FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	CHI/00ML/LSC/2022/0033
Property	**:**	Flat 10, 41 Kings Road, Brighton, BN1 1NA
Applicant	**:**	Ms Catherine Riley
Representative	**:**	
Respondent	**:**	Mr Christo Cleanthi
Representative	**:**	Mr Paul Harrington Chartered Legal Executive of DMH Stallard LLP
Type of Application	**:**	Determination of liability to pay and reasonableness of service charges under Section 27A of the Landlord and Tenant Act 1985 Application for Order under section 20C of the Landlord and Tenant Act 1985 Application for Order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002
Tribunal Members	**:**	Mrs J Coupe FRICS Judge R Cohen Mr L Packer
Date of Hearing	**:**	13 October 2022
Date of Decision	**:**	12 November 2022

DECISION

Decision of the Tribunal

(1) The Tribunal has made determinations of reasonableness in respect of disputed service charges for major works undertaken in 2021. The Tribunal determines that the costs in relation to A&F Pilbeam Construction Ltd; structural engineer reporting; and scaffolding costs & alarm are reduced by 20%. The Tribunal determines that 'loss of rent' is non-recoverable through the service charge. Further, the Tribunal determines that the first-stage supervisory fee is reduced to 6% + VAT.

(2) The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985, preventing the Respondent from charging the costs of the proceedings to the Applicant through the service charge. Written authority from Ms Baker and Mr Dwyer-Smith is to be received by the Tribunal and Respondent within 7 days.

(3) The Tribunal makes an order under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, preventing any administration charges in relation to these proceedings being charged to the Applicant.

(4) The Tribunal orders the Respondent to refund the Applicant the application fee and hearing fee within 14 days of the date of this decision.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ('the 1985 Act') as to the amount of service charges payable by her in respect of certain major works, these being the replacement of a beam and repair to a balcony overhang, carried out in 2021.

2. The Applicant seeks an order pursuant to Section 20C of the Landlord and Tenant Act 1985, joining Ms Kate Barker of Flat 3 and Mr Craig Dwyer-Smith of Flat 5, and an order pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

3. Directions were issued on 10 June 2022 and 21 September 2022. The Directions were substantially complied with. The Tribunal was supplied with an electronic bundle of 202 pages and, on 7 October 2022, supplementary documentation provided by the Applicant, copied to the Respondent. Both parties provided a skeleton argument in advance of the hearing for which the Tribunal is grateful. References in this determination to page numbers in the bundle are indicated as [ ].

The Background

4. The Tribunal did not inspect 41 Kings Road ('the property'). The property is described by the Applicant as a five storey building comprising commercial units at ground level and residential flats, numbered 1-10a, on the upper floors.

5. The Applicant holds Flat 10 pursuant to a lease granted in 1979 for a term of 99 years between Hereford Dwellings Development Limited as Lessor and Abdel Wahab Burawi as Lessee. By way of an assignment, dated 1 June 2018, the Applicant became the registered proprietor of the leasehold interest.

6. The Respondent is the registered proprietor of the freehold. The property is managed on the Respondent's behalf by Jonathan Rolls Property & Estate Management ('the agent').

7. The application concerns work undertaken to the property by the Respondent comprising a replacement beam and repairs to the balcony overhang at the front of the property. As part of these works an application was made by the Respondent to the Tribunal for dispensation from consultation under reference CHI/00ML/LDC/2021/0070. The Tribunal granted dispensation in respect of the replacement of the main structural beams and ancillary repairs to the balcony overhang.

8. The initial estimate of the cost of the works and demanded in service charges was £227,871, which the Applicant paid her share of. The final cost of the works nearly doubled to in excess of £400,000. The Applicant paid the additional service charge demand under protest.

9. The Applicant challenges the reasonableness and payability of the overall costs incurred on the following grounds:

   i. Historic neglect on the part of the Respondent;
   ii. Mismanagement of the works;
   iii. Complacency by the Respondent and/or his agent in recovering costs from third parties;
   iv. Final payment to the contractor remains outstanding;
   v. Certified final account is yet be provided by the Respondent.

The Hearing

10. The hearing was a hybrid hearing with the chairman sitting in Havant Justice Centre. The two Tribunal members and the parties attended remotely via the CVP video platform.

11. The applicant, Ms C Riley, attended the hearing. The respondent, Mr C Cleanthi, was represented by Mr Paul Harrington of DMH Stallard LLP. Also in attendance and on behalf of the Respondent was Mr Dan Greet, Property Manager of Jonathan Rolls Property & Estate Management.

12. At the conclusion of the hearing each party confirmed that they had been afforded adequate opportunity to present their respective case.

Timeline

13. The Tribunal finds it convenient to set out a timeline of events:

(i) **November 2018**: On the instructions of the Respondent, Sussex Surveyors ('Sussex') undertake a survey of the property. Sussex instruct Philip Goacher Associates ('PGA') to prepare a further survey, the extent of which is undisclosed. In early 2020, Sussex are dismissed for failure to progress works.

(ii) **February 2020**: The Respondent issues s.20 notices of intention citing works to replace a beam and repair the balcony overhang to the front of the building. Crowther Overton-Hart Surveyors ('COHS') are appointed by the Respondent to prepare a specification of works for tender purpose. COHS are alleged to have relied upon the surveys produced by Sussex and PGA. The cost of works is estimated as £150,000-£200,000. The s.20 notice advises leaseholders that tenders will be invited *"once a full specification has been drawn up by the surveyors"*.

(iii) **September 2020**: Statements of estimates are issued, the sum being £227,871.83. The Applicant raises a number of queries which Jonathan Rolls responds to.

(iv) **February 2021:** Leaseholders are advised that the contract of works has been awarded to A&F Pilbeam ('Pilbeam'). Works are scheduled to commence on 8 March 2021 and are due to be completed within eight weeks, that being 30 April 2021. Service charge demands are issued.

(v) **14 April 2021**: Leaseholders are advised of a two week delay due to unforeseen ground issues. The estimated time delay is subsequently extended to four weeks. The leaseholders are advised *"Site conditions have dictated a temporary works design of greatly increased complexity. It is not only the unconventional ground conditions but also that the bay windows, which were previously anticipated not to be load bearing, have now been discovered to be load bearing."*

(vi) **6 July 2021**: The agent advises leaseholders, by letter, that the works have been *"severely delayed"* following Pilbeam's ground excavations which exposed *"…unexpected issues with the geological conditions of the grounds…"*. Further *"At the same time upon exposure of the beam area, it was also discovered that the bays to the front of the building are not self-supporting."* [45] The letter continues by explaining that works were halted whilst the Respondent engaged in negotiations with the contractors and his advisors but that, following a loan from the Respondent, works have now resumed. Leaseholders are advised that additional costs of £123,500 minimum are anticipated. The Respondent successfully applies to the Tribunal for dispensation from consultation. The

Tribunal, at paragraph 17 of its decision dated 15 September 2021 states *"In granting dispensation, the Tribunal makes no determination as to whether any service charge costs are reasonable or payable."*

(vii) **August 2021**: The Applicant advises the agent of a lack of site activity on multiple dates. Ms Riley is advised of a further delay of 2-3 weeks and a revised competition date of late October. Further, she is advised that *"the freeholder's solicitor is also taking legal advice ahead of potential action against the surveyors* (COHS) *and structural engineers* (PGA) *in light of their perceived joint failings in this matter."*

(viii) **14 September 2021**: The Applicant is advised by the agent that a competition date and final costs are due from COHS on 24 September 2021.

(ix) **11 November 2021**: The Applicant is advised by the agent that works are due to complete on 26 November 2021.

(x) **8 December 2021**: Works are completed.

(xi) **7 January 2022**: The Applicant and other leaseholders are advised by the agent that the additional costs are £186,785, making the final sum £414,657. Service charge demands are issued with a due date of 10 January 2022. The correspondence, sent via post, arrived on 14 January 2022.

The Law

14. The relevant law is set out in sections 18, 19, 20C and 27A of the Landlord and Tenant Act 1985, as amended by the Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.

15. The Tribunal has the power to decide all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums 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. The Tribunal can decide by whom, to whom, how much and when a service charge is payable. 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.

The Lease

16. The Respondent relies on paragraph 3 of the First Part of the Third Schedule of the lease in regard to the lessor's repairing obligations, which provides that the lessor shall "keep the main structural parts of the Building (not comprised in the flat) including the roof roof timbers balconies fire escapes

main walls and external parts thereof and the foundations thereunder … in good and tenantable repair and condition throughout the term hereby granted …".

17. In regard to recovery of expenditure, the Respondent relies on paragraph 25(1) of section 2 of the lease whereby the lessee covenants with the lessor to "contribute and pay to the Lessor as a maintenance and service charge (hereinafter called "the Service Charge") the aggregate of (a) six per centum of the annual costs expenses and outgoings incurred by the Lessor in complying with the obligations contained in the First Part of the Third Schedule hereto and of the other matters which without prejudice to the generality hereto are set out in the First Part of the Fourth Schedule hereto and …"

The Issues

18. What follows is a summary of the relevant points made by the parties.

The Applicant

19. The Applicant referred the Tribunal to a letter dated 7 January 2022, sent by Jonathan Rolls, as provided within her supplementary documentation, which usefully provided a breakdown of the costs incurred. For convenience we summarise these below:

A&F Pilbeam Construction Ltd	£330,000.00
Supervisory fee	£30,056.00
Loss of rent	£31,606.23
Surveyor costs	£6,494.32
Structural engineer costs	£13,218.28
Scaffolding costs	£2,058.00
Planning application	£775.00
Scaffold alarm	£450.00
TOTAL	**£414,657.83**

20. The Applicant asserted that her application was not a vexatious one but one borne out of frustration following a lack of transparency and proactive management on the part of the Respondent and/or his agent, and an unacceptable escalation of costs, estimated at £227,871.86, which ultimately totalled £414,657.83.

21. The Applicant claimed that the escalating costs arose from a combination of historical neglect and mismanagement of the major works and their contracts. Ms Riley believed that the Respondent was aware of the disrepair as far back as 2005 when planning permission was granted for the reconstruction of the front bays and external repairs but that remedial work was never undertaken, as confirmed by the agent in a reply to her conveyancing solicitor in May 2018.

22. In support, Ms Riley directed the Tribunal to the Dixon Hurst structural engineers' report ('Dixon') of 2016 which advised that major works would be required within five years to the steel support structure [47]. The Applicant contended that such work was never undertaken.

23. In November 2018, emergency scaffolding was erected at the front of the building to shore up the balcony and as a health and safety precaution following reports of falling masonry. The Applicant stated that despite the severity of the situation the Respondent did not serve a Section 20 notice until February 2020 and, further, that the works did not commence for thirteen months.

24. In October 2020, the agent responded to an enquiry from the Applicant advising her that an original defect in the main structural beam had been identified.

25. The Applicant contended that were this the case, earlier remedial action could have reduced the final costs. Accordingly, the landlord was alleged to have breached his repairing covenant.

26. Referring next to the timeline of events, Ms Riley directed the Tribunal to evidence that in November 2018 Sussex Surveyors were instructed to scope the repair works (they were later dismissed in early 2020). In turn, Sussex instructed PGA to complete a survey, the instructions of which were undisclosed. In their report of 6 December 2018, Sussex wrote that *"The stone deck itself is likely to be a structural element, intended to provide direct support to the two bays…"* [55]. The Applicant said that this contradicted information provided by the agent to her conveyancing solicitor on 9 May 2018 when Mr Greet replied *"Our draughtsman does not believe we need any sort of council consent as the building is not listed and the balcony is not structural"*.

27. By February 2020, COHS were appointed to draw up a specification of works. COHS allegedly relied on the earlier survey prepared by Sussex and the previous advice of PGA, both of whom had now been dismissed.

28. In February 2021, the works contract was awarded to Pilbeam who took possession of the site in March 2021 with an estimated completion date eight weeks hence. However, Pilbeam soon discovered that the ground conditions were not as anticipated, nor were the front bays self-supporting, resulting in multiple delays to the project whilst further investigations and costings was undertaken.

29. In July 2021, the Respondent applied to the Tribunal for dispensation from consultation which was duly granted in September 2021. The Applicant and fellow leaseholders were advised that the costs would increase by a minimum of £123,500. The leaseholders were provided with no opportunity to query the costs or accountability of contractors and their requests for a meeting were refused by the agent. The additional works were completed on 8 December 2021 at a further cost of £186,785.

30. The Applicant contended that the works were inadequately managed and that insufficient investigations were undertaken prior to the contract being tendered. Ms Riley asserted that had COHS undertaken a thorough ground survey and a structural survey of the building, or alternatively instructed a firm of structural engineers to do so, the problems would have been identified earlier, thereby avoiding the extra costs caused by subsequent delays.

31. Ms Riley considered the Respondent's failure, and/or that of their appointed agent, to instruct comprehensive surveys at the outset directly led to the delays, which in turn incurred substantial increased costs.

32. One such cost related to the reimbursement of lost rent to the commercial units and those residential flats which were vacated throughout the works. Ms Riley queried the Respondents' ability to recover such costs under the service charge provisions of the lease.

33. Finally, the Applicant noted that the agent, on multiple occasions, had advised the leaseholders that the Respondent was seeking advice on taking legal redress against one or more of his professional advisors or appointed contractors and that any recovery of funds would, in due course, be credited to the leaseholders. Ms Riley stated that despite requests for an update on such matters none had been forthcoming.

34. Mr Harrington asked Ms Riley to explain why she had decided only now to submit her application to the Tribunal, some months after the works had been completed and once full payment had been made. Ms Riley responded that the final demand had only been issued in February 2022 and that her application was submitted to the Tribunal once she had sought legal advice and had had sufficient time to collate her evidence. In the meantime, Ms Riley explained that she had paid the additional demand under protest, so as not to breach the covenants of her lease.

The Respondent

35. Mr Harrington acknowledged that the project had been beset by problems. However, he stated that his client had, at all times, relied on the advice of his professional advisors. To that end, the Respondent had engaged the services of 'Sussex' a firm of Chartered Surveyors who, in turn, had recommended 'PGA Structural Engineers'. Having later dismissed Sussex for poor performance, the Respondent engaged the professional services of COHS, an alternative firm of Chartered Surveyors.

36. Mr Harrington said that the Respondent had instructed COHS, in good faith, to prepare the specification of works and was unaware that they were relying on surveys prepared by the now dismissed contractors. With hindsight, Mr Harrington acknowledged that COHS perhaps could have instructed new surveys but that the Respondent had tasked COHS with the preparation of the specification of works and the responsibility for such lay with them.

37. Mr Harrington advised the Tribunal that once the Respondent was advised of the additional works and likely costs, he applied to the Tribunal for

dispensation from consultation and communicated with the leaseholders.

38. Mr Harrington stated that the Applicant adduced no evidence to support her assertion that addressing the works at an earlier date would have reduced the final costs. He said that the issues with the ground conditions and bay would have increased the overall costs irrespective of when they had been identified. Further, Mr Harrington stated that the Applicant had not provided any evidence to support her contention that the actual works had been charged at an unreasonable rate.

39. However, Mr Harrington acknowledged that the works had not progressed as planned, that issues with contractors and an incomplete specification of works had caused delays and that, in all likelihood, avoidable costs had been incurred. When asked by the Tribunal to quantify the additional costs he responded that, in the circumstances, he was unable to quantify an award but that he accepted that some costs had been overcharged.

40. Mr Harrington reiterated that his client had, at all times, relied on professional advice. He was currently investigating *'what went wrong with the project',* and a meeting with Counsel was imminently scheduled to consider the level of service provided and scope for recovering costs from third parties. Mr Harrington stated that the Respondent had already, personally, incurred substantial costs in seeking such advice.

41. Mr Harrington stated that the final certificate had yet to be signed off and that the 5% retention had not been released. Mr Harrington assured Ms Riley that the final accounts would be issued at the earliest opportunity and that where the Respondent successfully reclaimed funds from a third party these would be credited to the leaseholders.

42. Upon judicial questioning Mr Harrington clarified that, to date, the Respondent had not received Counsel's opinion, and none of the contractors or professional advisors had been put on notice, although Pilbeam's file had been requested.

43. Mr Harrington accepted there had been issues surrounding the project, the delays and the likelihood that increased costs had been incurred but said that the Applicant had not adduced any evidence to quantify her loss nor had Ms Riley sought any independent professional advice on the scope of works or costings. Further, that Ms Riley had not adduced any evidence as to the quantum of costs that she alleged were avoidable had the works commenced earlier.

44. The Tribunal asked Mr Harrington, if there were grounds to consider the project had been mismanaged (and that excess costs had thereby been incurred), it would be reasonable to expect the Applicant to bear the excess costs, if Counsel were to advise against legal proceedings on the basis of a cost versus benefit analysis. Mr Harrington conceded that, in such circumstances, it would be neither fair nor reasonable to do so. He reiterated that neither the Respondent nor the Applicant were in a position to determine the quantum of any such award, and he invited the Tribunal to use its discretion.

45. In closing, Mr Harrington stated that the Respondent had been candid in his explanation of what went wrong with the project and that the Respondent was aware of his responsibility to act with reason and to pursue recompense from third parties where fault or negligence could be proven. Mr Harrington stated that although he was unable to quantify an award, he did accept that some costs were overcharged.

46. In response to a question from Ms Riley, Mr Harrington reiterated that the Respondent was "*keen to get the work done*".

Discussion

47. The Tribunal took Mr Greet and Mr Harrington through each head of expenditure as listed in Mr Greet's letter to leaseholders dated 7 January 2022 and as recited at paragraph 19 above.

48. The Tribunal was advised that Pilbeam were appointed following a competitive tender process. The 'supervisory' fee of £30,056, paid to COHS as part of their contract, was explained as relating to their work in '*organising, maintaining and supervising the works'*, such fee being calculated at 12% + VAT of the original contract sum for the first part of the works, reduced to 6% + VAT for the additional works in recognition of the problems encountered. Upon judicial questioning Mr Harrington stated that there was an argument that the *"6% for the second works shouldn't be charged at all"*. Mr Greet, in response to a Tribunal question, advised that Jonathan Rolls had waived their entitlement to any fee in relation to the project.

49. 'Loss of rent' was charged to the leaseholders at £31,606. Mr Greet was asked to recount the reasoning behind the Respondents' decision to recharge such sum to the leaseholders. He explained that two commercial units and two residential flats needed to be vacated for the works to be undertaken. Having taken advice on the point, the Respondent determined that the lessees' loss of rent for the vacant periods formed part of the costs of the works and, accordingly, was a relevant expense recoverable through the service charge. Mr Greet accepted that such expense formed a significant part of the overall costs particularly due to the extended time for which the units/flats were vacant.

50. The Tribunal invited Mr Harrington to refer them to the lease provision which enabled recovery of rent as a service charge expenses and to comment on paragraph 4 of The First Schedule [26] and paragraph 3 of the Second Schedule [27] in such regard. Having reflected on the point, both before and after a break in the hearing, Mr Harrington advised that he was unable to refer the Tribunal to any specific recoverability clause in the lease and, further, commented that perhaps the Respondent had been poorly advised on the point.

51. All other costs listed in the letter of 7 January 2022 were self-explanatory.

52. In response to judicial questioning as to why the ground conditions were not ascertained earlier, Mr Harrington replied that access was dependent on the

occupiers of the commercial units vacating. The Tribunal was surprised that no apparent attempt was made to establish the ground conditions externally prior to the units becoming vacant.

53. Further, the Tribunal asked Mr Harrington as to whether, in his opinion, the preparatory and exploratory works should have been carried out at an earlier stage, and whether he agreed that, if the works had been scoped properly, the leaseholders could have avoided paying extra loss of rent, fees and additional costs caused by the delays. Mr Harrington referred to his previous responses which acknowledged that the project had been beset by problems but that the Respondent had relied entirely on the advice of his professional advisors.

54. Ms Riley was asked by the Tribunal why a meeting was requested and how she was disadvantaged by the refusal of such a request. Ms Riley responded that it would have been helpful to engage in open dialogue with the Respondent and her fellow leaseholders. Upon judicial questioning Mr Greet advised that he had received just one such request and that it arose from another leaseholder, not the Applicant. At the time of the request, he held no client instructions on the point although, in hindsight, he agreed that such meetings can be beneficial.

Decision

55. Having heard evidence and submissions from the parties and having considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

56. By the end of the hearing, it was common ground between the parties that the project had encountered multiple serious problems, some of which had contributed to significantly higher costs than originally anticipated, although the extent of culpability remained in dispute.

57. On behalf of the Respondent, Mr Harrington conceded that, in all likelihood, an award was justified, but could not suggest what the quantum of such an award should be.

58. The Tribunal notes that in granting dispensation from consultation in September 2021, it made clear that no determination was made as to whether any service charge costs were reasonable or payable. Both parties now agree that the service charge demands in relation to these works, such demands having been paid by the Applicant under protest, were not wholly reasonable.

59. On the assumption that the information presented before the Tribunal represented the full picture, the Tribunal was surprised that neither the structural integrity of the balconies nor the ground conditions were definitively determined prior to the specification of works being issued to tender. That said, the Tribunal were not privy to the instructions issued by the Respondent, or his agent, to any of his professional advisors or contractors and, accordingly, the Tribunal make no finding on the content, or extent, of either the specification of works (of which the Tribunal were

not provided with a copy), nor the extent, adequacy or competency of PGA's report.

60. The Tribunal had before it substantial (if not complete) information on the course of the project, provided in written evidence and in submissions. Applying its knowledge and expertise as an expert Tribunal, and applying judicial good sense, the Tribunal necessarily adopts a broad-brush approach to quantifying the quantum of costs unreasonably demanded. Taking each heading in turn.

61. **A&F Pilbeam Construction Ltd: Final cost £330,000.00**
Pilbeam's tender was submitted on the basis of the specification of works prepared by COHS. Under judicial questioning the Respondent agreed that this specification appears to have relied on the survey prepared by Sussex Surveyors dated 6 December 2018 [54] and a structural engineers' report prepared by PGA dated 19 March 2019 [56]. It is now accepted by the Respondent that the specification of works proved inadequate, as it failed to account for either the structural integrity of the balconies or the ground conditions, both of which, upon later identification, caused delays and additional costs, to the project.

62. The Tribunal finds that there is no evidence that any other site survey was commissioned prior to the specification of works being issued to tender. The Tribunal notes that Sussex's instructions were to *"carry out an inspection of metalwork to the front elevation and provide our opinion."* Within their two-page report to the Respondent's agent they comment on the condition of various parts, provide their opinion and proffer that, in part, further investigations are necessary. In PGA's report to Sussex they cite their instructions as *"to inspect the front canopy structure at 41 Kings Road, Brighton"*.

63. The Tribunal notes that the structural configuration of the balconies and the ground conditions were only fully established once the works were underway and ground was broken. The Tribunal finds that the delay caused by the timing of this identification could have been avoided had these issues been identified prior to the works commencing. The Tribunal agrees with the Applicant that the suspension and subsequent delay of the works and other factors ultimately caused escalation and some duplication of costs. The Respondent similarly accepts that the project *"went wrong"*, to the extent of exploring with Counsel possible action against third parties. The question is the quantum of unreasonably-incurred costs. Doing the best it can, and in the absence of representations on the quantum from the Respondent despite invitation (or from the Applicant) the Tribunal estimates such costs at 20% of the construction costs. Accordingly, the Tribunal determines the reasonable and recoverable Pilbeam costs at **£264,000**.

64. **Supervisory Fee: Final cost £30,056.00**
Mr Greet advised the Tribunal that this fee was payable entirely to COHS, Jonathan Rolls having levied no additional charge for their part in the works. COHS' contract provided for a fee of 12% + VAT which was duly paid for the first stage of the works. The Respondent advised that the fee payable for the second stage of the contract, that being the additional works, was

reduced to 6% + VAT due to the problems with the project. The Respondent suggested that the second fee could be reduced to nil.

65. The Tribunal finds that the project did not proceed as anticipated, that considerable delays were experienced and that costs escalated unreasonably. The extent to which COHS are culpable for this may be tested in later legal proceedings and are not for this Tribunal to determine. However, the Tribunal finds that, on the evidence presented and having regard to the concessions made by the Respondent during oral submissions, the fees charged were not reasonable. Accordingly, the Tribunal reduces the supervisory fee payable on the first stage of the project to **6% + VAT** and retains the **6% + VAT fee** on the second stage of the project to reflect the work undertaken, some of which would have been incorporated in the original project had the building issues been identified at an earlier date.

66. **Loss of rent: Final cost £31,606.23**
The Tribunal finds that the Applicant's lease makes no provision for recovery of lost rent as a service charge expense. Further, paragraph 3 of the Second Schedule provides that the lessor is granted access to enter the Applicant's flat for *"the purpose of inspecting repairing cleansing and maintaining or renewing the Building generally …making good all damage thereby occasioned but without being liable for compensation for disturbance"*. Accordingly, the Tribunal reduces the amount recoverable to **Nil**.

67. **Surveyor costs: Final cost £6,494.32**
The Tribunal finds such costs to be reasonably incurred, reasonable and, accordingly, payable under the lease.

68. **Structural engineer costs: Final cost £13,218.28**
The Tribunal finds that such costs although reasonably incurred are likely to have included an element of duplication which could have been avoided. The quantum of these costs are therefore not considered reasonable. Accordingly, the Tribunal reduces the costs recoverable under the service charge by 20% to a final figure of **£10,574.62**.

69. **Scaffolding costs: Final cost £2,058.00**
The Tribunal reduces the sum recoverable under the service charge by 20% to reflect the additional costs incurred in extending the scaffolding hire as a result of the project delays. Sum recoverable **£1,646.40**.

70. **Planning application: Final cost £775.00**
The Tribunal finds this cost both reasonable and reasonably incurred. Sum recoverable **£775.00**.

71. **Scaffold alarm: Final cost £450.00**
Further to the Tribunal's findings in paragraph 69 above and for the same reasons it follows that the sum recoverable is reduced by 20%. Sum recoverable **£360.00**.

Applications for Orders under Section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002

72. In her application, Ms Riley requested the Tribunal to make orders to the effect that neither she, nor Ms Kate Barker of Flat 3 or Mr Craig Dwyer-Smith of Flat 5, should have to pay any of the Respondents' costs of these proceedings via the service charge, and that any costs they may be liable for under any clause in the lease allowing the Respondent to charge an administration charge for their costs, should not be payable.

73. Neither Ms Barker nor Mr Dwyer-Smith had applied to the Tribunal to be joined as a party to the proceedings. In response to judicial questioning Ms Riley advised that her instructions to act on behalf of Ms Barker and Mr Dwyer-Smith were verbal only and that no written authorisation was before the Tribunal.

74. The Tribunal invited submissions in respect of the cost applications during the hearing. The Applicant stated that the Respondent had conceded that the project had failed to run smoothly, that delays and increased costs had been avoidable and, therefore, that it would be unjust for the Respondent to recover the costs of this application through the service charge. Mr Harrington agreed that the project had encountered multiple problems but reiterated that the Respondent had acted in good faith and had relied on his professional advisors throughout. Mr Harrington reminded the Tribunal that the Respondent was seeking advice on legal redress and that any sums recovered would be credited to the leaseholders.

75. The purpose of Section 20C is to give the Tribunal the power to prevent a landlord recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal.

76. In *Tenants of Langford (Sherbani) v Doren Limited* LRX/37/2000, which concerned an application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 in which the applicant tenants had been successful, the Lands Tribunal (Judge Rich QC), at paragraph 28, said:

> *"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 may arise."*

77. However, there is also guidance in other cases to the effect that an order under Section 20C is to deprive the landlord of a property right and it should be used sparingly (see for example, *Veena v Chong: Lands Tribunal (*2003) 1EGLR175).

78. The Tribunal has considered all the circumstances and evidence before it, and has determined that the Applicant has been successful on a number of challenges, although others have failed. Those successful have resulted in a significant reduction in the quantum of costs the Respondent is entitled to recover through the service charge.

79. The Tribunal is mindful that the Applicant attempted to resolve her grievances through dialogue and correspondence with the Respondent and their managing agent prior to applying to the Tribunal for a determination but was unsuccessful. The Tribunal also takes account of the concessions made by the Respondents representatives in oral submissions during the hearing. In the round, the Tribunal therefore determines that it would not be just and equitable if the Applicant were to be held responsible for the cost of these proceedings.

80. Accordingly, the Tribunal makes an order pursuant to Section 20C of the Act that none of the Respondent's costs of these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicant. Further, the Tribunal extends the order as requested to Ms Baker and Mr Dwyer-Smith, provided that the Applicant supplies the Tribunal, **within 7 days,** with written authority from Ms Baker and Mr Dwyer-Smith to include them in the application, copying in the Respondent.

81. The Applicant also applied for an order under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to reduce or extinguish the Applicant's liability to pay administration charges in respect of the Respondent's litigation costs. For the same reasons explained above the Tribunal finds it just and equitable to exercise our discretion and make such an order thereby preventing any administration charges in relation to these proceedings being charged to the Applicant.

82. Further, the Tribunal orders that the Respondent pays the Applicant the application fee of £100.00 and hearing fee of £200.00. Such fees to be paid within 14 days of the date of this decision.

RIGHTS OF APPEAL

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

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

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

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

Annex 1

Application under Section 27A of the Landlord and Tenant Act 1985

Sections 18 and 19 provide:

18(1) In the following provisions of this Act 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to rent –

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

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

(3) For this purpose –

> (a) 'costs' include overheads, and
> (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

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

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

and the amount shall be limited accordingly.

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

Section 27A, so far as relevant, provides:

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

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

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

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

The 'appropriate tribunal' is this Tribunal.