FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/LSC/2020/0170**
HMCTS code	**:**	**REMOTE: V: VIDEO**
Property	**:**	**Flats 2 and 3 Brunswick Mansions Handel Street London WC1N 1PE**
Applicant	**:**	**Triplerose Ltd**
Representative	**:**	**Ms K Helmore of counsel**
Respondent	**:**	**(1) Brunwick Mansions Management Company Ltd** **(2) Mr G Gupta** **(3) Girish Gupta Ltd**
Representative	**:**	**(1) Mr M Comport, Dale and Dale, solicitors** **(2) and (3) No appearance**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Ms S Phillips MRICS**
Date and venue of Hearing	**:**	**21 June 2021** **Remote**
Date of Decision	**:**	**6 December 2021**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of service charge years from 2015 to 2020. The Applicant made two applications on the same date, which are joined under this case number.

2. The relevant legal provisions are set out in the Appendix to this decision.

The property

3. Brunswick Mansions is a mansion block, comprising 15 flats. Flats 2 and 3 are on the ground floor and lower ground floor.

The leases

4. The leases are both dated 2 May 2006, for terms of 999 years, and are in the same terms, apart from their percentage service charge contributions.

5. The first Respondent (the Management Company) is stated in the lease to be a company formed with the object of maintaining the building and providing services to the flats, and for collecting and spending the service charge. The leases provide for the lessees to be a member of the Management Company (paragraphs (2) and (3) of the recitals).

6. The structure of the service charge is based on the Management Company, except in respect of the insurance obligation (see paragraph [9] below). The definition of "total expenses" (clause 1(9)) is the expenses and other outgoings of the Management Company set out in the third schedule, and that schedule refers primarily to the Management Company's expenditures.

7. On assignment, the lessee is required by the covenant in clause 3(19)(c) to "transfer the Lessee's one share in the Management Company to the assignee at par value". In clause 6(5), provision is made for the lessor, with the lessees, to establish a new company if the Management Company enters into liquidation. Further, by clause 6(6), the lessor has the right to perform the Management Company's covenants, and to recover sums payable to it under the leases, should the Company cease to exist.

8. The covenants to maintain etc the building and clean and provide services to the common areas are by the Management Company with the lessee and the lessor (clause 5(1) and (2)). The Management Company is similarly responsible for procuring the approval and registration of share transfers under the lease (clause 5(3)).

9. By clause 4(4), it is the lessor, not the Management Company, who convents to insure the building as specified therein. The lessee covenants with both the lessor and the Management Company to pay (by way of further rent) a service charge for insurance (clause 3(1(b)) (as well as the other expenditure of the Management Company (clause 3(2)(a)).

10. The third schedule, which specifies the Management Company's expenses and outgoings, includes the following:

> "reasonable costs and proper fees and costs (including legal fees) of the Lessor's agents (which may be a company connected or associated with the Lessor) or the Management Company for the collection of rents and service charge … and for the general management of the building" (paragraph 7);
>
> "all other proper charges assessments and other outgoings … payable by the Management Company and/or the Lessor …" (paragraph 16)
>
> "the reasonable cost of doing all such other acts matters and things as shall be necessary or advisable for the proper maintenance and administration or inspection of the Building (including … the appointment and remuneration of … solicitors…)" (paragraph 19).

11. Clause 3(15) contains a lessee's covenant to

> "Pay to the Lessor the Management Company on demand all costs charges and expenses (including legal costs and surveyor's fees) which may be incurred by the Lessor or Management Company:-
> (a) under or in contemplation of any proceedings … under section 146 or 147 of the Law or Property Act 1925 … or in the preparation or service of any notice thereunder … notwithstanding that forfeiture is avoided …".
> (b) …

(c) in connection with any action reasonably and properly undertaken against the Lessee for recovery of any arrears of rent or service charge …”

12. Service charge percentage is 7.9615% for flat 2 and 8.0425% for flat 3 (Clause 1(8) and fifth schedule, part 3, in each lease).

The issues and the hearing

Introductory

13. Ms Helmore of counsel represented the Applicant. Mr Comport, Dale and Dale Solicitors, represented the first Respondent.

14. The second and third Respondents were not represented and did not appear. The second Respondent was the freeholder of the building until August 2017. Since then, the third Respondent has been the freeholder. Unqualified references in this decision to “the Respondent” refer to the first Respondent.

15. We heard evidence for the Applicant from Mr I Moskovitz, and for the Respondent from Mr S Unsdorfer and Ms Berlin. Mr Moskovitz is a director of the Applicant company. Mr Unsdorfer is a director of Parkgate Aspen Ltd (“Parkgate”), who are the managing agents for the Respondent. He is also the sole director of the Respondent. Another company, PA Registrars, acts as company secretary of the Respondent. Mr Undsorfer is in effective sole control of all three companies. Ms Berlin is the property manager responsible for Brunswick Mansions at Parkgate.

16. Preliminary questions arose in relation to various documents and other matters. The only matter on which we made a ruling was in relation to an estimate provided by the Respondent of managing agents’ fees which came from what is described as a “sister company” of the Applicant. The Applicant is professionally a landlord. The estimate is not dealt with in a witness statement, and was not related to the Applicant’s status as the tenant in these proceedings. We concluded that it would be unfair for the Respondent to use the estimate in cross-examination of the Applicant. It could be used in submissions, however, as an example of managing agents fees if the Respondent wished to do so. In the event, Mr Comport did not rely on the document in his submissions.

17. The disputed service charges relate to:

(i) Insurance, from 2015 to 2020;

(ii) Management fees in 2019 and 2020; and

(iii) The entry phone system, from 2017 to 2020.

(iv) The Applicant also applies for orders under Section 20C of the 1985 Act and Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A.

Insurance

18. The charges (for the property as a whole) for insurance were as follows:

    (i) £8,997 for 2015;

    (ii) £10,359 for 2016;

    (iii) £10,995 for 2017;

    (iv) £11,982 for 2018;

    (v) £15,306 for 2019; and

    (vi) £26,223 for 2020.

19. These figures are taken from the Applicant's Opening Statement, dated 10 June 2021 and signed by Ms Helmore, which was provided to us for the hearing, except that for 2020, as explained in the Applicant's statement in response, of the same date, and produced in the bundle.

20. The insurance policy relates only to Brunswick House. It is not part of a larger portfolio block policy.

21. The Applicant argued that the costs of insurance were excessive, but in particular that the increases since 2015 were unreasonable. The Applicant produced its own quotation secured by an insurance broker, Reich Group, from Allianz Insurance for an annual premium of £8,106.71. The date of the quotation was 12 March 2021.

22. Mr Moskovitz's evidence was that the alternative quotation was based on the existing insurance policy and the information available to the current insurer as to claims history. In his second witness statement, Mr Moskovitz explains that he initially secured the quotation without one claim, to which Mr Unsdorfer referred in his witness statement. Mr Moskovitz asked the broker for a revised quotation. He was told that there would be no difference, as the claim that he had omitted (for £7,832, in 2015, apparently for water damage) was over five years old and would not be considered relevant.

23. In her witness statement, Ms Berlin argued that the full claims history had not been disclosed to Mr Moskovitz's broker. In cross examination, however, she conceded that it had, Ms Holmore having taken her to the relevant documents.

24. In her witness statement, Ms Berlin said that Parkgate went to a reputable insurance broker, St Giles Insurance and Finance Services Ltd (St Giles), every year to test the market. In response to the Applicant's quotation, Ms Berlin said that Allianz Insurance had declined to quote when approached by St Giles for cover for 2020/21, and produced a copy of an email to that effect. Ms Berlin states that the Respondent does not take a commission in respect of insurance. She notes that, as is usual commercial practice, the brokers do so.

25. However, in her oral evidence, when Mr Comport asked her to prove her witness statements, she made what she called a small correction, and said that it was Mr Gupta (which we take to include via the third Respondent company during the relevant period) who went to St Giles, the brokers. Parkgate did receive documents from the brokers, but it was Mr Gupta who relayed the information to the broker, and it was he who would know about any additional commission.

26. At the close of the evidence, the position was, then, that the Respondent's own evidence suggested that the Reich/Allianz quotation was based on the correct claims information, and was in substance broadly like-for-like that secured by St Giles.

27. A significant element of the Respondent's position in respect of the insurance was that the Allianz Insurance quotation produced by the Applicant was expressed as coming within Allianz's "DA scheme". Mr Comport put it to Mr Moskovitz that "DA" stood for "delegated authority", and that this meant that the broker had been delegated authority by Allianz to offer insurance on a premium set by it, the broker. The charge was essentially that in such circumstances, a broker may offer a low initial premium in order to secure business, and the premiums in future years would rise significantly. Mr Moskovitz said that he did not understand that "DA" meant that, nor that the premium was set by the broker, not Allianz itself.

28. It appears that the only evidential basis for this suggestion is the following passage in Ms Berlin's witness statement:

> "the brokers [i.e. St Giles] have stated that the broker [i.e. Reich Group] may have the empowerment with Allianz to be able to quote themselves. This type of scheme does produce the situation of the quotation produced by the Applicant … . This can therefore lead to a substantial increase later."

29. We turn to our conclusions in relation to the insurance. In relation to the issue of delegated authority, we note, first, that the positive evidence that the Reich Group quotation was made under delegated authority is thin. It relies on the report by Ms Berlin of an oral statement by someone at St Giles. We do not know upon what basis that statement was made, but all that has been suggested is the use of the title "DA Scheme" in the quotation letter from Reich. No evidence as to what that meant has been provided, other than an assumption as to the meaning of the initials "DA". As a matter of general knowledge, we are aware that some brokers, in some contexts, do have delegated authority to write insurance for a primary provider, but that is as far as it goes.

30. But even if we accept that the Reich quotation was made under a delegated authority from Allianz, the Respondent's claim that that explains the very large discrepancy between the two quotations goes a great deal further than that.

31. First, the Respondent's argument relies on it being a practice of brokers to use delegated authority to under-price insurance in order to secure repeat business in future years. The evidence for that again rests solely on the passage quoted from Ms Berlin's witness statement. As a matter of common knowledge and common sense, it seems plain that a primary insurer is only likely to grant delegated authority to a broker that the insurer trusts to write appropriate policies. That is a consideration which would be expected to constrain a broker from using under-priced policies as a "loss leader" in the way suggested.

32. But even if, secondly, a broker was both able and willing to write policies at a lower-than-market premium using its delegated authority for that purpose, it is wholly implausible that it would do so to the extent required for this to be an explanation of the difference between the figures provided to us for the end of the period – £26,223 and £8,106. The "loss leader" approach could hardly be expected to work if the second year's premium were to jump to three times the "loss leader" figure, quite apart from the consideration referred to in the last paragraph.

33. Finally, exhibited to the Respondent's Statement in Response is a letter from Reich Group, dated 10 June 2021. The letter deals with three points, said to clarify "points raised". We do not have a copy of how the points put to Reich Group were expressed. One of the points is expressed as follows: "The premium rates and the range of cover including the excesses are provided by Allianz Insurance". We hesitate to rely wholly on this letter. First, the expression "provided by" is, perhaps, somewhat ambiguous, in this context. If the broker did have delegated authority, that would technically mean that it was standing in Allianz's shoes contractually, and so it might be argued that "provided by" would be an accurate description of even a policy written under

delegated authority. This is not the obvious and natural reading of the passage, but – and this is our other reason for hesitation – the letter was not the subject of cross-examination of Mr Moskovitz by Mr Comport, and was not relied on by Ms Helmore in her closing submissions. The Tribunal only appreciated its possible significance after the hearing. Nonetheless, it provides some reinforcement to our scepticism of the delegated authority loss leader argument.

34. As to the law, Mr Comport cited *Berrycroft Management Company Ltd & Others v Sinclair Gardens Investments (Kensington) Limited* [1997] EG 142, *Avon Estates (London) Ltd v Sinclair Gardens Investments (Kensington)* [2013] UKUT 264 (LC) and *Cos Services Ltd v Nicholson and Willans* [2017] UKUT 382 (LC), [2018] L & TR 5. Much the most useful for our purposes is the last of these, in which Judge Bridge analyses a number of previous authorities in the context of insurance disputes in the light of the then recently decided Court of Appeal authority *Waaler v Hounslow LBC* [2017] EWCA Civ 45, [2017] 1 WLR 2817.

35. At paragraph [46], Judge Bridge quotes from *Waaler*, paragraph [37]

> "whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome"

and applies that approach in the context of an insurance dispute. As in this case, the landlord had obtained insurance cover as a result of market testing carried out by a broker (although in that case, the insurance was a block policy).

36. Both parties agree that the insurance issue hinges on a question of outcomes in this case, as in *Cos Services*.

37. In concluding his consideration of the competing insurance quotations in *Cos Services*, Judge Bridge said

> "It remains a mystery, having heard the evidence adduced by both parties, why there is such a discrepancy between the premiums charged to tenants under the landlord's block policy and the premiums obtainable from other insurers on the open market. It is a mystery which the landlord has been wholly unable to explain."

38. At the close of the evidence in this case, things are not so stark as in that one. The discrepancy was even greater in *Cos Services*, and the tenants produced more than one competing quotation. However, the discrepancy remains a mystery. The Respondent seeks to explain the mystery on the basis of the delegated authority "loss leader" argument, thereby distinguishing this case from *Cos Services* (and *Forcelux*). For the reasons we set out above, that argument is based on a thin evidential base, and possible, but untested, contradiction by the broker. But even if we were to accept that the policy was written on the basis of

a delegated authority, we consider that that goes nowhere near explaining the size of the discrepancy in this case.

39. A landlord is not necessarily required to accept the cheapest price offered, for insurance any more than any other item of expenditure referable to the service charge. Further, we have only one quotation from the Applicant. Both considerations lead us to conclude that, even on a finding that, at the relevant period, the Respondent's premium was not reasonably incurred, that does not mean that the only sum that would have been reasonably incurred is that provided by the Applicant. We therefore approach setting a sum that would have been reasonably incurred in a spirit of caution. In that spirit of caution, we are also prepared to accept it is at least possible that a moderate version of the delegated authority loss leader argument might, at the margin, have led Reich to set a somewhat lower premium than would be sustainable in the longer run.

40. Taking these considerations into account, we are not satisfied on the evidence before us that the insurance premiums passed on in the service charges for the years from 2015 to 2018 inclusive were unreasonably incurred. We paused before concluding that the last of those, just under £12,000 in 2018, was reasonably incurred, but concluded on balance that it was. However, we conclude that those for 2019 and 2020 were unreasonable, and should be limited to £12,000.

41. *Decision*: The expenditure on insurance premiums from 2015 to 2018 was reasonably incurred. That on the premiums for 2019 and 2020 was not reasonably incurred. A sum of £12,000 in each year would have been reasonably incurred.

Management fees

42. The fees contested were, for the block as a whole, £8,682 for 2019 and £7,423 for 2020. These represent charges of £691.23 for flat 2 and £696.69 for flat 3 in 2019 and £590.98 and £597 respectively for 2020.

43. Mr Moskovitz said that he was not contesting the management fees in earlier years, because he had benefited from a voluntary rebate of 40% of the fees (he exhibited a service charge demand showing that these rebates were £203.42 for number 2 and £205.49 for number 3 in 2018).

44. Both in the bundles and orally, there was considerable evidence in relation to the history of the management of the block, and in particular Mr Undsorfer's role in it. In brief, Parkgate managed the block from 2004, having been appointed by the then freeholder. In 2007, Mr Unsdorfer became, apparently, sole director of the Management Company because, on Mr Unsdorfer's evidence, no-one else was willing to do so, and it would have been disadvantageous for the tenants if the

Company had folded. Parkgate do not have a written contract with the Management Company. Mr Moskovitz's evidence was that he had sought to become a director of the Company in the past, but his offer had not been taken up. Mr Unsdorfer said that he had invited Mr Moskovitz to nominate directors after the instant application was made, but he declined.

45. On the face of it, there were a number of potential factual and legal disputes arising from this history, including whether Mr Unsdorfer's appointment as sole director of the Management Company was irregular. However, the Applicant did not invite us to conclude that the history of the Management Company was such as to have any direct effect on the payability or reasonableness of the service charge demands. As a result, we do not consider that these issues fall to us to determine, and we do not do so. Rather, at most, they are illustrative of the background to the disputes that we have identified. As a result, we do not consider we are required to rehearse the arguments in detail or come to factual conclusions.

46. It was nonetheless surprising that there was no contract between Parkgate and the Management Company. Similarly surprising was Mr Unsdorfer's approach to the question. He appeared to think it was inappropriate for there to be a written contract, because he controlled both companies. He also considered there was no oral contract, because it would amount to "me talking to myself".

47. But, ultimately, we do not consider that the lack of a contract takes us very far in assessing the reasonableness of the management fee. The Applicant did not raise any issue about the quality of management, so the question in reality is quite a simple one – is the charge simply too high for adequate performance of the management tasks?

48. Ms Helmore raised an issue as to whether there had been failure to consult on what might be a qualifying long term agreement (section 20 of the 1985 Act). But, similarly, the question of prejudice/dispensation (*Deajan Investments v Benson and Others* [2013] UKSC 14, [2013] 1WLR 854) would come down in substance to the same question as we pose above, but in the context of conditional dispensation. We do not consider it necessary to come to a conclusion as to the issue.

49. Mr Moskovitz adduced a quotation from another managing agents, Eagerstates Ltd, of £3,900 plus VAT for the block. This would equate to £313.66 for number 3 and £310.50 for number 2. It was put to Mr Moskovitz in cross examination that he was linked to this company. Mr Moskovitz said that he had a partnership with one of the directors of Eagerstates, but that enterprise concerned other matters and he had no relationship with Eagerstates itself.

50. The Respondent's case was that the management fees were reasonable. Mr Unsdorfer said that it was within the usual industry margin, and that cheaper managing agents charged additional fees for some matters that were covered by the Respondent's single fee. Further, the Respondent argued that the fees per unit would necessarily appear higher because it was a comparatively small block. Larger blocks would have lower per unit fees.

51. We put it to Mr Comport that the Tribunal had experience of a general nature of management agent's fees in London, not attributable to a particular piece or pieces of disclosable evidence. That experience suggested that £400 per unit was at the very top end of the scale for fees passed on in service charges for most properties. Mr Comport repeated the arguments in the paragraph above.

52. We conclude that the management fees for the two years were not reasonably incurred. We agree that there is usually a play-off between a managing agent's overall fee and the fees chargeable for extra listed services, such that a overall fee usually includes more of these extra services. However, the fees charged by Parkgate are well over what we would expect to see even at the top of the normal range. As to the size of the block, even if Parkgate usually dealt with larger units, there is nonetheless a thriving market in managing agents' services for smaller blocks, and indeed individual converted houses in London.

53. The leases of numbers 2 and 3 provide for a particularly precise calculation of the flats' share of the overall expenditure, including that on management fees. In both cases, the percentage is greater than one fifteenth, so the leases presuppose that the two flats should pay a higher than equal share. We consider we should respect that choice in assessing what would be a reasonably incurred sum. As we indicated, we regard £400 per unit as an appropriate upper limit to the reasonable management fee, but in this case that should be considered the average, to allow us to calculate a whole-block fee of £6,000. That gives figures for flats 2 and 3 in each of the two years of £477.69 and £482.55 respectively.

54. *Decision*: The expenditure on the managing agents' fee was not reasonably incurred. A sum of £477.69 for flat 2 and £482.55 for flat 3 in each year would have been reasonably incurred.

Entry phone system

55. The Applicant contests the following charges for the entry phone system:

    (i) £1,495 for 2017;

    (ii) £1,552 for 2018;

(iii) £1,600 for 2019; and

(iv) £1,629 for 2020.

56. In 2008, the Respondent installed a new audio and video entry phone system, using a company called Command and Control. This company had been formed by Parkgate, and was under Mr Unsdorfer's control. Mr Unsdorfer took the decision that Command and Control would buy the new system, and that the Management Company would enter into a contract with Command and Control for its installation and maintenance.

57. The contract between the Management Company and Command and Control is exhibited to Ms Berlin's witness statement. Command and Control installed the equipment, but maintained title over it. The contract provided for on-going maintenance by Command and Control of the system. The agreement was for a term of 15 years.

58. The Applicant argued that the charges were excessive, and produced an estimate for the installation of a new system for £3,360, including VAT. He argued in cross examination that where one could obtain a new system for one and a half times the annual rent, the rented system is too expensive. He said that maintenance of a simple system need not be expensive – it would be preferable to rely on warranties to the extent possible and then pay for maintenance when the occasion demanded.

59. The Applicant's quotation was for an audio-only system. It became clear that Mr Moskovitz was under the impression that that was the type of system currently installed. The evidence for the Respondent was that it was a video and audio system. We accept that evidence, and conclude that Mr Moskovitz simply made a reasonable mistake about the specification of the entry system. We note that the lease specifies that the Management Company is responsible for the costs of "the video entry phone system" (third schedule, paragraph 13).

60. Mr Moskovitz's error in respect to the nature of the system undercuts the value of his audio only quotation. Mr Moskovitz also accepted in cross examination that the technology of entry phone systems has moved on apace since 2008, and costs had fallen.

61. We were not provided with any evidence in relation to general practice as to the installation and maintenance of such systems in 2008. In those circumstances, we cannot say that the Applicant has shown that either the form of the contract entered into in 2008, or its cost, were unreasonable. Mr Moskovitz may be quite right that purchasing a new system without a maintenance contract, and paying for maintenance separately, would be the most efficient and economical approach today. However, the question for us is whether the contract as agreed in 2008

was unreasonable *at that time*, and we do not have any evidence that would allow us to find that it was.

62. *Decision*: The charges for the entry system were reasonably incurred.

Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

63. The Applicant applied for orders under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge; and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

64. We have not heard detailed argument as to whether the legal costs of these proceedings are recoverable either under the service charge or as an administration charge. However, in response to the paragraph 5A application, the Respondent's skeleton argument notes that it cannot forfeit the lease, and so cannot seek its costs from the Applicant, a reference (we take it) to clause 3(15) of the leases (see paragraph [11]# above), and the approach to similar clauses set out in *Barrett v Robinson* [2014] UKUT 322 (LC), [2015] L. & T. R. 1. (and see now *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119).

65. We consider both applications on their merits, but without coming to any conclusions as to whether legal costs can be collected under the service charge or as an administration charge. That issue accordingly remains open for decision should it be litigated. The second and third Respondents have taken no part in the proceedings, and so may not have incurred any legal costs. However, it is clear that both applications are made against them as well as the first Respondent, and the orders we make below apply equally to them.

66. In respect of the section 20C application, the Respondent asserts the rectitude of its opposition to the section 27A application, and the need to defend its position for the lessees who have paid the service charge.

67. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C

68. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course. We should take into

account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC); [2014] 1 EGLR 111.

69. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances. Where a tenant is successful in whole or in part, an order will usually be made under section 20C (*The Church Commissioners v Derdabi* LRX/29/2011 at [19]).

70. These two important considerations point in opposite directions in this case. The Applicant has been very largely, although not wholly, successful before us in terms of value. On the other side, the Management Company is in form a leaseholder owned company. Despite the unusual arrangements as a result of which the Management Company is controlled by the person who controls (inter alia) the managing agent formally engaged by the Management Company, we must assume that the Company has no other form of income other than the service charge. But the particular arrangements, and the position of Mr Unsdorfer in them, is part of the background relevant to our consideration.

71. We must, therefore, accept that the making of the orders the subject of this application may have a significant effect on the Respondent. However, were we not to do so, and the Respondent enabled to recover its costs in the service charge or as an administration charge, the effect on the Applicant would also be significant, and would reduce the effect of the our findings in the Applicant's favour.

72. Balancing these considerations, we have come to the conclusion that it justice and equity come down on the side of us allowing the applications and making the orders.

73. *Decision*: We order (1) under section 20C of the 1985 Act that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Applicants; and (2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicants to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

74. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the London regional office.

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

76. If the application is not made within the 28 day time limit, the application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

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

Name: Tribunal Judge Professor Richard Percival **Date:** 6 December 2021

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 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.

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.

(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 the appropriate 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.

<u>Section 20</u>

(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 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

“qualifying works” means works on a building or any other premises, and

“qualifying long term agreement” means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

> (a) if it is an agreement of a description prescribed by the regulations, or
>
> (b) in any circumstances so prescribed.

(4) In section 20 and this section “the consultation requirements” means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

> (a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
>
> (b) to obtain estimates for proposed works or agreements,
>
> (c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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 tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , 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 the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , 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 the 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]1 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).