FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HA/LSC/2022/0078
Property	**:**	The Empire, Grand Parade, Bath BA2 4DF
Applicant	**:**	Professor Stanislaw Kolaczkowski and Dr Alexandra Kolaczkowski, and the leaseholders named in Appendix to the Application
Representative	**:**	Professor Stanislaw Kolaczkowski BSc, Phd, CEng, FIChemE, EurIng
Respondent One	**:**	First Port Retirement Property Services Ltd (Pegasus Courts Management Limited)
Representative	**:**	J B Leitch Solicitors
Respondent Two	**:**	The Empire Bath RTM Company Limited
Representative	**:**	Mr Adam Booth 3SIXTY REAL ESTATE, managing agent for the RTM.
Recognized Tenant's Association	**:**	Empire Owners Association
Type of Application	**:**	Service charges section 27A of the Landlord and Tenant Act 1985 ("1985 Act)
Tribunal Member(s)	**:**	Judge Tildesley OBE Mr M Ayres FRICS Mr M Jenkinson
Date and Venue of Hearing	**:**	Bath Law Courts 11 November 2022
Date of Decision	**:**	21 December 2022

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the costs of £16,202.76 for the erection of the 28 Titan props and the associated professional fees were reasonably incurred. The Tribunal decides that the residential leaseholders are liable to contribute 83.5 per cent of the costs, namely £13,529.30. The Tribunal finds that the Applicants who constitute 93 per cent of the residential leaseholders are liable to contribute £12,585.40.

2. The Tribunal determines that the works in connection with the Smithers Purslow Investigation were not carried out to the required standard. The Tribunal decides that the costs claimed of £24,164.64 were unreasonably incurred within the meaning of section 19(1)(b) of the 1985 Act. The Tribunal determines that an amount of £7,704.24 including VAT is reasonable which was the sum originally cited for the works. The Tribunal finds that the contribution of the residential leaseholders is £6,433.04, and that the amount paid by the Applicants is £5,984.01.

3. The Tribunal is satisfied from the First Respondents' statement of case that it was not relying on paragraph 9 of the Fifth Schedule to recover the costs of these proceedings from individual leaseholders. To avoid uncertainty the Tribunal makes an Order under Paragraph 5A of Schedule 11 extinguishing the tenant's liability to pay litigation costs in relation to these proceedings.

4. The Tribunal determines that there is no authority under the lease for the First Respondent to recover the costs of these proceedings through the service charge. If there had been such authority the Tribunal would have made an order under section 20C of the 1985 Act preventing the First Respondent from regarding the costs of these proceedings as relevant costs. The Tribunal considers that it would be just and equitable to make such an Order because the Applicants secured a substantial reduction in the one service charge which was disputed, and that such an outcome would be fair as the overwhelming majority of the lessees were joined to this Application.

5. The Tribunal makes no order for costs against the First Respondent under rule 13(1)(b) of the Tribunal Procedure Rules 2013.

6. The Tribunal makes a provisional order that the First Respondent will reimburse the Applicant with a contribution of £150 to the Tribunal fees representing 50 per cent of the total fees of £300. The parties are given the right to make representations in writing to the Tribunal and to each other regarding the reimbursement of fees within 14 days from the date of this decision. If no representations are received the Order will be confirmed without further notice.

The Application

1. On 29 June 2022 the Applicants applied for determination of service charges for 2021, and 2022 in respect of the costs already incurred and those that would be incurred in future years on structural works to the basement vaults located on the south side of the Property, known as the Empire.

2. The Applicants also applied for Orders under section 20C of the 1985 Act and under paragraph 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002 preventing the First Respondent from recovering the costs of these proceedings from the Applicants either through the service charge or against individual leaseholders directly.

3. The Application named five Respondents, Bath & North East Somerset Council (the Freeholder), Adriatic Land 3(GR1) Limited (the Head Lessor under Title Number AV256047), Pegasus Court Management Limited (the party named in the underlease with Applicants responsible for maintaining the Property and collecting the service charges), FirstPort Retirement Property Services Limited (described by the Applicant as the acting managing agent for the Property), and the Restaurant Group (UK) Limited (the holder of a commercial lease in respect of the ground-restaurant premises and basement).

4. The Applicants established The Empire Bath RTM Company Limited which acquired the right to manage the property on 6 July 2022.

5. On the 29 July 2022 the Tribunal held a case management hearing. Professor Stanislaw Kolaczkowski appeared for the Applicant. Miss Katherine Traynor of Counsel appeared for Adriatic Land 3 (GR1) Ltd and First Port Retirement Property Services Ltd together with her instructing solicitor Mr Raja of J B Leitch solicitors. Mr Booth attended for 3 Sixty Real Estate as agents for the RTM company.

6. After hearing from Miss Traynor the Tribunal determined that FirstPort Retirement Property Services Limited would be named as the First Respondent to the proceedings. Miss Traynor explained that FirstPort Property Services had purchased Pegasus Courts Management Limited which was the party named in the underlease for the provision of services and the collection of service charges from the Applicants. The Tribunal also decided that The Empire Bath RTM Company Limited would be named as the Second Respondent because of its responsibilities for the management of the property from 6 July 2022.

7. The Tribunal at the case management hearing directed that the dispute would be restricted to the costs incurred by the First

Respondent prior to 6 July 2022 on works to the basement vaults. The Tribunal identified the following charges.

a) 2021: £16,202.76 relating to the costs of Titan Props and Survey Inspection.
b) 2022: £36,000.00 approximately relating to concrete and steelwork testing

8. The Tribunal declined to deal with the Applicant's request to determine the estimated costs of the repair to the vaults because these costs have not been crystallised as a service charge and would, therefore, be outside the Tribunal's jurisdiction.

9. The Tribunal heard the Application on 11 November 2022 at Bath Law Courts. Professor Stanislaw Kolaczkowski represented the Applicants. Various leaseholders attended the hearing as observers. Miss Traynor of Counsel represented the First Respondent. Mr Stuart Burton, the Area Manager of the First Respondent attended as a witness. Mr Adam Booth, director of 3Sixty Real Estate, appeared for the Second Respondent.

10. The First Respondent had prepared the hearing bundle which comprised 624 pages. The Tribunal directed the First Respondent at the end of the hearing to provide a copy of the lease for the Restaurant Group which contained the details of the service charge contribution paid by the Restaurant Group. Mrs Anne Robins, the Secretary of the Empire Owners Association supplied a summary of the "Time Line" regarding the complaint raised with the First Respondent about the lack of progress with the publication of the report from Smithers Purlow.

11. The Tribunal inspected the basement vaults in the presence of the parties and walked round the perimeter of the building prior to the hearing at Bath Law Courts.

12. At the commencement of the hearing Professor Kolaczkowski drew the Tribunal's attention to two new charges made by the First Respondent from the reserves after the case management hearing which appeared to relate to the legal costs in connection with these proceedings and additional costs in connection with the preparation of the Smithers Purlow report. The Tribunal declined to deal with them because they were not part of the application. The Tribunal, however, questioned whether the First Respondent was able to collect service charges after the acquisition of the Right to Manage by The Empire Bath RTM Company Limited. It would also appear that these additional charges related to matters which were under consideration in this Application. The Tribunal suggests that the First Respondent might wish to reconsider the imposition of these charges in view of the comments made by the Tribunal so as avoid further unnecessary proceedings.

13. Professor Kolaczkowski in the Applicants' reply questioned whether the First Respondent had been correctly identified as the legal person liable to provide the services under the lease with the leaseholders. Professor Kolaczkowski analysed the various records and correspondence and proposed that the Head Lessor, Adriatic 3 Limited, was effectively operating as the Management Company under the terms of the lease. Professor Kolaczkowski also questioned the authority of First Port to collect service charges based on his analysis of Company records.

14. Miss Traynor stated that she had nothing further to add to her instructions given at the case management hearing that FirstPort Retirement Property Services Limited should be named as the First Respondent. Miss Traynor referred to paragraph 10 of the Respondent's statement of case which said as follows:

> "Pegasus Court Management Limited (Pegasus) is the named Management Company under the terms of the lease. Pegasus forms part of FirstPort Property Services No 3 Limited. It is respectfully submitted that Pegasus is the relevant party to respond to this application as the First Respondent.
>
> The First Respondent instructs FirstPort Retirement Property Services Limited as its professionally appointed managing agents for the Development. FirstPort also fall under the same corporate structure as the First Respondent".

15. Counsel summarised the position in her skeleton dated 26 July 2022 for the Case Management Hearing as follows:

> "FirstPort Retirement Services have purchased Pegasus Court Management Ltd (which is now listed as dormant). In essence, FirstPort Retirement Property Services Ltd, is the managing agent for Pegasus Court Management Ltd and therefore, will be the Respondent for the service charges in 2021 and the first part of 2022".

16. The Tribunal after considering the representations has decided to accept Counsel's submissions and names the First Respondent as First Port Retirement Property Services Ltd (Pegasus Courts Management Limited).

The Property

17. The Property was built and opened as the Empire Hotel, Bath, in 1901, and consisted of six floors, a basement, and a sub-basement. In 1995 the Property was converted into mixed residential and commercial use. There were 43 apartments comprising a mixture of one, two and three bedroom units which were occupied by leaseholders who owned individual apartments and who also have use of communal space which included a dining room, sitting room, cinema and garden. Parts of the ground floor and parts of the

basement are occupied by commercial users operating as restaurants under the control of The Restaurant Group. In the basement and sub- basement area there was a carpark for use by leaseholders who have an assigned space, and outside on the front forecourt facing Orange Grove there were extra parking spaces.

18. The vaults, the subject of this Application, were located in the basement on the south side of the building. The vaults extended beyond the footprint of the actual building and under the area referred to as the Orange Grove, part of the Grand Parade of the City of Bath.

19. The vaults were originally of a pier and arch construction and formed of Bath stone and rubble which dated back to the 18th and 19th centuries. The vaults were then used for the storage of coal, wood and water tanks. The original structure of the vaults was modified in the 20th century with the replacement of the arched construction with a concrete flat slab filler joist floor spanning between the masonry piers that the arches would have sprung from. Steel beams were erected to support the filler joist floors and the lightwell parapets.

20. The vaults separated out into three areas. An electrical sub-station has been installed in the central area, and the use of that area was subject to the terms of a commercial under lease dated 1 January 2004 for a term expiring on 28 December 2119 in return of a yearly rent of one pound (£1) and made between Hart Retirement Developments (Southern) PLC; Western Power Distribution (South West) PLC; and Bath and North Eastern Somerset Council. This area of the vaults had restricted access, which meant that the Tribunal was unable to inspect the area occupied by the substation.

21. The Western area of the Vaults was located beneath the restaurant terrace and housed a range of services for use by the commercial and residential parts of the property. This area still retained parts of the original structure for the vaults, and had a variety of steel beams in various states of repair supporting the lightwell parapets in the pavement above. The Western Area had the benefit of electrical lighting and was a usable space. Professor Kolaczkowski described this area as " The light-side", and at the inspection he drew the Tribunal's attention to a steel beam supported with three Acro props.

22. The Eastern area of the vaults was dark, damp, abandoned and described by Professor Kolaczkowski as "The dark-side". The Tribunal understands that under the planning permission for the conversion of the Property into residential units this area was to be demolished and reshaped to provide an access point with display areas to The Colonnade a separate set of vaults beneath The Grand Parade at the side of the property. The proposed development of The Colonnade did not go ahead and the developer was released from its

obligations to construct the new access point in this area of the vaults.

23. In the Eastern area all the original vaulted arches had been replaced with a concrete filler joist flat slab, and at the same time the lightwells had been infilled with a similar construction. The Tribunal understands that this work took place in the early 20th Century. In this area there was also an extensive grille of steel beams running North South and East West supporting the flat slab. At the time of the Tribunal's inspection the steel beams were being underpinned by steel props.

24. The documents bundle included correspondence on various dates in 1995 and 1996 between PRP Architects, Poole Stokes Wood and Eastwood & Partners Consulting Engineers regarding investigatory works to the basement roof slab of the vaults. On 27 October 1995 Eastwood & Partners reported that Alfred McAlpine Construction, the builders of the conversion, had not completed the cleaning of the steel beams, and it was possible when the cleaning was completed that this would reveal some steel beams that required replacing. Eastwood & Partners also recorded that the slab of the Eastern area of the vaults was in very poor condition and recommended some remedial works such as injection with suitable repair matters.

25. On 16 September 1996 PRP Architects wrote to Poole Stokes Wood about investigatory works to the basement roof slab. PRP Architects stated that "when Pegasus are aware of the figure they will decide whether we should proceed with the investigatory works".

26. On 1 October 1996 J Dziczkaniece, Development Director for Pegasus Group PLC, cancelled the instructions to Alfred McAlpine Construction for the remedial works to the vaults.

27. On 8 October 2019 Mr Kellard MRICS, Estates Surveyor for Bath and North East Somerset Council wrote to the Estates Manager of the Property informing him that

> "I am writing to you as freeholder of the above property, the tenant of which is your client Adriatic Land 3 (GR1) Limited.
>
> During inspection of the road above the southern vaults to the above building, we have identified areas of significant corrosion to the steelwork supporting the property which we believe, may affect the structural integrity of the building and road/pavements above.
>
> Under the terms of the lease of this property the tenant is responsible for the repair of the building.
>
> Can you please inform your client and request that they arrange to identify the work required to rectify these faults and repair them, as a matter of urgency and public safety. Would you please

> confirm to me when you will be sending a structural engineer to inspect".

28. Following Mr Kellard's letter the First Respondent instructed Ingleton Wood to undertake a structural inspection of the vaults at the property. On 17 October 2019 Mr Miller of Ingleton Wood carried out a visual inspection of the vaults and found that

> "The defects in the Western area could be addressed with maintenance procedures of making masonry repairs, replacing the inner beam to vault 1 and middle beam in vault 4. Elsewhere the exposed steel beams should be treated with a protective coating to enhance the life of the construction. None of these defects represented an immediate concern to structural failure but should be addressed in the next two years.
>
> The condition of the steelwork in the Eastern area was poor and significantly weakened. However, there was little visual evidence that the overall transfer structure of the combined steel beams and filler joist flat concrete slab was significantly overstressed which would result in excessive deflections and deformations. There was risk of the filler joist flat concrete slab failing and if this transfer structure was left unattended the collapse could be sudden, albeit just localised".

29. Mr Miller recommended that initial works be undertaken to support the filler joint flat concrete slab in the Eastern area of the vaults followed by (1) intrusive investigation to confirm the structural make up and strength of the filler joist concrete slab, (2) repair the less damaged steel sections and install a protective system to prevent further loss of strength, and (3) design and install strengthening permanent works where heavily corroded steel beams need to be removed and replaced.

30. As a result of this report the First Respondent arranged for 28 props to be installed in the Eastern area of the vaults whilst further testing was carried out. According to the First Respondent, there were difficulties in sourcing contractors but eventually the work was carried out by Masters Pipeline Services Limited in January 2021.

31. The Empire Owners Association commissioned its own structural survey of the vaults from Mann Williams, Consulting Civil and Structural Engineers. The survey comprised a visual walkover inspection of the structures in the vaults and was carried out on 2 September 2020. Mann Williams concluded that the steel beams in the Western area of the vaults were on the whole in reasonable condition. In contrast Mann Williams found that the steel beams in the Eastern area including those replaced in 1995 were generally in very poor condition with heavy corrosion evident in the top flanges which were in contact with the damp concrete above.

32. The First Respondent requested Smithers Purslow to carry out further concrete and steelwork testing. Moorhead Richardson carried out an investigation of the concrete slab on 26 April 2022 Smithers Purslow commissioned an examination by Stanger, Materials Testing and Consultancy of the steel beams in the Eastern area of the vaults. The site visit was conducted on 24 May 2022 and an assessment of the beams was undertaken by visual inspection and ultrasonic testing. The report dated 22 June 2022 concluded that the steel beams were in very poor condition and beyond economic repair.

33. The Empire Bath RTM Company Limited (The Second Respondent) has now taken on responsibility for progressing the urgent works to the vaults. The RTM Company has identified two potential options with budget estimates to render the Eastern area of the vaults safe. Option 1 involves repairing the structure at an estimated cost of £483,000 inclusive of VAT. Option 2 involves filling in the void of the Eastern area at an estimated cost of £237,000 inclusive of VAT.

The Issues

34. The Tribunal is solely concerned with the reasonableness of the costs incurred by the First Respondent investigating the state of disrepair of the vaults on the Eastern area and carrying out temporary repairs to minimise the risks.

35. At the case management hearing the Tribunal identified two items of expenditure which were the subject of this determination. The First Respondent in its statement of case supplied the detailed costings of the two items of expenditure which were as follows:

    i. The costs for the erection of the 28 Titan Props in the Eastern area of the vaults and the associated fees which total £16,202.76 and incurred on various dates from 12 January 2021 to 16 February 2021. The total contribution of the leaseholders was £13,529.30.

    ii. The costs of the structural engineering services supplied by Smithers Purslow totalling £24,164.64 and invoiced on 21 April 2022 and 22 June 2022. The total contribution of the leaseholders was £20,177.47.

36. The Tribunal is not concerned with the estimated costs of the repairs to the vaults, which will now be undertaken by the Second Respondent.

37. Professor Kolaczkowski requested the Tribunal to make a determination on whether the First Respondent and the Head Lessor had occasioned disrepair to the vaults through their historic neglect of the repairing obligations under the lease. The Tribunal indicated

at the case management hearing that it would not be considering such arguments.

38. At the hearing Professor Kolaczkowski asked the Tribunal to reconsider its position about the issue of historic neglect. He argued that the Tribunal had jurisdiction to decide whether the disrepair to the vaults was a result of the historic neglect of the First Respondent and the Head Lessor of their repairing obligations under the lease. Professor Kolaczkowski relied on the Lands Tribunal decision in *Continental Property Ventures Inc v White* [2007] L.& T.R.4 which at H3 said:

> "The leasehold valuation tribunal was mistaken in concluding that costs incurred by a landlord due to its own historic breach of a repairing covenant were not "reasonably incurred" within the meaning of s.19(1)(a) of the Landlord and Tenant Act 1985 . It was however entitled to conclude that such costs were not "payable" within the meaning of s.27A of the 1985 Act insofar as the breach of the landlord's covenant to repair would give rise to a claim in damages by the leaseholder that could include the increased service charge liability so as to give rise to an equitable set-off and as such constitute a defence"[1].

39. Professor Kolaczkowski contended that the facts of the historic neglect were straightforward, He asserted that there was no dispute about the need to repair the vaults; no dispute that the problems causing the disrepair had occurred over an extended period; and no dispute that the management company did not perform any maintenance. Professor Kolaczkowski stated the only matter that required a determination was whether the First Respondent should have carried out maintenance of the steel beams.

40. The First Respondent contended that the Applicants were conflating two separate issues, namely: historic neglect and equitable set off. The First Respondent maintained that historic neglect and equitable set off were not relevant to the dispute in this case which was whether the costs of the erection of the props and the services supplied by Smithers Purslow were reasonably incurred by the First Respondent at the time the decision to incur costs was made. The First Respondent asserted that as a matter of fact the Applicant's evidence did not come close to establishing that the costs of the props and of the Smithers Purslow' investigation have increased because of the allegation of historic neglect.

41. The First Respondent acknowledged that if the Applicants could establish a separate claim for breach of covenant that this might amount to a defence to the payability of some of the funds found to have been reasonably incurred for the props and the investigation. The First Respondent, however, submitted that it was not consistent

[1] Professor Kolaczkowski in his reply appeared to cite H3 as part of the decision in Waaler v Hounslow LBC [303] of the bundle.

with the overriding objective for the Tribunal to embark upon a trial of a claim for breach of covenant when the sum in dispute was £36,000 and would involve evidence dating back to 1996.

42. The Tribunal confirms its position as stated at the case management hearing that it would not deal with the question of historic neglect caused by an alleged breach of the repairing covenant on the part of the First Respondent in connection with the vaults. The Tribunal agrees with the First Respondent that historic neglect or breach of repairing covenant was not relevant to whether the costs of the props and of the Smithers Purslow investigations were reasonably incurred.

43. The Tribunal accepts that it has jurisdiction to hear a defence of alleged breach of the landlord's repairing covenant and that it can set off any damages for the alleged breach against the amount ordered for the disputed service charges. Judge Rich QC, however, made it clear in *Continental Property Ventures* at paragraph 16 that the Tribunal has a discretion on whether it should hear a defence of alleged breach of repairing covenant in a matter where the Tribunal finds that the nature of the issues makes a court procedure more appropriate.

44. In the Tribunal's view this is such a case which should be dealt with by the Court rather than the Tribunal. Contrary to Professor Kolaczkowski's submissions, the Tribunal is satisfied that the facts of the alleged breach of repairing covenant were not straightforward and were disputed by the First Respondent. Further the Tribunal observes there is no continuing responsibility on the First Respondent to incur costs on the repair of the vaults following the acquisition of the right to manage by Empire Bath RTM Company Limited. Finally the Tribunal notes that if the Applicants were successful with its claim for breach of repairing covenant, the award of damages was more than likely to exceed significantly the amount of service charges under dispute which means that the Tribunal would not be able to provide full recompense to the Applicants for the alleged breach.

45. The Tribunal now turns to the issues that it will determine in respect of this Application. Professor Kolaczkowski categorised these issues as five Claims, the fifth being historic neglect which the Tribunal has declined to hear. The Tribunal identifies the four remaining issues which do not replicate precisely the "Claims" as follows:

    i. Whether the First Respondent is entitled under the terms of the lease to recover the costs of the props and of the Smithers Purslow investigation from the Applicants as service charges?

ii. If the answer to question 1 is yes, how should those costs be apportioned between the residential and commercial entities occupying the property?

iii. Whether the costs of the erection of the 28 Titan Props and of the Smithers Purslow investigation were subject to the statutory consultation requirements of section 20 of the Landlord and Tenant Act 1985?

iv. Whether the costs of the erection of the 28 Titan Props and the costs of the Smithers Purslow investigations were reasonably incurred by the First Respondent?

46. Miss Traynor Counsel for the First Respondent contended that Professor Kolaczkowski had raised additional issues in the Applicant's reply which were not in the Tribunal's contemplation when setting this matter for a hearing. The Tribunal took the view that it was not proportionate and contrary to the overriding objective to adjourn the hearing. The First Respondent had addressed the issues of apportionment and dispensation from consultation in its response to the Applicant's reply. Mr Burton was the person who instructed Smithers Purslow and able to give evidence on the reasonableness of the costs incurred.

47. The Tribunal deals with each of the identified issues in turn.

Whether the First Respondent was entitled to recover the costs through the service charge?

48. This issue turns upon the proper construction of the relevant leases.

49. Under the Head Lease dated 29 December 1995 Bath City Council demised the Premises to Pegasus Retirement Homes PLC for a term of 125 years from the last day of January 1995 in return of consideration consisting of premium, the works, the payment of the rent and the covenants on the part of the Tenant.

50. Under clause 6.5.1 of the lease the Tenant covenants to cleanse and keep clean and to keep in good and substantial repair and conditions the Premises

51. The First Schedule of the lease describes the Premises as

> **"FIRST ALL THAT** land and buildings formerly known as the Empire Hotel Bath and having frontages to the Grand Parade Orange Grove and Boatstall Lane and **SECONDLY ALL THOSE** vaults under Orange Grove and under the passageway to the west of the property first described all which premises first and secondly described shown edged red on the attached Plans A,G, B and SB, ... **THIRDLY** the area beneath Grand Parade shown edged yellow on Plan SB ..... **FOURTHLY**

the canopy and portico **TOGETHER WITH** the following rights and easements ……".

52. The Tribunal observes that Plans A and B include the vaults within the area edged red. Plans G and B show the area occupied by City Centre Restaurants on the ground floor and basement which is identified by shading. The vaults on Plan B are not a shaded area.

53. Clause 1.9.3 of the lease states that the basement and sub-basement which is shown red on Plans B and SB annexed to this lease shall be used as a private car park for the residents of the apartments and for ancillary and storage accommodation for the residents apartments and the sub-tenants of the commercial premises, and or such other ancillary uses which are in keeping with the principles of good estate management.

54. The Tribunal refers next to the occupational lease between (1) Pegasus Retirement Homes PLC (2) Pegasus Court Management Limited (the Company) and (3) the sub-leaseholder of the residential units. The parties exhibited as a specimen the Underlease for Apartment 27 dated 25 September 1997 for a term of 125 years less one day starting 1 January 1995.

55. Under (1) definitions:

(a) the Development shall mean the land now or formerly comprised in a Headlease dated 29 December 1995 and made between Bath City Council (1) and Pegasus Retirement Homes PLC (the Lessor) (2) (hereinafter called the Head Lease) registered under the above mentioned Title Number (AV256047).
(b) "the building" shall mean the building erected on the Development and known as The Empire comprising apartments together with communal facilities and commercial premises.

56. The Registered Title refers to the Leasehold land shown within the edged red on the filed plan known as The Empire, Orange Grove and Grand parade (BA2 4DF).

57. Note 1 on the Property Register records that: The whole site of the complex known as The Empire is edged red on the filed plan. The registration of The Empire includes only those parts on the sub-basement, basement, ground and first to sixth floors tinted pink, tinted blue, tinted brown and tinted yellow on the supplementary plan to the filed plan. The Tribunal observes that the supplementary plan lodged with HM Land Registry was not exhibited in the documents bundle.

58. Under Clause 4 of the Underlease the Company covenants with the Lessee and (as a separate covenant) with the Lessor that the

Company will observe and perform the covenants in the Eighth schedule thereto.

59. By paragraph 1 of the Eighth Schedule of the Underlease the Company covenants to indemnify the Lessor the expenditure incurred in complying with the covenants on the part of Lessee in the Headlease insofar as that expenditure does not relate to the commercial premises comprised in the Development.

60. By paragraph 2 of the Eighth Schedule the Company covenants to maintain repair and renew the Buildings and as appropriate the services and facilities used or enjoyed by the Lessee in common with the Lessor or the Company or the Occupiers of the Dwellings save that nothing in the Lease shall oblige the Company to maintain particular facilities which in its opinion are not fully utilised provided that such discontinuance does not substantially affect the market value of the Apartment.

61. By paragraph 7 of the Eighth Schedule the Company covenants to take such steps as it shall think fit to decorate repair maintain improve and enhance the Development but excluding the commercial premises in the Development.

62. Paragraph 13 of the Fifth schedule sets out the Lessees' obligations to contribute to the costs of the Company. Paragraph 13 states that the lessee shall pay to the Company the fraction of 1 /X+ 1th (where X equals the number of dwellings included in the planning permission in force in relation to the Development or should the Development be physically completed the number of physically completed Dwellings) part of the expenses and outgoings incurred by the Company in the repair maintenance renewal and management of the Building the Development the Facilities and the Services and the other expenditure incurred by the Company in the performance of its obligations under this lease including the fees of its managing agents and accountants or other professional persons plus value added tax (if applicable) and such sums as the Company shall reasonably require to establish and maintain a sinking fund or funds pursuant to paragraph 14 of the Eighth Schedule hereto less any income derived from non-residents and other sources such payment and excluding all expenditure relating to the commercial premises comprised in the Development (hereinafter called "the Service Charge").

63. Paragraph 13 further states that the payment of the Service Charge is subject to the following terms and provisions:

(a) for the avoidance of doubt it is agreed that the Company shall have the right to appoint a managing agent to carry out the Company's obligations under this lease and that the fees of such agent shall be included in the Service Charge.

(b) the amount of the Service Charge shall be ascertained annually and certified by a certificate (hereinafter called "the Certificate") signed by the Company's auditors or accountants or managing agents (at the discretion of the Company) acting as experts and so soon after the end of the Company's Financial year as may be practicable.

(c) the expression "the Company's financial year" shall mean such annual period as the Company may in its discretion from time to time determine as being that to the end of which the accounts of the Company shall be made up.

(d) a copy of the Certificate for each financial year may be inspected by the Lessee at the offices of the Company or of its managing agents.

(e) the Certificate shall:

(i) contain a summary of the expenses and outgoings incurred by the Company in respect of the Service Charge during the Company's financial year to which it relates together with a summary of the relevant details and figures forming the basis of the Service Charge.
(ii) be conclusive evidence of the matters which it purports to certify and a copy certified by or on behalf of the person giving it shall also be so conclusive.

(f) the expression "the expenses and outgoings incurred by the Company" shall be deemed to include not only those expenses and outgoings and other expenditure which have been actually disbursed incurred or made by the Company during the year in question but also such reasonable part of all such expenses outgoings and other expenditure which are of a periodically recurring nature (whether regularly or irregularly) whenever disbursed incurred or made and may include such sums of money by way of reasonable provision for anticipated expenditure as the Company or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances.

(h) as soon as practicable after the signature of the Certificate the Company shall render to the Lessee an account for the proportion of the Service Charge payable by the Lessee for the year in question due credit being given for all interim payments made by the Lessee in respect of that year and for any overpayment made by the Lessee in the previous year and for any period prior to the commencement of this Lease and upon rendering such account the Lessee shall pay the Service Charge or any balance found payable to the Company save that where the Lessee has a debit or credit balance with the Company of an amount not exceeding a two week proportion of the Service Charge then such balance shall be carried forward to the following Company's financial year".

64. The Tribunal turns next to the leases governing the occupation of the Property by commercial entities. The Tribunal starts with the Lease of Part dated 29 December 1995 and made between Pegasus Retirement Homes PLC as Landlord and City Centre Restaurants (UK) Limited as Tenant.

65. Under the terms of the lease Pegasus Retirement Homes grants City Centre Restaurants a lease of the Premises on the ground floor and basement of the former Empire Hotel Orange Grove and Grand Parade Bath showed edged red on the plan annexed. The grant was for a term of 125 years less 7 days from 1 January 1995 for consideration of a premium, rents which includes insurance and service charge rents, and the covenants agreements and declarations on the part of the Tenant.

66. The plan annexed to the lease identifies the Premises on the ground floor and the basement by shaded areas edged in red. The plan does not identify the vaults within the Premises. The plan notes the existence of water tanks and air handling in the Western area of the vaults.

67. Clause 1.12 defines the Property as the Premises described in the particulars and then spells out the detail of what precisely falls within the definition of the Property which essentially are the non-structural parts and the doors and windows.

68. The lease distinguishes "Property" from the "Residential Common Parts" which means the area and facilities within the Building available only for use by two or more occupiers of the residential apartments (Clause 1.14) and from the "Retained Parts" which means the Building excluding the Property, any Lettable Unit and the Residential Common Parts (Clause 1.15).

69. The lease defines the Building as the building and curtilage previously known as The Empire Hotel Orange Grove and Grand Parade Bath as the same is more particularly described in and demised by the Headlease. The lease also refers to "Adjoining Property" which means any neighbouring or adjoining land including the remainder of the Building in which the Landlord has a freehold or leasehold interest or in which during the Term the Landlord or such a company shall have acquired a freehold or leasehold interest.

70. Under Clause 4 of the lease the Tenant is responsible for repairing the Property as defined by Clause 1.12 and keeping it in good and substantial repair and condition. Clause 4.28 requires the Tenant to comply with the Tenant's obligations regarding insurance and service charge contained in the fourth and fifth schedules. There is a corresponding obligation upon the Landlord under clause 5.2 to comply with the requirements of the fourth and fifth schedules.

71. The fifth schedule defines Service Charge as the General Service Charge Percentage of the Annual Expenditure in relation to the General Services. The General Service Charge Percentage is stated to be 16.5 per cent in the particulars. Annual Expenditure means all costs expenses and outgoing incurred by the Landlord in providing all or any of the services during a Financial year but excluding any expenditure in respect of any Lettable Unit. The General Services are defined as the works services facilities and other matters specified in Part 3 of the fifth schedule. Services, however, does not include the Residential Services. Part 3 includes Maintenance of the Building under The General Services and is defined as inspecting maintaining cleansing repairing rebuilding renewing resurfacing and reinstating the Building and the Retained Parts, and without prejudice to the generality of the foregoing stone cleaning and replacement and damp proofing and tanking works in relation to the same.

72. The Respondent also supplied a copy of an Underlease dated 26 November 1996 and made between Allied Dunbar Assurance PLC and City Centre Restaurants (UK) Limited which related to the same commercial areas of the Property. The Underlease did not add anything new to the construction of the Superior Lease.

73. The final lease supplied concerned the Electricity sub-station located in the central part of the vaults. This was an Underlease dated 15 January 2004 and made between Hart Retirement Developments (Southern) PLC, the landlord (1), Western Power Distribution (South West) PLC (the tenant) (2), and Bath and North East Somerset Council (the superior landlord (3).

74. The leases demised the Premises in the basement shown coloured pink on the plan annexed until terminated in accordance with Clause 8 but if not terminated within the perpetuity period (80 years) for the term hereby granted. The pink area identified in the Plan related solely to the current location of the electricity sub-station. The Tenant in consideration of the demise agreed amongst other matters to pay rent (£1 per annum), to repair at all times and keep the Premises in good and substantial repair, and to observe the covenants and the obligations of the Landlord as Tenant in the superior lease with Bath City Council in so far as they relate to the Premises coloured pink in this Underlease.

75. The Tribunal considers the most straightforward way of dealing with the construction of the various leases is to start with the Applicants' liability for their contribution to the service charge.

76. Paragraph 13 of the Fifth Schedule of the Occupational Lease requires the leaseholder of each apartment to contribute 1/44[2] of the

[2] It would appear from the documents in the bundle that each leaseholder is contributing 1/43rd of the cost. The formula in the lease states that the denominator should be the number of apartments plus 1..

costs incurred by the First Respondent as the Company in discharge of its obligations under the lease in any accounting year.

77. The First Respondent's obligations as the Company are set out in the Eighth Schedule of the Lease. The Tribunal considers there are three relevant obligations which would have a bearing upon this dispute.

78. Paragraph 1 requires the First Respondent to indemnify the Lessor (Adriatic Land 3 (GR1) Limited) of expenditure incurred in complying with covenants under the Head Lease in so far it does not relate to expenditure on commercial premises. The Lessor under the Head Lease is responsible for the repair and maintenance of the Premises which under the terms of the lease explicitly include the vaults. The Head Lease does not denote the vaults as commercial premises with the use of shading on the plans annexed to the Head lease.

79. Paragraph 2 obliges the First Respondent to maintain and repair the Building which is defined as the Building erected on the Development. Arguably the definition of Building does not include the vaults because they are not part of the main structure of the Building and are identified separately from the Building in the definition of Premises under the Head Lease.

80. Paragraph 7 obliges the First Respondent to take such steps as it thinks fit to repair and maintain the Development but excluding the commercial premises of the Development. Under the occupational lease the definition of "Development" is much wider than "Buildings" and includes land now or formerly comprised in the Head Lease. The Tribunal is satisfied that the vaults are included in the land comprised in the Head Lease.

81. The Tribunal notes that the First Respondent in its statement of case placed reliance on the wider definition of "Development", and in turn the obligation under Paragraph 7 of the Eighth Schedule as its authority under the lease to recover the costs incurred on the erection of the props and the Smithers Purslow investigation through the service charge.

82. The Tribunal agrees with the First Respondent's analysis that the costs incurred were caught by Paragraph 7. The costs related to works connected with the repair and maintenance of the supporting structure for the Eastern area of the vaults which were part of the "Development".

83. The Tribunal does not consider that the obligation under Paragraph 1 was triggered because there was no evidence that Adriatic Land 3 (GR1) had incurred costs repairing and maintaining the vaults under its covenant with Bath and North East Somerset Council in the Head Lease. Likewise the obligation under Paragraph 2 is restricted to the

repair and maintenance of the Building which does not include the vaults.

84. The Applicant's liability to pay service charges under paragraph 13 of the Fifth Schedule explicitly excludes expenditure on the commercial premises. The Tribunal is satisfied by its examination of the plans attached to the Head Lease and to the Superior Lease between Pegasus with City Centre Restaurant Group that the Western and Eastern areas of vaults are not part of the shaded area which identifies the scope of the commercial premises with the property. The Tribunal finds that the commercial Tenant under the Superior Lease is liable to contribute towards the costs of any repair to the Western and Eastern vaults because such repairs fall within the definition of The General Services in part 3 of the fifth schedule to the Superior Lease. The contribution of the commercial tenant is limited to 16.5 per cent which is fixed by the terms of the Superior Lease.

85. The Tribunal is satisfied that the Applicants and the commercial tenant under the Superior Lease are not liable to contribute to the repair of that part of the vaults occupied by the Electricity sub station. The Tribunal considers that under the terms of the Underlease dated 15 January 2004 the Tenant of that lease is responsible for the costs of the repair and maintenance of the area coloured pink. Unlike the commercial tenant under the Superior Leases the Tenant under the lease for the Electricity sub-station has no liability to contribute by way of service charge to the upkeep of the Property as a whole.

86. Professor Kolaczkowski argued under the "First Claim" that the vaults were exclusively commercial premises and that the Head Lessor had reserved the Eastern area of the vaults for commercial use. Professor Kolaczkowski asserted that the shaded areas in the various plans were an unreliable indicator of the extent of the commercial premises in the property. Professor Kolaczkowski relied in particular on the absence of a shaded area in those plans for the Electricity sub-station. In addition Professor Kolaczkowski supported his argument by referring to the planning history for the reconstruction of the Eastern area of the vaults as part of the proposed development for The Colonnade.

87. The Tribunal is not convinced by the arguments put forward by Professor Kolaczkowski. The Applicants' liability to contribute to the repair and maintenance of the vaults is essentially a legal question dependent upon the correct construction of the relevant leases. The Tribunal is satisfied that it has arrived at the correct construction based on its evaluation of the pertinent clauses in the relevant leases. The Tribunal considers it unsurprising that the plans attached to the Head Lease and the Superior Lease did not single out the Electricity sub-station as commercial premises because the lease for the Electricity sub-station post-dated the Head and Superior Leases.

88. **The Tribunal, therefore, finds that the First Respondent is entitled under paragraph 7 of the Eighth Schedule and paragraph 13 of the Fifth Schedule of the occupational lease to recover the costs of the props and of the Smithers Purslow investigation from the Applicants as service charges.**

How should the costs for the props and the Smithers Purslow investigation be apportioned between the residential and commercial entities occupying the property?

89. Professor Kolaczkowski submitted under "Claims 2 and 3" that if the Applicants were unsuccessful in persuading the Tribunal that the vaults were part of the commercial premises then the method of apportionment of the costs of repair between the Applicants and the commercial tenants was unfair.

90. Professor Kolaczkowski proposed an apportionment which took account of the footprint of the restaurant above the vaults. Professor Kolaczkowski's calculations produced apportionments between the Applicants and the commercial tenant respectively of 10.855:89.145 in respect of costs for the Western area of the vaults and 58.45: 41.55 in respect of costs for the Eastern area of the vaults.

91. The First Respondent contended that the Tribunal had no jurisdiction to entertain an argument on apportionment of service charges between the Applicants and the commercial tenants. The First Respondent pointed out that the apportionment between the Applicants and commercial tenants of 83.5:16.5 had been accepted and agreed by the Applicants for many years, if not decades. The First Respondent argued that the Applicants in their reply had acknowledged the long standing nature of this rate of apportionment to which the Applicant had not objected because they had assumed that the rate was connected to the respective floor space occupied by the residential and commercial tenants and that the rate had looked reasonable. Professor Kolaczkowski, however, emphasised that there had been no discussions between the respective parties about the apportionment of 83.5:16.5.

92. The First Respondent submitted that the apportionment was a matter which had been agreed or admitted by the Applicants within the meaning of section 27A(4) of the 1985 Act which meant that the Tribunal had no jurisdiction to determine a matter that had been previously admitted by the parties. The Tribunal accepts the validity of the First Respondent's submission. The fact that the parties may not have discussed the apportionment in detail did not undermine the existence of the longstanding arrangement between the parties regarding the apportionment to which the Applicants had not objected. In the Tribunal's view this is sufficient to amount an

admission on the part of the Applicants within the meaning of section 27A(4) of the 1985 Act with the effect that the Tribunal has no jurisdiction to interfere with the arrangement to apportion the service charge between the Applicants and the commercial tenants on 83.5:16.5 basis.

93. The Tribunal, however, considers there is a further obstacle to Professor Kolaczkowski's plea to change the apportionment of service charges between the residential and commercial tenants. Professor Kolaczkowski gives the impression with his submissions that the method of apportionment as laid down in the occupational lease was based on notions of fairness and reasonableness. It is not. Paragraph 13 of the Fifth Schedule fixes the method of apportionment by requiring each lessee to pay a fixed percentage of expenses and outgoings incurred by the Company in the repair maintenance renewal and management of "the Development" less any income derived from non-residents and other sources. The income derived from the contribution of the commercial tenant to the service charge is likewise fixed by the relevant lease at 16.5 per cent. The Tribunal has no power to interfere with the contractual terms agreed by the respective parties to the relevant leases.

94. **The Tribunal decides that it has no jurisdiction to change the apportionment of the service charge between the Applicants and the commercial tenants because (a) the Applicants have agreed the rate of apportionment at 83.5: 16.5 , and (b) the method of apportionment is fixed by the terms of the respective leases.**

Whether the costs of the erection of the 28 Titan Props and of the Smithers Purslow investigation were subject to the statutory consultation requirements of section 20 of the Landlord and Tenant Act 1985?

95. Professor Kolaczkowski submitted in relation to the "Fourth Claim" that the First Respondent was not entitled to recover the costs in connection with the Smithers Purslow investigation because the consultation requirements of section 20 of the 1985 Act had not been complied with. Professor Kolaczkowski pointed out that costs of around £24,000 had been incurred on the investigation between August 2021 and June 2022 which exceeded the amount of £10,750 to trigger the consultation requirements.

96. The First Respondent stated that a section 20 notice dated 1 June 2020 had been served on all lessees and the recognised tenants association in respect of the erection of 28 props in the Eastern area of the vaults for health and safety reasons whilst concrete tests took place. On 3 July 2020 Professor Kolaczkowski in his capacity of Chair of the Empire Owners Association responded to the Notice raising various queries about the proposed works. Mr Burton of the First Respondent replied on 4 August 2020 to Professor

Kolaczkowski's letter providing answers to the various matters raised.

97. The First Respondent invited tenders for the propping up of the vaults with a return date of 25 August 2020. First Port Surveying Services carried out a Tender Analysis and recommended the lowest tender. The Analysis recorded a total cost of £17,748 which included the surveyor's fees and VAT. On 7 November 2020 the First Respondent sent a letter to all the lessees about the proposed works. On the 10 November 2020 the First Respondent invited the lessees and the recognised tenants' association to agree to dispense with parts of the safety related work to the basement vaults.

98. On 19 November 2020 Professor Kolaczkowski replied on behalf of Empire Owners Association as follows:

> "On behalf of the Empire Owners' Association, being a recognised tenants' association, we take note of your letter dated 10 Nov 2020 and your desire to proceed with the safety related part of the works to the basement. We do not raise any objections to you proceeding with that work without following the Section 20 consultation procedure but this is strictly on the basis that those works you refer to are required as a matter of urgency for health and safety reasons. You are of course required to follow the appropriate Section 20 procedure for any further works, and any works which are not urgently required for health and safety reasons. To be clear, we do not accept responsibility for the payment for this or any other work connected with that side of the vaults which had not been developed or maintained. For the avoidance of doubt, this reply is without prejudice to the lessees' right to dispute any service charge raised for any costs associated with the Proposed Works and the Section 20 Notice. The lessees' position is fully reserved as to its liability for the associated costs of the works and the lessees reserve the right to challenge any sums sought to be recovered as service charge in due course".

99. The First Respondent argued that the Applicants had waived their rights to be consulted in connection with the works propping up the slab above the Eastern area of the vaults. Professor Kolaczkowski accepted at the hearing that the Applicants had agreed for the works erecting the 28 props to go ahead without following the section 20 consultation procedure because of their urgency in respect of health and safety.

100. **The Tribunal finds that the Applicants waived their right to be consulted on the works erecting the 28 Titan Props. Given this finding the Tribunal is not inclined to limit the costs to the sum of £10,750 (£250 x 43) which is the amount that can be recovered through the service charge when the consultation requirements have not been complied with**. If the Tribunal is wrong on this finding, the First Respondent is

entitled to apply for dispensation of consultation requirements, which in the Tribunal's view is likely to be successful because of the requirement upon the Applicants to establish relevant prejudice from the failure to consult.

101. The First Respondent said that during 2021 it provided the Applicants with an estimate of £5,500.00 plus VAT for the costs of concrete and steelwork testing by Smithers Purslow. The First Respondent asserted that it is established law that the statutory consultation requirements did not apply to estimated costs of proposed works citing in favour the Upper Tribunal decision in *23 Dollis Avenue (1998) Ltd v Vejdani*, [2016] IIKUT 365. The First Respondent contended that this proposition still applied despite the increase in estimated costs to £16,460.40.

102. The Tribunal disagrees with the First Respondent's reliance on *23 Dollis Avenue* in respect of the costs for the Smithers Purslow investigation. The First Respondent now accepts that costs in the sum of £24,164.64 have actually been incurred for which Smithers Purslow has issued invoices.

103. The Tribunal observes from the invoices that Smithers Purslow was being paid for the provision of structural engineering services for an investigation of the structural condition and potential remedial works required for vaults structure. The Tribunal does not consider that such services meets the definition of "Qualifying Works" in section 20ZA(2) of the 1985 Act which is a pre-requisite for the invoking of the statutory consultation procedures under section20.

104. Section 20ZA(2) defines qualifying works as works on a building or any other premises. However, the term "works" is not defined in sections 20 or 20ZA(2). HH Judge Cotter QC in *Phillips v Francis* unreported 19 March 2012 Truro County Court expressed the view that the phrase building works was used to describe significant works with a permanent effect by way of modification of what there was before.

105. The Tribunal finds that the works supplied by Smithers Purslow were more in the nature of services rather than building works, and did not meet the definition of qualifying works. The Tribunal had no evidence before it to suggest the existence of a qualifying long term agreement between the First Respondent and Smithers Purslow.

106. **The Tribunal, therefore, decides that the section 20 consultation requirements did not apply to the services supplied by Smithers Purslow.**

Whether the costs of the erection of the 28 Titan Props and the costs of the Smithers Purslow investigations were reasonably incurred by the First Respondent?

107. The First Respondent stated that it had incurred costs of £16,202.76 for the erection of the 28 Titan Props in the Eastern area of the vaults which was made up of £14,940 to the contractor for the 28 Titan Props, £379.26 for the site inspection of the basement props by First Port Surveying Services and £883.50 for the balance of the survey fee by First Port surveying services. The expenditure was evidenced by the invoices for the charges.

108. First Port Surveying Services had carried out a competitive tendering exercise for the erection of the 28 Titan Props, and had received two tenders. First Port Surveying Services chose the cheaper tender.

109. The First Respondent contended that it was necessary to support the concrete slab above the Eastern area of the vaults to enable an investigation of the structural make up and the strength of the filler joist flat concrete slab. The report of Ingleton Wood had recommended the investigation of the structural integrity of the concrete slab following concerns expressed by Bath City and North East Somerset Council about the state of disrepair of the Eastern area of the vaults.

110. Professor Kolaczkowski in answer to questions put by the Tribunal accepted that the costs of £16,202.76 had been incurred and that the Applicants had no evidence of alternative quotations for the works. Professor Kolaczkowski added that the Applicants had agreed that the works were necessary for health and safety reasons.

111. The Tribunal is satisfied that the erection of the 28 Titan Props and the associated professional fees were necessary to enable the investigations of the structural integrity of the concrete slab to take place. The Tribunal finds that the First Respondent conducted a competitive tendering exercise and that the Applicants did not dispute the reasonableness of the costs.

112. **The Tribunal determines that the costs of £16,202.76 for the erection of the 28 Titan props and the associated professional fees were reasonably incurred. The Tribunal decides that the residential leaseholders are liable to contribute 83.5 per cent of the costs, namely £13,529.30. The Tribunal finds that the Applicants who constitute 93 per cent of the residential leaseholders are liable to contribute £12,585.40.**

113. The First Respondent claimed the sum of £24,164.64 for the costs of the structural engineering services supplied by Smithers Purslow. This was supported by the production of two invoices. The first covered the work done in the period September 2021 to February 2022 and was in the amount of £7,704.24 including VAT. The services provided were site visits, engineering advice, appointing/administering sub-contractors and liaising with the Local Authority. The second was for structural services from March

2022 to June 2022, and was in the amount of £16,460 including VAT[3]. It would appear from the invoice that the costs included the fees of Smithers Purslow for engineering advice, the costs of Stanger Material Testing and Consultancy Limited for its report on the structural composition of the concrete slab, and the costs of a digital scan of the slab by Clifton Surveys.

114. Professor Kolaczkowski agreed that the costs had been incurred by the First Respondent but objected to the reasonableness of the costs. Professor Kolaczkowski asserted on behalf of the Applicants that there had been unacceptable delays with the progress of the investigation, no effective communications with the leaseholders, and that the First Respondent had lost control of the expenditure.

115. Professor Kolaczkowski supported his submissions by reference to Annex 15 to the Applicants' reply which gave details of the Stage 1 and Stage 2 Complaints to the First Respondent about the lack of progress and transparency about the investigation and its costs. Professor Kolaczkowski also called upon Mrs Anne Robbins, Secretary and now Chair of the Empire Owners Association to provide a timeline for the complaints.

116. The Tribunal sets out below the Timeline in respect of the complaints:

19 August 2019: Bath and North East Somerset Council sent letter to Head Lessor and First Respondent regarding the alleged disrepair of the vaults.

17 November 2019: Ingleton Woods Report with recommendation for supports in the Eastern area of the vaults, and other works to test the structure.

11 January 2021: The Titan Props were erected in the Eastern area of the Vaults.

7 October 2021: Stage 1 Complaint made by Mrs Robbins raising issues of lack of progress and lack of information about timetable and projected costs for the concrete testing.

15 October 2021: First Respondent provided a brief response with some background and promising owner communication.

19 October 2021 Mrs Robbins sent a follow up reminding the First Respondent that no information had been sent on costs. Mrs Robbins also reminded the First Respondent of its "Best Practice Obligation" to notify Leaseholders of any expenditure of £1,000 and above.

[3] The amount is taken from the Table in the First Respondent's statement of case. The copy invoice had not been scanned properly.

1 November 2021: The First Respondent replied and a summary of the reply is set out below:

> "Once the requirements were confirmed, we raised the Purchase Order at the beginning of August and the estimated cost for everything up to producing a scope of work and tendering the contract is approximately £5,500+ VAT. The payment for the first part of their work is not due until the scope of work is provided around mid-December, when we can issue the Notice 1. This will include work on all the vaults including around the substation. Following your comments, I will put together a communication to all owners, stating that we expect a scope of works by mid-December".

23 December 2021: Mrs Robbins requested the First Respondent to provide an update.

10 January 2022: Mr Burton on behalf of the First Respondent replied as follows:

> "I am speaking to my major works team to get an update of where we are with the vaults, I know that Smithers Purslow are contacting the Council and Highways department as the slab above the vaults appears to be connected with their jurisdiction and reports expected have not materialised as yet and I am working to get an update and expected timescale. I do understand the urgency for those owners who are looking to sell".

7 February 2022: Mrs Robbins escalated the complaint to state 2 stating that

> "I was being advised that testing and subsequent definition of the scope of further work was finally expected around mid-December 2021, and a further one paragraph update from you on 10 January 2022 did not indicate how far behind even that schedule the work was. Professor Kolaczkowski has indicated to me today that he understands the testing (concrete and steel) has not yet been carried out; this is extremely worrying since, as indicated by me to you before, this uncertainty around the Vaults is, inter alia, holding up sales of apartments. He believes that your appointed contractor, Smithers Purslow, is having to sub contract some or all of the testing to another firm".
>
> Mrs Robbins requested an update on (1) When the testing was due to complete, and who was carrying it out; (2) When the document defining the scope for future work was now due.

> "In your second response to me of 1/11/21 you advised that when you raised the Purchase Order for Smithers Purslow at the beginning of August 2021 'the estimated cost for everything up to producing a scope of work and tendering the contract is approximately £5,500 plus VAT'. This was therefore below the Section 20 level for the Empire. Although presumably coming from the contingency reserve fund, this had not been properly notified to Owners via the First Port notice board, in accordance with First Port's own guidelines. Given these recent delays and the apparent need for a sub contract to cover the actual testing please advise the latest estimate for the task as defined above**".**
>
> "Since the start of this formal complaint none of the promised communication with Empire Owners has taken place. Should the cost estimate for your contractor and any testing sub contractor now breach Section 20 notification levels, this lack of Owner communication becomes even more of an issue. Please advise of your latest communication plans. Do you plan to visit the Empire to explain the situation to Owners?"

16 February 2022: First Respondent stated that "Timetable now hoped to be the end of March 2022".

23 February 2022: Mrs Robbins requested an update.

5 April 2022: Mrs Robbins requested an update on progress and outstanding cost information.

14 April 2022: The First Respondent gave an explanation of the problems causing delay and confirmation that concrete testing had started.

3 May 2022: The First Respondent provided an update on committed costs. The First Respondent gave no information on the timing of the final testing and the date of the final report.

117. Mr Burton said in cross examination that he had expected Smithers Purslow to produce a specification for the repairs to the Eastern area of the Vaults. Mr Burton acknowledged that no specification had been supplied. Mr Burton accepted that there had been delays with progressing the investigation and was unable to provide a convincing explanation for the delays.

118. The Tribunal finds that here have been unacceptable delays with progressing the investigations of the structural integrity of the vaults. The need for the investigations was identified in the Ingleton Woods report in November 2019 and after three years the specification for the proposed repairs has not been produced. The

Tribunal is also satisfied that the First Respondent did not comply with its own standards of keeping the Applicants informed of costs and progress in a timely manner. The Tribunal holds on the evidence that the First Respondent failed to maintain an effective control on the costs.

119. The Tribunal determines on the above findings that the works in connection with the Smithers Purslow Investigation were not carried out to the required standard. **The Tribunal decides that the costs claimed of £24,164.64 were unreasonably incurred within the meaning of section 19(1)(b) of the 1985 Act. The Tribunal determines that an amount of £7,704.24 including VAT is reasonable which was the sum originally cited for the works. The Tribunal finds that the contribution of the residential leaseholders is £6,433.04, and that the amount paid by the Applicants is £5,984.01**.

Applications under S20C of the Landlord and Tenant Act 1985, Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 and costs generally including Tribunal fees

120. Professor Kolaczkowski applied for Orders under section 20C of the 1985 Act and Paragraph 5A of Schedule 11 of the 2002 Act and also for the Applicants' costs in preparation of the case.

121. Professor Kolaczkowski cited a series of arguments in support of the Applicants' applications which included amongst others that: the First Respondent had failed to engage in any meaningful discussion about the issues; used Goliath versus David tactics; had distracted attention from the real issues by emphasising reasonably incurred; made no attempt to address the Applicant's issues; delayed in presenting information on the costs for the repair of the vaults and progressing the necessary works, failed to consult with the leaseholders over the proposed works, and failed to provide accurate information about the works to potential purchasers of the Apartments.

122. The First Respondent stated that there was no need for an application under paragraph 5A of the 2002 Act because the costs of this application could not be recovered directly from individual Applicants by way of an administration fee.

123. The First Respondent, however, argued that it was not just and equitable to make an Order under section 20C. The First Respondent asserted that the Applicants had failed to justify the need for their Application and that First Respondent was able to demonstrate a continuing dialogue with the Applicant over their concerns.

124. The Tribunal starts with the Application under Paragraph 5A of schedule 11 of the 2002 Act under which the Tribunal has power to reduce or extinguish the tenant's liability to pay a particular

administration charge in respect of litigation costs. The latter is defined as costs incurred or to be incurred.

125. By virtue of paragraph 9 of the Fifth Schedule of the occupational lease the First Respondent is entitled to recover solicitor's costs against individual leaseholders in respect of costs incurred for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925.

126. **The Tribunal is satisfied from the First Respondents' statement of case that it was not relying on paragraph 9 of the Fifth Schedule to recover the costs of these proceedings from individual leaseholders. To avoid uncertainty the Tribunal makes an Order under Paragraph 5A of Schedule 11 extinguishing the tenant's liability to pay litigation costs in relation to these proceedings.**

127. Section 20C of the 1985 Act enables the Tribunal to make an order that all or any of the costs incurred or to be incurred by a Landlord in connection with proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Defendant. The Tribunal may make such Order as it considers just and equitable.

128. Although the Tribunal has a wide discretion to make an Order it should be cautious about interfering with the Landlord's right under the lease to recover such costs through the service charge. Further when exercising its discretion the Tribunal should have regard to the degree of success in obtaining a reduction in the service charge, and to the practical and financial consequences for all those who may be affected by the Order.

129. The problem in this case is that the First Respondent had failed to identify the provision in the lease which enabled it to recover the legal costs of the proceedings through the service charge. The Tribunal found no explicit reference in the occupational lease for the First Respondent to charge the legal costs of proceedings to the service charge account. The sole reference to solicitor's costs is in paragraph 9 of the Fifth Schedule which relates to proceedings in contemplation of forfeiture, and is not relevant to costs through the service charge. Paragraph 13 makes oblique reference to the fees of other professional persons which in the Tribunal's view is not explicit to charge legal costs of proceedings to the service charge account. **The Tribunal determines that there is no authority under the lease for the First Respondent to recover the costs of these proceedings through the service charge.**

130. **If there had been authority under the lease to recover costs of the legal proceedings through the service charge, the Tribunal would have made an order under section 20C of the 1985 Act preventing the First Respondent from**

regarding the costs of these proceedings as relevant costs. The Tribunal considers that it would be just and equitable to make such an Order because the Applicants secured a substantial reduction in the one service charge which was disputed, and that such an outcome would be fair as the overwhelming majority of the lessees were joined to this Application.

131. Professor Kolaczkowski asked the Tribunal for an Order of costs against the First Respondent. The Tribunal is a no costs forum and can only order one party to pay the costs of the other if the offending parties had acted unreasonably in the conduct of the proceedings. The threshold of unreasonableness is a high one. The Tribunal is of the view that the First Respondent did not conduct these proceedings unreasonably. The Tribunal finds that the examples cited by Professor Kolaczkowski either occurred before the proceedings were commenced or that the First Respondent was simply mounting a vigorous defence to the Application. **The Tribunal makes no order for costs against the First Respondent under rule 13(1)(b) of the Tribunal Procedure Rules 2013.**

132. The Tribunal has a wider discretion in respect of the reimbursement of fees. In this case the Applicants paid a £100 application fee, and £200 hearing fee. Having regard to the Tribunal's findings in this case the Tribunal is minded to split the fee between the parties. **The Tribunal makes a provisional order that the First Respondent will reimburse the Applicant with a contribution of £150 to the fees. The parties are given the right to make representations in writing regarding the reimbursement of fee within 14 days from the date of this decision. If no representations are received the Order will be confirmed without further notice.**

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the 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.

4. 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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 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 the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(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) Subsection (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 incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, 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 be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 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.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(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.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).