule Part I	4. 5th Schedule Part II
5. Flat 1	6. 23.0656%	7. nil
8. Flat 2	9. 17.8257%	10. 23.1700%
11. Flat 3	12. 15.6709%	13. 20.3692%
14. Flat 4	15. 15.5077%	16. 20.1570%
17. Flat 5 [1]	18. 15.4913%	19. 20.1358%
20. Flat 6	21. 12.4388%	22. 16.1680%

38. The calculation of the precise sums said to be due from the Respondent for the external decoration works came about in this way. The Applicant (through Bright Willis) had made a decision by February 2018 that external decoration should now be progressed. A further section 20 consultation process therefore took place. At its conclusion, the Applicant issued a paragraph b statement under paragraph 11(4)(b) of Schedule 4 to the Service Charges (Consultation etc) Regulations 2003 ("the Regulations") on 9 March 2018. This statement identified that three estimates for the works had been obtained as follows:

	£
J & B Painters and Decorators (no VAT payable)	17,471.00
Seddon Construction Ltd (incl VAT)	28,584.00
Hardyman & Co Ltd	29,512.95

39. Also on 9 March 2018, the Applicant sent a letter to the Respondent stating that should the lowest tender for the works be successful, the total cost of the works would be £20,091.66 made up as follows:

£	
Lowest quote – J & B Painters and Decorators	17,471.00
Bright Willis supervisory fee	2,183.88
VAT	436.78
Sub total	20,091.21
Less reserve fund	8366.21

[1] In the lease of Flat 5 the proportions for Part I and Part II costs have been incorrectly juxtaposed. The figures in this table are the proportions which the Tribunal assumes should have been used.

Total	11,725.42

40. It is on the basis of these calculations that the Service Charge Demands were issued for flats 1, 4 and 5 on 9 April 2018, demanding payment of the individual flats percentage contribution towards this total sum of £11,725.42, to be collected as a Special Contribution under clause 3.4 of the leases, from the Respondent. The sums were calculated as follows:

Flat 1 – 23.0656% of £11,725.42 = £2,704.54
Flat 4 - 15.5077% of £11,725.42 = £1,818.34
Flat 5 - 15.4913% of £11,725.42 = £1,816.42

41. The Applicant's case is that these are sums due under the covenant contained in clause 3.4 of the leases to pay a special contribution towards the proposed costs of the external decoration, which fall squarely within the scope of works that the Applicant covenants to carry out as set out in paragraph 1(a) of Part 1 of the Fifth Schedule, and that they have been correctly calculated using the apportionment methodology set out in the leases.

42. The Respondent declined to pay the Service Charge Demands at the time, arguing that the works were not needed. At the hearing, he confirmed that his reasons for denying liability to pay them were:

a The work was not necessary;

b The section 20 consultation that had been carried out between Feb and April 2018 had been flawed;

c The proposed overall cost of the work was too high based on the fact that lower estimates had been obtained;

d His ability to pay should be taken into account, and the work should therefore be phased;

e The management company should have built up reserves to ensure there were sufficient funds to cover the works without demanding a large amount on one go;

f If it was correct to charge for the external decoration work now, the addition of a fee for supervision was unreasonable;

g It was possible that no notice of his rights under section 21B of the Act had been served;

h A service charge cost in the 2018/19 service charge year had included work which should not have been included in the service charge; and

i The whole management of the Property is not carried out with regard to his interests.

j The apportionment of the overall costs to his flats had been incorrect;

43. We now look at the detail of each of points (a) to (i).

(a) Work not necessary

44. In his defence in the County Court, and in his statement for these Tribunal proceedings, the Respondent argued that the proposed external decorating work was not necessary. At the hearing, he abandoned this argument.

Discussion

45. In the Tribunal's opinion, the Respondent was right to drop his argument on this point. Our view is that the exterior joinery is generally in need of urgent repainting which should take place in summer 2019 to prevent the risk of significant deterioration through next winter. Whilst the masonry paint has performed quite well to many parts of the elevations, beyond the need for cleaning, some significant deterioration has occurred in places and in any event repainting of all parts of the stone/render surfaces would now be timely.

46. Delaying repainting the exterior joinery would not be wise and since redecoration is necessary to all elevations it would not be practical or advisable to consider painting, say, the joinery and render to two elevations this year and the remaining elevations next year. We therefore conclude that there would be significant disadvantages to phasing the redecoration work.

(b) Section 20 consultation

47. The Respondent's main objection to the section 20 consultation process was that although he had nominated a proposed contractor, the Applicant had failed to obtain an estimate from that contractor.

48. The law on consultation is contained in section 20 of the Landlord and Tenant Act 1985 ("the Act") and the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations"). Section 20(6) of the Act, in the context of this case, limits the cost incurred on the external decoration works to the sum of £250 per flat unless the consultation requirements have been complied with or dispensed with. The Regulations, in so far as is relevant to the Respondent's argument in this case, require that the Applicant's initial notice of intention to carry out works must invite each tenant to propose the name of a person from

whom the landlord should try to obtain an estimate for the carrying out of those works.

49. It is common ground that although the Respondent proposed the name of a contractor, the Applicant failed to obtain an estimate from that nominated company.

50. What happened was this (and the Tribunal finds the following account as fact). The Applicant's notice of intention to carry out works was dated 6 February 2018, and it was received by the Respondent on 13 February 2018. The Respondent wrote to Bright Willis in reply the same day, through Crystalight Ltd who were representing his interests in the Property. They objected to the proposed works, but then said:

"If you continue your intentions we nominate PCJ Bespoke Design and Build Pucks Hill, Knightwick, Worcester WR6 5QW 01886821138."

51. In his evidence at the hearing, Mr Alan Freedman, a property management consultant working for Bright Willis, said that someone in their office (he thought it was someone called Wendy Hemming) had made "a number" of calls to the telephone number given for PCJ Design and Build, probably on 14 February, but had not been able to make contact.

52. A letter was produced at the hearing by Mr Stimmler, which had not been included in the bundle of documents, and which was said to be a letter from Bright Willis to PCJ Design and Build, dated 14 February 2018. It was headed "External decoration – Elgin House, 75 Graham Road, Malvern, Worcester" and it said that Bright Willis had attempted to make contact with PCJ on a number of occasions but the number given had not been recognised. It requested that the recipient contact Bright Willis within the next 7 days.

53. Bright Willis replied to the Crystalight letter of 13 February 2018 on 15 February 2018. They said, in relation to the Respondent's nomination:

"We have tried to make contact with your suggested contractor, PCJ Bespoke Design and Build Pucks, although it seems the contact details you have provided are incorrect. After searching the above contractor via google the details on there are also incorrect. Therefore, please provide us with the correct contact details in order that we can approach them accordingly."

54. Crystalight received this letter on 19 February 2018, and again responded by letter the same day, saying:

"Revised details for PCJ Bespoke Design and Build Pucks Hill, Knightwick, Worcester, WR6 5QW. Director Mr Nick Welham Mobile Number 07785 494547."

55. At this point in the narrative, complications set in, as Mr Freedman denied that Bright Willis had received Crystalight's letter of 19 February, and Mr Welham, the director of PCJ Design and Build at the time of this correspondence, (who gave evidence to this effect at the hearing) denied receiving Bright Willis's letter of 14 February 2018. So, if they are both right, PCJ did not know that Bright Willis wanted them to quote for the decorating work, and Bright Willis did not have Mr Welham's mobile number to make contact with him.

56. Nothing more happened until Bright Willis issued its paragraph b statement. As mentioned above, this must set out the estimates obtained, a summary of the observations received, and a response to them. The estimates must be made available for inspection. The notice was dated 9 March 2018. Crystalight responded to this notice on 3 April 2018 by letter stating:

"Revised details for PCJ Bespoke Design and Build Pucks Hill, Knightwick, Worcester WR5 3QW were sent on the 19th February 2018 (copy attached)."

57. In giving his evidence, Mr Freedman accepted that Bright Willis had received this letter but said the enclosed copy of the letter dated 19 February from Crystalight had not been enclosed; there had been an enclosure, but it was Crystalight's letter of 13 April, not 19 April.

58. Nevertheless, Mr Freedman took no further steps to find PCJ Design and Build and on 9 April 2018 the Service Charge Demands were issued.

59. As alluded to, Mr Nick Welham came to the Tribunal hearing to give evidence. In his pre-prepared witness statement he said that he had never received any letter or phone call inviting him to quote for external decorating works at Elgin House. He believed that his correct contact details had been provided to the Applicant. He said he was a director of a building company and had experience as a builder and decorator, having carried out many similar projects to the proposed project to redecorate Elgin House. He had provided a quote to the Respondent to carry out that work for the sum of £14,680.00.

60. In his oral evidence, he confirmed that the building firm PCJ Design and Build Ltd had gone into liquidation in August 2018. He was now operating a new firm called PCJ Construction Ltd from the same premises, which was the company that had given a quote to the Respondent. He said that the two firms were operating alongside each other in the period April – May 2018. PCJ Design and Build has folded mainly because his father had had dementia. He confirmed that he remained willing and able to carry out the decorating work at Elgin House and would stick to the quote he had given.

61. Mr Welham also said that he believed, as a builder / decorator with 35 years experience, that the proposed supervisory fee of 12.5% of the contract price was excessive.

Discussion

62. If the Applicant has failed to comply with the section 20 consultation requirements, this does not mean that an invoice for an advance payment to cover the proposed costs of building works is not payable, nor that it is limited to the statutory maximum charge of £250.00 (*23 Dollis Avenue (1998) Limited v Vejdani [2016] UKUT 0365*). This is because the statutory limitation applies to the incurring (i.e. spending) of cost, not the collection of funds.

63. Nevertheless, the consultation process is directed entirely towards the step of selecting a contractor and fixing the proposed price of works, so the whole focus is on the cost of works in the future. If the consultation process has not been complied with, this may be relevant to the reasonableness of the amount claimed as an advance payment for the works (see paragraph 48 of *23 Dollis Avenue*). The Tribunal therefore considers that it is right to determine whether the consultation process was carried out correctly, and the Applicant did not seek to dissuade us from this course.

64. The Tribunal's view is that the Applicant did not comply with the requirements of the Regulations. The particular failure was the failure to obtain an estimate from the Respondent's nominated contractor. This is an essential requirement of the Regulations, which require that when a contractor has been nominated, the Applicant must "try to obtain an estimate from the nominated person".

65. In reviewing the facts as set out above, the Tribunal takes the view that the Applicant essentially gave up too easily in his attempts to obtain an estimate from PCJ Design and Build Ltd. The right of the tenants to have their own chosen contractor considered for the work is important; it counters any suspicion that a landlord is ignoring the importance of cost for the tenants, who have in the end to pay the bill. In the circumstances of this case, in our view this is doubly important as there are only two tenants. We heard at the hearing that the Respondent is himself an architect / builder, and indeed that he supervised the conversion work at Elgin House prior to the grant of the leases. When Col and Mrs Walker and the Respondent are the only two tenants, and the Walkers also have complete control over the management company and the freehold, a failure to take all reasonable steps to comply with the Respondent's legally valid request to obtain an estimate from his own nominated contractor will run the danger that is seen as a failure to be even-handed between the tenants.

66. That the Respondent was serious about his nomination should have been apparent to the managing agent. Crystalight responded to letters promptly and clearly. From its perspective, it had notified Bright Willis of the name and address of the Respondent's contractor three times, and a mobile telephone number twice (though Bright Willis say they never received the mobile telephone number). And Mr Welham has confirmed in evidence, which the Tribunal accepts, that he was present at that address and was willing to provide an estimate.

67. In the Tribunal's view, Bright Willis's error arose on or about 3 April 2018. The receipt of the letter from Crystalight dated on that date made it clear that the obtaining of an estimate from PCJ was still desired by the Respondent. And by that time, the fact that there might have been some correspondence which had gone astray would have been apparent to Bright Willis, as they had been informed of the existence of the Crystalight letter of 19 February 2018, which they had not seen. There were therefore sufficient warnings then that to proceed without an estimate from PCJ Design and Build might raise this whole issue of compliance with the Regulations, so that they should at that point have made a further effort to contact the Respondent to resolve the difficulties they were having in contacting Mr Welham.

68. The Tribunal also considers that the google search which was carried out on or about 14 February 2018 by Wendy Hemming was reportedly to the effect that the details of PCJ Design and Build "were not correct". This is a strange statement, as it suggests that some sort of entry was shown via google about PCJ Design and Build, but it was not identical to the details provided. Had no such firm existed, the letter would have been more likely to say that no details were given. The Tribunal cannot help but feel that Bright Willis were trying to find reasons not to obtain an estimate from the Respondent's nominated contractor, whereas the legal obligation upon them is precisely the opposite.

69. The Tribunal also notes one other small point in relation to consultation. The Applicant's paragraph b statement dated 9 March 2018 did not include a complete summary of the observations made by the Respondent as required by paragraph 11(5)(ii) of Schedule 4 of the Regulations, in that there is no reference in the paragraph b statement to the challenge to the necessity of the works, nor the Applicant's response to that challenge.

70. Finally, and for completeness, the Tribunal notes that the county court proceedings were commenced only six days after the Respondent had again attempted to provide contact details for PCJ Design and Build, and two days after the closure of the consultation period on the estimates had expired, without further warning or letter before action.

71. For the above reasons, the Tribunal determines that the Applicant did not comply with the Regulations.

(c) the overall cost was too high

72. As well as the estimate obtained by the Respondent from PCJ Construction Ltd for £14,680, he also obtained an estimate from a company called Lane Britton and Jenkins, quoting £12,612 including VAT. There are therefore now five estimates for consideration by the Tribunal, including the three estimates set out in the notice of estimates referred to at paragraph 38 above.

Discussion

73. The issue for the Tribunal is to apply section 19(2) of the Act in this case. That sub-section provides:

> "Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable…"

74. There is no dispute that payment of a Special Contribution under the leases is a payment of a "service charge", nor that the proposed costs of external redecoration are "relevant costs".

75. It is not necessary for the Applicant to show that the cost of the external decorating works is the cheapest price for those works. However, it is necessary to show that the cost falls within a range of reasonable prices for the same works. In seeking a payment in advance the Applicant will need to be able to point to some rational basis for the amount demanded.

76. Of course, the obvious rational basis upon which the Applicant made the Service Charge Demands was that they selected the lowest estimate then in their possession. But with hindsight, there are now lower estimates which need to be considered, in determining what amount was reasonable to collect on account for the external decoration cost.

77. In the view of the Tribunal, a reasonable amount to be determined would be based on like for like quotes, followed by an assessment of capacity and capability of the competing contractors. It would be legitimate to include any prior experience of working with specific contractors, or any local knowledge of the reputation each one had.

78. Unfortunately, Mr Freedman's evidence did not cover the question of how the decision to assess the competing estimates was made, or what criteria were applied. The Applicant's documentation did not contain any specification for the proposed decorating contract. The copies of the Applicant's estimates were in fact included in the Respondent's documents, not the Applicants. Nevertheless, reading the three estimates provided, it does not appear that there is a significant difference between the scope of work each has estimated for, and so the Tribunal has no reason to disturb the initial decision to select J&B Painters and Decorators.

79. The Tribunal's difficulty is that the PCJ Construction Ltd quote is significantly lower even than that of J&B Painters and Decorators. If it turns out that PCJ Construction Ltd have estimated on the basis of the same specification as J&B Painters and Decorators, the Tribunal would need to understand why PCJ Construction Ltd were preferred. It may be that there would have been a good reason, but none has been offered.

80. It is worth explaining why the Tribunal thinks the estimate from PCJ Construction Ltd comes into the picture at all. After all, it was not the Respondent's nominated contractor, and it has never even provided an estimate to the Applicant. The reason is this: even after a section 20 consultation has been completed, the Applicant remains under a responsibility to levy invoices for advance payments on the basis that the amount charged is reasonable. If the section 20 process has been followed, it would generally be very difficult for a lessee to claim that the resulting placement of the contract with the contractor who emerged as the successful bidder in the section 20 process was unreasonable. But here, as the Tribunal has found, the section 20 process was not followed correctly, and the Respondent is now saying that the same person who was behind PCJ Design and Build, who is the person he knows from his experience in the building business to be a capable decorator with the capacity and willingness to carry out this contract, is available to do the work at a better price than J&B Painters and Decorators, even though he would contract through a different company from that initially proposed by the Respondent. That merits consideration.

81. Our decision on what would be a reasonable sum for the Respondent to pay as a special contribution for external decoration of the Property is that, in the absence of a clear rationale from the Applicant as to why the PCJ Construction Ltd estimate is inappropriate, the sum payable should be based on the PCJ Construction Ltd quote. The exact amount of the sum that we determine should be paid will be set out below in the light of our consideration of the remaining issues raised by the Respondent.

(d) Phasing and ability to pay

82. The Respondent says he will have some difficulties in making payment of the large sum of money demanded, and he argues that the work should be carried out in phases, to spread the costs across a few years. He argued that the cost would be the same, even if it was necessary to scaffold half the Property in one year, and the other half in another year, because the same amount of scaffold would only be brought to site once, and would only need to be erected and taken down once. This is not a case where full scaffolding would need to be erected twice.

Discussion

83. We have already concluded above that the external woodwork needs urgent attention; it would be unwise to delay this element of the work beyond summer 2019.

84. Following *Garside v B R Maunder Taylor[2011] UKUT 367 (LC)* and *Waaler v Hounslow BC [2015] UKUT 0017 (LC)*, the law is that the lessor's means when considering particularly a large and unexpected service charge bill are not irrelevant, but responsibility to pay service charges properly due under a lease could not be avoided by the argument of hardship. The lessee's means are just one of the factors in the factual matrix which the Tribunal should consider when making its determination on the reasonableness of a service charge demand.

85. Leaving to one side the need for the work to be carried out urgently, if phasing were a real option, there would be two compelling arguments against it in this case. The first is that, whilst the Tribunal accepts the logic of the Respondent's argument that scaffolding cost would not have to be incurred twice, there will inevitably be back office cost that would be incurred twice; two sets of contractual documents, twice as many phone calls to arrange start dates etc, and twice as many visits to site to view progress by the managing agents, just to give three examples. The second argument is that it would probably be noticeable that the work had been carried out in phases.

86. The Respondent is a commercial landlord of his flats in the Property, owns a business, and has provided the Tribunal with no evidence of his financial position.

87. In this case, the Tribunal rejects the Respondent's suggestion that the work should be phased, which would have resulted in lower demands for a payment in advance towards the cost of the work.

(e) Lack of reserve funds

88. Over £8,000 already exists in the reserve fund, which the Applicant says it intends to apply towards the external decorating cost. The Respondent says it should be more; indeed it should be enough to cover the cost of the external decoration works, to avoid the need to ask for a large and unexpected lump sum now.

89. In his evidence, Mr Freedman said that a sum to build up reserves had been charged in the service charges levied in recent years, but it had all been spent in those years. He also said that he tried to keep the service charge as low as possible, so had not claimed as much reserve as perhaps he could have done.

Discussion

90. The Tribunal does not follow the logic of either of Mr Freedman's points; a sum is not a contribution towards a reserve fund if it is spent in the year it was claimed, and the practice of not claiming a reserve fund contribution to keep the service charge low does not achieve that objective if the money has eventually to be claimed.

91. However, the Tribunal rejects the Respondent's argument on this point. As a property professional himself, the Respondent is well aware of the decorating obligation imposed in the leases upon the Applicant, and he was aware of the abortive attempt in 2013 to carry out work then. The failure to build up a reserve in recent years has saved the Respondent from larger service charge bills in those years.

92. The Tribunal therefore does not accept that there is any legal basis for challenging the Service Charge Demands on the basis of the Respondent's argument on this point.

(f) The supervision fee

93. The Respondent's case was that the supervision fee of 12.5% of the contract price was unnecessary and unreasonable. Mr Welham also gave evidence on this issue.

94. The leases allow the Applicant to charge a professional fee to the lessees for its administrative and management expenses including the costs, fees and expenses paid to any managing agent.

Discussion

95. In the view of the Tribunal, it is entirely appropriate for the Applicant to instruct its managing agent to supervise the external decorating works. It is good practice to monitor compliance with the contract specification by inspecting the work at each stage. Liaison with the contractors and the residents will be required specifically as a result of the decorating contract, and over and above the normal work of the managing agents.

96. The Tribunal determines that the addition of a supervisory fee at 12.5%, which it considers to be a fairly standard percentage, is reasonable.

(g) Section 21B of the 1985 Act

97. This issue was in fact raised by the Tribunal of its own volition, because the Service Charge Demands in the documents bundle supplied by the Applicant did not contain the necessary statement of rights required under section 21B.

Discussion

98. Section 21B of the Act provides that:

"(1) 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.

…

(3) A tenant may withhold payment of a service charge which has been demanded from him is subsection (1) is not complied with in relation to the demand."

99. The form of the summary of rights is set out in the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.

100. It would have been wrong, in the Tribunal's view, for us to find that there was a cause of action under which the Applicant could obtain judgement for a service charge demand if this section had not been complied with. We therefore asked the parties for their evidence of fact and submissions on this point. Mr Freedman, for Bright Willis, said that the section 21B notice had been served, and the failure to include a copy of it with the copy demands in the bundle had been an error. Mr Freedman managed to obtain an electronic copy of the full version of the demands during the course of the hearing. The Respondent was not able to say the notices were not properly served. He simply said that he did not recall whether or not they contained the correct notice of rights. On the balance of the evidence and submissions the Tribunal determines that the Service Charge Demands were compliant with section 21B of the Act.

(h) The Respondent was overcharged in the 2018/19 service charge year

101. This point was raised by the Respondent because copy invoices for certain service charge expenditure were produced in the trial bundle. On page 314, an invoice dated 8 October 2018 appears from J & B Painters and Decorators for "internal decoration to entrance hall x2 and office room". The amount is for £1,347.00. The Respondent's case is that this decorating work was for work in one of Col or Mrs Walker's flats, and should not be in the service charge.

Discussion

102. In the leases, the service charge year starts on 2 April in each year. It follows that at the time of the first hearing, no accounts for 2018/19 had yet been prepared and no demand for payment of the actual service charge in that year had yet been made. Nobody therefore yet knows whether the management company will include that invoice within the costs for the 2018/19 service charge. It is therefore not a matter for resolution within these proceedings. If the Respondent wishes to challenge any decision to include that invoice in the final accounts for 2018/19, the Respondent will

have the right to challenge that decision in due course by bringing proceedings in this Tribunal under section 27A of the 1985 Act.

(i) Management of the Property is not carried out with regard to theRespondent's interests.

103. The Respondent made general points about his feeling that the Manager is not managing the Property for the benefit of all flat owners.

Discussion

104. The Tribunal's role is to determine the outcome of specific disputes between the parties on the basis of the facts and submissions it hears. The Respondent has not particularised how he alleges his concerns have affected any decisions made, and all his specific complaints concerning the sums he has been asked to pay for the external decorating work have been addressed in this decision. Because there is no specific allegation behind the Respondent's point here, there is nothing that the Tribunal can determine to address it.

105. We have now addressed 9 of the 10 reasons why the Respondent claimed that he should not have to pay the Service Charge Demands. The 10th reason does not affect the total bill to be paid by all lessees, and this is therefore an appropriate point to determine the total sum payable by the lessees of the Property towards external decorating. The outstanding issue in paragraph 42 of apportionment will be considered below.

The Tribunal's conclusion on the question of the payability of a sum towards external decorating

106. This work is necessary. The leases oblige the Respondent to pay an apportioned part of the cost of it. It is inevitable, following the decisions the Tribunal has already made, that the Respondent must pay something.

107. The sum that we determine should be paid is the appropriate proportion of the sum that is incontrovertibly due. We have taken the contract cost as the sum quoted by PCJ Construction Ltd, as that is the best price quoted to either party. We do not see any basis upon which the Respondent can object to this sum, as it is his preferred contractor's price. To this sum should be added a supervision fee, plus VAT. The sum the lessees therefore have to pay as a special contribution towards the anticipated costs of the redecoration work is £14,680 plus a supervisory fee of £1,834 plus VAT of £367 on that fee, less the accrued reserve of £8,366.21, totalling £8,514.79.

108. The Applicant will have to carry out a further section 20 consultation process (or apply for dispensation) in order to pay the invoice for work that is contracted.

109. The estimates/quotations for the external redecoration works that the Tribunal has considered had not been obtained in response to a detailed schedule of works. Accordingly, the Tribunal could not be fully assured that the competing contractors would all carry out the work required to the same standard of workmanship and materials. Therefore, the Tribunal recommends that before the next consultation process and before fresh quotations are obtained, a detailed specification of the works, including the preparation necessary and the type of paints to be used, should be prepared.

110. The Applicant will in due course have to make the decision about which contractor it will actually engage, following the consultation exercise. It is possible (though not inevitable) that for good reason the Applicant may not select the PCJ Construction Ltd quote, particularly if the quotes were not on a like for like basis against a defined specification. If so, the sum payable may be greater and the Respondent would need to contribute more funds for the external decorating work.

Apportionment

111. The last of the Respondent's arguments summarised in paragraph 42 above is that he is being charged an incorrect proportion of the service charge.

112. The leases contain fixed percentages of service charge, apparently based on floor area when the conversion work was completed. These have already been described in paragraph 37 g-h above.

113. The Respondent's case was that a new garage building with an accommodation room above ("the New Garage") had been constructed by the Applicant at the north western corner of the plot, without any consultation or reference to him. It was probable that this building might impact the cost of the service charge, e.g. by discharging items into the drainage system which would require additional maintenance and/or cleaning out. The Respondent also said that this building would generate additional visitors or car usage, impacting the maintenance of the roads and pathways.

114. The Respondent also objected to the fact that the garage was positioned in a way that interfered with his car parking space, and that the land on which it was positioned was land over which the lessees of the Property had a right to use under their leases.

115. Separately, the Respondent argued that the layout of the southern end of Flat 3 of the Property had been altered, in that a bin store and old storage room had been altered to provide additional floor space for the use of that flat ("the New Room"). Flat 3 is one of the flats owned by Col or Mrs Walker.

116. The lease contains a clause allowing the variation of the percentage contributions of each flat towards the service charge as follows:

> "If in the opinion of the Company [i.e. the Applicant] it should at any time become necessary or equitable to do so the Company shall recalculate on an equitable basis the service charge proportions appropriate to the flats and parking spaces in the Block and the Estate and notify the lessees accordingly …"

117. Mr Stimmler argued on the first hearing day that the Tribunal had no jurisdiction to interfere with a fixed percentage apportionment system in a lease, citing the case of Warrior Quay Management Company Ltd v Joachim 2008 WL 168730. However, after that hearing, the Tribunal asked for further submissions about whether that case is still the appropriate authority following the decisions in Windermere Marina Village Limited v Wild [2014] UKUT 163 (LC); [2014] L&TR 30, and Gater v Wellington Real Estate Limited [2015] [2014] UKUT 0561; [2015] L&TR 19) as approved by the Court of Appeal in Oliver v Sheffield City Council [2017] EWCA Civ 225; [2017] 1 WLR 4473. A further case on the topic is Fairman & Others v Cinamon (Plantation Wharf) Ltd [2018] UKUT 0421(LC), published on 5 December 2018 (particularly paragraphs 38 to 50).

118. The argument is that the lease sets up a contractual procedure whereby if it is equitable to do so, the Company should recalculate the service charge proportions. They are therefore not fixed; they can be varied. Any provision in the lease which purports to govern the manner in which the variation might be determined is void in so far as it prevents a determination of that issue by the Tribunal (section 27A(6) of the Act). Arguably, the Tribunal therefore has jurisdiction to consider the apportionment of the service charges between the flats.

119. On the basis that it seemed to the Tribunal that it might have jurisdiction to determine the apportionment issue raised, and that on the first inspection it had not seen the inside of the New Garage or the New Room, a further hearing day was convened for 1 May 2019 prior to which the Tribunal carried out a further inspection looking specifically at the New Garage and the New Room. Rather than describe that inspection, the Tribunal has described the changes in paragraph 121 below.

120. On 1 May 2019, Mr Sweeney confirmed that the Applicant did not wish to pursue any further an argument that the Tribunal could not consider apportionment.

121. At the hearing on 1 May 2019, Col Peter Walker and the Respondent (both of whom had first hand knowledge about the Property and the changes) gave evidence to the Tribunal which in the end was relatively uncontroversial. The Tribunal finds the following facts, based upon the evidence heard:

a. The New Garage was erected by Col Walker in around 2015 entirely at his cost. It comprises a double garage at ground floor. There are external steps to the south of it allowing access to a first-floor room within the roof space. Part of the room has been sectioned off to provide a bathroom with shower, wash hand basin. and WC. The rest of the space is used as a hobby room.

b. It was agreed between the parties that the useable space in the first-floor room (i.e. not counting any part of the floor space with less than 1.53m headroom) was 28.675sqm.

c. The drains and sewers from the New Garage connect into the established drainage system located in the grounds of the Property.

d. Col and Mrs Walker do not have the same need to use the external parking spaces they have leased in the grounds of the Property as they did before building the New Garage. By consent, one occupier of a flat has taken to using the space allocated to Flat 2.

e. In relation to the car parking space leased to the Respondent within the lease of Flat 1, it would appear that when the Applicant's agents instructed workmen to mark out car parking spaces, some 10 years or so ago, they omitted to check the leases and inadvertently marked the car space included within the demise for Flat 1 as a turning area with cross-hatching indicating, of course, that the Respondent should not park there. There is a conflict of evidence on the issue of whether the occupier of Flat 1 used the parking space allocated in the lease.

f. The lease of Flat 1 however does demise a car parking space to the Respondent, which is in the position where yellow cross-hatching lines have been marked, and adjacent to a wall that used to be exist before the New Garage was built. As mentioned above, those marking imply that the Respondent should not park in the space that has been demised to him in law.

g. The New Garage has had a further impact upon the car parking space, as if the Respondent or his licensee used it, this would impede access to the New Garage for Col and Mrs Walker. The Respondent probably has the right to use the land leased to him as a car parking area (subject to any arguments about acquiescence or estoppel or otherwise), but that would be bound to create yet more friction between the parties, and is thus an unattractive prospect.

h. In relation to the New Room, the extent of the rear boundary of Flat 3 that was leased to Col Walker ran in a straight line along the southern rear boundary of the Property. At the southernmost end, there was a single storey shed type construction with a flat roof ("the

Old Shed"), with a door on the western side (at the rear of the Property) but no door on the eastern side.

i. Immediately to the west of the Old Shed there is a "channel" (so called on Plan 2 in the lease of Flat 3) or passage, around 1m wide. There was disagreement between Col Walker and the Respondent as to whether this channel was covered or open when the lease was granted; Col Walker was fairly sure (and became more sure as he answered question on the issue) that it had always been covered. The Respondent was adamant that it had not been. On balance, though it makes no real practical difference, the Tribunal prefers the Respondent's recollection as the cross hatching on Plan 2 does not extend over the channel.

j. Further to the west of the channel there was another construction ("the Old Storage Area"), which Col Walker said contained two storage areas accessed from the south (i.e. a solid brick wall from the north). This construction did have a roof of some kind on it, as is shown by the cross-hatching on Plan 2.

k. Progressing further westwards again, there is an open bin store at a higher level. The bin store is available for all lessees to place their rubbish for collection. Their access to the bin store is via a land to the rear of the Property which is formed into a bank. It used to be accessed via a grass path, but it can now be accessed more conveniently via the new steps which Col Walker has installed to access the first floor of the New Garage.

l. At some point between the date that Col Walker took the lease of Flat 3 and the present day, he has made alterations to the Old Shed. The precise time is not important, and the Tribunal was not provided with evidence on the question. The alterations are the incorporation into the Old Shed of the channel and the Old Storage Area, the construction of a wall on the southern side, installation of a door in what became the northern wall, the roofing of the whole with a metal flat roof, the extension of the eastern wall of the Old Shed by approximately 30-60mm and the installation of a door and window in the eastern wall.

m. The whole of this altered area (i.e. the New Room) is now a shed/hobby room comprising 15.63sqm of space. The Old Shed comprised no more than 5.92sqm. In fact it would have been slightly smaller. At the inspection, it was not realised that the eastern wall of the Old Shed had been moved further east, so the measurements taken by the parties at the inspection did not record this additional area. The additional floor area of the New Room, after deducting the maximum area of the Old Shed, is 9.71 sq m (104.5 sq ft).

n. The footprint of the New Room is primarily on land which was demised to Col Walker in the lease of Flat 3. It was not part of the built area demised, but the demise also includes some garden area edged green on Plan 1. Any part of the New Room that is not on land demised to Col Walker in the lease of Flat 3 does not appear to the Tribunal to be located on land which the Respondent would have had the benefit of had it not been for the construction of the New Room.

o. The New Room could be used for woodworking, pottery, gardening activities, or similar activities, and undoubtedly has some value to an occupier of Flat 3. However, it does not have internal access to Flat 3, and would not be considered to be a habitable room.

p. The original measurement of Flat 3 for the purposes of establishing the percentage contributions to the service charge, was 960 sq ft (89.1869 sq m), according to the schedule produced by the Applicant for the second hearing.

Discussion

122. The Tribunal must determine whether it is "necessary or equitable" to adjust the proportion of service charge payable by the lessee of Flat 3 (see paragraph 116 above).

123. Dealing firstly with the southern part of Flat 3, there is a strong argument to the effect that the Tribunal should adjust the service charge proportions. Col Walker's evidence was that he had made changes to the Old Shed to create the New Room, which is larger, and of considerable more use than the Old Shed. If the original measurements for the floor area of Flat 3 had included the Old Shed, which was likely as the Old Shed is included within the demise of Flat 3, the fact that the area is now larger suggests it would be equitable to make an adjustment.

124. It is not necessarily right, however, to adjust on the basis that the New Room is equivalent to the habitable space within a flat. In essence, the New Room is still an external shed, though much improved upon the original Old Shed.

125. Unfortunately, neither party supplied the Tribunal with evidence establishing the basis of the calculation of the original floor areas of the Property. The Tribunal had requested information to explain how the existing apportionment had been determined, with details of the floor area data for the flats. The Applicant only supplied one floor area measurement for each flat, with no floor plans, and did not explain how those figures were arrived at. The Respondent supplied a plan of Flat 3 (page 13 of his bundle), which has a calculation of 101.48 sq m for Flat 3, which does not reconcile with the figures provided by the Applicant, which the Respondent did not challenge.

126. It is not possible, therefore, for the Tribunal to know exactly how the floor area for Flat 3, or indeed that of any of the other flats in the block, had been calculated for apportionment purposes. Thus, the Tribunal cannot be certain that it would be fair to adjust the apportionments of all the flats by the percentage increase of the alleged increase in size created by the New Room and, even if the floor areas were ascertained throughout the building to be able to re-apportion on a floor area basis, it would not necessarily be equitable as the New Room is essentially an outbuilding thus should not perhaps be regarded as pari passu with habitable space/living accommodation. The apportionment issue was the Respondent's point, and he should have come to the Tribunal with clear detailed evidence establishing the basis of the existing apportionment figures, and his calculation of what he wanted the Tribunal to determine as the appropriate new calculations, using the same approach. Unfortunately, he did not do so.

127. Our determination is therefore that any service charge levied upon the Respondent would not be reasonably incurred in so far as it includes costs that relate to the New Room. Specifically, maintenance costs for the roof of the New Room, and for painting and decorating of the north wall and the windows and doors in it, and for any maintenance to the door and window in the west wall, should not be included in a service charge. On the other hand, charges that would have been payable for the Old Shed will still be payable.

128. It also follows that all other heads of expenditure in the service charge would need to be reviewed to determine whether they may be higher because the extent of the Property and Flat 3 are larger than when the original leases were granted. It is very much to be hoped that the parties can take a common sense approach to this exercise, to avoid needless dispute. The managing agent will need to establish an effective channel of communication with the Respondent for this to be achieved.

129. The exclusion of most of the costs relating to the New Room means the Respondent is not disadvantaged. Should the owner/s of Flat 3 consider that the exterior maintenance of the New Room should be included in the service charge then they should request the Applicants to instruct an independent surveyor to re-measure all the flats to IPMS3 (International Property Measurements Standards – No 3, the internal measuring of residential property) and to fairly re-apportion the service charge taking into account the fact that the New Room is essentially an outbuilding.

130. We turn now to consider the effect of the New Garage upon the service charge. Cutting straight to the chase, our determination is that it is not necessary or reasonable to amend the service charge proportions as a result of it being built.

131. We take this view for the following reasons:

a. We accept Col Walker's evidence that he was entirely responsible for the cost of construction, so no service charges have been levied to cover any such cost;

b. The leases do not or should not include within the Fifth Schedule any heads of expenditure which might be attributable to any cost incurred for the New Garage. We should clarify that the definition of the "Block" in the leases should only include the buildings shown on the plans in the leases, so that, for instance, the obligation to insure applies only to the "Block" as originally set out on the plan, without the New Garage, rather than with it, and the same approach should be taken to all service charge spending;

c. We do not accept that the New Garage will generate any additional vehicle movements at this point. There are no new occupiers of the Property;

d. Whilst we agree that the surface and foul drainage systems will have to cope with additional discharges from the New Garage, the additional risk of blockage is very remote, and virtually impossible to quantify in terms of a consequent increase in a percentage contribution towards the service charge.

132. In our view, we have no jurisdiction to provide a remedy for any impact upon the Respondent of any breach of his covenant for quiet enjoyment arising from the failure to provide him with his allocated car parking space for Flat 1, or for breach of his contractual right to use the area now occupied by the New Garage as garden space. Nor do we have any ability to consider any alleged breaches of planning law in relation to the grant of planning permission for the New Garage. The Respondent will need to pursue those points (if advised) through other channels.

133. We do however hope that the Applicant will consider regularising the car parking space issue through a deed of variation without cost to the Respondent as a gesture of goodwill. Similarly, the Applicant should confirm that all occupiers of all the flats may use the exterior metal steel staircase, for Col and Mrs Walker are solely responsible, to gain access to the upper area of terraced garden and thereby to reach the bin store and the rear pedestrian gate.

Determination of Respondent's liability to pay the Service Charge Demands

134. The sum recoverable as a Special Contribution towards external redecoration of the Property was determined as £8,514.79.

135. As the Tribunal are not making any adjustment to the apportionment percentages in the leases, the Respondent is liable to pay £4,603.48 as a special contribution towards the proposed costs of external decoration at

the Building as a result of receiving the Service Charge Demands as shown below:

Flat	Percentage of £8,514.79	Amount
Flat 1	23.0656%	1,963.98
Flat 4	15.5077%	1,320.45
Flat 5	15.4913%	1,319.05
Total		**4,603.48**

The claim for payment of the Administration Charge Demands

136. To remind the reader, the administration charges claimed in the County Court were £1,360.82, being three demands of £120 for each flat for a "legal fee" claimed on or around 30 August 2017, of which there was said to be an unpaid amount of £93.61 for flats 1 and 4 and £93.60 for Flat 5, and demands of £360 per flat for an unspecified further fee on unspecified dates.

137. The demands themselves (i.e. the invoice or other document setting out the charge and demanding that the Respondent should pay it) were not provided to the Tribunal in the trial bundle. The Tribunal asked to be supplied with these, and with the accompanying notification of rights and obligations of tenants that is required by paragraph 4 of Part I of Schedule 11 of the 2002 Act.

138. The Applicant was unable to provide these documents. On enquiry, the Tribunal was told that no paragraph 4 notification was provided in any event. The Applicant, through its counsel, withdrew its claim for payment of the Administration Charge Demands on the first hearing day.

139. It follows that the sums credited by the Applicant towards payment of the three charges of £120 each, totalling £79.19, were wrongly applied to these charges and should now be credited back to the Respondents service charge accounts.

Interest

140. The Applicant has claimed interest under s.69 County Courts Act 1984 on these sums at the rate of 8%. Judge Goodall sitting alone as a judge of the County Court awarded interest at the rate of 4% after balancing the arguments that: (a) interest rates generally had been low for many years, and (b) there was no good reason for the Respondent leaseholder not to have paid a substantial contribution towards the disputed invoices, under protest if necessary. Interest will be allowed from 28 days after the date of the invoices, which were dated 9 April 2018. The interest awarded amounts to £180.61 to 1 May 2019 (358 days).

Costs

141. The Applicant produced a schedule of costs (which had been sent to the tribunal offices and to the Respondent a week before the final hearing) amounting to £19,446.26, comprising:

Costs in the county court up to the transfer to the Tribunal

Work involved	Time spent	Cost (£)
Attendances, letters, phone calls, and documents – grade A fee earner	3 hours @£275 per hour	825.00
Attendances, letters, phone calls, and documents – grade D fee earner	8 hours 24 mins @£130 per hour	1,092.00
Court fee		455.00
VAT		474.40
Total		**2,846.40**

Costs in the Tribunal for hearing on 6 March 2019

Attendances, letters, phone calls, and documents – grade A fee earner	3 hours 30 mins @£275 per hour	962.50
Attendances, letters, phone calls, and documents – grade C fee earner	31 hours @£180 per hour	5,580.00
Hearing fee		200.00
Counsels Fee		1,750.00
Counsel travel expenses		131.46
VAT		1,658.50
Total		**10,282.46**

Costs in the Tribunal for hearing on 1 May 2019

Attendances, letters, phone calls, and documents – grade A fee earner	1 hour 54 mins @£275 per hour	522.50
Attendances, letters, phone calls, and documents – grade D fee earner	19 hours 24 mins @£180 per hour	3492.00
Counsels fees		1,250.00
VAT		1,052.90
		6,317.40

142. The Applicant relied on clause 3.1 and on paragraph 2(b) of the Third Schedule in the leases which, it said, entitled it to claim the costs of proceedings in respect of recovery of service charges on an indemnity basis. In the alternative, the landlord sought an order for costs in the court's discretion.

143. Clause 3.1 states as follows:

> "The Lessee hereby covenants with the Lessor and the Company as follows:
>
> 3.1 To observe and perform the obligations set out in the Third Schedule

144. Paragraph 2(b) of the Third Schedule states as follows:

> "To pay to the Company on a full indemnity basis all costs and expenses incurred by the Company or the Company's Solicitors in enforcing the payment by the Lessee of all Rents Service Charge Maintenance Adjustment Special Contribution or other monies payable by the Lessee under the terms of this Lease."

145. The first issue for the County Court is whether to award some or all of the costs. The second issue is then the quantification of such costs as are awarded.

146. In terms of the award of the costs, Judge Goodall made an order under s.51 Senior Courts Act 1981. He applied the presumption found in CPR 44.2 of the Civil Procedure Rules namely that the general rule in the County Court is that the unsuccessful party will be ordered to pay the costs of the successful party. He concluded that the Applicant was the successful party.

147. In Barnes v Time Talk (UK) Ltd [2003] EWCA Civ 402 the Court said:

> "In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure. [Para 28]"

148. And in Day v Day [2006] EWCA Civ 415, it was said:

> "In a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case."

149. In this case, the test clearly results in the Applicant being the successful party, for it has succeeded in obtaining a judgement for a money sum to be paid to it by the Respondent.

150. But in cases which have a contractual right to costs, Judge Goodall recognised that this is a rebuttable presumption and that an important factor is the contractual provision. He took into account the decision in Church Commissioners v Ibrahim [1997] EGLR 13 which stated:

> "35. In our opinion, the following principles emerge from the cases and dicta to which I have referred.
>
> (i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: section 51 of the Act of 1981.
>
> (ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right."

151. He recognised that this is a discretion to be exercised and that the court retains this discretion (see Forcelux v Martyn Ewan Binnie [2009] EWCA Civ 1077) which stated:

> "But the general principle is not a rule of law and it may well be that in a particular case, or even in a class of case, the court's discretion should be used to override the contractual right."

152. The above principles have been endorsed in Chaplair Ltd v Kumari [2015] EWCA Civ 798 which established two principles, firstly that the costs awarded pursuant to s.51 can include the costs of the FTT and further that the contractual provision displaces the provisions of CPR 27.14 which limit the costs in the Small Claims Track. The above principles have been endorsed in the decision in Avon Ground Rents Limited v Sarah Louise Child [2018] UKUT 204 (LC).

153. Judge Goodall (in his capacity as a Judge of the County Court) concluded that the contractual clause does give the landlord a contractual entitlement (on an indemnity basis) to its costs in taking proceedings to recover Service Charges, both in the County Court and in the Tribunal.

154. The costs therefore are assessed in accordance with CPR 44.3; 44.4, and; 44.5. The proportionality test does not apply. Costs which have been unreasonably incurred or which are unreasonable in amount will not be allowed. However, there is a rebuttable presumption that costs have been reasonably incurred and that they are reasonable in amount.

155. In assessing the costs, all the circumstances have to be taken into account, particularly those in CPR 44.4(3).

156. Applying those principles to the costs claimed in this case, the Court makes the following observations:

    a. Whilst the proportionality principle is not engaged, costs must still be reasonable. There is a concern in this case that excessive time has been taken for the issues at stake;

    b. Whilst particulars of claim needed to be prepared to commence the claim, this was otherwise a simple money claim for unpaid invoices, so 11 hours of fee earner time for the county court aspect seems excessive;

    c. The claim for administration charges was abandoned by the Applicant. The Applicant should have established a good basis for the claim before bringing proceedings for the administration charges;

    d. Despite spending 20 hours on the case between the first and second hearing days, the Applicant did not provide details of the evidence clearly required for the Tribunal to consider the apportionment question. The key information was provided by Col Walker at the second hearing, and no proof of evidence had been prepared. The bundle of documents contained significant duplication as three leases had already been copied in the first hearing bundle;

    e. The charging rates in this case appear to Judge Goodall to be above those that are reasonable in the area.

157. Taking those issues into account, Judge Goodall taxed off the sum of £567.00 from the county court element of the costs to allow these at the total sum of £2,075.00 (£1,350 plus VAT and the court fee of £455.00).

158. On the claim for costs in the Tribunal up to 6 March 2019, Judge Goodall reduced the fee earner rates and did not consider that nearly 35 hours time spent on the file was reasonable for the work preparing for the first hearing. A statement of case was prepared of just over 9 pages, a substantial part of which recited the lease terms. Mr Freedman's statement required to be prepared, but it was only 5 pages, and it failed to provide facts to assist the Tribunal and the parties in determination of the case; in particular, to provide details of the consultation procedure run by Mr Freedman, and the need for decorating. Judge Goodall reduced the charging rate claimed to £225 per hour for the Grade A solicitor and to £130 per hour for the grade C/D solicitor, and reduced the total resultant cost by 25% because more time than was reasonable was expended. Counsels fees were reduced by £250 to £1,500. The resultant costs for this element were £6,493.51.

159. For the costs of the second hearing day, Judge Goodall made the same adjustments to the charging rates as for the first hearing day, and reduced

the total time spent on documents of 10.7 hours by 3 hours. This resulted in solicitor's costs of £2,559.50, plus counsel's fees of £1,250.00 and VAT, totalling £4,571.40.

160. Accordingly, the Court finds that the sum of £13,139.91.00 would be payable in respect of costs, subject to the Schedule 5A determinations below.

Application for an order reducing or extinguishing the Respondent's liability to pay costs

161. Paragraph 1 of Schedule 11 to the 2002 Act provides

"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—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

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

162. Paragraph 5A of Schedule 11 provides:

"(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. …"

163. Paragraph 5A(3) requires that the decision to be made under sub-paragraph (1) is to be made by the "relevant court or tribunal"; that is the county court for county court proceedings, and the first-tier tribunal for tribunal proceedings.

164. It was not disputed that the contractual costs claimed were an administration charge under sub-paragraph (c) or (d) of paragraph 1 of Schedule 11.

Tribunal costs

165. The Tribunal therefore firstly considered how to determine the paragraph 5A application in respect of the Tribunal proceedings.

166. The jurisdiction under paragraph 5A requires that the Tribunal make a "just and equitable" order. The same phrase is used in section 20C of the Landlord and Tenant Act 1985. That provision has been considered on a number of occasions by the Upper Tribunal. *Tenants of Langford Court (Sherbani) v Doren Limited LRX/37/2000* concerned an application for the appointment of a manager under section 24 of the 1987 Act in which the applicant tenants had been successful. The Lands Tribunal (Judge Rich QC) made the following remarks about a section 20C application:

> "28. In my judgement 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 parties as well as the outcome of the proceedings in which they arise.
>
> 29. I think that it can be derived from *Iperion Investments Corporation v Broadwalk House Residents Limited (1996) 71 P & CR 34* that where a court has power to award costs, and exercises such power, it should also exercise its power under s20C, in order to ensure that its decision on costs is not subverted by the effect of the service charge.
>
> 30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.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.
>
> 31. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s.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 make its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but 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 and properly incurred by the landlord, it would be unjust that the tenants or some particular tenant should have to pay them.
>
> 32. Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a

landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by s. 20C should be cautious to ensure that it is not itself turned into an instrument of oppression."

167. From this passage, the Tribunal derives the principle that the Tribunal has a wide discretion under paragraph 5A, and its decision should address its view of justice and fairness between the parties, their conduct, and the outcome of the case, but should also have regard to the property right of the Applicant (here the contractual right to costs) contained in the lease.

168. In this case, we are dealing with two parties only. The dispute essentially exists between Col and Mrs Walker on the one hand (through their ownership of the Applicant), and the Respondent. For whatever reason, they appear not to have unanimity of mind on a number of issues to do with the Property. We were made aware during the course of the proceedings that there had been a previous unsuccessful attempt to carry out external redecoration at the Property which had caused friction, but in our view that had no bearing on our determination of this case. But it may have been the cause of the poor relations, as may the car parking issue, and/or the decision to erect a garage in the grounds of the Property without consultation.

169. The two parties involved are however not equally matched. The Applicant has the benefit of a contractual right to be paid its costs of having their dispute litigated; the Respondent has not only to fund his defence, but he also has to pay his opponent.

170. The Respondent has persuaded the Tribunal:

    a. to agree with his view of the section 20 consultation process;

    b. to agree that in the face of a better quote, the Applicant's proposed contract for redecorating should be re-visited;

    c. that, although in the end the Tribunal had no jurisdiction to provide a remedy, the Respondent cannot, without causing even more deterioration in relations, use the car parking space which he leases;

    d. to give judgement for a substantially smaller sum than that sought by the Applicant.

171. It has also emerged that the Applicant's agent failed to use the required procedures to collect administration charges from the Respondent.

172. On the other hand, the Respondent was sued for payments to enable the Property to be decorated externally, and he not only failed to pay for this work, but also failed to even accept the need for redecoration until the first

hearing day of this case. The Tribunal determined that the work was both necessary and urgent.

173. For the reasons set out in the previous three paragraphs of this decision, the Tribunal determines that the Respondent must pay 60% of the costs incurred by the Applicant in the Tribunal. The total Tribunal costs amount to £11,064.91. Exercising its discretion under paragraph 5A, the Tribunal reduces the Respondents liability for those costs to the sum of £6,638.95.

County Court Costs

174. Judge Goodall considered whether to make any determination under paragraph 5A in respect of the County Court costs. Having participated in the determination in relation to the Tribunal costs, he saw no reason to adopt a different approach, and for the same reasons as appear above, he orders that the Respondent must pay 60% of £2,075.00, the sum which he determined as being the assessed costs in the County Court. This amounts to £1,245.00.

175. A separate County Court order, reflecting this decision, is attached.

Application for an order under section 20C of the Landlord and Tenant Act 1985

176. As there are no other lessees of the Property, the Tribunal's careful determination of the costs position set out above would be undermined if the Applicant was able to recover legal costs through the service charge. It is therefore appropriate to order that no costs incurred by the Applicant in these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Appeals in respect of the decisions made by the FTT

177. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Appeals in respect of decisions made by the Tribunal Judge in his capacity as a Judge of the County Court

178. An application for permission to appeal may be made to the Tribunal Judge who dealt with your case or to an appeal judge in the County Court.

179. Please note: you must in any event lodge your appeal notice within 21 days of the date of the decision against which you wish to appeal.

180. Further information can be found at the County Court offices (not the tribunal offices) or on-line.

Appeals in respect of decisions made by the Tribunal Judge in his capacity as a Judge of the County Court and in respect the decisions made by the FTT

181. You must follow both routes of appeal indicated above raising the FTT issues with the Tribunal Judge and County Court issues with either the Tribunal Judge or proceeding directly to the County Court.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)