FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/00HH/LSC/2020/0013
Property:	Various Flats, Waldon House, St Lukes Road South, Torquay Devon TQ2 5YQ
Applicants:	Mike Murray (Flat 29) Amanda Churchill (Flat 10) Chris Lovell (Flat 17) Marilyn Tozer (Flat 26) Stephen Bell (Flat 5) Mike Moore (Flat 25) Lauren Taylor (Flat 13) Amanda Duncan (Flat 27) Gordon Medcalf (Flat 19)
Representative:	Mr David Bell
Respondent:	Waldon House Management Limited
Representative:	Mr David Riley
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Tenants application for the determination of reasonableness of service charges for the year October 2018 to September 2019
Tribunal Members:	Judge A Cresswell (Chairman) Mr WH Gater FRICS MCIArb Regional Surveyor Mr M Jenkinson
Date and venue of Hearing:	15 July 2020 by Video
Date of Decision:	20 July 2020

DECISION

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The Application

1. This case arises out of the Applicant tenants' application, made on 10 February 2020, for the determination of liability to pay service charges for the year October 2018 to September 2019.

Summary Decision

2. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that the landlord has not demonstrated that the charges in question, i.e Legal costs in the sum of £2,827.44 and the Ellis Roofing costs in the sum of £25,910, were reasonably incurred or that the services or work was of a reasonable standard or that they are reasonable in amount and so they are not payable by the Applicants.
3. The Tribunal allows the Applicants' application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Respondent from recovering its cost in relation to the application by way of service charge or by administration charge.

Inspection and Description of Property

4. The Tribunal did not inspect the property save by reference to the internet and the photographs and documents presented by the parties. (Two members of the Tribunal had inspected the property prior to an earlier hearing).
5. Waldon House is a modern purpose-built block of 29 apartments constructed about 35 years ago. It stands on an elevated position above Torquay harbour and has open views over Torbay. The first 3 storeys are principally constructed with brick faced cavity wall under a flat roof. There are two penthouse apartments built on the roof of the main structure. These have rendered timber-framed walls.

Directions

6. Directions were issued on 13 May 2020.
7. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
8. This determination is made in the light of the documentation submitted in response to those directions and the evidence and submissions made at the hearing. Evidence was given to the hearing by Mr Riley, a Director of the Respondent Company and by Natasha Nicoll of APA Management for the Respondent and by Mr David Bell, Amanda Churchill (Flat 10), Chris Lovell (Flat 17), Marilyn Tozer (Flat 26) and Lauren Taylor (Flat 13).
9. At the end of the hearing, Mr Riley and Mr Bell told the Tribunal that they had had an opportunity to say all that they wished and had nothing further to add.
10. This Decision is made further to "the earlier Decision" of 15 October 2019 and must be seen in the light of and as following that Decision.
11. The Tribunal has regard in how it has dealt with this case to its overriding objective: The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013

    Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

    (2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

. (a) exercises any power under these Rules; or

. (b) interprets any rule or practice direction.

(4) Parties must:

. (a) help the Tribunal to further the overriding objective; and

. (b) co-operate with the Tribunal generally.

The Law

12. The relevant law is set out in sections 18, 19, 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 and is set out in the Annex below.
13. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable.
14. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
15. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.
16. In reaching its Decision, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to

variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties. In accordance with the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009, failure to comply with any provision of an approved code does not of itself render any person liable to any proceedings, but in any proceedings the codes of practice shall be admissible as evidence and any provision that appears to be relevant to any question arising in the proceedings is taken into account.

17. "*If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the* ***Yorkbrook*** *case* ***(Yorkbrook Investments Ltd v Batten*** *(1986) 19 HLR 25) make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.":* **Schilling v Canary Riverside Development PTE Limited** LRX/26/2005 at paragraph 15.

18. "*Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available:* **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.

19. The lessee is obliged to identify the costs which s/he disputes and to give reasons for his/her challenge. The landlord is expected to produce evidence which justifies the costs and answers the lessee's challenge. If the lessee succeeds in persuading the Tribunal that the costs should be reduced, the Tribunal will expect him/her to produce evidence of the amount by which the landlord's costs should be reduced. It is a key element of the section 27A determination process (**The Gateway (Leeds) Management Ltd v (1) Mrs Bahareh Naghash (2) Mr Iman Shamsizadeh** [2015] UKUT 0333 (LC)).

20. Where a party does bear the burden of proof:
"*It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law... It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out...: the burden of proof is a last, not a first, resort."* (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

21. The Upper Tribunal reiterated in **Knapper v Francis** [2017] UKUT 3 (LC) that the Tribunal can make *its own assessment of the reasonable cost.*

Ownership and Management

22. The Respondent is the owner of the freehold. The property is partly managed for it by APA Management Limited.

The Lease

23. The Applicant, Mr Murray, holds Flat 29 under the terms of a lease dated 24 May 1985, which was made between Neil Corner as lessor and Brian Knapman Investments Limited as lessee. The Tribunal understood this lease to be representative of all leases at the property.
24. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
25. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

    Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

    15. When interpreting a written contract, the Court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

26. The following are some of the relevant Clauses:
27. *Clause 19(iii)(a) to contribute and pay the sum of Seventy pounds on the signing hereof and thereafter annually on the twenty sixth day of December for each year of the term beginning on the twenty-fifth day of December and ending on the twenty-fourth day of December (hereinafter called "the Maintenance Year") a fair and proper proportion (hereinafter called "the Lessee's Contribution") of the estimated total for that Maintenance Year of the costs expenses outgoings and matters mentioned in Clause 3 hereof (hereinafter called "The Service Cost")*
28. *Clause 19(iii)(b) the estimated total of the Service Cost and the Lessee's Contribution under paragraph (a) of this Clause shall be ascertained and decided by the Lessor or its Managing Agents (if any) and shall be finding and binding on the Lessee*
29. *Clause 19(iii)(c) Within three months of the expiration of each Maintenance Year of the term or as soon as thereafter as is reasonably practicable the Lessor shall supply the Lessee with a statement prepared by the Lessor's Auditors or Managing Agents certifying the actual amount of the Service Cost for that preceding Maintenance Year which statement shall be final and binding on the parties hereto and the Lessee shall within twenty one days of receipt of the said statement pay to the Lessor the Lessee's contribution or such balance as may be shown thereby to be due to the Lessor*

30. *Clause 19(iii)(d) in the event of the Lessee's contribution to the actual total Service Cost in any Maintenance Year of the term amounting to less than Seventy pounds or less than such other sum as may have been collected for the Maintenance Year in question credit for the amount overpaid shall be given by the Lessor when next applying to the Lessee for any payment under paragraph (a) and (c) of this Clause*
31. *Clause 2 paragraph (16) of the lease provides: To pay to the Lessor on demand all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor under or in contemplation of any proceedings in respect of the demised premises under Sections 146 and 147 of the Law of Property Act 1925 any legislation amending or replacing the same or in the preparation or service of any notice hereunder respectively notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court*
32. *Clause 2 paragraph (17) of the lease provides: To pay all reasonable costs and expenses of the Lessor (including all solicitors' architects' and surveyors' costs and fees) incurred in considering or granting any consent under this Lease*
33. *Clause 3 paragraph (8) of the lease provides: Without prejudice to the foregoing do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessor be necessary or advisable for the proper maintenance safety and administration of the Building and the areas specified in Clause 3(2) of this Lease*

The Remedial Roof Works

The Applicants

34. The Applicants asserted that none of the costs of the Ellis Roofing work should be recoverable as the works were a total failure and made matters worse for some flats.
35. Haldons wrote to the Respondent on 3 September 2018, immediately before Ellis Roofing commenced works. They recorded: "*The information provided with the Ellis Roofing quotation is insufficient to enable us to adequately appraise the proposal and therefore our comments are limited and based on incomplete information.*" They set out a list of items which they would require to see in order to give a full appraisal.
36. APA had confirmed to Mr Bell that they had no involvement in the roofing works.
37. The works went ahead without advice from Haldons or APA.
38. Although Mr Riley said that Nicholls Basker did not criticise the Ellis Roofing works, there were no supporting documents from them to show this.
39. Although Mr Riley relies upon the heavy rainfall as causing the first leaks on 2 November 2019, the paper setting out rainfall figures showed heavy rainfall at times prior to that in the months after March 2019 when the works were complete.
40. The Respondent had not properly assessed the quotations from Jarratt and Martin. A calculation of the likely costs from each on a similar basis to the extra costs charged by Ellis Roofing (£6000 for the parapet walls and balustrades + scaffolding at £1440) provides figures of £15,220 and £14,240 respectively, both some £10,000 or so below Ellis Roofing costs.
41. Mr Riley said that Flat 26 suffered leaks due to poor windows in Flat 29. However, the tenant of Flat 29 believed that the window was damaged when it was removed by Ellis Roofing and not replaced properly.
42. The proper way to proceed now should involve an analysis of what went wrong, where the leaks are and a solution. New lead trays for patio doors were proposed. Flats 26 and 17 have leaks through lintels and no apparent solution is offered by

Nicholls Basker. Nicholls Basker appear to be being heavily influenced by Mr Riley as to what is proposed.

43. Ms Tozer (Flat 26) told the Tribunal that she had had leaks since the new roof was put on by Egglestone. A small leak in a corner had gradually worsened, five further leaks occurred during the Ellis works. She suffers continuous leaks in the middle of the room, ceiling and wall and by a window.
44. Mr C Lovell of Flat 17 reported to the Tribunal leaks as soon as it started to rain after summer 2019. He refuted Mr Riley's claim that leaks had not occurred prior to 2 November 2019 by reason of photographs taken on 1 November 2019. Also he had holes in his plasterwork caused by Mr Riley's use of a damp check meter in October 2019. Further to this, a photograph showed his drain full of rubble left by Mr Ellis together with a further photo of Mr Riley trying to drill the rubble out of his drain. He cannot open any window in his flat and nobody can live in it. Flat 18 was still damp 2 to 3 days ago.
45. Ms A Churchill of Flat 10 told the Tribunal that leaks started within her flat after her windows were replaced. There were no leaks before the work started. The leaking commenced in October 2019 and, as the weather got more exciting, the rain came through as if the window was not there at all. Now it is gaffer taped. The cosmetic quality of the Ellis works too was poor.
46. Ms L Taylor of Flat 13 recorded her dissatisfaction with the fact that over £100,000 had been spent on the roof during her time in the building and yet the roof is still leaking.
47. In documents submitted for the hearing, Mr S Bell of Flat 5 complained of water ingress to his flat.

The Respondent

48. The Respondent argued that the works completed by Ellis Roofing were generally sound.
49. The Respondent had asked Haldons to research their folder of papers and to advise on the lead upstandings. The Respondent was not satisfied with the generality of Haldons' response.
50. The contract with Ellis Roofing had arisen as a result of site meetings, earlier quotation and subsequent detailed quotation. Ellis had tendered on the basis of replacing the lead upstands around the balustrades of flats 10 and 29 and around the apartments of flats 10 and 29.
51. Further quotations were received from Jarratt Roofing and F Martin Roofing, but only looking at Flat 29. Jarratt tendered at a price of £3890 and Martin at a price of £6800 for around flat 29. The Respondent selected Ellis on the recommendation of APA Management who had many years' experience of the firm. APA did not look at all 3 tenders.
52. Ellis additionally charged £3000 for the balustrades with a total price of £24,010 inclusive of scaffolding and patio doors.
53. In error, the Respondent actually paid £25,910, an overpayment of £1,900. Mr Riley was unable to explain how this had occurred, save that he had trusted "people". He had subsequently chased the overpayment but without result.
54. The Respondent did not use Haldons for the supervision of the job, *"it was a simple job"*.
55. The Respondent was dissatisfied with Ellis Roofing as Mr Ellis was difficult to control on and off the job and completed it in 4 tranches, when the expectation had been that it would be completed in one. Mr Ellis was a very chaotic worker, but he was kept on because there were serious leaks and there was a lot of pressure on the 5 directors.

56. It was Ellis Roofing who had come up with the specification.

57. "*The work looked ok*". Nicholls Basker & Partners, construction engineers, have not criticised Ellis's work. That is what he had meant when he said the following in the Respondent's Statement of Truth: *In their conclusions, they did decide that the lead flashing works around the balustrade and penthouse upstands as carried out by Ellis Roofing were fit for purpose,*

58. Ellis's work is not the cause of the current water ingress.

59. The first complaints about water ingress were on 2 November 2019 after very heavy rain. The patio terrace overflowed and water went up and underneath the Ellis leadworks. In respect of Flat 17, it went down the cavity wall and not the drain outside. The Respondent was unable to say the cause of water ingress to Flat 5 without going on to the patio of Flat 10. In respect of Flat 10 it was the patio doors at fault. Flat 26 is underneath Flat 29 where there was an overflow, which Mr Riley believed had been resolved by fixing the doors to Flat 29.

60. Flat 17 had been water-damaged as a result of Ellis causing damage to the roof of Flat 17 by leaving an upstand open which allowed water to enter. Notwithstanding that damage and a statement by Mr Riley that he would have pursued Ellis most vigorously, the Ellis Roofing final account was paid. Mr Riley pointed to personal illness at the time, but accepted that there were 4 other directors.

61. The Respondent had been dissatisfied with the response of Haldons as they could not give any definitive directions. They sat on the wall. They did not advise the cause of the problem. The Respondent felt that it had given Haldons enough information to receive an educated advice.

The Tribunal

62. The Tribunal recorded in the earlier Decision some of the relevant history given to it by Mr Whitehouse (then a Director of the Respondent company) and Mr Riley:

100. The Respondent gave a history of the roofing problems. Mr Whitehouse told the Tribunal that he had been chairman of the Respondent company over 20 years. The property had been built in 1985 and the roof has leaked from the first winter. The penthouses are wooden structures and they move in the wind and seals will be severely tested in heavy weather conditions. The building was prone in the face of the elements. He had felt the penthouse structure move as he had previously occupied one of the penthouse flats.

101. Mr Riley told the Tribunal that the Respondent had started a Section 20 consultation exercise on 1 November 2015 with a view to replacing the complete patio terrace roof around apartments 10 and 29. The company, Egglestone Developments, had performed the work and finished in September 2016. The works were signed off as satisfactory by RSL who oversaw the project and the Respondent paid the final bill. Costs in total were £80,613, some £8000 more than the original quotation.

102. As early as January 2017, there were signs of further water ingress. There were faults with the works completed by Egglestone Developments. It became apparent that a 20-year insurance-backed guarantee against faulty works and materials was worthless. The Respondent tried and continues to try all available avenues seeking recompense for the failure of these expensive works.

103. In summer 2018, the Respondent started to look for a contractor to remedy the cause of water ingress after doing some remedial works themselves to seal leaks, including putting in a new seal and lead-based tape as a temporary solution. In May 2018, they started to receive quotations for remedial work, being the replacement of the lead upstands. They were being

advised at that time by a surveyor, i.e. Haldons. They received 3 quotations and put one of those quotations forward to Haldons for comment, being the quotation from Ellis Roofing Ltd in the sum of £20,740. This company was known to and recommended by the Respondent's Managing Agent.

104. The Respondent was dissatisfied with the response of Haldons because they wanted all sorts of additional information and provided little advice despite their services costing £848.

105. The Respondent did not believe that a further Section 20 consultation was required and believed that the works would be covered by the original Section 20 notice as it was part of the roof replacement.

106. The works were split into 4 tranches because of the availability of the contractor and because of the availability of funds to pay him. Mr Riley accepted that this was an artificial split of the works and that it was not 4 sets of work but 1 split into 4.

107. The contractor turned out to be less than satisfactory; indeed, the Respondent was very dissatisfied with the way he worked. He was difficult to pin down and would often not attend when he had promised. Notwithstanding this, the Respondent paid for each of the 4 tranches of work, paying a total sum of £25,910.

63. The Tribunal has looked at the issues here in their historic context. The comments made by the Tribunal about the quality of the building and its position in the earlier Decision are still very relevant. Further, the Tribunal said this under General Comments in that Decision: "*An amateur approach may appear to reduce costs, but that is not always the result. The leaseholders here have spent close on £110,000 to resolve a leaking roof. The proper course was suggested in the letter of 3 September 2018 from Haldons construction consultants. Had the Respondents engaged further with Haldons as requested, they would have had a full professional appraisal of the works proposed by Ellis Roofing. On completion of the appraisal Haldons may have made other recommendations to ensure successful completion of the works. Following a proper course will always be reasonable, and the proper costs of such a course are likely to be held as reasonable by a Tribunal even where it appears to be more expensive than "doing it on the cheap"*. The Tribunal repeats those comments here.
64. There is a measure of caution for the Applicants also in the advice given by Haldons, "*Due to the nature of the site in its exposed location, and the type of construction, it is extremely difficult to identify exact points of entry and causes of water ingress to the building. Consequently, specifying remedial works is often challenging and rarely solves all issues.*
65. Haldons are construction consultants. They are experts in their field. Having spent already some £80,000 in failing to make the roof watertight, any sensible landlord would have spent the money on engaging experts to oversee the project. This Respondent even baulked at spending further sums on a proper analysis of what Ellis Roofing planned to do, despite the clear warning in Haldons' letter to the effect that "*The information provided with the Ellis Roofing quotation is insufficient to enable us to adequately appraise the proposal and therefore our comments are limited and based on incomplete information.*" It was, finds the Tribunal, a reckless and unreasonable act for the Respondent to spend a further substantial sum without proper guidance.
66. The final quotation of Ellis Roofing dated 23 September 2018 was parlously lacking in detail. It was seen by Haldons and commented upon in their letter to Mr Riley.

There is no evidence before the Tribunal that the guidance and comments made by Haldons were transmitted to Ellis Roofing or included either in the contract or the actual works, but rather the Tribunal notes that Mr Riley signed the quotation on 28 September 2018.

67. Nor, despite the dissatisfaction with Ellis Roofing did the Respondent take the opportunity presented by the piecemeal work of Ellis Roofing to stand back and reevaluate the situation.
68. The same specification was not given to the 3 contractors asked to tender. The final specification was arrived at "on the hoof" and chosen by Mr Ellis himself. He was, by far, the most expensive of the 3 when a calculation is made crudely upon the basis suggested by Mr Bell.
69. There is a conflict as to how he was chosen. Mr Riley says that he was recommended by APA Management, but APA told Mr Bell they had had no involvement in the roof works. Wherever the truth lies there, even if APA had recommended Ellis Roofing, they are a management company and not experts in the mould of Haldons and nor had they seen the three quotations. Haldons expressed real caution, as detailed above, about the lack of specificity in the Ellis Roofing proposals.
70. The £1900 overpaid could not reasonably be expected of the Applicants, in any event. Why should they pay for a failure by the Respondent to spot that it was being overcharged?
71. The Respondent should have engaged the services of an expert company, which could have checked on the quality of the works as they progressed even if it decided to go ahead without a full prior analysis of its viability. There were opportunities to pull some of the coals from the fire at the stages of the works.
72. There could be no guarantees that the works would succeed, but the chances of them not succeeding could have been much reduced by a proper prior analysis and checking of the works in progress. This is not the benefit of hindsight, but rather a statement of the obvious.
73. There is no evidence before the Tribunal that Nicholls Basker regarded the Ellis works as being sound, an assertion which Mr Riley rowed back from when asked in oral evidence to point to such a conclusion related in his Statement of Truth. Indeed, the scope of works detailed within that company's Specification for Remedial Works has very much the feel of works that Ellis Roofing should have done and a repetition of some of the works completed by it:

- *Lower and replace existing parapet rainwater outlets. Add new rainwater outlets through the parapet.Install new render bellcast to parapet wall perimeter.Raise all penthouse door thresholds on seaward elevations. Replace all affected doors with new to revised door heights. Waterproofing to remaining seaward facing windows. Repair all lead flashings affected by the works.Install new neoprene gaskets under all lead flashings. Inspect existing GRP to whole roof and repair as necessary. Replace all guttering and downpipes with higher capacity.*

74. The Tribunal has determined that this was a disastrous exercise. It was poorly conceived and managed in circumstances where a considerable sum had already been wasted and where the Respondent needed to get it right. It did not achieve the aim hoped for. The landlord now plans to spend even more on getting it right. The Tribunal could see no benefit to the tenants from this failed enterprise, where water is still permeating the building, in some cases worse since the works. The landlord now intends to put into effect what Ellis Roofing should have achieved. The Tribunal could see no gains to the tenants from the Ellis roof works.

75. Taking all of the facts into consideration, the Tribunal has determined that a nil amount is reasonably payable by the Applicants for the Ellis roof works project.
76. The Tribunal is painfully aware that disallowing such a large sum may well place the Respondent company (and, accordingly, the tenants) in some financial jeopardy, but must make the determination in accordance with the Jurisdiction it must apply and, having found that the sum was not reasonably demanded of the Applicants, must disallow it.

The Legal Advice

The Applicants

77. The Applicants said that the legal fees had not been disclosed to them at the previous hearing. The Applicant then was not represented and saw no reason why the other side should be either.

The Respondent

78. The Respondent told the Tribunal that the earlier Tribunal hearing was such a huge case and the directors had no experience of the First-tier Tribunal. "The lady" at Boyce Hatton Solicitors had talked them through the various stages and advised them how to produce documents and follow the procedure. Mr Riley believed that the charges were £195 per hour.

The Tribunal

79. The Tribunal first examines the lease to determine whether the Applicant is able to recover its costs via the Service Charge in accordance with the lease. The Tribunal has followed the guidance of the Upper Tribunal in **Geyfords Ltd v O'Sullivan, Grinter, Shaw, Morgan, Bonsor** [2015] UKUT 0683 (LC) and has interpreted the lease in accordance with the guidance of the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36.
80. The Tribunal reminds itself of the guidance in ***Assethold Ltd v Mr NM Watts*** [2014] UKUT 0537, where the Upper Tribunal rejected the proposition that in order for legal costs to be recovered it was necessary for there to be clear and unambiguous wording to that effect. "*55. The proper question was not whether specific, or "magic" words appeared in the paragraph but whether the costs in question had been incurred for the purposes mentioned in the paragraph."*
81. In **Union Pension Trustees Limited, Paul Bliss v Mrs Maureen Slavin** [2015] UKUT 0103 (LC), the UT considered whether a lease including the following wording gave the landlord the power to recover £6,500 in legal costs incurred in LVT proceedings: *"... any other costs and expenses reasonably and properly incurred in connection with the landlord's Property including without prejudice to the generality of the foregoing (a) the cost of employing Managing Agents and (b) the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder.*" It was argued that the legal costs had been incurred "*in connection with the landlord's property*" in particular since it must have been contemplated that costs might be incurred in connection with the recovery of the expense of maintaining the fabric of the building. The Upper Tribunal rejected the argument. In another part of the lease there was the power for the landlord to recover the cost of specified professionals but lawyers were not included. In those circumstances: "*The parties cannot be taken to have slipped in, under general words, an obvious category of potential expenditure which their more specific provisions appear consciously to omit.*"
82. *Looking at the service charge provisions of the lease as a whole, the costs of managing and administering the Building and the employment of professionals is*

covered extensively in clause 5(4)(g). Entirely absent from that clause is any reference to lawyers or the cost of proceedings. While I agree that the absence of a specific reference to legal expenses is not fatal, provided there is other language apt to demonstrate a clear intention that such expenditure should be recoverable, when considering the scope of any general words relied on for that purpose it is necessary to have regard to other relevant provisions of the lease. The terms of clause 5(4)(g) are in very marked contrast to those of clause 3(9) which is an express covenant by the tenant to pay to the landlord all costs, including solicitors', counsels' and surveyors' costs and fees, incurred in a specific category of legal proceedings, namely those under ss. 146 and 147 of the Law of Property Act 1925.

83. *When the lease was granted in 1981, before residential property tribunals had jurisdiction to resolve service charge disputes in a largely costs-free environment, the parties would have anticipated that a dispute over the liability to contribute towards a service charge would be resolved in the County Court, and that by an order of the court the successful party would recover its costs from the unsuccessful party. The idea that leaseholders should be collectively responsible through the service charge for litigation costs which had not been recovered from one or more of their number with whom the landlord had been in dispute would not have been at all obvious. The expectation apparent from clause 3(9) was that the landlord's costs would be recovered from a defaulting leaseholder, rather than through the service charge.*
84. *In* ***Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited*** *[2016] UKUT 317 (LC), the Upper Tribunal refused to allow legal costs in the absence of clear words. There it was said that there is no need to construe service charge clauses restrictively. That said, 'it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease': see* ***Francis v Philips*** *[2014] EWCA Civ 1395 at [74]. The court or tribunal should not therefore 'bring within the general words of a service charge clause anything which does not clearly belong there.'*
85. There is no hard and fast rule that legal costs cannot be recovered where the clause employs 'general words' and makes no specific mention of lawyers or the costs of legal proceedings. However, the requirement of clarity means that in such circumstances there must be '*other language apt to demonstrate a clear intention that such expenditure should be recoverable*': **Union Pension Trustees Ltd v Slavin** [2015] UKUT 0103 (LC).
86. The Tribunal construed the lease term in that case conjunctively so as to restrict the costs of solicitors to their role in management of the estate.
87. In **Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited,** the terms of the lease were detailed as follows:

6. By Clause 3(A) *the Lessee covenants with the Lessor that the Lessee will at all times during the term:*

Pay to the Lessor such annual sum as may be notified to the Lessee by the Lessor from time to time as representing the due proportion of the reasonably estimated amount required to cover the costs and expenses incurred or to be incurred by the Lessor in carrying out the obligations or functions contained in or referred to in this Clause and Clauses 4 and 6 hereof and in the covenants set out in the Ninth Schedule hereto...

The ‘costs and expenses’ are referred to in clause 3A as “*the Management Charges*”, the clause making further provision for the calculation and the time for payment of such charges and the establishment of a reserve fund.

7. By Clause 4 *the Lessor covenants with the Lessee that the Lessor will perform and observe and carry out the covenants and obligations set out in the Ninth Schedule and the obligations on its part contained in the lease.*

8. By Clause 6(A) *it is agreed and declared as follows:*

That the Lessor shall at all times during the term hereby granted manage the Estate and the Block in a proper and reasonable manner and shall be entitled:

(i) to appoint if the Lessor so desires managing agents for the purpose of managing the Estate and Block and to remunerate them properly for their services;

(ii) to employ architects surveyors solicitors accountants contractors builders gardeners and any other person firm or company properly required to be employed in connection with or for the purpose of or in relation to the estate and the Block or any part thereof and pay them all proper fees charges salaries wages costs expenses and outgoings;

(iii) to delegate any of its functions under Clause 6 and sub-clause A(i) and (ii) of this clause and the Ninth Schedule hereof to any firm or company or any other body of persons whose business it is to undertake such obligations upon such terms and conditions and for such remunerations as the Lessor shall think fit.

88. Sinclair Gardens and Avon Estates previously had proceedings in front of the First-tier Tribunal in 2010 and 2011. Sinclair Gardens attempted to recover the total sum of £10,112.40 in legal costs from its tenants via the service charge provisions under the lease.
89. The Upper Tribunal held that the only legal costs that could be recovered from the tenant were those incurred in the “*ordinary course of the management of the estate*.” Clause 6 did not mean the landlord could instruct solicitors for any purpose and recover the costs from the tenant. The costs of litigation did not qualify as those incurred in the ordinary course of the management of the estate. Although the clause made explicit reference to solicitors, the recoverable solicitors fees were only those relating to their employment for the purposes of the management of the estate.
90. The Upper Tribunal considered the whole lease. As there were more specific provisions elsewhere, the general wording of clause 6 (A) did not impose liability on the tenant for the costs of litigation. In order for legal costs to be recovered under a general service charge clause, it must be clear from the wording that this is the intention.
91. There is no hard and fast rule that legal costs cannot be recovered where the clause employs ‘general words’ and makes no specific mention of lawyers or the costs of legal proceedings. However, the requirement of clarity means that in such circumstances there must be ‘*other language apt to demonstrate a clear intention that such expenditure should be recoverable*’: **Union Pension Trustees Ltd v Slavin** [2015] UKUT 0103 (LC).
92. **Eshragi v 7/9 Avenue Road (London House) Ltd** (2020) UKUT 0208 (LC): *Paragraph 11, which the FTT found to be the critical provision, allows the following expenditure to be recouped through the service charge:*

"The cost of providing or maintaining any other service matter or thing which the Lessor may in its absolute discretion decide shall be proper and reasonable to be provided done or carried out for the benefit of the building or the occupiers thereof as a whole and/or in the interests of good estate management."

A dispute over the corporate governance of the respondent company was not "for the benefit of the building or the occupiers thereof as a whole and/or in the interests of good estate management."

I have no difficulty in relation to the costs incurred in pursuing the recovery of service charges from Mr Freedman. Good estate management requires that service charges be collected, including by proceedings if necessary. To the extent that the costs of such proceedings are not recovered from the defaulting leaseholder, or their mortgagee, I see no reason why they should not be recovered under a charging provision in the terms of paragraph 11. The fact that the costs of the proceedings are primarily recoverable from the defaulting leaseholder (or his mortgagee) under clause 2(9)(a) does not mean that any uncollected shortfall arising on an assessment of costs by the court or caused by an inability of the leaseholder to pay, is outside the scope of paragraph 11.

93. In the present case, the Tribunal considered the whole of the Lease. In the absence of any suggestion from the Respondent or APA as to a clause which would allow recovery of legal costs, the Tribunal set about an analysis of the terms of the Lease. It noted that, although clause 3(8) appeared to be general in its terms and made no mention of legal fees, there were also the specific terms of clauses 2(16) and (17), where specific reference is made to the recoverability of legal costs and solicitors' costs and fees respectively. This was a very similar situation to that pertaining in **Union Pension Trustees Limited, Paul Bliss v Mrs Maureen Slavin.** Applying the reasoning given by the Upper Tribunal in that case, the Tribunal finds that there is no provision within the Lease which would allow the Respondent landlord to recover the legal expenses incurred in receiving advice in respect of the earlier hearing, so that the Respondent cannot recover all or any of the legal costs incurred, or to be incurred, by the landlord in connection with proceedings by way of a demand for service charge.

Section 20c and Paragraph 5A Application

94. The Applicants have made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Respondent's costs incurred in these proceedings.

Section 20C

95. The costs in question here are related to the time spent by the directors of the Respondent company at £36 per hour, totalling £8712 + telephone calls at £25 and stationery and postage at £14.50, a total of £8751.50. Mr Riley told the Tribunal that further work since that assessment would increase the costs by a further £3456.
96. Mr Riley told the Tribunal that it was the intention of the directors to pay the costs into the service charge account.
97. Mr Bell argued that directors have never charged for their time before and that he did not believe that it was allowed for in the lease and had not been agreed at the last AGM. He had no objection to payment for stationery and mobile calls if the extra cost was not already paid for in Mr Riley's mobile contract.

98. The Tribunal first examines the lease to determine whether the Applicant is able to recover its costs via the Service Charge in accordance with the lease. The Tribunal has looked particularly at Clause 3(8) of the lease and has concluded that there is provision within the lease permitting the recovery by the Respondent of its reasonable costs (**London Borough of Southwark v Paul and Others** [2013] UKUT 0375 (LC)).
99. In considering an application under Section 20C, the Tribunal has a wide discretion, having regard to all relevant circumstances. It follows a similar course when considering administration charges. *"Its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them." "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."* (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000).
100. *"An order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances." "The scope of the order which may be made under section 20C is constrained by the terms of the application seeking that order...; "The FTT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else".* (**SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)). *"In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."* (**Conway v Jam Factory Freehold Limited** (2013) UKUT 0592 (LC)).
101. In **Bretby Hall Management Company Limited v Pratt** (2017) UKUT 70 (LC), HH Judge Behrens gave a summary of the decision in **Conway v Jam Factory**:

46. I was referred to a number of cases where s 20C has been considered including the decision of the Deputy President in The Jam Factory [2013] UKUT 0592 which contains a full review of relevant authorities. I shall not lengthen this judgment by setting out the lengthy passage from the report. I summarise what I take to be the principles:

1. *The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.*

2. *The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.*

3. *Where 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 unreasonably cannot normally expect to recover his costs of defending such conduct.*

4. *The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.*

5. *One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income.*

102. Because the Applicants have been wholly successful in their application, the Tribunal has no hesitation in allowing their application under Section 20c of the Landlord and Tenant Act 1985. It directs that the Respondent landlord's costs in respect of their charged hours in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

103. In making that determination, the Tribunal is aware of the nature of the landlord in this case, but notes also from the evidence of Mr Riley that the intention in adding this sum to the service charge demand was not to pay the directors for their time, but to increase the monies available to spend on services.

Paragraph 5A

104. The Tribunal follows the guidance in **Avon Ground Rents Ltd v Child** [2018] UKUT 02014.

105. **Avon Ground Rents Ltd v Child** [2018] UKUT 02014 (LC), Mr Justice Holgate:

53. *This analysis potentially raises some practical problems. We understand that many lessors have commonly relied upon lease terms of the kind referred to in para. 5 above (and on **Chaplair**) to demand payment by a lessee of the whole of the legal costs they have incurred in proceedings to recover service charge arrears from that lessee, including dealing with any issues about the reasonableness of such service charges. Where this happens, the lessee has only been able to challenge the reasonableness of such "post-issue" costs once they are demanded and become "administration charges" amenable to control under the 2002 Act and by being willing to become involved in yet more litigation. That process could carry on ad infinitum, generating unnecessary litigation, professional fees and costs. Para. 5A of Sch. 11 of the 2002 Act has been introduced to enable a lessee to make an application for an order to reduce or extinguish litigation costs which have been or are to be incurred. The order made by the court or tribunal does not depend upon those costs having already become "administration charges." Provided that a lessee makes an application under para. 5A it is possible for the court or tribunal to address this litigation "carousel".*

57.The Court of Appeal considered the corresponding jurisdiction to limit the recoverability of legal costs by way of service charge under s.20C of the 1985 Act in the case of Iperion Investments v Broadwalk House Residents Ltd (1994) 27 HLR 196. On the footing that the tenant was contractually liable to pay a share of the landlord's legal costs of proceedings as part of the service charge, the Court of Appeal held that it should exercise its statutory power under s.20C to order that such costs should be disregarded in determining the amount of the service charge

payable by the tenant. It was held to be just and equitable to exercise the discretion in favour of a tenant who had been awarded the costs of legal proceedings against his landlord.
Delivering the leading judgment, Peter Gibson LJ said (at pp.202-3) that an obvious circumstance which Parliament must be taken to have had in mind in enacting s.20C was a case where a tenant had been successful in litigation against his landlord yet the costs of the proceedings were within the scope of the service charge recoverable from the tenant. Where a tenant has been successful in litigation against his landlord and the court has decided not merely that he should not be ordered to pay any costs to the landlord but instead the landlord should pay the whole or part of the tenant's costs, it is unattractive that the tenant should subsequently find himself having to pay any part of the landlord's costs through the service charge. Citing observations of Nicholls LJ in the earlier Court of Appeal decision in Holding & Management Ltd v Property Holdings & Investment Trust Plc [1989] 1 WLR 1313, the Court of Appeal said that a landlord "should not get through the back door what had been refused by the front".

106. The Tribunal directs that the Respondent landlord's costs in respect of their charged hours in relation to this application are not to be regarded as relevant charges to be taken into account in determining the amount of the administration charge for the current or any future year for the same reasons as detailed above in respect of the Section 20c application.

A Cresswell (Judge)

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 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.

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

18 Meaning of "service charge" and "relevant costs"

(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.

19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.

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

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

(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 of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

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

> *(3) The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Schedule 11, Part 1, Paragraph 5A Commonhold and Leasehold Reform Act 2002

(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.

(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal