FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CR/LSC/2018/0009**
Properties	**:**	**40 Pippin Avenue, Halesowen, West Midlands, B63 2PW**
Applicants	**:**	**Ms Angela Clancy**
Representative	**:**	**Not represented**
Respondent	**:**	**14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited**
Representative	**:**	**Counsel – Ms Julia Petrenko of Falcon Chambers, instructed by Beale & Company Solicitors LLP**
Type of Application	**:**	**Applications under sections 27A and 20C of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the liability to pay administration charges**
Tribunal Members	**:**	**Judge M K Gandham** **Mr N Wint FRICS**
Date and venue of Hearing	**:**	**16th and 17th October 2018** **Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU**
Date of Decision	**:**	**22 July 2019**

DECISION

Introduction

1. On 10th May 2018, the Tribunal received an application from Ms Angela Clancy ('the Applicant') under section 27A of the Landlord and Tenant Act 1985 ('the Act') to determine whether the service charges demanded for the service charge periods from 1st July 2014 to 30th June 2018 were payable (and the amounts which were reasonably payable) in respect of the leasehold property known as 40 Pippin Avenue, Halesowen, Birmingham, B63 2PW ('the Property'). In addition, the Applicant made applications under section 20C of the Act and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in respect of an administration charge and the landlord's costs.

2. The Applicant is the current lessee of the Property under a lease dated 1st December 2016 made between (1) Sinclair Gardens Investments (Kensington) Limited and the Applicant ('the New Lease'), this being an extension of a lease of the Property dated 22nd August 1974 made between (1) A& J Mucklow & Co. Limited and (2) Thomas Naughton and Catherine Dunne ('the Original Lease'). The Tribunal was informed that the provisions relating to the service charge remained as per the Original Lease.

3. The Property forms part of an estate referred to, under the Original Lease, as 'the Mansion'. This encompasses six blocks of properties, thirty garages, driveways, pathways, gardens and grounds. The freehold of the Property is still held by Sinclair Gardens Investments (Kensington) Limited. 14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited ('the Respondent') acquired the right to manage the Mansion on 6th April 2014.

4. A Procedural Judge issued directions on 31st May 2018. A second Directions Order, dated 11th July 2018, extended the deadline for receipt of documents referred to in the first Directions Order. On 11th September 2018, a further Directions Order was issued confirming that any allegations in respect of fraud and breach of trust were outside the jurisdiction of the Tribunal and that the Tribunal could not order a full independent audit, so the Applicant should rely on her own independent expert. The Order also confirmed that any items of service charge in dispute were as set out in pages 5 to 12 of the Applicant's Statement of Case.

5. The Tribunal received further correspondence and bundles of documents from both parties, in addition to a witness statement from Mr Paul Jepps of Haines Watts (SEM) Limited (the expert witness of the Applicant) on 20th September 2018 and the Respondent's skeleton argument on 15th October 2018, the day prior to the hearing.

6. The matter was listed for an inspection, to take place on 16th October 2018, followed by an oral hearing on 16th and 17th October 2018.

7. Submissions in relation to the section 20C Application were sent after the hearing and the Tribunal reconvened on 12th December 2018 and 21st February 2019 to discuss the same. Submissions relating to paragraph 5A of Schedule 11 to the 2002 Act were received by the Tribunal, from the Respondent on 3rd May 2019 and from the Applicant on 8th May 2019. The Tribunal wrote to both parties on 17th May 2019 to confirm that it would not entertain any further correspondence or submissions.

Inspection

8. The Tribunal inspected the Property and estate on 16th October 2019 in the presence of the Applicant and, on behalf of the Respondent - Ms Petrenko (counsel), Mr Matthee (a solicitor from Beale & Company Solicitors LLP) and Mr Nock and Mrs Nock (directors at the Respondent company).

9. The Property is accessed off Pippin Avenue and is a first floor maisonette in a block of four properties (numbered 38 to 44 Pippin Avenue) defined in the Original Lease, and referred to in this decision, as 'the Building'. The Property has the benefit of a garage, which is located within a private area containing twenty-four garages, accessed via a private drive off Apperley Way.

10. The Tribunal also inspected the remainder of the Mansion, which comprises a block of ten flats (18 to 36 Apperley Avenue), four further blocks of four maisonettes on Apperley Way (14 to 20; 22 to 28; 30 to 36 and 38 to 44) and a block of six garages located in an area, accessed via a separate drive off Apperley Way, in addition to the various pathways and grounds.

11. The estate appeared to be in a fair condition of repair generally. All of the garages appeared to have been maintained fairly recently, the doors had been painted and they had been fitted with new soffits and fascia, although the private drives leading to the garage blocks were in need of repair. In relation to the Building, two of the external doors had been replaced and the other two, the Tribunal were informed, were awaiting replacement.

The Law

12. The relevant provisions in respect of liability to pay and reasonableness of service charges are found in sections 19 and 27(A) of the Act (as amended), which are set out as follows:

Section 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.

Section 27A Liability to pay service charges: jurisdiction

(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.
…

13. Section 20c of the Act (as amended) provides:

Section 20c 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….the First-tier 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 person specified in the application.
…
(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.

14. The relevant provisions in respect of liability to pay and reasonableness of administration charges are found in paragraphs 1, 2, 5 and 5A of Schedule 11 of the 2002 Act (as amended), which are set out as follows:

Paragraph 1 Meaning of "administration charge"

(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.
…

Paragraph 2 Reasonableness of administration charges

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

Paragraph 5 Liability to pay administration charges

(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.
…

Paragraph 5A Limitation of administration charges: costs of proceedings

(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	***"The relevant court or tribunal"***
Court proceedings	*The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court*
First-tier Tribunal proceedings	*The First-tier Tribunal*
Upper Tribunal proceedings	*The Upper Tribunal*
Arbitration proceedings	*The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.*

The Lease

15. The New Lease confirmed that it was made on the same terms and subject to the same the conditions and covenants as contained in the Original Lease, other than those expressly provided in or otherwise inconsistent with the New Lease (which simply related to the term and ground rent).

16. In Part II of the Third Schedule to the Original Lease, the lessee covenanted, amongst other matters:

"*2. (i) To contribute and pay one equal fourth part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirtieth part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax.*

...

(iii) The contribution under paragraph (i) of this clause for the period of twelve months (hereinafter called "the Service Charge Year") ending on 30th June in each and every year during the remainder of the term hereby granted shall be estimated by the Lessor (whose decision shall be final) not later than 30th June of the immediately preceding year and notified to the Lessee who shall pay the estimated contribution in advance by two instalments on 1st July and 1st January in the Service Charge Year.

(iv) As soon as reasonably may be after the Service Charge Year ending on 30th June 1976 and in each succeeding third Service Charge

Year when the actual amount of the said costs expenses outgoings and matters for the three Service Charge Years ending on 30th June 1979 or such succeeding third year (as the case may be) has been ascertained the Lessee shall forthwith pay the balance due to the Lessor or be credited in the Lessor's books with any amount overpaid.

...

4. To pay a fair share of the cost of the upkeep of any party fences walls sewers drains pipes passages footpaths entrances or garage access surface as apportioned by the Lessor.

...

11. To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 or 147 or the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

The Sixth Schedule details the lessor's covenants which include the following:

"(4) Subject to payment by the Lessee of the Lessee's proportion of the Lessor's Expenses: –

(i) To maintain repair redecorate and renew: –

(a) the main structure roof gutters and rain water pipes of the Building and garage (if any) and...

...

(iv) So often as reasonably required to decorate the exterior of the Building and the Garage in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit...

(v) To maintain the gardens and grounds of the Mansion including lawns borders trees and plants and to maintain and repair the paths driveways and garage forecourt.

(vi) Effect and maintain with the Prudential Assurance Company Limited or some other reputable insurance company nominated by the Lessor: –

(i) the insurance of the Building and the Garage...

...

(viii) To keep or cause to be kept proper books of accounts showing the expenditure incurred by it in carrying out its obligations under this Lease in respect of the Mansion."

The Eighth Schedule details the lessor's expenses in relation to the payment of the service charge. Part I of the Eighth Schedule details the expenses in relation to the Building and specifically includes the maintenance, repair, redecoration and renewing of the main structure of the Building and garage, as well as any costs and charges of any accountant employed for the purpose of auditing the accounts in respect of the lessor's expenses, and Part II deals with expenses in relation to the Mansion, which includes items such as maintaining the grounds, paths and driveways and costs and charges of the lessor or any agents employed by the lessor to manage or administer the Mansion.

Hearing

17. Following the inspection, a hearing was held at the Tribunal's hearing rooms at Centre City Tower, Birmingham. The Applicant attended on her own behalf. Ms Petrenko represented the Respondent, accompanied by Mr Matthee and Mr Nock, together with Mr Lunt (from Whittingham Riddell LLP, the Respondent's accountants).

Submissions

Preliminary issues

18. Ms Petrenko referred to the skeleton argument that she had provided to the Tribunal. She directed the Tribunal to the provisions in paragraph 2 (iv) of Part II of the Third Schedule to the Lease which, unusually, referred to a triennial balancing procedure. She confirmed that, although statutory accounts had been produced for the years ending 31st March 2015, 30th June 2016 and 30th June 2017, no balancing procedure, as required by the Original Lease, had yet been carried out. As such, she confirmed that all payments currently demanded were on account service charges.

19. Mr Lunt confirmed that a balancing service charge account was due to be carried out shortly. He confirmed that this should have been carried out in 2015; however, as the Respondent had only taken over the management at that time, it did not have the necessary information to carry out the same.

20. Ms Petrenko referred the Tribunal to the decision of the Upper Tribunal in *Knapper v Francis* [2017] UKUT 3(LC) and to the two-stage test, set out by Martin Roger QC, that the tribunal should consider when dealing with on account payments:

> "*28. … The starting point for its determination is the contractual position between the parties…*
>
> *30. The second stage of the determination is to consider whether the on-account payment required by the lease exceeded the statutory limit imposed by section 19(2). The effect of the statute is to modify the contractual obligation so that no greater amount than is*

reasonable is payable before the relevant costs are incurred. The language of the subsection suggests that the statutory ceiling applies at the time the leaseholder's liability arises. If, at that date, the on-account payment is greater than a reasonable sum, the leaseholder's contractual obligation is to pay only the lesser, reasonable, sum."

21. Ms Petrenko invited the Tribunal to adopt this two-stage process in relation to each of the service charges years. She stated that the contractual positon was clear, the lessee was required to pay the estimated service charge under paragraph 2(iii) of Part II of the Third Schedule. She submitted that the second stage was to determine what sums were reasonably payable on the date on which the payments were requested. As such, she stated that the relevant documents to be considered were the service charge demands not the accounts, which had been produced later. She submitted that it was only when the three yearly balancing service charge procedure had been carried out, that any consideration as to whether the actual expenditure was reasonable, would become relevant.

22. In relation to the failure of the Respondent to produce the balancing service charge account in 2015, Ms Petrenko referred to the decisions of the Upper Tribunal in *Warrior Quay Management Co Limited v Joachim* (LRX/42/2006) ('*Warrior Quay*'), *Pendra Loweth Management Limited v North* [2015] UKUT 91 (LC) ('*Pendra*') and *Wigmore Homes (UK) Limited v Spembley Works Residents Association Limited* [2018] UKUT 252 (LC) ('*Wigmore Homes*').

23. She stated that all of these decisions made it clear that - depending on the provisions of the lease - a failure on the part of the management company to provide certified accounts, did not suspend any obligation under the lease to pay the estimated service charge account. She referred the Tribunal to the provisions of the Original Lease relating to the payment of the estimated service charge and pointed to the fact that this did not refer to any payments demanded being subject to the receipt of the balancing service charge account. She also stated that, although two of the earlier demands were not sent by 30th June, time was not of the essence and the demands were sent shortly thereafter.

24. In addition, she stated, it was clear that from the budgets that the Respondent had produced, that the figures demanded were less than those demanded by the freeholder in the year ending 2014 and that the amounts demanded had not increased greatly year on year. Thus, she submitted, the sums demanded were reasonable.

25. In relation to specific items in dispute, Ms Petrenko referred to the fact that the Directions Order of 11th September 2018 had limited the Applicant's application to those matters set out in pages 5 to 12 of her statement. She stated that the Applicant should, therefore, not be allowed to refer to any matters detailed in Mr Jepps' statement that did not relate to those specific matters.

26. The Applicant stated that there had been many items in the accounts that she could not make sense of. She stated that, as the Tribunal had allowed Mr Jepps' statement to be submitted in evidence, the information contained in the same should be allowed.

27. The Tribunal agreed that, as no balancing process had been carried out, this was a matter dealing with the reasonableness of on account payments, as per section 19(2) of the Act. It allowed the Applicant to refer to the items detailed in Mr Jepps' statement, but confirmed that the decision could, quite clearly, only concern the matters relevant to the on account payments.

Service Charge - year ending 30th June 2015

28. The Applicant referred to an item identified as legal costs on the accounts relating to the year ending 30th June 2015. She believed this related to the costs for setting up the 'Right To Manage' company and stated that such costs were not permitted under the lease provisions as part of the service charge and should instead have been detailed in RTM company accounts. In addition, she stated that she had given a sum of £200 on account of these costs and that this was not detailed on the accounts.

29. The Applicant stated that one of the invoices for garage costs referred to 17 garages and not 30 garages, consequently, costs had been unevenly distributed in the accounts, as not all of the lessees were liable for the sum that had been expended on that invoice.

30. She stated that the accountancy fee was high, considering the fact that the accounts were unaudited, and stated that the sums relating to electrical repairs and drain charges were not reasonable. She also queried whether any of the items should have been subject to a section 20 consultation.

31. Ms Petrenko, on behalf of the Respondent, stated that the legal costs were payable as part of the service charge under paragraph 5 of Part II of the Eighth Schedule to the Original Lease, which referred to the "*costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion*".

32. In relation to the garages, she stated that the relevant costs were those detailed in the budget, not the accounts. She noted that there appeared to have been an incorrect apportionment in the accounts, as under the lease provisions the garages should have been apportioned as part of the Building (a quarter share) rather than as part of the Mansion (a thirtieth share). She stated that this was not a significant issue as the budget was for anticipated works and had been based on the fact that there would be noticeable works required to every garage. She stated that the sum requested from the Applicant, £50, was reasonable and payable under paragraph 1 of Part I of the Eighth Schedule, as were the sums requested for the drains and electrical repairs (£20 and £6.67 respectively).

33. Ms Petrenko confirmed that none of the agreements entered in to by the Respondent were for a period of more than 12 months, therefore, were not Qualifying Long Term Agreements and that none of the works undertaken involved a contribution of more than £250 per lessee, therefore, were not Qualifying Works. As such, she stated that no section 20 consultation was required.

34. Mr Lunt stated that, although the Original Lease referred to accounts being 'audited', due to the age of the Original Lease, this was not the same as what are now considered as *audited accounts*. He stated that the latest version of the RICS code endorsed this view and that the accounts that had been produced complied with the lease provisions. Ms Petrenko submitted that the budget for the accountancy fee, £17.93 per property, was reasonable and payable under paragraph 5 of Part I of the Eighth Schedule to the Original Lease.

Service Charge - year ending 30th June 2016

35. The Applicant queried why no reserve fund had been collected. She stated that there was provision in the Original Lease for collection of the same and that this had been requested in the 2017 budget.

36. In relation to general repairs and maintenance and the allocation of fees generally in the accounts, she queried why fees that should have been charged as part of the Mansion costs were charged in the costs for the buildings and vice versa. In addition, she queried whether the costs in relation to gardening, insurance and management fees should have been subject to consultation under section 20.

37. Ms Petrenko, on behalf the Respondent, stated that the Respondent was not obliged to hold a reserve under the lease provisions.

38. In relation to the allocation of items of expenditure in the accounts, she stated that these were not relevant for the purposes of the proceedings, as the Tribunal was considering the reasonableness of the amounts demanded on account and whether the sums detailed in the budgets were reasonable and payable. She confirmed that, as previously stated, the Respondents had not carried out any Qualifying Works nor entered into any Qualifying Long Term Agreements, including in relation to the gardening or management services.

39. She stated that any other matters raised by Mr Jepps in his statement related to the accounts rather than the budgets, had not been detailed on pages 5 to 12 of the Applicant's statement and were, therefore, beyond the remit of the Tribunal's considerations.

Service Charge - year ending 30th June 2017

40. The Applicant, again, queried the allocation of the budget and accounts, in that all items appeared to have been allocated to the blocks of

properties, rather than having two separate allocations - one for the Building costs and one for the costs of the maintenance of the Mansion. She also, again, queried the cost of the gardening and estate management and whether consultation was required.

41. Ms Petrenko stated that the items detailed in the budgets were simply an estimated expenditure in relation to lessor's expenses, as required under paragraph 2 of Part II of the Third Schedule. She stated that this paragraph did not require the estimate to be split between items relating to the Building and items relating to the Mansion.

42. She confirmed that, as previously stated, there were no relevant Qualifying Works and no relevant Qualifying Long Term Agreements, for which a section 20 consultation would have been required.

Service Charge - year ending 30th June 2018

43. The Applicant stated that she had not received any accounts and, therefore, could not query any individual item.

44. The Respondent confirmed that the question for the Tribunal related to the reasonableness of the budget, not the accounts, and that the Applicant had not advanced any basis upon which she considered the same to be unreasonable.

Service Charge - year ending 30th June 2019

45. Although the service charges for this period was not referred to in the Applicant's application, the Applicant referred to the reasonableness of the prospective service charges for 2018 to 2019 in page 12 of her statement. She stated a prospective charge of £711.09 had been demanded for the reserve, which, she believed, related to the repair of water pipes. She queried whether this was reasonable as, she stated, the Building was in serious disrepair and the sum had been demanded without section 20 consultation.

46. Ms Petrenko submitted that the Respondent was entitled to, but not obliged to, accumulate a reserve fund under paragraph 1 of Part I of the Eighth Schedule. She stated that the Respondent had recently dealt with a number of issues in relation to corroding poly pipes in the drainage system across the Mansion. She referred to the Respondent's statement, where it was stated that in a twelve-month period approximately twenty pipes had burst. The Respondent, in its statement, also confirmed that these repairs cost approximately £350 a time and, therefore, estimated that there would be a cost of approximately £3000 to £4000 per block, which the Respondent hoped to build up in the reserve funds so that the works could be carried out as soon as possible. Ms Petrenko stated that the figure of £711.09 represented a genuine pre-estimate in relation to the proposed works and that it was reasonable. She stated that, at the moment, no section 20 consultation was required as it was a sum

requested on account and referred to *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 0365. In addition, she stated that the figure of £711.09 was for the Building, so only amounted to a sum of just under £178 per lessee, and that consultation would be carried out by the Respondent, in due course, if required.

Administration charge

47. The Applicant queried whether she was liable to pay, and the reasonableness, of an administration charge of £150, which had been levied on her by the Respondent in relation to the removal of rubbish in 2017. She stated that the Respondent had, firstly, informed her that the charge was for the removal of a boat within the communal area and, subsequently, informed her that it was for the removal of items of rubbish from a communal area that had been left by one of her tenants. In addition, she had been charged with a late payment fee from HLM.

48. She confirmed that she had contacted Countrywide/HLM (the management company employed by the Respondent) and stated that she did not believe that the sums charged were either warranted or justified. She stated that HLM had, subsequently, removed their late charge fee; however, they had stated that they were unable to waive the administration charge of £150 for the fly tipping, as the Respondent had levied this sum directly.

49. The Applicant stated that she had driven to the Property on two occasions, after having been contacted by the Respondents, and had never witnessed any evidence of fly tipping or any overflow of the bin store. She stated that there was no evidence that the items that had been left in the communal area were from one of her tenants and that there would have been no reason for her tenant to have left any items in the communal area as he could have left any unwanted items in the garage.

50. Ms Petrenko stated that Mr Nock knew the Applicant's tenant by name and saw him moving out of the Property on 14th August 2017. She stated that Mr Nock had taken a photograph of the items that had been left by the tenant and referred to the letter of 23rd of January 2018, sent by the Respondent to the Applicant, which included the photograph.

51. Ms Petrenko stated that under the terms of the Original Lease - paragraph 3 of Part I of the Third Schedule - it stated that items of refuse could only be deposited in the bin storage area. She confirmed that, in the Respondent's letter of 23rd of January 2018, as the Applicant had threatened to make an application to the Tribunal, the Respondent had agreed to reduce the administration fee for the removal of the items to £100 to match any tribunal application fee. She stated that the Respondent considered this a pragmatic solution to avoid the need for the Applicant to make such an application.

52. Ms Petrenko stated that the sum of £100 was reasonable and considerably cheaper than sums charged by local authorities for the removal of fly tipping. She stated that Mr Nock was at the site at the relevant time, that he recognised the tenant and that he had taken a photograph of the rubbish. She stated that, as the Applicant had not even been at the site at the relevant time, Mr Nock's evidence was clearly more compelling than that of the Applicant.

Application under Section 20C

53. The Applicant's submissions in relation to section 20C of the Act reiterated her reasons for the application and stated that she had reasonable grounds to make the application and that, as the application was a low value matter, it should have been dealt with proportionately.

54. She confirmed that she had been through Countrywide's complaints procedure twice in the past year four years, that she did not have access to any contracts to consider whether or not they were long term agreements and that various charges had not been properly explained.

55. She stated that the conduct of Beale & Company Solicitors LLP was unreasonable, in that there are only two items of work that had been carried out on the Building, the fascia and the bin store roof, and that it should not have been difficult to acquire those invoices and explain the income and outgoings.

56. The Applicant stated that it was not reasonable for the Respondent to incur 'devastating' costs when this was a low value matter, nor was it reasonable to seek to impose those costs on others. She stated that she was not wealthy, and was sure that other lessees were not either, and that she would not have incurred such costs herself, as they would have been completely ruinous.

57. In relation to the conduct of the Respondent, she stated that she had ongoing issues in relation to charges being put on to her account without her knowledge, some of which were later removed. She did not consider this behaviour to be just and equitable. She stated that she was persistently told that there were insufficient funds to maintain the Building and that it was impossible to tell what the income and expenditure for each property was, when the income was pooled and allocated to different schedules. In addition to this, she was informed that an £11,000 loan had been repaid, which did not appear in the accounts, and was unsure as to why a sum for legal costs appeared on the accounts. She went on to refer to the discrepancies detailed in Mr Jepps' statement.

58. The Respondent opposed the application for an order under section 20C as, it submitted, it would not be just and equitable in all of the circumstances of the case. The Respondent stated that the majority of the Applicant's submissions effectively repeated assertions made in her

application, which had already been responded to, and were not relevant in relation to an order under section 20C.

59. In relation to the Applicant's argument that "*it was a low value matter and should have been dealt with proportionately*", the Respondent stated that the Applicant did not deal with matter proportionally and left the Respondent with no option but to defend itself and the other lessees' interests against allegations and challenges, incurring substantial expenditure in the process.

60. In relation to the order, they submitted that it was not a necessary or a relevant consideration of the Tribunal to assess whether the relevant legal costs incurred were recoverable as a service charge under the provisions of the lease or whether such costs were reasonably incurred; the reason being that, if the Applicant failed in her section 20C application she would still retain the right to challenge the costs as part of the service charges under section 27A of the Act. Notwithstanding this, the Respondent went on to state that it believed that such costs were recoverable, under clause 5 of Part II of the Eighth Schedule to the Original Lease, and referred to the decisions in *Plantation Wharf Management Company Limited v Jackson and another* [2011] UKUT 488 (LC), *Conway and others v Jam Factory Freehold Limited* [2013] UKUT 592 (LC) ('*Jam Factory*') and *Schilling v Canary Riverside Property Limited* LRX/65/2005 ('*Schilling*').

61. In relation to the question of the assessment of 'just and equitable' the Respondent referred to the decision in *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 ('*Doren*'), where His Honour Judge Rich Q.C. set out guidance upon which the discretion under section 20C should be exercised (paragraphs 28 to 32), which included, "*the conduct and circumstances of all of the parties*" and "*the outcome of the proceedings*", and went on to state that "those *entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an "instrument of oppression*".

62. The Respondent also referred to paragraph 54 of *Jam Factory* in which Martin Roger QC referred to *Schilling* and stated:

> "*the ratio of the decision in [Doren] is "there is no automatic expectation of an Order under s.20C in favour of successful tenant". "So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour*."

63. As such, the Respondent submitted that the starting point for all of their legal defence costs in defending the application were that they should be recoverable as a service charge from the Applicant and the other lessees unless there were circumstances why it would not be just and equitable.

64. In relation to the conduct of the parties, the Respondent submitted that the Applicant had commenced a campaign of baseless allegations against

the Respondent over a number of years, which had caused distress to the Respondent and representatives of Respondent. It stated that the Applicant was, through its managing agents, invited to make an appointment to inspect the service charge accounts and documents at the managing agents' offices and that the Applicant did not even acknowledge these invitations, let alone take them up.

65. The Respondent further stated that the Applicant's statement did not narrow the issues in the application, but instead made further allegations, which were generic blanket challenges and that Mr Jepps' statement, which was only received four weeks prior to the hearing, detailed further items that had not been included on the Applicant's statement.

66. The Respondents referred to paragraphs 72 and 73 of the decision in *Jam Factory*, where Martin Roger QC stated, in relation to a section 20C order granted in favour of an unsuccessful appellant whose application was not supported by the majority of the lessees:

> *"…I cannot help but feel that its effect is at best ironic and at worst perverse or capricious. The majority of leaseholders did not support the appellant's application … Those leaseholders … are to contribute through the service charge to the costs incurred by the respondent in defeating the application. The [unsuccessful] appellants themselves, however, are to be protected from what would otherwise be their contractual obligation to pay their share of those costs, notwithstanding the fact that the costs have been incurred ensuring that their efforts … did not succeed. In the context of a development owned by the leaseholders through their own company it seems to me quite impossible to describe an outcome which discriminates between leaseholders in that way as just and equitable…The vice of the [section 20C] order is that it benefits the losing appellants at the expense of the members of the successful respondent, each of whom will not only be liable to pay their own share as leaseholder, but will have to make up the shortfall created by the respondent's inability to recoup an equal share from the appellants. That seems to me to be fundamentally unfair."*

67. The Respondent concluded by stating that this was not a case in which any order would be just and equitable as it would relieve the Applicant, and the other lessees specified in her application, from responsibility for contributing towards relevant legal costs through the service charge at the expense of the other lessees.

Application under Paragraph 5A

68. In relation to application under paragraph 5A of schedule 11 to the 2002 Act, the Applicant stated that the Respondent's costs should be limited to reasonable costs of a responsible lessor acting in accordance with the lease, RICS code, the articles and the applicable legislation.

69. She confirmed that she had tried to resolve the disputes over a four-year period but could not do so. She stated that Mr Nock was the only active director and his responses to her had been unreasonable throughout.

70. She stated that she had good reason to suspect the service charges were being charged unreasonably because maintenance was being refused to the Building on the grounds of insufficient funds (despite the fact that some of the other properties were not being neglected), that excuses had been made in relation to the lack of funding and that there were various discrepancies in the accounts. She stated that her evidence illustrated unreasonable behaviour amounting to victimisation which was borne out by the erroneous charges placed on her service charge account.

71. The Applicant further stated that section 20C recognised, 'where the landlord had abused its rights and used them oppressively' there should be protection for the lessees.

72. She stated that the year-end accounts for 30th June 2018 had still not been produced, which was a material breach of the lease, despite her chasing the same. She, also, did not believe that significant costs would have been saved had she examined the accounts, as suggested by the managing agents, as she would have only been permitted access to the accounts for the year ending 30th June 2017 and that many of the costs that she had queried were prior to this date.

73. She further stated that she had incurred considerable costs, £4000, on Mr Jepps' services to prepare for the hearing in order to try and advance the case, as the hearing would have taken even longer if she had not done this, as the accounts were not straightforward and did not comply with the lease provisions.

74. She believed that the service charges were high and believed that the Respondent's Representative had pursued matters which had already been resolved and that a barrister need not have been instructed on certain issues.

75. In addition, the Applicant stated that she did not believe that there was any danger of the Respondent folding, as its costs had been underwritten and queried why the costs would not, in any event, be covered by the insurance.

76. The Respondent stated that paragraph 5A of schedule 11 to the 2002 Act was enacted relatively recently and that there were not many reported decisions but considered that, as the language mirrored the language of section 20C (3) of the Act, the Respondent's position was that the principles established in relation to section 20C were applicable to any application under paragraph 5A.

77. The Respondent further stated that it was not relevant for the purposes of the application whether the legal costs incurred by the Respondent were

permitted under the lease provisions nor whether they were reasonably incurred, as the Applicant would still have a right to challenge any legal costs under paragraph 5 of schedule 11 to the 2002 Act.

78. The Respondent referred to their previous submissions, in particular the fact that there is no presumption that an order is to be made (*Doren*), and that given the Applicant's conduct - in both bringing the proceedings and her conduct of those proceedings - there was no basis for making an order. The Applicant had made serious allegations of harassment, queried a huge number of service charges without any reasonable basis, raised new issues (based of Mr Jepps' statement) which were unreasonable and unfair to the Respondent and had repeatedly failed to comply with her disclosure obligations.

79. The Respondent referred to the fact that the Tribunal was entitled to have regard to the financial and practical consequences of making an order. It stated that the Respondent was a resident owned RTM company which ran for the benefit of the lessees. The Respondent did not have any assets of its own, but collected service charges and administration costs from the lessees. Further, that it would not be just and equitable to deprive the Respondent of its ability to recover administration costs from the Applicant as it would, either, be left having to recover any uninsured legal costs from other lessees, by way of the service charge, or face serious financial difficulty.

80. For all the above reasons, the Respondent invited the Tribunal to dismiss the Applicant's application for an order.

The Tribunal's Determinations

81. The Tribunal considered all of the written and oral evidence submitted and briefly summarised above.

Service Charges

82. The Tribunal noted that the service charge demanded was an estimated service charge and that the Applicant was liable to pay the same under paragraph 2(iii) of Part II of the Third Schedule to the Original Lease. The Tribunal does not consider the fact that some of the demands had been requested a few days later than detailed in the Original Lease, to extinguish or reduce any liability of the Applicant to pay the same.

83. In cases relating to estimated charges, the Tribunal needs to determine, under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the lease. The Tribunal is not concerned as to whether any actual service costs have been reasonably incurred, as this could only be queried after the balancing service charge statement had been produced. As such, the Tribunal agrees with Ms

Petrenko, that it is the reasonableness of the demands that are the relevant consideration for the determination by the Tribunal.

84. That being said, the Tribunal notes that a balancing service charge process should have been carried out in 2015, and is conscious of the comments of His Honour Judge Huskinson in the *Warrior Quay* decision, at paragraph 25:

> [the lessor] *"… cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year…. The LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against…"* [the lessor]

85. This decision was followed in the *Pendra* decision, where Martin Roger QC stated, at paragraph 51:

> *"The absence of proper accounts for previous years may, of course, provide grounds for treating the estimate with circumspection or even suspicion; it may make it easier to justify reduction under section 19(2) on the basis that there is little to suggest the estimate is reasonable…"*

86. In this case, although the balancing service charge account had not been produced, accounts had been produced for the years ending June 2015, June 2016 and June 2017. It is clear, therefore, that the Respondent did have some information, from 2016, onwards as to likely expenditure.

87. In the recent decision of the Upper Tribunal in *Wigmore Homes* the Upper Tribunal stated, at paragraph 55:

> *"We are conscious that reasonableness is to be judged by the information at the date of the demand. We are also conscious that more information as to actual expenses became available as time went on."*

88. As such, although the reasonableness of the demands are the relevant consideration for the Tribunal, any accounts that were available at the date of the demand, is information that could be taken in to account when judging the reasonableness of the demands.

89. Having considered the Respondent's demands for the estimated service charge expenditure, it is noted that the demand made in 2014 (for the year ending June 2015) was for a sum of £861.59, which was less than the previous freeholder's estimate of £1053.52, and no accounts were available at that time. In the following year, the demand made in 2015 (for the year ending June 2016) was further reduced to £745.48.

90. The accounts for the year ending June 2015 became available in December of 2015 and indicated that the amount actually expended in

that year was less than the budgeted figure and the Tribunal notes that the demand made in 2016 (for the year ending June 2017) was reduced, this time to £727.48.

91. The accounts for the years ending 2016 and 2017 were available in the December of those years, and both indicated a deficit in the accounts. The Tribunal notes that the budgets for the year ending June 2018 and the year ending June 2019 (after those respective accounts were available) were increased. The Tribunal also notes that the estimated service charge demands for the years ending June 2017, June 2018 and June 2019, all detailed either the projected expenditure or the estimated actual expenditure for the previous year, in addition to the proposed budget for the upcoming service charge year.

92. As such, the Tribunal does consider that the Respondent was taking into account the additional information that was available to it when estimating the budgets. The Tribunal, therefore, believes that the method used by the Respondent for the calculation of the estimated service charge to be reasonable.

93. In relation to the service charges generally, the Tribunal notes the Respondent's statement, that there were no Qualifying Works nor any Qualifying Long Term Agreements that required any section 20 consultation.

94. Having considered the provisions in the Original Lease, the Tribunal is also satisfied that, although it may have been beneficial for the estimated costs to be separated in relation to those allocated for the Building and those in relation to the Mansion, this was not a necessity, although it clearly would be required in the balancing service charge accounts.

Service Charge - year ending 30th June 2015

95. In relation to the service charge for the year ending June 2015, the Tribunal does not concur with Ms Petrenko, that any legal costs would fall within the remit of service charge in paragraph 5 of Part II of the Eighth Schedule, as it does not consider that the set up costs in relation to a 'Right to Manage' company would fall within, either the definition of "*costs … of the Lessor and any Agent…employed by the Lessor*" (as the Respondent did not appear to be either of these at the time the costs appear to have been incurred), nor did the costs appear to relate to the management or administration of the estate. The Tribunal notes, however, that although legal costs may have been detailed on the accounts they did not appear to on the estimated service charge demand, therefore are not relevant to the Tribunal's determination.

96. The Tribunal notes that the Respondent had proposed to carry out works to all of the garages and believes that the figure detailed for the garage repairs in the demand to be reasonable (although the accounts may have contained an error, this was not the relevant document for considering

the reasonableness of the sum demanded). In addition, the Tribunal also considers the other items of expenditure, including the fee for the accounting, electrical and general repairs, to be reasonable. As such, the Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2015 was reasonable and that the sum of £861.59 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2016

97. The Tribunal notes that the Original Lease did not require the Respondent to set up a reserve fund. The Tribunal is also satisfied that there were no items requiring section 20 consultation for the estimate, and that the budgeted items appeared to be reasonable sums. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2016 was reasonable and that the sum of £745.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2017

98. As previously stated, the Tribunal did not consider that the estimate required a separate allocation between the costs for the Building and those for the Mansion, nor that any section 20 consultation was required. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2017 was reasonable and that the sum of £727.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2018

99. The Tribunal notes that the Applicant did not give any information as to why she considered the budget for the year ending June 2018 to be unreasonable. As such, the Tribunal determines, in the absence of any evidence to the contrary, that the estimated expenditure detailed in the budget for the year ending 30th June 2018 was reasonable and that the sum of £743.63 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2019

100. The Tribunal notes that the Original Lease does allow the Respondent to request sums towards future works, which does not appear to be disputed by the Applicant. The amount requested in relation to the works to the drains appears to be based on costs already incurred by the Respondent for existing repairs that had been carried out on some parts of the estate. The Applicant did not obtain her own quote, nor did she detail any alternative figure that she would consider reasonable. The Tribunal considers the Respondent's estimate to be reasonable and notes Ms Petrenko's comments, and is satisfied, that no section 20 consultation was required when the demand was sent.

101. In relation to the Applicant's comments regarding the Building being in serious disrepair, the Tribunal noted, on their inspection, that the

Building appeared to be in a fair state of condition and is satisfied that the drainage works are imminently required. The Tribunal, therefore, determines that the estimated expenditure detailed in the budget for the year ending 30th June 2019 was reasonable and that the sum of £800 demanded is payable by the Applicant.

Administration charges

102. The Tribunal notes that the administration charge levied by the Respondent, in relation to fly tipping in the communal area, was for a sum of £100.

103. Although the Applicant states that there was no evidence that the refuse was left by her tenant, there appears to be no dispute that the Applicant's tenant was vacating the Property at that time, and Mr Nock states that he recognised and knew him by name. The Tribunal is satisfied that Mr Nock was on site and took a contemporaneous photograph and that it was reasonable for the Respondent to levy an administration charge on the Applicant based on the provisions in the lease.

104. Regarding the reasonableness of the charge, the Tribunal notes that the original cost of the charge appears to have been £150, and that this was later reduced in line with the application fee to the tribunal. The Tribunal considers it highly unusual that a fee should be reduced in this way, as any charge should be an amount which relates to the item of expenditure, not an amount to avert potential scrutiny. The Tribunal considers the administration fee to be excessive and determines a sum of £50 is reasonable and payable by the Applicant.

Application under Section 20C

105. The Applicant has applied for an order, in accordance with section 20C of the Act, that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. In making such an order, the Tribunal must consider what is 'just and equitable' in the circumstances, taking in to account matters such as the conduct and circumstances of the parties and the outcome of the proceedings.

106. The Tribunal does accept the Respondent's submissions, in that, the issue as to whether the Respondent is entitled to recover the costs under the terms of the lease or whether the costs incurred are reasonable, are both issues which are more properly considered in an application under section 27A of the Act, should such costs be included within the service charge.

107. The Tribunal also notes the comments of His Honour Judge Rich, in the *Doren* decision, at paragraph 31:

"In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20 C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

108. Looking at the circumstances leading to the application and the conduct of the parties, the Tribunal is conscious of the fact that the application was made by the Applicant as she had noticed discrepancies in certain items in the accounts and noted that certain items of service charge did not appear to have been allocated as per the terms of the Original Lease. She was also concerned regarding the upkeep and maintenance of the Building.

109. The Tribunal also notes that the Applicant appears to have followed the Countrywide complaints procedure, she states to no avail, and that by the time of the application there clearly appeared to be a great deal of animosity and distrust between the parties.

110. That being said, the application, and subsequent statement by the Applicant, were vague in the issues involved and referred primarily to the accounts rather than the budgets, with questions rather than submissions, such as "*Is there a receipt for the £13 electrical repairs*" and "*What was £25 electrical repairs*?" In addition, at the hearing, the Applicant did not appear to recognise what matters would be defined as Qualifying Works or Qualifying Long Term Agreements.

111. The Tribunal notes that the managing agents did offer the Applicant an opportunity to inspect the accounts and that the Applicant had failed to take up this offer, as she had stated that not all of the relevant accounts would have been available for inspection.

112. The Tribunal also notes that the Respondent had raised concerns regarding the inclusion of Mr Jepps' statement four weeks prior to the hearing, which raised further issues in relation to the accounts, rather than the budgets, and referred to the fact that the Applicant had often failed to comply with timescales set down by the Tribunal.

113. On the part of the Respondent, although the estimated budgets produced by the Respondent did not require any costs to be allocated between the individual buildings and the Mansion, this separation was, also, not detailed in the accounts that had been produced and, clearly, would need to have been included in any balancing service charge accounts, as the apportionments for the lessees would vary depending on whether the costs were allocated to the Building (for which the Applicant was liable for a quarter share) or for the Mansion (where the Applicant was liable for a thirtieth share).

114. There also appeared to have been other irregularities detailed in the year-end accounts that had been referred to by Mr Jepps, which included the

legal costs. Although these did not appear in the Respondent's budget, consequently, were not a consideration for the Tribunal in relation to the reasonableness of the estimated service charge; they did not appear to be costs which could be recovered under the service charge under paragraph 5 of Part II of the Eight Schedule to the Original Lease, as submitted by the Respondent, for the reasons previously mentioned. As such, the Tribunal could understand the Applicant's concerns with regard to the accounts.

115. In addition to this, the Tribunal noted that the Respondent appeared to be under the impression, at the hearing, that, if there were insufficient funds in relation to the Building, it would not be responsible to maintain the same. The lessor's covenants under paragraph 4 of the Sixth Schedule to the Original Lease clearly states that, subject to the payment by the Applicant of her proportion of the expenses, the Respondent has a duty to maintain and repair the relevant parts of the Building and garage.

116. The Tribunal also notes that, although the Respondent referred to the late submission of Mr Jepps' statement, the skeleton argument, sent on behalf of the Respondent, was only submitted the day prior to the hearing. This document correctly identified that the relevant service charges were the estimated service charges detailed in the budget, rather than any figures in the accounts. Prior to this, both the Applicant's submissions and the Respondent's statements in relation to the service charge, referred to various items on the accounts. Copious documents were provided in relation to those accounts and corresponding invoices, the vast majority of which were not referred to at the hearing, as they were not relevant in relation to the reasonableness of the estimated figures in the service charge budgets.

117. Regarding the outcome of the proceedings, the Tribunal notes that the Applicant has failed to identify that any of the estimated service charges for the relevant years were unreasonable, although the Tribunal has found that the administration charge was excessive.

118. In such circumstances, the Tribunal is particularly mindful of the reasoning of Martin Roger QC in *Jam Factory*, in that it would seem perverse and unjust that, where the Applicant has been unsuccessful in the vast majority of her application, she should be protected from costs at the potential expense of the Respondent and the remaining lessees who were either neutral or who did not support the application.

119. Taking in to account all of the circumstances, the Tribunal does not consider that it would be just and equitable to make any order in favour of the Applicant under section 20C of the Act.

Application under Paragraph 5A

120. In relation to the application under paragraph 5A of Schedule 11 to the 2002 Act, the Tribunal concurs that items that are relevant in relation to

the application to section 20C of the Act are relevant in relation to an application under paragraph 5A. In such an application; however, the Tribunal is considering the Applicant's liability to pay administration charges in respect of litigation costs.

121. Paragraph 5A has been considered in the recent decision, *Avon Ground Rents Limited v Child* [2018] UKUT 0204 (LC). An order under paragraph 5A was not available to the tribunal in the first instance of those proceedings as they had begun before October 2016; however, in paragraph 58, Holdgate J observed:

> *"Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondents' contractual liability to pay the legal costs that the Applicant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters…"*

In addition, the Upper Tribunal found the level of costs before the First Tribunal to be "troubling" and stated, at paragraph 65:

> *"The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear."*

122. As previously stated, the Tribunal notes that the vast majority of the documents produced by both parties in their bundles related to various invoices and accounts, which were not referred to at the hearing, as the Respondent's skeleton argument, submitted just prior to the hearing, confirmed that the relevant considerations were whether the estimated budgets were reasonable and that the actual costs incurred would not be relevant until the balancing service charge adjustment process had taken place.

123. The Tribunal considers that, had the Respondent upon receipt of the Applicant's application put this argument forward, the issues in relation to the reasonableness of the service charges would clearly have been narrowed and the copious amounts of documentation produced by the Respondent would have been greatly reduced.

124. That being said, it is not clear, from the Applicant's submissions whether, if such an argument had been put to her, she might have altered her submissions, as even when the Tribunal confirmed that this was the correct position, the Applicant's subsequent submissions still appeared to focus on the discrepancies in the accounts.

125. Taking all of these matters into account, the Tribunal considers it would be just and equitable to make an order, under paragraph 5A of Schedule

11 to the 2002 Act, that the Applicant is only liable to pay 25% of any administration charges in respect of litigation arising from this application.

Appeal Provisions

126. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
.....
Judge M. K. Gandham

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CR/LSC/2018/0009**
Properties	**:**	**40 Pippin Avenue, Halesowen, West Midlands, B63 2PW**
Applicants	**:**	**Ms Angela Clancy**
Representative	**:**	**Not represented**
Respondent	**:**	**14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited**
Representative	**:**	**Counsel – Ms Julia Petrenko of Falcon Chambers, instructed by Beale & Company Solicitors LLP**
Type of Application	**:**	**Applications under sections 27A and 20C of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the liability to pay administration charges**
Tribunal Members	**:**	**Judge M K Gandham** **Mr N Wint FRICS**
Date and venue of Hearing	**:**	**16th and 17th October 2018** **Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU**
Date of Decision	**:**	**22 July 2019**

DECISION

Introduction

1. On 10th May 2018, the Tribunal received an application from Ms Angela Clancy ('the Applicant') under section 27A of the Landlord and Tenant Act 1985 ('the Act') to determine whether the service charges demanded for the service charge periods from 1st July 2014 to 30th June 2018 were payable (and the amounts which were reasonably payable) in respect of the leasehold property known as 40 Pippin Avenue, Halesowen, Birmingham, B63 2PW ('the Property'). In addition, the Applicant made applications under section 20C of the Act and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in respect of an administration charge and the landlord's costs.

2. The Applicant is the current lessee of the Property under a lease dated 1st December 2016 made between (1) Sinclair Gardens Investments (Kensington) Limited and the Applicant ('the New Lease'), this being an extension of a lease of the Property dated 22nd August 1974 made between (1) A& J Mucklow & Co. Limited and (2) Thomas Naughton and Catherine Dunne ('the Original Lease'). The Tribunal was informed that the provisions relating to the service charge remained as per the Original Lease.

3. The Property forms part of an estate referred to, under the Original Lease, as 'the Mansion'. This encompasses six blocks of properties, thirty garages, driveways, pathways, gardens and grounds. The freehold of the Property is still held by Sinclair Gardens Investments (Kensington) Limited. 14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited ('the Respondent') acquired the right to manage the Mansion on 6th April 2014.

4. A Procedural Judge issued directions on 31st May 2018. A second Directions Order, dated 11th July 2018, extended the deadline for receipt of documents referred to in the first Directions Order. On 11th September 2018, a further Directions Order was issued confirming that any allegations in respect of fraud and breach of trust were outside the jurisdiction of the Tribunal and that the Tribunal could not order a full independent audit, so the Applicant should rely on her own independent expert. The Order also confirmed that any items of service charge in dispute were as set out in pages 5 to 12 of the Applicant's Statement of Case.

5. The Tribunal received further correspondence and bundles of documents from both parties, in addition to a witness statement from Mr Paul Jepps of Haines Watts (SEM) Limited (the expert witness of the Applicant) on 20th September 2018 and the Respondent's skeleton argument on 15th October 2018, the day prior to the hearing.

6. The matter was listed for an inspection, to take place on 16th October 2018, followed by an oral hearing on 16th and 17th October 2018.

7. Submissions in relation to the section 20C Application were sent after the hearing and the Tribunal reconvened on 12th December 2018 and 21st February 2019 to discuss the same. Submissions relating to paragraph 5A of Schedule 11 to the 2002 Act were received by the Tribunal, from the Respondent on 3rd May 2019 and from the Applicant on 8th May 2019. The Tribunal wrote to both parties on 17th May 2019 to confirm that it would not entertain any further correspondence or submissions.

Inspection

8. The Tribunal inspected the Property and estate on 16th October 2019 in the presence of the Applicant and, on behalf of the Respondent - Ms Petrenko (counsel), Mr Matthee (a solicitor from Beale & Company Solicitors LLP) and Mr Nock and Mrs Nock (directors at the Respondent company).

9. The Property is accessed off Pippin Avenue and is a first floor maisonette in a block of four properties (numbered 38 to 44 Pippin Avenue) defined in the Original Lease, and referred to in this decision, as 'the Building'. The Property has the benefit of a garage, which is located within a private area containing twenty-four garages, accessed via a private drive off Apperley Way.

10. The Tribunal also inspected the remainder of the Mansion, which comprises a block of ten flats (18 to 36 Apperley Avenue), four further blocks of four maisonettes on Apperley Way (14 to 20; 22 to 28; 30 to 36 and 38 to 44) and a block of six garages located in an area, accessed via a separate drive off Apperley Way, in addition to the various pathways and grounds.

11. The estate appeared to be in a fair condition of repair generally. All of the garages appeared to have been maintained fairly recently, the doors had been painted and they had been fitted with new soffits and fascia, although the private drives leading to the garage blocks were in need of repair. In relation to the Building, two of the external doors had been replaced and the other two, the Tribunal were informed, were awaiting replacement.

The Law

12. The relevant provisions in respect of liability to pay and reasonableness of service charges are found in sections 19 and 27(A) of the Act (as amended), which are set out as follows:

Section 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.

Section 27A Liability to pay service charges: jurisdiction

(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.
…

13. Section 20c of the Act (as amended) provides:

Section 20c 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….the First-tier 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 person specified in the application.
…
(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.

14. The relevant provisions in respect of liability to pay and reasonableness of administration charges are found in paragraphs 1, 2, 5 and 5A of Schedule 11 of the 2002 Act (as amended), which are set out as follows:

Paragraph 1 Meaning of "administration charge"

(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.
…

Paragraph 2 Reasonableness of administration charges

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

Paragraph 5 Liability to pay administration charges

(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.
…

Paragraph 5A Limitation of administration charges: costs of proceedings

(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	***"The relevant court or tribunal"***
Court proceedings	*The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court*
First-tier Tribunal proceedings	*The First-tier Tribunal*
Upper Tribunal proceedings	*The Upper Tribunal*
Arbitration proceedings	*The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.*

The Lease

15. The New Lease confirmed that it was made on the same terms and subject to the same the conditions and covenants as contained in the Original Lease, other than those expressly provided in or otherwise inconsistent with the New Lease (which simply related to the term and ground rent).

16. In Part II of the Third Schedule to the Original Lease, the lessee covenanted, amongst other matters:

"*2. (i) To contribute and pay one equal fourth part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirtieth part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax.*

...

(iii) The contribution under paragraph (i) of this clause for the period of twelve months (hereinafter called "the Service Charge Year") ending on 30th June in each and every year during the remainder of the term hereby granted shall be estimated by the Lessor (whose decision shall be final) not later than 30th June of the immediately preceding year and notified to the Lessee who shall pay the estimated contribution in advance by two instalments on 1st July and 1st January in the Service Charge Year.

(iv) As soon as reasonably may be after the Service Charge Year ending on 30th June 1976 and in each succeeding third Service Charge

Year when the actual amount of the said costs expenses outgoings and matters for the three Service Charge Years ending on 30th June 1979 or such succeeding third year (as the case may be) has been ascertained the Lessee shall forthwith pay the balance due to the Lessor or be credited in the Lessor's books with any amount overpaid.

...

4. To pay a fair share of the cost of the upkeep of any party fences walls sewers drains pipes passages footpaths entrances or garage access surface as apportioned by the Lessor.

...

11. To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 or 147 or the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

The Sixth Schedule details the lessor's covenants which include the following:

"(4) Subject to payment by the Lessee of the Lessee's proportion of the Lessor's Expenses: –

(i) To maintain repair redecorate and renew: –

(a) the main structure roof gutters and rain water pipes of the Building and garage (if any) and...

...

(iv) So often as reasonably required to decorate the exterior of the Building and the Garage in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit...

(v) To maintain the gardens and grounds of the Mansion including lawns borders trees and plants and to maintain and repair the paths driveways and garage forecourt.

(vi) Effect and maintain with the Prudential Assurance Company Limited or some other reputable insurance company nominated by the Lessor: –

(i) the insurance of the Building and the Garage...

...

(viii) To keep or cause to be kept proper books of accounts showing the expenditure incurred by it in carrying out its obligations under this Lease in respect of the Mansion."

The Eighth Schedule details the lessor's expenses in relation to the payment of the service charge. Part I of the Eighth Schedule details the expenses in relation to the Building and specifically includes the maintenance, repair, redecoration and renewing of the main structure of the Building and garage, as well as any costs and charges of any accountant employed for the purpose of auditing the accounts in respect of the lessor's expenses, and Part II deals with expenses in relation to the Mansion, which includes items such as maintaining the grounds, paths and driveways and costs and charges of the lessor or any agents employed by the lessor to manage or administer the Mansion.

Hearing

17. Following the inspection, a hearing was held at the Tribunal's hearing rooms at Centre City Tower, Birmingham. The Applicant attended on her own behalf. Ms Petrenko represented the Respondent, accompanied by Mr Matthee and Mr Nock, together with Mr Lunt (from Whittingham Riddell LLP, the Respondent's accountants).

Submissions

Preliminary issues

18. Ms Petrenko referred to the skeleton argument that she had provided to the Tribunal. She directed the Tribunal to the provisions in paragraph 2 (iv) of Part II of the Third Schedule to the Lease which, unusually, referred to a triennial balancing procedure. She confirmed that, although statutory accounts had been produced for the years ending 31st March 2015, 30th June 2016 and 30th June 2017, no balancing procedure, as required by the Original Lease, had yet been carried out. As such, she confirmed that all payments currently demanded were on account service charges.

19. Mr Lunt confirmed that a balancing service charge account was due to be carried out shortly. He confirmed that this should have been carried out in 2015; however, as the Respondent had only taken over the management at that time, it did not have the necessary information to carry out the same.

20. Ms Petrenko referred the Tribunal to the decision of the Upper Tribunal in *Knapper v Francis* [2017] UKUT 3(LC) and to the two-stage test, set out by Martin Roger QC, that the tribunal should consider when dealing with on account payments:

> "*28. … The starting point for its determination is the contractual position between the parties…*
>
> *30. The second stage of the determination is to consider whether the on-account payment required by the lease exceeded the statutory limit imposed by section 19(2). The effect of the statute is to modify the contractual obligation so that no greater amount than is*

reasonable is payable before the relevant costs are incurred. The language of the subsection suggests that the statutory ceiling applies at the time the leaseholder's liability arises. If, at that date, the on-account payment is greater than a reasonable sum, the leaseholder's contractual obligation is to pay only the lesser, reasonable, sum."

21. Ms Petrenko invited the Tribunal to adopt this two-stage process in relation to each of the service charges years. She stated that the contractual positon was clear, the lessee was required to pay the estimated service charge under paragraph 2(iii) of Part II of the Third Schedule. She submitted that the second stage was to determine what sums were reasonably payable on the date on which the payments were requested. As such, she stated that the relevant documents to be considered were the service charge demands not the accounts, which had been produced later. She submitted that it was only when the three yearly balancing service charge procedure had been carried out, that any consideration as to whether the actual expenditure was reasonable, would become relevant.

22. In relation to the failure of the Respondent to produce the balancing service charge account in 2015, Ms Petrenko referred to the decisions of the Upper Tribunal in *Warrior Quay Management Co Limited v Joachim* (LRX/42/2006) ('*Warrior Quay*'), *Pendra Loweth Management Limited v North* [2015] UKUT 91 (LC) ('*Pendra*') and *Wigmore Homes (UK) Limited v Spembley Works Residents Association Limited* [2018] UKUT 252 (LC) ('*Wigmore Homes*').

23. She stated that all of these decisions made it clear that - depending on the provisions of the lease - a failure on the part of the management company to provide certified accounts, did not suspend any obligation under the lease to pay the estimated service charge account. She referred the Tribunal to the provisions of the Original Lease relating to the payment of the estimated service charge and pointed to the fact that this did not refer to any payments demanded being subject to the receipt of the balancing service charge account. She also stated that, although two of the earlier demands were not sent by 30th June, time was not of the essence and the demands were sent shortly thereafter.

24. In addition, she stated, it was clear that from the budgets that the Respondent had produced, that the figures demanded were less than those demanded by the freeholder in the year ending 2014 and that the amounts demanded had not increased greatly year on year. Thus, she submitted, the sums demanded were reasonable.

25. In relation to specific items in dispute, Ms Petrenko referred to the fact that the Directions Order of 11th September 2018 had limited the Applicant's application to those matters set out in pages 5 to 12 of her statement. She stated that the Applicant should, therefore, not be allowed to refer to any matters detailed in Mr Jepps' statement that did not relate to those specific matters.

26. The Applicant stated that there had been many items in the accounts that she could not make sense of. She stated that, as the Tribunal had allowed Mr Jepps' statement to be submitted in evidence, the information contained in the same should be allowed.

27. The Tribunal agreed that, as no balancing process had been carried out, this was a matter dealing with the reasonableness of on account payments, as per section 19(2) of the Act. It allowed the Applicant to refer to the items detailed in Mr Jepps' statement, but confirmed that the decision could, quite clearly, only concern the matters relevant to the on account payments.

Service Charge - year ending 30th June 2015

28. The Applicant referred to an item identified as legal costs on the accounts relating to the year ending 30th June 2015. She believed this related to the costs for setting up the 'Right To Manage' company and stated that such costs were not permitted under the lease provisions as part of the service charge and should instead have been detailed in RTM company accounts. In addition, she stated that she had given a sum of £200 on account of these costs and that this was not detailed on the accounts.

29. The Applicant stated that one of the invoices for garage costs referred to 17 garages and not 30 garages, consequently, costs had been unevenly distributed in the accounts, as not all of the lessees were liable for the sum that had been expended on that invoice.

30. She stated that the accountancy fee was high, considering the fact that the accounts were unaudited, and stated that the sums relating to electrical repairs and drain charges were not reasonable. She also queried whether any of the items should have been subject to a section 20 consultation.

31. Ms Petrenko, on behalf of the Respondent, stated that the legal costs were payable as part of the service charge under paragraph 5 of Part II of the Eighth Schedule to the Original Lease, which referred to the "*costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion*".

32. In relation to the garages, she stated that the relevant costs were those detailed in the budget, not the accounts. She noted that there appeared to have been an incorrect apportionment in the accounts, as under the lease provisions the garages should have been apportioned as part of the Building (a quarter share) rather than as part of the Mansion (a thirtieth share). She stated that this was not a significant issue as the budget was for anticipated works and had been based on the fact that there would be noticeable works required to every garage. She stated that the sum requested from the Applicant, £50, was reasonable and payable under paragraph 1 of Part I of the Eighth Schedule, as were the sums requested for the drains and electrical repairs (£20 and £6.67 respectively).

33. Ms Petrenko confirmed that none of the agreements entered in to by the Respondent were for a period of more than 12 months, therefore, were not Qualifying Long Term Agreements and that none of the works undertaken involved a contribution of more than £250 per lessee, therefore, were not Qualifying Works. As such, she stated that no section 20 consultation was required.

34. Mr Lunt stated that, although the Original Lease referred to accounts being 'audited', due to the age of the Original Lease, this was not the same as what are now considered as *audited accounts*. He stated that the latest version of the RICS code endorsed this view and that the accounts that had been produced complied with the lease provisions. Ms Petrenko submitted that the budget for the accountancy fee, £17.93 per property, was reasonable and payable under paragraph 5 of Part I of the Eighth Schedule to the Original Lease.

Service Charge - year ending 30th June 2016

35. The Applicant queried why no reserve fund had been collected. She stated that there was provision in the Original Lease for collection of the same and that this had been requested in the 2017 budget.

36. In relation to general repairs and maintenance and the allocation of fees generally in the accounts, she queried why fees that should have been charged as part of the Mansion costs were charged in the costs for the buildings and vice versa. In addition, she queried whether the costs in relation to gardening, insurance and management fees should have been subject to consultation under section 20.

37. Ms Petrenko, on behalf the Respondent, stated that the Respondent was not obliged to hold a reserve under the lease provisions.

38. In relation to the allocation of items of expenditure in the accounts, she stated that these were not relevant for the purposes of the proceedings, as the Tribunal was considering the reasonableness of the amounts demanded on account and whether the sums detailed in the budgets were reasonable and payable. She confirmed that, as previously stated, the Respondents had not carried out any Qualifying Works nor entered into any Qualifying Long Term Agreements, including in relation to the gardening or management services.

39. She stated that any other matters raised by Mr Jepps in his statement related to the accounts rather than the budgets, had not been detailed on pages 5 to 12 of the Applicant's statement and were, therefore, beyond the remit of the Tribunal's considerations.

Service Charge - year ending 30th June 2017

40. The Applicant, again, queried the allocation of the budget and accounts, in that all items appeared to have been allocated to the blocks of

properties, rather than having two separate allocations - one for the Building costs and one for the costs of the maintenance of the Mansion. She also, again, queried the cost of the gardening and estate management and whether consultation was required.

41. Ms Petrenko stated that the items detailed in the budgets were simply an estimated expenditure in relation to lessor's expenses, as required under paragraph 2 of Part II of the Third Schedule. She stated that this paragraph did not require the estimate to be split between items relating to the Building and items relating to the Mansion.

42. She confirmed that, as previously stated, there were no relevant Qualifying Works and no relevant Qualifying Long Term Agreements, for which a section 20 consultation would have been required.

Service Charge - year ending 30th June 2018

43. The Applicant stated that she had not received any accounts and, therefore, could not query any individual item.

44. The Respondent confirmed that the question for the Tribunal related to the reasonableness of the budget, not the accounts, and that the Applicant had not advanced any basis upon which she considered the same to be unreasonable.

Service Charge - year ending 30th June 2019

45. Although the service charges for this period was not referred to in the Applicant's application, the Applicant referred to the reasonableness of the prospective service charges for 2018 to 2019 in page 12 of her statement. She stated a prospective charge of £711.09 had been demanded for the reserve, which, she believed, related to the repair of water pipes. She queried whether this was reasonable as, she stated, the Building was in serious disrepair and the sum had been demanded without section 20 consultation.

46. Ms Petrenko submitted that the Respondent was entitled to, but not obliged to, accumulate a reserve fund under paragraph 1 of Part I of the Eighth Schedule. She stated that the Respondent had recently dealt with a number of issues in relation to corroding poly pipes in the drainage system across the Mansion. She referred to the Respondent's statement, where it was stated that in a twelve-month period approximately twenty pipes had burst. The Respondent, in its statement, also confirmed that these repairs cost approximately £350 a time and, therefore, estimated that there would be a cost of approximately £3000 to £4000 per block, which the Respondent hoped to build up in the reserve funds so that the works could be carried out as soon as possible. Ms Petrenko stated that the figure of £711.09 represented a genuine pre-estimate in relation to the proposed works and that it was reasonable. She stated that, at the moment, no section 20 consultation was required as it was a sum

requested on account and referred to *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 0365. In addition, she stated that the figure of £711.09 was for the Building, so only amounted to a sum of just under £178 per lessee, and that consultation would be carried out by the Respondent, in due course, if required.

Administration charge

47. The Applicant queried whether she was liable to pay, and the reasonableness, of an administration charge of £150, which had been levied on her by the Respondent in relation to the removal of rubbish in 2017. She stated that the Respondent had, firstly, informed her that the charge was for the removal of a boat within the communal area and, subsequently, informed her that it was for the removal of items of rubbish from a communal area that had been left by one of her tenants. In addition, she had been charged with a late payment fee from HLM.

48. She confirmed that she had contacted Countrywide/HLM (the management company employed by the Respondent) and stated that she did not believe that the sums charged were either warranted or justified. She stated that HLM had, subsequently, removed their late charge fee; however, they had stated that they were unable to waive the administration charge of £150 for the fly tipping, as the Respondent had levied this sum directly.

49. The Applicant stated that she had driven to the Property on two occasions, after having been contacted by the Respondents, and had never witnessed any evidence of fly tipping or any overflow of the bin store. She stated that there was no evidence that the items that had been left in the communal area were from one of her tenants and that there would have been no reason for her tenant to have left any items in the communal area as he could have left any unwanted items in the garage.

50. Ms Petrenko stated that Mr Nock knew the Applicant's tenant by name and saw him moving out of the Property on 14th August 2017. She stated that Mr Nock had taken a photograph of the items that had been left by the tenant and referred to the letter of 23rd of January 2018, sent by the Respondent to the Applicant, which included the photograph.

51. Ms Petrenko stated that under the terms of the Original Lease - paragraph 3 of Part I of the Third Schedule - it stated that items of refuse could only be deposited in the bin storage area. She confirmed that, in the Respondent's letter of 23rd of January 2018, as the Applicant had threatened to make an application to the Tribunal, the Respondent had agreed to reduce the administration fee for the removal of the items to £100 to match any tribunal application fee. She stated that the Respondent considered this a pragmatic solution to avoid the need for the Applicant to make such an application.

52. Ms Petrenko stated that the sum of £100 was reasonable and considerably cheaper than sums charged by local authorities for the removal of fly tipping. She stated that Mr Nock was at the site at the relevant time, that he recognised the tenant and that he had taken a photograph of the rubbish. She stated that, as the Applicant had not even been at the site at the relevant time, Mr Nock's evidence was clearly more compelling than that of the Applicant.

Application under Section 20C

53. The Applicant's submissions in relation to section 20C of the Act reiterated her reasons for the application and stated that she had reasonable grounds to make the application and that, as the application was a low value matter, it should have been dealt with proportionately.

54. She confirmed that she had been through Countrywide's complaints procedure twice in the past year four years, that she did not have access to any contracts to consider whether or not they were long term agreements and that various charges had not been properly explained.

55. She stated that the conduct of Beale & Company Solicitors LLP was unreasonable, in that there are only two items of work that had been carried out on the Building, the fascia and the bin store roof, and that it should not have been difficult to acquire those invoices and explain the income and outgoings.

56. The Applicant stated that it was not reasonable for the Respondent to incur 'devastating' costs when this was a low value matter, nor was it reasonable to seek to impose those costs on others. She stated that she was not wealthy, and was sure that other lessees were not either, and that she would not have incurred such costs herself, as they would have been completely ruinous.

57. In relation to the conduct of the Respondent, she stated that she had ongoing issues in relation to charges being put on to her account without her knowledge, some of which were later removed. She did not consider this behaviour to be just and equitable. She stated that she was persistently told that there were insufficient funds to maintain the Building and that it was impossible to tell what the income and expenditure for each property was, when the income was pooled and allocated to different schedules. In addition to this, she was informed that an £11,000 loan had been repaid, which did not appear in the accounts, and was unsure as to why a sum for legal costs appeared on the accounts. She went on to refer to the discrepancies detailed in Mr Jepps' statement.

58. The Respondent opposed the application for an order under section 20C as, it submitted, it would not be just and equitable in all of the circumstances of the case. The Respondent stated that the majority of the Applicant's submissions effectively repeated assertions made in her

application, which had already been responded to, and were not relevant in relation to an order under section 20C.

59. In relation to the Applicant's argument that "*it was a low value matter and should have been dealt with proportionately*", the Respondent stated that the Applicant did not deal with matter proportionally and left the Respondent with no option but to defend itself and the other lessees' interests against allegations and challenges, incurring substantial expenditure in the process.

60. In relation to the order, they submitted that it was not a necessary or a relevant consideration of the Tribunal to assess whether the relevant legal costs incurred were recoverable as a service charge under the provisions of the lease or whether such costs were reasonably incurred; the reason being that, if the Applicant failed in her section 20C application she would still retain the right to challenge the costs as part of the service charges under section 27A of the Act. Notwithstanding this, the Respondent went on to state that it believed that such costs were recoverable, under clause 5 of Part II of the Eighth Schedule to the Original Lease, and referred to the decisions in *Plantation Wharf Management Company Limited v Jackson and another* [2011] UKUT 488 (LC), *Conway and others v Jam Factory Freehold Limited* [2013] UKUT 592 (LC) ('*Jam Factory*') and *Schilling v Canary Riverside Property Limited* LRX/65/2005 ('*Schilling*').

61. In relation to the question of the assessment of 'just and equitable' the Respondent referred to the decision in *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 ('*Doren*'), where His Honour Judge Rich Q.C. set out guidance upon which the discretion under section 20C should be exercised (paragraphs 28 to 32), which included, "*the conduct and circumstances of all of the parties*" and "*the outcome of the proceedings*", and went on to state that "those *entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an "instrument of oppression*".

62. The Respondent also referred to paragraph 54 of *Jam Factory* in which Martin Roger QC referred to *Schilling* and stated:

> "*the ratio of the decision in [Doren] is "there is no automatic expectation of an Order under s.20C in favour of successful tenant". "So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour*."

63. As such, the Respondent submitted that the starting point for all of their legal defence costs in defending the application were that they should be recoverable as a service charge from the Applicant and the other lessees unless there were circumstances why it would not be just and equitable.

64. In relation to the conduct of the parties, the Respondent submitted that the Applicant had commenced a campaign of baseless allegations against

the Respondent over a number of years, which had caused distress to the Respondent and representatives of Respondent. It stated that the Applicant was, through its managing agents, invited to make an appointment to inspect the service charge accounts and documents at the managing agents' offices and that the Applicant did not even acknowledge these invitations, let alone take them up.

65. The Respondent further stated that the Applicant's statement did not narrow the issues in the application, but instead made further allegations, which were generic blanket challenges and that Mr Jepps' statement, which was only received four weeks prior to the hearing, detailed further items that had not been included on the Applicant's statement.

66. The Respondents referred to paragraphs 72 and 73 of the decision in *Jam Factory*, where Martin Roger QC stated, in relation to a section 20C order granted in favour of an unsuccessful appellant whose application was not supported by the majority of the lessees:

> *"…I cannot help but feel that its effect is at best ironic and at worst perverse or capricious. The majority of leaseholders did not support the appellant's application … Those leaseholders … are to contribute through the service charge to the costs incurred by the respondent in defeating the application. The [unsuccessful] appellants themselves, however, are to be protected from what would otherwise be their contractual obligation to pay their share of those costs, notwithstanding the fact that the costs have been incurred ensuring that their efforts … did not succeed. In the context of a development owned by the leaseholders through their own company it seems to me quite impossible to describe an outcome which discriminates between leaseholders in that way as just and equitable…The vice of the [section 20C] order is that it benefits the losing appellants at the expense of the members of the successful respondent, each of whom will not only be liable to pay their own share as leaseholder, but will have to make up the shortfall created by the respondent's inability to recoup an equal share from the appellants. That seems to me to be fundamentally unfair."*

67. The Respondent concluded by stating that this was not a case in which any order would be just and equitable as it would relieve the Applicant, and the other lessees specified in her application, from responsibility for contributing towards relevant legal costs through the service charge at the expense of the other lessees.

Application under Paragraph 5A

68. In relation to application under paragraph 5A of schedule 11 to the 2002 Act, the Applicant stated that the Respondent's costs should be limited to reasonable costs of a responsible lessor acting in accordance with the lease, RICS code, the articles and the applicable legislation.

69. She confirmed that she had tried to resolve the disputes over a four-year period but could not do so. She stated that Mr Nock was the only active director and his responses to her had been unreasonable throughout.

70. She stated that she had good reason to suspect the service charges were being charged unreasonably because maintenance was being refused to the Building on the grounds of insufficient funds (despite the fact that some of the other properties were not being neglected), that excuses had been made in relation to the lack of funding and that there were various discrepancies in the accounts. She stated that her evidence illustrated unreasonable behaviour amounting to victimisation which was borne out by the erroneous charges placed on her service charge account.

71. The Applicant further stated that section 20C recognised, 'where the landlord had abused its rights and used them oppressively' there should be protection for the lessees.

72. She stated that the year-end accounts for 30th June 2018 had still not been produced, which was a material breach of the lease, despite her chasing the same. She, also, did not believe that significant costs would have been saved had she examined the accounts, as suggested by the managing agents, as she would have only been permitted access to the accounts for the year ending 30th June 2017 and that many of the costs that she had queried were prior to this date.

73. She further stated that she had incurred considerable costs, £4000, on Mr Jepps' services to prepare for the hearing in order to try and advance the case, as the hearing would have taken even longer if she had not done this, as the accounts were not straightforward and did not comply with the lease provisions.

74. She believed that the service charges were high and believed that the Respondent's Representative had pursued matters which had already been resolved and that a barrister need not have been instructed on certain issues.

75. In addition, the Applicant stated that she did not believe that there was any danger of the Respondent folding, as its costs had been underwritten and queried why the costs would not, in any event, be covered by the insurance.

76. The Respondent stated that paragraph 5A of schedule 11 to the 2002 Act was enacted relatively recently and that there were not many reported decisions but considered that, as the language mirrored the language of section 20C (3) of the Act, the Respondent's position was that the principles established in relation to section 20C were applicable to any application under paragraph 5A.

77. The Respondent further stated that it was not relevant for the purposes of the application whether the legal costs incurred by the Respondent were

permitted under the lease provisions nor whether they were reasonably incurred, as the Applicant would still have a right to challenge any legal costs under paragraph 5 of schedule 11 to the 2002 Act.

78. The Respondent referred to their previous submissions, in particular the fact that there is no presumption that an order is to be made (*Doren*), and that given the Applicant's conduct - in both bringing the proceedings and her conduct of those proceedings - there was no basis for making an order. The Applicant had made serious allegations of harassment, queried a huge number of service charges without any reasonable basis, raised new issues (based of Mr Jepps' statement) which were unreasonable and unfair to the Respondent and had repeatedly failed to comply with her disclosure obligations.

79. The Respondent referred to the fact that the Tribunal was entitled to have regard to the financial and practical consequences of making an order. It stated that the Respondent was a resident owned RTM company which ran for the benefit of the lessees. The Respondent did not have any assets of its own, but collected service charges and administration costs from the lessees. Further, that it would not be just and equitable to deprive the Respondent of its ability to recover administration costs from the Applicant as it would, either, be left having to recover any uninsured legal costs from other lessees, by way of the service charge, or face serious financial difficulty.

80. For all the above reasons, the Respondent invited the Tribunal to dismiss the Applicant's application for an order.

The Tribunal's Determinations

81. The Tribunal considered all of the written and oral evidence submitted and briefly summarised above.

Service Charges

82. The Tribunal noted that the service charge demanded was an estimated service charge and that the Applicant was liable to pay the same under paragraph 2(iii) of Part II of the Third Schedule to the Original Lease. The Tribunal does not consider the fact that some of the demands had been requested a few days later than detailed in the Original Lease, to extinguish or reduce any liability of the Applicant to pay the same.

83. In cases relating to estimated charges, the Tribunal needs to determine, under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the lease. The Tribunal is not concerned as to whether any actual service costs have been reasonably incurred, as this could only be queried after the balancing service charge statement had been produced. As such, the Tribunal agrees with Ms

Petrenko, that it is the reasonableness of the demands that are the relevant consideration for the determination by the Tribunal.

84. That being said, the Tribunal notes that a balancing service charge process should have been carried out in 2015, and is conscious of the comments of His Honour Judge Huskinson in the *Warrior Quay* decision, at paragraph 25:

> [the lessor] *"… cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year…. The LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against…"* [the lessor]

85. This decision was followed in the *Pendra* decision, where Martin Roger QC stated, at paragraph 51:

> *"The absence of proper accounts for previous years may, of course, provide grounds for treating the estimate with circumspection or even suspicion; it may make it easier to justify reduction under section 19(2) on the basis that there is little to suggest the estimate is reasonable…"*

86. In this case, although the balancing service charge account had not been produced, accounts had been produced for the years ending June 2015, June 2016 and June 2017. It is clear, therefore, that the Respondent did have some information, from 2016, onwards as to likely expenditure.

87. In the recent decision of the Upper Tribunal in *Wigmore Homes* the Upper Tribunal stated, at paragraph 55:

> *"We are conscious that reasonableness is to be judged by the information at the date of the demand. We are also conscious that more information as to actual expenses became available as time went on."*

88. As such, although the reasonableness of the demands are the relevant consideration for the Tribunal, any accounts that were available at the date of the demand, is information that could be taken in to account when judging the reasonableness of the demands.

89. Having considered the Respondent's demands for the estimated service charge expenditure, it is noted that the demand made in 2014 (for the year ending June 2015) was for a sum of £861.59, which was less than the previous freeholder's estimate of £1053.52, and no accounts were available at that time. In the following year, the demand made in 2015 (for the year ending June 2016) was further reduced to £745.48.

90. The accounts for the year ending June 2015 became available in December of 2015 and indicated that the amount actually expended in

that year was less than the budgeted figure and the Tribunal notes that the demand made in 2016 (for the year ending June 2017) was reduced, this time to £727.48.

91. The accounts for the years ending 2016 and 2017 were available in the December of those years, and both indicated a deficit in the accounts. The Tribunal notes that the budgets for the year ending June 2018 and the year ending June 2019 (after those respective accounts were available) were increased. The Tribunal also notes that the estimated service charge demands for the years ending June 2017, June 2018 and June 2019, all detailed either the projected expenditure or the estimated actual expenditure for the previous year, in addition to the proposed budget for the upcoming service charge year.

92. As such, the Tribunal does consider that the Respondent was taking into account the additional information that was available to it when estimating the budgets. The Tribunal, therefore, believes that the method used by the Respondent for the calculation of the estimated service charge to be reasonable.

93. In relation to the service charges generally, the Tribunal notes the Respondent's statement, that there were no Qualifying Works nor any Qualifying Long Term Agreements that required any section 20 consultation.

94. Having considered the provisions in the Original Lease, the Tribunal is also satisfied that, although it may have been beneficial for the estimated costs to be separated in relation to those allocated for the Building and those in relation to the Mansion, this was not a necessity, although it clearly would be required in the balancing service charge accounts.

Service Charge - year ending 30th June 2015

95. In relation to the service charge for the year ending June 2015, the Tribunal does not concur with Ms Petrenko, that any legal costs would fall within the remit of service charge in paragraph 5 of Part II of the Eighth Schedule, as it does not consider that the set up costs in relation to a 'Right to Manage' company would fall within, either the definition of "*costs … of the Lessor and any Agent…employed by the Lessor*" (as the Respondent did not appear to be either of these at the time the costs appear to have been incurred), nor did the costs appear to relate to the management or administration of the estate. The Tribunal notes, however, that although legal costs may have been detailed on the accounts they did not appear to on the estimated service charge demand, therefore are not relevant to the Tribunal's determination.

96. The Tribunal notes that the Respondent had proposed to carry out works to all of the garages and believes that the figure detailed for the garage repairs in the demand to be reasonable (although the accounts may have contained an error, this was not the relevant document for considering

the reasonableness of the sum demanded). In addition, the Tribunal also considers the other items of expenditure, including the fee for the accounting, electrical and general repairs, to be reasonable. As such, the Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2015 was reasonable and that the sum of £861.59 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2016

97. The Tribunal notes that the Original Lease did not require the Respondent to set up a reserve fund. The Tribunal is also satisfied that there were no items requiring section 20 consultation for the estimate, and that the budgeted items appeared to be reasonable sums. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2016 was reasonable and that the sum of £745.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2017

98. As previously stated, the Tribunal did not consider that the estimate required a separate allocation between the costs for the Building and those for the Mansion, nor that any section 20 consultation was required. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2017 was reasonable and that the sum of £727.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2018

99. The Tribunal notes that the Applicant did not give any information as to why she considered the budget for the year ending June 2018 to be unreasonable. As such, the Tribunal determines, in the absence of any evidence to the contrary, that the estimated expenditure detailed in the budget for the year ending 30th June 2018 was reasonable and that the sum of £743.63 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2019

100. The Tribunal notes that the Original Lease does allow the Respondent to request sums towards future works, which does not appear to be disputed by the Applicant. The amount requested in relation to the works to the drains appears to be based on costs already incurred by the Respondent for existing repairs that had been carried out on some parts of the estate. The Applicant did not obtain her own quote, nor did she detail any alternative figure that she would consider reasonable. The Tribunal considers the Respondent's estimate to be reasonable and notes Ms Petrenko's comments, and is satisfied, that no section 20 consultation was required when the demand was sent.

101. In relation to the Applicant's comments regarding the Building being in serious disrepair, the Tribunal noted, on their inspection, that the

Building appeared to be in a fair state of condition and is satisfied that the drainage works are imminently required. The Tribunal, therefore, determines that the estimated expenditure detailed in the budget for the year ending 30th June 2019 was reasonable and that the sum of £800 demanded is payable by the Applicant.

Administration charges

102. The Tribunal notes that the administration charge levied by the Respondent, in relation to fly tipping in the communal area, was for a sum of £100.

103. Although the Applicant states that there was no evidence that the refuse was left by her tenant, there appears to be no dispute that the Applicant's tenant was vacating the Property at that time, and Mr Nock states that he recognised and knew him by name. The Tribunal is satisfied that Mr Nock was on site and took a contemporaneous photograph and that it was reasonable for the Respondent to levy an administration charge on the Applicant based on the provisions in the lease.

104. Regarding the reasonableness of the charge, the Tribunal notes that the original cost of the charge appears to have been £150, and that this was later reduced in line with the application fee to the tribunal. The Tribunal considers it highly unusual that a fee should be reduced in this way, as any charge should be an amount which relates to the item of expenditure, not an amount to avert potential scrutiny. The Tribunal considers the administration fee to be excessive and determines a sum of £50 is reasonable and payable by the Applicant.

Application under Section 20C

105. The Applicant has applied for an order, in accordance with section 20C of the Act, that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. In making such an order, the Tribunal must consider what is 'just and equitable' in the circumstances, taking in to account matters such as the conduct and circumstances of the parties and the outcome of the proceedings.

106. The Tribunal does accept the Respondent's submissions, in that, the issue as to whether the Respondent is entitled to recover the costs under the terms of the lease or whether the costs incurred are reasonable, are both issues which are more properly considered in an application under section 27A of the Act, should such costs be included within the service charge.

107. The Tribunal also notes the comments of His Honour Judge Rich, in the *Doren* decision, at paragraph 31:

"In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20 C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

108. Looking at the circumstances leading to the application and the conduct of the parties, the Tribunal is conscious of the fact that the application was made by the Applicant as she had noticed discrepancies in certain items in the accounts and noted that certain items of service charge did not appear to have been allocated as per the terms of the Original Lease. She was also concerned regarding the upkeep and maintenance of the Building.

109. The Tribunal also notes that the Applicant appears to have followed the Countrywide complaints procedure, she states to no avail, and that by the time of the application there clearly appeared to be a great deal of animosity and distrust between the parties.

110. That being said, the application, and subsequent statement by the Applicant, were vague in the issues involved and referred primarily to the accounts rather than the budgets, with questions rather than submissions, such as "*Is there a receipt for the £13 electrical repairs*" and "*What was £25 electrical repairs*?" In addition, at the hearing, the Applicant did not appear to recognise what matters would be defined as Qualifying Works or Qualifying Long Term Agreements.

111. The Tribunal notes that the managing agents did offer the Applicant an opportunity to inspect the accounts and that the Applicant had failed to take up this offer, as she had stated that not all of the relevant accounts would have been available for inspection.

112. The Tribunal also notes that the Respondent had raised concerns regarding the inclusion of Mr Jepps' statement four weeks prior to the hearing, which raised further issues in relation to the accounts, rather than the budgets, and referred to the fact that the Applicant had often failed to comply with timescales set down by the Tribunal.

113. On the part of the Respondent, although the estimated budgets produced by the Respondent did not require any costs to be allocated between the individual buildings and the Mansion, this separation was, also, not detailed in the accounts that had been produced and, clearly, would need to have been included in any balancing service charge accounts, as the apportionments for the lessees would vary depending on whether the costs were allocated to the Building (for which the Applicant was liable for a quarter share) or for the Mansion (where the Applicant was liable for a thirtieth share).

114. There also appeared to have been other irregularities detailed in the year-end accounts that had been referred to by Mr Jepps, which included the

legal costs. Although these did not appear in the Respondent's budget, consequently, were not a consideration for the Tribunal in relation to the reasonableness of the estimated service charge; they did not appear to be costs which could be recovered under the service charge under paragraph 5 of Part II of the Eight Schedule to the Original Lease, as submitted by the Respondent, for the reasons previously mentioned. As such, the Tribunal could understand the Applicant's concerns with regard to the accounts.

115. In addition to this, the Tribunal noted that the Respondent appeared to be under the impression, at the hearing, that, if there were insufficient funds in relation to the Building, it would not be responsible to maintain the same. The lessor's covenants under paragraph 4 of the Sixth Schedule to the Original Lease clearly states that, subject to the payment by the Applicant of her proportion of the expenses, the Respondent has a duty to maintain and repair the relevant parts of the Building and garage.

116. The Tribunal also notes that, although the Respondent referred to the late submission of Mr Jepps' statement, the skeleton argument, sent on behalf of the Respondent, was only submitted the day prior to the hearing. This document correctly identified that the relevant service charges were the estimated service charges detailed in the budget, rather than any figures in the accounts. Prior to this, both the Applicant's submissions and the Respondent's statements in relation to the service charge, referred to various items on the accounts. Copious documents were provided in relation to those accounts and corresponding invoices, the vast majority of which were not referred to at the hearing, as they were not relevant in relation to the reasonableness of the estimated figures in the service charge budgets.

117. Regarding the outcome of the proceedings, the Tribunal notes that the Applicant has failed to identify that any of the estimated service charges for the relevant years were unreasonable, although the Tribunal has found that the administration charge was excessive.

118. In such circumstances, the Tribunal is particularly mindful of the reasoning of Martin Roger QC in *Jam Factory*, in that it would seem perverse and unjust that, where the Applicant has been unsuccessful in the vast majority of her application, she should be protected from costs at the potential expense of the Respondent and the remaining lessees who were either neutral or who did not support the application.

119. Taking in to account all of the circumstances, the Tribunal does not consider that it would be just and equitable to make any order in favour of the Applicant under section 20C of the Act.

Application under Paragraph 5A

120. In relation to the application under paragraph 5A of Schedule 11 to the 2002 Act, the Tribunal concurs that items that are relevant in relation to

the application to section 20C of the Act are relevant in relation to an application under paragraph 5A. In such an application; however, the Tribunal is considering the Applicant's liability to pay administration charges in respect of litigation costs.

121. Paragraph 5A has been considered in the recent decision, *Avon Ground Rents Limited v Child* [2018] UKUT 0204 (LC). An order under paragraph 5A was not available to the tribunal in the first instance of those proceedings as they had begun before October 2016; however, in paragraph 58, Holdgate J observed:

> *"Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondents' contractual liability to pay the legal costs that the Applicant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters…"*

In addition, the Upper Tribunal found the level of costs before the First Tribunal to be "troubling" and stated, at paragraph 65:

> *"The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear."*

122. As previously stated, the Tribunal notes that the vast majority of the documents produced by both parties in their bundles related to various invoices and accounts, which were not referred to at the hearing, as the Respondent's skeleton argument, submitted just prior to the hearing, confirmed that the relevant considerations were whether the estimated budgets were reasonable and that the actual costs incurred would not be relevant until the balancing service charge adjustment process had taken place.

123. The Tribunal considers that, had the Respondent upon receipt of the Applicant's application put this argument forward, the issues in relation to the reasonableness of the service charges would clearly have been narrowed and the copious amounts of documentation produced by the Respondent would have been greatly reduced.

124. That being said, it is not clear, from the Applicant's submissions whether, if such an argument had been put to her, she might have altered her submissions, as even when the Tribunal confirmed that this was the correct position, the Applicant's subsequent submissions still appeared to focus on the discrepancies in the accounts.

125. Taking all of these matters into account, the Tribunal considers it would be just and equitable to make an order, under paragraph 5A of Schedule

11 to the 2002 Act, that the Applicant is only liable to pay 25% of any administration charges in respect of litigation arising from this application.

Appeal Provisions

126. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
.....
Judge M. K. Gandham

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CR/LSC/2018/0009**
Properties	**:**	**40 Pippin Avenue, Halesowen, West Midlands, B63 2PW**
Applicants	**:**	**Ms Angela Clancy**
Representative	**:**	**Not represented**
Respondent	**:**	**14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited**
Representative	**:**	**Counsel – Ms Julia Petrenko of Falcon Chambers, instructed by Beale & Company Solicitors LLP**
Type of Application	**:**	**Applications under sections 27A and 20C of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the liability to pay administration charges**
Tribunal Members	**:**	**Judge M K Gandham** **Mr N Wint FRICS**
Date and venue of Hearing	**:**	**16th and 17th October 2018** **Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU**
Date of Decision	**:**	**22 July 2019**

DECISION

Introduction

1. On 10th May 2018, the Tribunal received an application from Ms Angela Clancy ('the Applicant') under section 27A of the Landlord and Tenant Act 1985 ('the Act') to determine whether the service charges demanded for the service charge periods from 1st July 2014 to 30th June 2018 were payable (and the amounts which were reasonably payable) in respect of the leasehold property known as 40 Pippin Avenue, Halesowen, Birmingham, B63 2PW ('the Property'). In addition, the Applicant made applications under section 20C of the Act and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in respect of an administration charge and the landlord's costs.

2. The Applicant is the current lessee of the Property under a lease dated 1st December 2016 made between (1) Sinclair Gardens Investments (Kensington) Limited and the Applicant ('the New Lease'), this being an extension of a lease of the Property dated 22nd August 1974 made between (1) A& J Mucklow & Co. Limited and (2) Thomas Naughton and Catherine Dunne ('the Original Lease'). The Tribunal was informed that the provisions relating to the service charge remained as per the Original Lease.

3. The Property forms part of an estate referred to, under the Original Lease, as 'the Mansion'. This encompasses six blocks of properties, thirty garages, driveways, pathways, gardens and grounds. The freehold of the Property is still held by Sinclair Gardens Investments (Kensington) Limited. 14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited ('the Respondent') acquired the right to manage the Mansion on 6th April 2014.

4. A Procedural Judge issued directions on 31st May 2018. A second Directions Order, dated 11th July 2018, extended the deadline for receipt of documents referred to in the first Directions Order. On 11th September 2018, a further Directions Order was issued confirming that any allegations in respect of fraud and breach of trust were outside the jurisdiction of the Tribunal and that the Tribunal could not order a full independent audit, so the Applicant should rely on her own independent expert. The Order also confirmed that any items of service charge in dispute were as set out in pages 5 to 12 of the Applicant's Statement of Case.

5. The Tribunal received further correspondence and bundles of documents from both parties, in addition to a witness statement from Mr Paul Jepps of Haines Watts (SEM) Limited (the expert witness of the Applicant) on 20th September 2018 and the Respondent's skeleton argument on 15th October 2018, the day prior to the hearing.

6. The matter was listed for an inspection, to take place on 16th October 2018, followed by an oral hearing on 16th and 17th October 2018.

7. Submissions in relation to the section 20C Application were sent after the hearing and the Tribunal reconvened on 12th December 2018 and 21st February 2019 to discuss the same. Submissions relating to paragraph 5A of Schedule 11 to the 2002 Act were received by the Tribunal, from the Respondent on 3rd May 2019 and from the Applicant on 8th May 2019. The Tribunal wrote to both parties on 17th May 2019 to confirm that it would not entertain any further correspondence or submissions.

Inspection

8. The Tribunal inspected the Property and estate on 16th October 2019 in the presence of the Applicant and, on behalf of the Respondent - Ms Petrenko (counsel), Mr Matthee (a solicitor from Beale & Company Solicitors LLP) and Mr Nock and Mrs Nock (directors at the Respondent company).

9. The Property is accessed off Pippin Avenue and is a first floor maisonette in a block of four properties (numbered 38 to 44 Pippin Avenue) defined in the Original Lease, and referred to in this decision, as 'the Building'. The Property has the benefit of a garage, which is located within a private area containing twenty-four garages, accessed via a private drive off Apperley Way.

10. The Tribunal also inspected the remainder of the Mansion, which comprises a block of ten flats (18 to 36 Apperley Avenue), four further blocks of four maisonettes on Apperley Way (14 to 20; 22 to 28; 30 to 36 and 38 to 44) and a block of six garages located in an area, accessed via a separate drive off Apperley Way, in addition to the various pathways and grounds.

11. The estate appeared to be in a fair condition of repair generally. All of the garages appeared to have been maintained fairly recently, the doors had been painted and they had been fitted with new soffits and fascia, although the private drives leading to the garage blocks were in need of repair. In relation to the Building, two of the external doors had been replaced and the other two, the Tribunal were informed, were awaiting replacement.

The Law

12. The relevant provisions in respect of liability to pay and reasonableness of service charges are found in sections 19 and 27(A) of the Act (as amended), which are set out as follows:

Section 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.

Section 27A Liability to pay service charges: jurisdiction

(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.
…

13. Section 20c of the Act (as amended) provides:

Section 20c 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….the First-tier 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 person specified in the application.
…
(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.

14. The relevant provisions in respect of liability to pay and reasonableness of administration charges are found in paragraphs 1, 2, 5 and 5A of Schedule 11 of the 2002 Act (as amended), which are set out as follows:

Paragraph 1 Meaning of "administration charge"

(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.
…

Paragraph 2 Reasonableness of administration charges

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

Paragraph 5 Liability to pay administration charges

(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.
…

Paragraph 5A Limitation of administration charges: costs of proceedings

(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	***"The relevant court or tribunal"***
Court proceedings	*The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court*
First-tier Tribunal proceedings	*The First-tier Tribunal*
Upper Tribunal proceedings	*The Upper Tribunal*
Arbitration proceedings	*The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.*

The Lease

15. The New Lease confirmed that it was made on the same terms and subject to the same the conditions and covenants as contained in the Original Lease, other than those expressly provided in or otherwise inconsistent with the New Lease (which simply related to the term and ground rent).

16. In Part II of the Third Schedule to the Original Lease, the lessee covenanted, amongst other matters:

"*2. (i) To contribute and pay one equal fourth part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirtieth part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax.*

...

(iii) The contribution under paragraph (i) of this clause for the period of twelve months (hereinafter called "the Service Charge Year") ending on 30th June in each and every year during the remainder of the term hereby granted shall be estimated by the Lessor (whose decision shall be final) not later than 30th June of the immediately preceding year and notified to the Lessee who shall pay the estimated contribution in advance by two instalments on 1st July and 1st January in the Service Charge Year.

(iv) As soon as reasonably may be after the Service Charge Year ending on 30th June 1976 and in each succeeding third Service Charge

Year when the actual amount of the said costs expenses outgoings and matters for the three Service Charge Years ending on 30th June 1979 or such succeeding third year (as the case may be) has been ascertained the Lessee shall forthwith pay the balance due to the Lessor or be credited in the Lessor's books with any amount overpaid.

...

4. To pay a fair share of the cost of the upkeep of any party fences walls sewers drains pipes passages footpaths entrances or garage access surface as apportioned by the Lessor.

...

11. To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 or 147 or the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

The Sixth Schedule details the lessor's covenants which include the following:

"(4) Subject to payment by the Lessee of the Lessee's proportion of the Lessor's Expenses: –

(i) To maintain repair redecorate and renew: –

(a) the main structure roof gutters and rain water pipes of the Building and garage (if any) and...

...

(iv) So often as reasonably required to decorate the exterior of the Building and the Garage in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit...

(v) To maintain the gardens and grounds of the Mansion including lawns borders trees and plants and to maintain and repair the paths driveways and garage forecourt.

(vi) Effect and maintain with the Prudential Assurance Company Limited or some other reputable insurance company nominated by the Lessor: –

(i) the insurance of the Building and the Garage...

...

(viii) To keep or cause to be kept proper books of accounts showing the expenditure incurred by it in carrying out its obligations under this Lease in respect of the Mansion."

The Eighth Schedule details the lessor's expenses in relation to the payment of the service charge. Part I of the Eighth Schedule details the expenses in relation to the Building and specifically includes the maintenance, repair, redecoration and renewing of the main structure of the Building and garage, as well as any costs and charges of any accountant employed for the purpose of auditing the accounts in respect of the lessor's expenses, and Part II deals with expenses in relation to the Mansion, which includes items such as maintaining the grounds, paths and driveways and costs and charges of the lessor or any agents employed by the lessor to manage or administer the Mansion.

Hearing

17. Following the inspection, a hearing was held at the Tribunal's hearing rooms at Centre City Tower, Birmingham. The Applicant attended on her own behalf. Ms Petrenko represented the Respondent, accompanied by Mr Matthee and Mr Nock, together with Mr Lunt (from Whittingham Riddell LLP, the Respondent's accountants).

Submissions

Preliminary issues

18. Ms Petrenko referred to the skeleton argument that she had provided to the Tribunal. She directed the Tribunal to the provisions in paragraph 2 (iv) of Part II of the Third Schedule to the Lease which, unusually, referred to a triennial balancing procedure. She confirmed that, although statutory accounts had been produced for the years ending 31st March 2015, 30th June 2016 and 30th June 2017, no balancing procedure, as required by the Original Lease, had yet been carried out. As such, she confirmed that all payments currently demanded were on account service charges.

19. Mr Lunt confirmed that a balancing service charge account was due to be carried out shortly. He confirmed that this should have been carried out in 2015; however, as the Respondent had only taken over the management at that time, it did not have the necessary information to carry out the same.

20. Ms Petrenko referred the Tribunal to the decision of the Upper Tribunal in *Knapper v Francis* [2017] UKUT 3(LC) and to the two-stage test, set out by Martin Roger QC, that the tribunal should consider when dealing with on account payments:

> "*28. … The starting point for its determination is the contractual position between the parties…*
>
> *30. The second stage of the determination is to consider whether the on-account payment required by the lease exceeded the statutory limit imposed by section 19(2). The effect of the statute is to modify the contractual obligation so that no greater amount than is*

reasonable is payable before the relevant costs are incurred. The language of the subsection suggests that the statutory ceiling applies at the time the leaseholder's liability arises. If, at that date, the on-account payment is greater than a reasonable sum, the leaseholder's contractual obligation is to pay only the lesser, reasonable, sum."

21. Ms Petrenko invited the Tribunal to adopt this two-stage process in relation to each of the service charges years. She stated that the contractual positon was clear, the lessee was required to pay the estimated service charge under paragraph 2(iii) of Part II of the Third Schedule. She submitted that the second stage was to determine what sums were reasonably payable on the date on which the payments were requested. As such, she stated that the relevant documents to be considered were the service charge demands not the accounts, which had been produced later. She submitted that it was only when the three yearly balancing service charge procedure had been carried out, that any consideration as to whether the actual expenditure was reasonable, would become relevant.

22. In relation to the failure of the Respondent to produce the balancing service charge account in 2015, Ms Petrenko referred to the decisions of the Upper Tribunal in *Warrior Quay Management Co Limited v Joachim* (LRX/42/2006) ('*Warrior Quay*'), *Pendra Loweth Management Limited v North* [2015] UKUT 91 (LC) ('*Pendra*') and *Wigmore Homes (UK) Limited v Spembley Works Residents Association Limited* [2018] UKUT 252 (LC) ('*Wigmore Homes*').

23. She stated that all of these decisions made it clear that - depending on the provisions of the lease - a failure on the part of the management company to provide certified accounts, did not suspend any obligation under the lease to pay the estimated service charge account. She referred the Tribunal to the provisions of the Original Lease relating to the payment of the estimated service charge and pointed to the fact that this did not refer to any payments demanded being subject to the receipt of the balancing service charge account. She also stated that, although two of the earlier demands were not sent by 30th June, time was not of the essence and the demands were sent shortly thereafter.

24. In addition, she stated, it was clear that from the budgets that the Respondent had produced, that the figures demanded were less than those demanded by the freeholder in the year ending 2014 and that the amounts demanded had not increased greatly year on year. Thus, she submitted, the sums demanded were reasonable.

25. In relation to specific items in dispute, Ms Petrenko referred to the fact that the Directions Order of 11th September 2018 had limited the Applicant's application to those matters set out in pages 5 to 12 of her statement. She stated that the Applicant should, therefore, not be allowed to refer to any matters detailed in Mr Jepps' statement that did not relate to those specific matters.

26. The Applicant stated that there had been many items in the accounts that she could not make sense of. She stated that, as the Tribunal had allowed Mr Jepps' statement to be submitted in evidence, the information contained in the same should be allowed.

27. The Tribunal agreed that, as no balancing process had been carried out, this was a matter dealing with the reasonableness of on account payments, as per section 19(2) of the Act. It allowed the Applicant to refer to the items detailed in Mr Jepps' statement, but confirmed that the decision could, quite clearly, only concern the matters relevant to the on account payments.

Service Charge - year ending 30th June 2015

28. The Applicant referred to an item identified as legal costs on the accounts relating to the year ending 30th June 2015. She believed this related to the costs for setting up the 'Right To Manage' company and stated that such costs were not permitted under the lease provisions as part of the service charge and should instead have been detailed in RTM company accounts. In addition, she stated that she had given a sum of £200 on account of these costs and that this was not detailed on the accounts.

29. The Applicant stated that one of the invoices for garage costs referred to 17 garages and not 30 garages, consequently, costs had been unevenly distributed in the accounts, as not all of the lessees were liable for the sum that had been expended on that invoice.

30. She stated that the accountancy fee was high, considering the fact that the accounts were unaudited, and stated that the sums relating to electrical repairs and drain charges were not reasonable. She also queried whether any of the items should have been subject to a section 20 consultation.

31. Ms Petrenko, on behalf of the Respondent, stated that the legal costs were payable as part of the service charge under paragraph 5 of Part II of the Eighth Schedule to the Original Lease, which referred to the "*costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion*".

32. In relation to the garages, she stated that the relevant costs were those detailed in the budget, not the accounts. She noted that there appeared to have been an incorrect apportionment in the accounts, as under the lease provisions the garages should have been apportioned as part of the Building (a quarter share) rather than as part of the Mansion (a thirtieth share). She stated that this was not a significant issue as the budget was for anticipated works and had been based on the fact that there would be noticeable works required to every garage. She stated that the sum requested from the Applicant, £50, was reasonable and payable under paragraph 1 of Part I of the Eighth Schedule, as were the sums requested for the drains and electrical repairs (£20 and £6.67 respectively).

33. Ms Petrenko confirmed that none of the agreements entered in to by the Respondent were for a period of more than 12 months, therefore, were not Qualifying Long Term Agreements and that none of the works undertaken involved a contribution of more than £250 per lessee, therefore, were not Qualifying Works. As such, she stated that no section 20 consultation was required.

34. Mr Lunt stated that, although the Original Lease referred to accounts being 'audited', due to the age of the Original Lease, this was not the same as what are now considered as *audited accounts*. He stated that the latest version of the RICS code endorsed this view and that the accounts that had been produced complied with the lease provisions. Ms Petrenko submitted that the budget for the accountancy fee, £17.93 per property, was reasonable and payable under paragraph 5 of Part I of the Eighth Schedule to the Original Lease.

Service Charge - year ending 30th June 2016

35. The Applicant queried why no reserve fund had been collected. She stated that there was provision in the Original Lease for collection of the same and that this had been requested in the 2017 budget.

36. In relation to general repairs and maintenance and the allocation of fees generally in the accounts, she queried why fees that should have been charged as part of the Mansion costs were charged in the costs for the buildings and vice versa. In addition, she queried whether the costs in relation to gardening, insurance and management fees should have been subject to consultation under section 20.

37. Ms Petrenko, on behalf the Respondent, stated that the Respondent was not obliged to hold a reserve under the lease provisions.

38. In relation to the allocation of items of expenditure in the accounts, she stated that these were not relevant for the purposes of the proceedings, as the Tribunal was considering the reasonableness of the amounts demanded on account and whether the sums detailed in the budgets were reasonable and payable. She confirmed that, as previously stated, the Respondents had not carried out any Qualifying Works nor entered into any Qualifying Long Term Agreements, including in relation to the gardening or management services.

39. She stated that any other matters raised by Mr Jepps in his statement related to the accounts rather than the budgets, had not been detailed on pages 5 to 12 of the Applicant's statement and were, therefore, beyond the remit of the Tribunal's considerations.

Service Charge - year ending 30th June 2017

40. The Applicant, again, queried the allocation of the budget and accounts, in that all items appeared to have been allocated to the blocks of

properties, rather than having two separate allocations - one for the Building costs and one for the costs of the maintenance of the Mansion. She also, again, queried the cost of the gardening and estate management and whether consultation was required.

41. Ms Petrenko stated that the items detailed in the budgets were simply an estimated expenditure in relation to lessor's expenses, as required under paragraph 2 of Part II of the Third Schedule. She stated that this paragraph did not require the estimate to be split between items relating to the Building and items relating to the Mansion.

42. She confirmed that, as previously stated, there were no relevant Qualifying Works and no relevant Qualifying Long Term Agreements, for which a section 20 consultation would have been required.

Service Charge - year ending 30th June 2018

43. The Applicant stated that she had not received any accounts and, therefore, could not query any individual item.

44. The Respondent confirmed that the question for the Tribunal related to the reasonableness of the budget, not the accounts, and that the Applicant had not advanced any basis upon which she considered the same to be unreasonable.

Service Charge - year ending 30th June 2019

45. Although the service charges for this period was not referred to in the Applicant's application, the Applicant referred to the reasonableness of the prospective service charges for 2018 to 2019 in page 12 of her statement. She stated a prospective charge of £711.09 had been demanded for the reserve, which, she believed, related to the repair of water pipes. She queried whether this was reasonable as, she stated, the Building was in serious disrepair and the sum had been demanded without section 20 consultation.

46. Ms Petrenko submitted that the Respondent was entitled to, but not obliged to, accumulate a reserve fund under paragraph 1 of Part I of the Eighth Schedule. She stated that the Respondent had recently dealt with a number of issues in relation to corroding poly pipes in the drainage system across the Mansion. She referred to the Respondent's statement, where it was stated that in a twelve-month period approximately twenty pipes had burst. The Respondent, in its statement, also confirmed that these repairs cost approximately £350 a time and, therefore, estimated that there would be a cost of approximately £3000 to £4000 per block, which the Respondent hoped to build up in the reserve funds so that the works could be carried out as soon as possible. Ms Petrenko stated that the figure of £711.09 represented a genuine pre-estimate in relation to the proposed works and that it was reasonable. She stated that, at the moment, no section 20 consultation was required as it was a sum

requested on account and referred to *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 0365. In addition, she stated that the figure of £711.09 was for the Building, so only amounted to a sum of just under £178 per lessee, and that consultation would be carried out by the Respondent, in due course, if required.

Administration charge

47. The Applicant queried whether she was liable to pay, and the reasonableness, of an administration charge of £150, which had been levied on her by the Respondent in relation to the removal of rubbish in 2017. She stated that the Respondent had, firstly, informed her that the charge was for the removal of a boat within the communal area and, subsequently, informed her that it was for the removal of items of rubbish from a communal area that had been left by one of her tenants. In addition, she had been charged with a late payment fee from HLM.

48. She confirmed that she had contacted Countrywide/HLM (the management company employed by the Respondent) and stated that she did not believe that the sums charged were either warranted or justified. She stated that HLM had, subsequently, removed their late charge fee; however, they had stated that they were unable to waive the administration charge of £150 for the fly tipping, as the Respondent had levied this sum directly.

49. The Applicant stated that she had driven to the Property on two occasions, after having been contacted by the Respondents, and had never witnessed any evidence of fly tipping or any overflow of the bin store. She stated that there was no evidence that the items that had been left in the communal area were from one of her tenants and that there would have been no reason for her tenant to have left any items in the communal area as he could have left any unwanted items in the garage.

50. Ms Petrenko stated that Mr Nock knew the Applicant's tenant by name and saw him moving out of the Property on 14th August 2017. She stated that Mr Nock had taken a photograph of the items that had been left by the tenant and referred to the letter of 23rd of January 2018, sent by the Respondent to the Applicant, which included the photograph.

51. Ms Petrenko stated that under the terms of the Original Lease - paragraph 3 of Part I of the Third Schedule - it stated that items of refuse could only be deposited in the bin storage area. She confirmed that, in the Respondent's letter of 23rd of January 2018, as the Applicant had threatened to make an application to the Tribunal, the Respondent had agreed to reduce the administration fee for the removal of the items to £100 to match any tribunal application fee. She stated that the Respondent considered this a pragmatic solution to avoid the need for the Applicant to make such an application.

52. Ms Petrenko stated that the sum of £100 was reasonable and considerably cheaper than sums charged by local authorities for the removal of fly tipping. She stated that Mr Nock was at the site at the relevant time, that he recognised the tenant and that he had taken a photograph of the rubbish. She stated that, as the Applicant had not even been at the site at the relevant time, Mr Nock's evidence was clearly more compelling than that of the Applicant.

Application under Section 20C

53. The Applicant's submissions in relation to section 20C of the Act reiterated her reasons for the application and stated that she had reasonable grounds to make the application and that, as the application was a low value matter, it should have been dealt with proportionately.

54. She confirmed that she had been through Countrywide's complaints procedure twice in the past year four years, that she did not have access to any contracts to consider whether or not they were long term agreements and that various charges had not been properly explained.

55. She stated that the conduct of Beale & Company Solicitors LLP was unreasonable, in that there are only two items of work that had been carried out on the Building, the fascia and the bin store roof, and that it should not have been difficult to acquire those invoices and explain the income and outgoings.

56. The Applicant stated that it was not reasonable for the Respondent to incur 'devastating' costs when this was a low value matter, nor was it reasonable to seek to impose those costs on others. She stated that she was not wealthy, and was sure that other lessees were not either, and that she would not have incurred such costs herself, as they would have been completely ruinous.

57. In relation to the conduct of the Respondent, she stated that she had ongoing issues in relation to charges being put on to her account without her knowledge, some of which were later removed. She did not consider this behaviour to be just and equitable. She stated that she was persistently told that there were insufficient funds to maintain the Building and that it was impossible to tell what the income and expenditure for each property was, when the income was pooled and allocated to different schedules. In addition to this, she was informed that an £11,000 loan had been repaid, which did not appear in the accounts, and was unsure as to why a sum for legal costs appeared on the accounts. She went on to refer to the discrepancies detailed in Mr Jepps' statement.

58. The Respondent opposed the application for an order under section 20C as, it submitted, it would not be just and equitable in all of the circumstances of the case. The Respondent stated that the majority of the Applicant's submissions effectively repeated assertions made in her

application, which had already been responded to, and were not relevant in relation to an order under section 20C.

59. In relation to the Applicant's argument that "*it was a low value matter and should have been dealt with proportionately*", the Respondent stated that the Applicant did not deal with matter proportionally and left the Respondent with no option but to defend itself and the other lessees' interests against allegations and challenges, incurring substantial expenditure in the process.

60. In relation to the order, they submitted that it was not a necessary or a relevant consideration of the Tribunal to assess whether the relevant legal costs incurred were recoverable as a service charge under the provisions of the lease or whether such costs were reasonably incurred; the reason being that, if the Applicant failed in her section 20C application she would still retain the right to challenge the costs as part of the service charges under section 27A of the Act. Notwithstanding this, the Respondent went on to state that it believed that such costs were recoverable, under clause 5 of Part II of the Eighth Schedule to the Original Lease, and referred to the decisions in *Plantation Wharf Management Company Limited v Jackson and another* [2011] UKUT 488 (LC), *Conway and others v Jam Factory Freehold Limited* [2013] UKUT 592 (LC) ('*Jam Factory*') and *Schilling v Canary Riverside Property Limited* LRX/65/2005 ('*Schilling*').

61. In relation to the question of the assessment of 'just and equitable' the Respondent referred to the decision in *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 ('*Doren*'), where His Honour Judge Rich Q.C. set out guidance upon which the discretion under section 20C should be exercised (paragraphs 28 to 32), which included, "*the conduct and circumstances of all of the parties*" and "*the outcome of the proceedings*", and went on to state that "those *entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an "instrument of oppression*".

62. The Respondent also referred to paragraph 54 of *Jam Factory* in which Martin Roger QC referred to *Schilling* and stated:

> "*the ratio of the decision in [Doren] is "there is no automatic expectation of an Order under s.20C in favour of successful tenant". "So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour*."

63. As such, the Respondent submitted that the starting point for all of their legal defence costs in defending the application were that they should be recoverable as a service charge from the Applicant and the other lessees unless there were circumstances why it would not be just and equitable.

64. In relation to the conduct of the parties, the Respondent submitted that the Applicant had commenced a campaign of baseless allegations against

the Respondent over a number of years, which had caused distress to the Respondent and representatives of Respondent. It stated that the Applicant was, through its managing agents, invited to make an appointment to inspect the service charge accounts and documents at the managing agents' offices and that the Applicant did not even acknowledge these invitations, let alone take them up.

65. The Respondent further stated that the Applicant's statement did not narrow the issues in the application, but instead made further allegations, which were generic blanket challenges and that Mr Jepps' statement, which was only received four weeks prior to the hearing, detailed further items that had not been included on the Applicant's statement.

66. The Respondents referred to paragraphs 72 and 73 of the decision in *Jam Factory*, where Martin Roger QC stated, in relation to a section 20C order granted in favour of an unsuccessful appellant whose application was not supported by the majority of the lessees:

> *"…I cannot help but feel that its effect is at best ironic and at worst perverse or capricious. The majority of leaseholders did not support the appellant's application … Those leaseholders … are to contribute through the service charge to the costs incurred by the respondent in defeating the application. The [unsuccessful] appellants themselves, however, are to be protected from what would otherwise be their contractual obligation to pay their share of those costs, notwithstanding the fact that the costs have been incurred ensuring that their efforts … did not succeed. In the context of a development owned by the leaseholders through their own company it seems to me quite impossible to describe an outcome which discriminates between leaseholders in that way as just and equitable…The vice of the [section 20C] order is that it benefits the losing appellants at the expense of the members of the successful respondent, each of whom will not only be liable to pay their own share as leaseholder, but will have to make up the shortfall created by the respondent's inability to recoup an equal share from the appellants. That seems to me to be fundamentally unfair."*

67. The Respondent concluded by stating that this was not a case in which any order would be just and equitable as it would relieve the Applicant, and the other lessees specified in her application, from responsibility for contributing towards relevant legal costs through the service charge at the expense of the other lessees.

Application under Paragraph 5A

68. In relation to application under paragraph 5A of schedule 11 to the 2002 Act, the Applicant stated that the Respondent's costs should be limited to reasonable costs of a responsible lessor acting in accordance with the lease, RICS code, the articles and the applicable legislation.

69. She confirmed that she had tried to resolve the disputes over a four-year period but could not do so. She stated that Mr Nock was the only active director and his responses to her had been unreasonable throughout.

70. She stated that she had good reason to suspect the service charges were being charged unreasonably because maintenance was being refused to the Building on the grounds of insufficient funds (despite the fact that some of the other properties were not being neglected), that excuses had been made in relation to the lack of funding and that there were various discrepancies in the accounts. She stated that her evidence illustrated unreasonable behaviour amounting to victimisation which was borne out by the erroneous charges placed on her service charge account.

71. The Applicant further stated that section 20C recognised, 'where the landlord had abused its rights and used them oppressively' there should be protection for the lessees.

72. She stated that the year-end accounts for 30th June 2018 had still not been produced, which was a material breach of the lease, despite her chasing the same. She, also, did not believe that significant costs would have been saved had she examined the accounts, as suggested by the managing agents, as she would have only been permitted access to the accounts for the year ending 30th June 2017 and that many of the costs that she had queried were prior to this date.

73. She further stated that she had incurred considerable costs, £4000, on Mr Jepps' services to prepare for the hearing in order to try and advance the case, as the hearing would have taken even longer if she had not done this, as the accounts were not straightforward and did not comply with the lease provisions.

74. She believed that the service charges were high and believed that the Respondent's Representative had pursued matters which had already been resolved and that a barrister need not have been instructed on certain issues.

75. In addition, the Applicant stated that she did not believe that there was any danger of the Respondent folding, as its costs had been underwritten and queried why the costs would not, in any event, be covered by the insurance.

76. The Respondent stated that paragraph 5A of schedule 11 to the 2002 Act was enacted relatively recently and that there were not many reported decisions but considered that, as the language mirrored the language of section 20C (3) of the Act, the Respondent's position was that the principles established in relation to section 20C were applicable to any application under paragraph 5A.

77. The Respondent further stated that it was not relevant for the purposes of the application whether the legal costs incurred by the Respondent were

permitted under the lease provisions nor whether they were reasonably incurred, as the Applicant would still have a right to challenge any legal costs under paragraph 5 of schedule 11 to the 2002 Act.

78. The Respondent referred to their previous submissions, in particular the fact that there is no presumption that an order is to be made (*Doren*), and that given the Applicant's conduct - in both bringing the proceedings and her conduct of those proceedings - there was no basis for making an order. The Applicant had made serious allegations of harassment, queried a huge number of service charges without any reasonable basis, raised new issues (based of Mr Jepps' statement) which were unreasonable and unfair to the Respondent and had repeatedly failed to comply with her disclosure obligations.

79. The Respondent referred to the fact that the Tribunal was entitled to have regard to the financial and practical consequences of making an order. It stated that the Respondent was a resident owned RTM company which ran for the benefit of the lessees. The Respondent did not have any assets of its own, but collected service charges and administration costs from the lessees. Further, that it would not be just and equitable to deprive the Respondent of its ability to recover administration costs from the Applicant as it would, either, be left having to recover any uninsured legal costs from other lessees, by way of the service charge, or face serious financial difficulty.

80. For all the above reasons, the Respondent invited the Tribunal to dismiss the Applicant's application for an order.

The Tribunal's Determinations

81. The Tribunal considered all of the written and oral evidence submitted and briefly summarised above.

Service Charges

82. The Tribunal noted that the service charge demanded was an estimated service charge and that the Applicant was liable to pay the same under paragraph 2(iii) of Part II of the Third Schedule to the Original Lease. The Tribunal does not consider the fact that some of the demands had been requested a few days later than detailed in the Original Lease, to extinguish or reduce any liability of the Applicant to pay the same.

83. In cases relating to estimated charges, the Tribunal needs to determine, under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the lease. The Tribunal is not concerned as to whether any actual service costs have been reasonably incurred, as this could only be queried after the balancing service charge statement had been produced. As such, the Tribunal agrees with Ms

Petrenko, that it is the reasonableness of the demands that are the relevant consideration for the determination by the Tribunal.

84. That being said, the Tribunal notes that a balancing service charge process should have been carried out in 2015, and is conscious of the comments of His Honour Judge Huskinson in the *Warrior Quay* decision, at paragraph 25:

> [the lessor] *"… cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year…. The LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against…"* [the lessor]

85. This decision was followed in the *Pendra* decision, where Martin Roger QC stated, at paragraph 51:

> *"The absence of proper accounts for previous years may, of course, provide grounds for treating the estimate with circumspection or even suspicion; it may make it easier to justify reduction under section 19(2) on the basis that there is little to suggest the estimate is reasonable…"*

86. In this case, although the balancing service charge account had not been produced, accounts had been produced for the years ending June 2015, June 2016 and June 2017. It is clear, therefore, that the Respondent did have some information, from 2016, onwards as to likely expenditure.

87. In the recent decision of the Upper Tribunal in *Wigmore Homes* the Upper Tribunal stated, at paragraph 55:

> *"We are conscious that reasonableness is to be judged by the information at the date of the demand. We are also conscious that more information as to actual expenses became available as time went on."*

88. As such, although the reasonableness of the demands are the relevant consideration for the Tribunal, any accounts that were available at the date of the demand, is information that could be taken in to account when judging the reasonableness of the demands.

89. Having considered the Respondent's demands for the estimated service charge expenditure, it is noted that the demand made in 2014 (for the year ending June 2015) was for a sum of £861.59, which was less than the previous freeholder's estimate of £1053.52, and no accounts were available at that time. In the following year, the demand made in 2015 (for the year ending June 2016) was further reduced to £745.48.

90. The accounts for the year ending June 2015 became available in December of 2015 and indicated that the amount actually expended in

that year was less than the budgeted figure and the Tribunal notes that the demand made in 2016 (for the year ending June 2017) was reduced, this time to £727.48.

91. The accounts for the years ending 2016 and 2017 were available in the December of those years, and both indicated a deficit in the accounts. The Tribunal notes that the budgets for the year ending June 2018 and the year ending June 2019 (after those respective accounts were available) were increased. The Tribunal also notes that the estimated service charge demands for the years ending June 2017, June 2018 and June 2019, all detailed either the projected expenditure or the estimated actual expenditure for the previous year, in addition to the proposed budget for the upcoming service charge year.

92. As such, the Tribunal does consider that the Respondent was taking into account the additional information that was available to it when estimating the budgets. The Tribunal, therefore, believes that the method used by the Respondent for the calculation of the estimated service charge to be reasonable.

93. In relation to the service charges generally, the Tribunal notes the Respondent's statement, that there were no Qualifying Works nor any Qualifying Long Term Agreements that required any section 20 consultation.

94. Having considered the provisions in the Original Lease, the Tribunal is also satisfied that, although it may have been beneficial for the estimated costs to be separated in relation to those allocated for the Building and those in relation to the Mansion, this was not a necessity, although it clearly would be required in the balancing service charge accounts.

Service Charge - year ending 30th June 2015

95. In relation to the service charge for the year ending June 2015, the Tribunal does not concur with Ms Petrenko, that any legal costs would fall within the remit of service charge in paragraph 5 of Part II of the Eighth Schedule, as it does not consider that the set up costs in relation to a 'Right to Manage' company would fall within, either the definition of "*costs … of the Lessor and any Agent…employed by the Lessor*" (as the Respondent did not appear to be either of these at the time the costs appear to have been incurred), nor did the costs appear to relate to the management or administration of the estate. The Tribunal notes, however, that although legal costs may have been detailed on the accounts they did not appear to on the estimated service charge demand, therefore are not relevant to the Tribunal's determination.

96. The Tribunal notes that the Respondent had proposed to carry out works to all of the garages and believes that the figure detailed for the garage repairs in the demand to be reasonable (although the accounts may have contained an error, this was not the relevant document for considering

the reasonableness of the sum demanded). In addition, the Tribunal also considers the other items of expenditure, including the fee for the accounting, electrical and general repairs, to be reasonable. As such, the Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2015 was reasonable and that the sum of £861.59 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2016

97. The Tribunal notes that the Original Lease did not require the Respondent to set up a reserve fund. The Tribunal is also satisfied that there were no items requiring section 20 consultation for the estimate, and that the budgeted items appeared to be reasonable sums. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2016 was reasonable and that the sum of £745.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2017

98. As previously stated, the Tribunal did not consider that the estimate required a separate allocation between the costs for the Building and those for the Mansion, nor that any section 20 consultation was required. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2017 was reasonable and that the sum of £727.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2018

99. The Tribunal notes that the Applicant did not give any information as to why she considered the budget for the year ending June 2018 to be unreasonable. As such, the Tribunal determines, in the absence of any evidence to the contrary, that the estimated expenditure detailed in the budget for the year ending 30th June 2018 was reasonable and that the sum of £743.63 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2019

100. The Tribunal notes that the Original Lease does allow the Respondent to request sums towards future works, which does not appear to be disputed by the Applicant. The amount requested in relation to the works to the drains appears to be based on costs already incurred by the Respondent for existing repairs that had been carried out on some parts of the estate. The Applicant did not obtain her own quote, nor did she detail any alternative figure that she would consider reasonable. The Tribunal considers the Respondent's estimate to be reasonable and notes Ms Petrenko's comments, and is satisfied, that no section 20 consultation was required when the demand was sent.

101. In relation to the Applicant's comments regarding the Building being in serious disrepair, the Tribunal noted, on their inspection, that the

Building appeared to be in a fair state of condition and is satisfied that the drainage works are imminently required. The Tribunal, therefore, determines that the estimated expenditure detailed in the budget for the year ending 30th June 2019 was reasonable and that the sum of £800 demanded is payable by the Applicant.

Administration charges

102. The Tribunal notes that the administration charge levied by the Respondent, in relation to fly tipping in the communal area, was for a sum of £100.

103. Although the Applicant states that there was no evidence that the refuse was left by her tenant, there appears to be no dispute that the Applicant's tenant was vacating the Property at that time, and Mr Nock states that he recognised and knew him by name. The Tribunal is satisfied that Mr Nock was on site and took a contemporaneous photograph and that it was reasonable for the Respondent to levy an administration charge on the Applicant based on the provisions in the lease.

104. Regarding the reasonableness of the charge, the Tribunal notes that the original cost of the charge appears to have been £150, and that this was later reduced in line with the application fee to the tribunal. The Tribunal considers it highly unusual that a fee should be reduced in this way, as any charge should be an amount which relates to the item of expenditure, not an amount to avert potential scrutiny. The Tribunal considers the administration fee to be excessive and determines a sum of £50 is reasonable and payable by the Applicant.

Application under Section 20C

105. The Applicant has applied for an order, in accordance with section 20C of the Act, that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. In making such an order, the Tribunal must consider what is 'just and equitable' in the circumstances, taking in to account matters such as the conduct and circumstances of the parties and the outcome of the proceedings.

106. The Tribunal does accept the Respondent's submissions, in that, the issue as to whether the Respondent is entitled to recover the costs under the terms of the lease or whether the costs incurred are reasonable, are both issues which are more properly considered in an application under section 27A of the Act, should such costs be included within the service charge.

107. The Tribunal also notes the comments of His Honour Judge Rich, in the *Doren* decision, at paragraph 31:

"In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20 C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

108. Looking at the circumstances leading to the application and the conduct of the parties, the Tribunal is conscious of the fact that the application was made by the Applicant as she had noticed discrepancies in certain items in the accounts and noted that certain items of service charge did not appear to have been allocated as per the terms of the Original Lease. She was also concerned regarding the upkeep and maintenance of the Building.

109. The Tribunal also notes that the Applicant appears to have followed the Countrywide complaints procedure, she states to no avail, and that by the time of the application there clearly appeared to be a great deal of animosity and distrust between the parties.

110. That being said, the application, and subsequent statement by the Applicant, were vague in the issues involved and referred primarily to the accounts rather than the budgets, with questions rather than submissions, such as "*Is there a receipt for the £13 electrical repairs*" and "*What was £25 electrical repairs*?" In addition, at the hearing, the Applicant did not appear to recognise what matters would be defined as Qualifying Works or Qualifying Long Term Agreements.

111. The Tribunal notes that the managing agents did offer the Applicant an opportunity to inspect the accounts and that the Applicant had failed to take up this offer, as she had stated that not all of the relevant accounts would have been available for inspection.

112. The Tribunal also notes that the Respondent had raised concerns regarding the inclusion of Mr Jepps' statement four weeks prior to the hearing, which raised further issues in relation to the accounts, rather than the budgets, and referred to the fact that the Applicant had often failed to comply with timescales set down by the Tribunal.

113. On the part of the Respondent, although the estimated budgets produced by the Respondent did not require any costs to be allocated between the individual buildings and the Mansion, this separation was, also, not detailed in the accounts that had been produced and, clearly, would need to have been included in any balancing service charge accounts, as the apportionments for the lessees would vary depending on whether the costs were allocated to the Building (for which the Applicant was liable for a quarter share) or for the Mansion (where the Applicant was liable for a thirtieth share).

114. There also appeared to have been other irregularities detailed in the year-end accounts that had been referred to by Mr Jepps, which included the

legal costs. Although these did not appear in the Respondent's budget, consequently, were not a consideration for the Tribunal in relation to the reasonableness of the estimated service charge; they did not appear to be costs which could be recovered under the service charge under paragraph 5 of Part II of the Eight Schedule to the Original Lease, as submitted by the Respondent, for the reasons previously mentioned. As such, the Tribunal could understand the Applicant's concerns with regard to the accounts.

115. In addition to this, the Tribunal noted that the Respondent appeared to be under the impression, at the hearing, that, if there were insufficient funds in relation to the Building, it would not be responsible to maintain the same. The lessor's covenants under paragraph 4 of the Sixth Schedule to the Original Lease clearly states that, subject to the payment by the Applicant of her proportion of the expenses, the Respondent has a duty to maintain and repair the relevant parts of the Building and garage.

116. The Tribunal also notes that, although the Respondent referred to the late submission of Mr Jepps' statement, the skeleton argument, sent on behalf of the Respondent, was only submitted the day prior to the hearing. This document correctly identified that the relevant service charges were the estimated service charges detailed in the budget, rather than any figures in the accounts. Prior to this, both the Applicant's submissions and the Respondent's statements in relation to the service charge, referred to various items on the accounts. Copious documents were provided in relation to those accounts and corresponding invoices, the vast majority of which were not referred to at the hearing, as they were not relevant in relation to the reasonableness of the estimated figures in the service charge budgets.

117. Regarding the outcome of the proceedings, the Tribunal notes that the Applicant has failed to identify that any of the estimated service charges for the relevant years were unreasonable, although the Tribunal has found that the administration charge was excessive.

118. In such circumstances, the Tribunal is particularly mindful of the reasoning of Martin Roger QC in *Jam Factory*, in that it would seem perverse and unjust that, where the Applicant has been unsuccessful in the vast majority of her application, she should be protected from costs at the potential expense of the Respondent and the remaining lessees who were either neutral or who did not support the application.

119. Taking in to account all of the circumstances, the Tribunal does not consider that it would be just and equitable to make any order in favour of the Applicant under section 20C of the Act.

Application under Paragraph 5A

120. In relation to the application under paragraph 5A of Schedule 11 to the 2002 Act, the Tribunal concurs that items that are relevant in relation to

the application to section 20C of the Act are relevant in relation to an application under paragraph 5A. In such an application; however, the Tribunal is considering the Applicant's liability to pay administration charges in respect of litigation costs.

121. Paragraph 5A has been considered in the recent decision, *Avon Ground Rents Limited v Child* [2018] UKUT 0204 (LC). An order under paragraph 5A was not available to the tribunal in the first instance of those proceedings as they had begun before October 2016; however, in paragraph 58, Holdgate J observed:

> *"Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondents' contractual liability to pay the legal costs that the Applicant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters…"*

In addition, the Upper Tribunal found the level of costs before the First Tribunal to be "troubling" and stated, at paragraph 65:

> *"The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear."*

122. As previously stated, the Tribunal notes that the vast majority of the documents produced by both parties in their bundles related to various invoices and accounts, which were not referred to at the hearing, as the Respondent's skeleton argument, submitted just prior to the hearing, confirmed that the relevant considerations were whether the estimated budgets were reasonable and that the actual costs incurred would not be relevant until the balancing service charge adjustment process had taken place.

123. The Tribunal considers that, had the Respondent upon receipt of the Applicant's application put this argument forward, the issues in relation to the reasonableness of the service charges would clearly have been narrowed and the copious amounts of documentation produced by the Respondent would have been greatly reduced.

124. That being said, it is not clear, from the Applicant's submissions whether, if such an argument had been put to her, she might have altered her submissions, as even when the Tribunal confirmed that this was the correct position, the Applicant's subsequent submissions still appeared to focus on the discrepancies in the accounts.

125. Taking all of these matters into account, the Tribunal considers it would be just and equitable to make an order, under paragraph 5A of Schedule

11 to the 2002 Act, that the Applicant is only liable to pay 25% of any administration charges in respect of litigation arising from this application.

Appeal Provisions

126. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
.....
Judge M. K. Gandham

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CR/LSC/2018/0009**
Properties	**:**	**40 Pippin Avenue, Halesowen, West Midlands, B63 2PW**
Applicants	**:**	**Ms Angela Clancy**
Representative	**:**	**Not represented**
Respondent	**:**	**14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited**
Representative	**:**	**Counsel – Ms Julia Petrenko of Falcon Chambers, instructed by Beale & Company Solicitors LLP**
Type of Application	**:**	**Applications under sections 27A and 20C of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the liability to pay administration charges**
Tribunal Members	**:**	**Judge M K Gandham** **Mr N Wint FRICS**
Date and venue of Hearing	**:**	**16th and 17th October 2018** **Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU**
Date of Decision	**:**	**22 July 2019**

DECISION

Introduction

1. On 10th May 2018, the Tribunal received an application from Ms Angela Clancy ('the Applicant') under section 27A of the Landlord and Tenant Act 1985 ('the Act') to determine whether the service charges demanded for the service charge periods from 1st July 2014 to 30th June 2018 were payable (and the amounts which were reasonably payable) in respect of the leasehold property known as 40 Pippin Avenue, Halesowen, Birmingham, B63 2PW ('the Property'). In addition, the Applicant made applications under section 20C of the Act and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in respect of an administration charge and the landlord's costs.

2. The Applicant is the current lessee of the Property under a lease dated 1st December 2016 made between (1) Sinclair Gardens Investments (Kensington) Limited and the Applicant ('the New Lease'), this being an extension of a lease of the Property dated 22nd August 1974 made between (1) A& J Mucklow & Co. Limited and (2) Thomas Naughton and Catherine Dunne ('the Original Lease'). The Tribunal was informed that the provisions relating to the service charge remained as per the Original Lease.

3. The Property forms part of an estate referred to, under the Original Lease, as 'the Mansion'. This encompasses six blocks of properties, thirty garages, driveways, pathways, gardens and grounds. The freehold of the Property is still held by Sinclair Gardens Investments (Kensington) Limited. 14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited ('the Respondent') acquired the right to manage the Mansion on 6th April 2014.

4. A Procedural Judge issued directions on 31st May 2018. A second Directions Order, dated 11th July 2018, extended the deadline for receipt of documents referred to in the first Directions Order. On 11th September 2018, a further Directions Order was issued confirming that any allegations in respect of fraud and breach of trust were outside the jurisdiction of the Tribunal and that the Tribunal could not order a full independent audit, so the Applicant should rely on her own independent expert. The Order also confirmed that any items of service charge in dispute were as set out in pages 5 to 12 of the Applicant's Statement of Case.

5. The Tribunal received further correspondence and bundles of documents from both parties, in addition to a witness statement from Mr Paul Jepps of Haines Watts (SEM) Limited (the expert witness of the Applicant) on 20th September 2018 and the Respondent's skeleton argument on 15th October 2018, the day prior to the hearing.

6. The matter was listed for an inspection, to take place on 16th October 2018, followed by an oral hearing on 16th and 17th October 2018.

7. Submissions in relation to the section 20C Application were sent after the hearing and the Tribunal reconvened on 12th December 2018 and 21st February 2019 to discuss the same. Submissions relating to paragraph 5A of Schedule 11 to the 2002 Act were received by the Tribunal, from the Respondent on 3rd May 2019 and from the Applicant on 8th May 2019. The Tribunal wrote to both parties on 17th May 2019 to confirm that it would not entertain any further correspondence or submissions.

Inspection

8. The Tribunal inspected the Property and estate on 16th October 2019 in the presence of the Applicant and, on behalf of the Respondent - Ms Petrenko (counsel), Mr Matthee (a solicitor from Beale & Company Solicitors LLP) and Mr Nock and Mrs Nock (directors at the Respondent company).

9. The Property is accessed off Pippin Avenue and is a first floor maisonette in a block of four properties (numbered 38 to 44 Pippin Avenue) defined in the Original Lease, and referred to in this decision, as 'the Building'. The Property has the benefit of a garage, which is located within a private area containing twenty-four garages, accessed via a private drive off Apperley Way.

10. The Tribunal also inspected the remainder of the Mansion, which comprises a block of ten flats (18 to 36 Apperley Avenue), four further blocks of four maisonettes on Apperley Way (14 to 20; 22 to 28; 30 to 36 and 38 to 44) and a block of six garages located in an area, accessed via a separate drive off Apperley Way, in addition to the various pathways and grounds.

11. The estate appeared to be in a fair condition of repair generally. All of the garages appeared to have been maintained fairly recently, the doors had been painted and they had been fitted with new soffits and fascia, although the private drives leading to the garage blocks were in need of repair. In relation to the Building, two of the external doors had been replaced and the other two, the Tribunal were informed, were awaiting replacement.

The Law

12. The relevant provisions in respect of liability to pay and reasonableness of service charges are found in sections 19 and 27(A) of the Act (as amended), which are set out as follows:

Section 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.

Section 27A Liability to pay service charges: jurisdiction

(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.
…

13. Section 20c of the Act (as amended) provides:

Section 20c 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….the First-tier 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 person specified in the application.
…
(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.

14. The relevant provisions in respect of liability to pay and reasonableness of administration charges are found in paragraphs 1, 2, 5 and 5A of Schedule 11 of the 2002 Act (as amended), which are set out as follows:

Paragraph 1 Meaning of "administration charge"

(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.
…

Paragraph 2 Reasonableness of administration charges

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

Paragraph 5 Liability to pay administration charges

(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.
…

Paragraph 5A Limitation of administration charges: costs of proceedings

(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	***"The relevant court or tribunal"***
Court proceedings	*The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court*
First-tier Tribunal proceedings	*The First-tier Tribunal*
Upper Tribunal proceedings	*The Upper Tribunal*
Arbitration proceedings	*The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.*

The Lease

15. The New Lease confirmed that it was made on the same terms and subject to the same the conditions and covenants as contained in the Original Lease, other than those expressly provided in or otherwise inconsistent with the New Lease (which simply related to the term and ground rent).

16. In Part II of the Third Schedule to the Original Lease, the lessee covenanted, amongst other matters:

"*2. (i) To contribute and pay one equal fourth part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirtieth part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax.*

...

(iii) The contribution under paragraph (i) of this clause for the period of twelve months (hereinafter called "the Service Charge Year") ending on 30th June in each and every year during the remainder of the term hereby granted shall be estimated by the Lessor (whose decision shall be final) not later than 30th June of the immediately preceding year and notified to the Lessee who shall pay the estimated contribution in advance by two instalments on 1st July and 1st January in the Service Charge Year.

(iv) As soon as reasonably may be after the Service Charge Year ending on 30th June 1976 and in each succeeding third Service Charge

Year when the actual amount of the said costs expenses outgoings and matters for the three Service Charge Years ending on 30th June 1979 or such succeeding third year (as the case may be) has been ascertained the Lessee shall forthwith pay the balance due to the Lessor or be credited in the Lessor's books with any amount overpaid.

...

4. To pay a fair share of the cost of the upkeep of any party fences walls sewers drains pipes passages footpaths entrances or garage access surface as apportioned by the Lessor.

...

11. To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 or 147 or the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

The Sixth Schedule details the lessor's covenants which include the following:

"(4) Subject to payment by the Lessee of the Lessee's proportion of the Lessor's Expenses: –

(i) To maintain repair redecorate and renew: –

(a) the main structure roof gutters and rain water pipes of the Building and garage (if any) and...

...

(iv) So often as reasonably required to decorate the exterior of the Building and the Garage in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit...

(v) To maintain the gardens and grounds of the Mansion including lawns borders trees and plants and to maintain and repair the paths driveways and garage forecourt.

(vi) Effect and maintain with the Prudential Assurance Company Limited or some other reputable insurance company nominated by the Lessor: –

(i) the insurance of the Building and the Garage...

...

(viii) To keep or cause to be kept proper books of accounts showing the expenditure incurred by it in carrying out its obligations under this Lease in respect of the Mansion."

The Eighth Schedule details the lessor's expenses in relation to the payment of the service charge. Part I of the Eighth Schedule details the expenses in relation to the Building and specifically includes the maintenance, repair, redecoration and renewing of the main structure of the Building and garage, as well as any costs and charges of any accountant employed for the purpose of auditing the accounts in respect of the lessor's expenses, and Part II deals with expenses in relation to the Mansion, which includes items such as maintaining the grounds, paths and driveways and costs and charges of the lessor or any agents employed by the lessor to manage or administer the Mansion.

Hearing

17. Following the inspection, a hearing was held at the Tribunal's hearing rooms at Centre City Tower, Birmingham. The Applicant attended on her own behalf. Ms Petrenko represented the Respondent, accompanied by Mr Matthee and Mr Nock, together with Mr Lunt (from Whittingham Riddell LLP, the Respondent's accountants).

Submissions

Preliminary issues

18. Ms Petrenko referred to the skeleton argument that she had provided to the Tribunal. She directed the Tribunal to the provisions in paragraph 2 (iv) of Part II of the Third Schedule to the Lease which, unusually, referred to a triennial balancing procedure. She confirmed that, although statutory accounts had been produced for the years ending 31st March 2015, 30th June 2016 and 30th June 2017, no balancing procedure, as required by the Original Lease, had yet been carried out. As such, she confirmed that all payments currently demanded were on account service charges.

19. Mr Lunt confirmed that a balancing service charge account was due to be carried out shortly. He confirmed that this should have been carried out in 2015; however, as the Respondent had only taken over the management at that time, it did not have the necessary information to carry out the same.

20. Ms Petrenko referred the Tribunal to the decision of the Upper Tribunal in *Knapper v Francis* [2017] UKUT 3(LC) and to the two-stage test, set out by Martin Roger QC, that the tribunal should consider when dealing with on account payments:

> "*28. … The starting point for its determination is the contractual position between the parties…*
>
> *30. The second stage of the determination is to consider whether the on-account payment required by the lease exceeded the statutory limit imposed by section 19(2). The effect of the statute is to modify the contractual obligation so that no greater amount than is*

reasonable is payable before the relevant costs are incurred. The language of the subsection suggests that the statutory ceiling applies at the time the leaseholder's liability arises. If, at that date, the on-account payment is greater than a reasonable sum, the leaseholder's contractual obligation is to pay only the lesser, reasonable, sum."

21. Ms Petrenko invited the Tribunal to adopt this two-stage process in relation to each of the service charges years. She stated that the contractual positon was clear, the lessee was required to pay the estimated service charge under paragraph 2(iii) of Part II of the Third Schedule. She submitted that the second stage was to determine what sums were reasonably payable on the date on which the payments were requested. As such, she stated that the relevant documents to be considered were the service charge demands not the accounts, which had been produced later. She submitted that it was only when the three yearly balancing service charge procedure had been carried out, that any consideration as to whether the actual expenditure was reasonable, would become relevant.

22. In relation to the failure of the Respondent to produce the balancing service charge account in 2015, Ms Petrenko referred to the decisions of the Upper Tribunal in *Warrior Quay Management Co Limited v Joachim* (LRX/42/2006) ('*Warrior Quay*'), *Pendra Loweth Management Limited v North* [2015] UKUT 91 (LC) ('*Pendra*') and *Wigmore Homes (UK) Limited v Spembley Works Residents Association Limited* [2018] UKUT 252 (LC) ('*Wigmore Homes*').

23. She stated that all of these decisions made it clear that - depending on the provisions of the lease - a failure on the part of the management company to provide certified accounts, did not suspend any obligation under the lease to pay the estimated service charge account. She referred the Tribunal to the provisions of the Original Lease relating to the payment of the estimated service charge and pointed to the fact that this did not refer to any payments demanded being subject to the receipt of the balancing service charge account. She also stated that, although two of the earlier demands were not sent by 30th June, time was not of the essence and the demands were sent shortly thereafter.

24. In addition, she stated, it was clear that from the budgets that the Respondent had produced, that the figures demanded were less than those demanded by the freeholder in the year ending 2014 and that the amounts demanded had not increased greatly year on year. Thus, she submitted, the sums demanded were reasonable.

25. In relation to specific items in dispute, Ms Petrenko referred to the fact that the Directions Order of 11th September 2018 had limited the Applicant's application to those matters set out in pages 5 to 12 of her statement. She stated that the Applicant should, therefore, not be allowed to refer to any matters detailed in Mr Jepps' statement that did not relate to those specific matters.

26. The Applicant stated that there had been many items in the accounts that she could not make sense of. She stated that, as the Tribunal had allowed Mr Jepps' statement to be submitted in evidence, the information contained in the same should be allowed.

27. The Tribunal agreed that, as no balancing process had been carried out, this was a matter dealing with the reasonableness of on account payments, as per section 19(2) of the Act. It allowed the Applicant to refer to the items detailed in Mr Jepps' statement, but confirmed that the decision could, quite clearly, only concern the matters relevant to the on account payments.

Service Charge - year ending 30th June 2015

28. The Applicant referred to an item identified as legal costs on the accounts relating to the year ending 30th June 2015. She believed this related to the costs for setting up the 'Right To Manage' company and stated that such costs were not permitted under the lease provisions as part of the service charge and should instead have been detailed in RTM company accounts. In addition, she stated that she had given a sum of £200 on account of these costs and that this was not detailed on the accounts.

29. The Applicant stated that one of the invoices for garage costs referred to 17 garages and not 30 garages, consequently, costs had been unevenly distributed in the accounts, as not all of the lessees were liable for the sum that had been expended on that invoice.

30. She stated that the accountancy fee was high, considering the fact that the accounts were unaudited, and stated that the sums relating to electrical repairs and drain charges were not reasonable. She also queried whether any of the items should have been subject to a section 20 consultation.

31. Ms Petrenko, on behalf of the Respondent, stated that the legal costs were payable as part of the service charge under paragraph 5 of Part II of the Eighth Schedule to the Original Lease, which referred to the "*costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion*".

32. In relation to the garages, she stated that the relevant costs were those detailed in the budget, not the accounts. She noted that there appeared to have been an incorrect apportionment in the accounts, as under the lease provisions the garages should have been apportioned as part of the Building (a quarter share) rather than as part of the Mansion (a thirtieth share). She stated that this was not a significant issue as the budget was for anticipated works and had been based on the fact that there would be noticeable works required to every garage. She stated that the sum requested from the Applicant, £50, was reasonable and payable under paragraph 1 of Part I of the Eighth Schedule, as were the sums requested for the drains and electrical repairs (£20 and £6.67 respectively).

33. Ms Petrenko confirmed that none of the agreements entered in to by the Respondent were for a period of more than 12 months, therefore, were not Qualifying Long Term Agreements and that none of the works undertaken involved a contribution of more than £250 per lessee, therefore, were not Qualifying Works. As such, she stated that no section 20 consultation was required.

34. Mr Lunt stated that, although the Original Lease referred to accounts being 'audited', due to the age of the Original Lease, this was not the same as what are now considered as *audited accounts*. He stated that the latest version of the RICS code endorsed this view and that the accounts that had been produced complied with the lease provisions. Ms Petrenko submitted that the budget for the accountancy fee, £17.93 per property, was reasonable and payable under paragraph 5 of Part I of the Eighth Schedule to the Original Lease.

Service Charge - year ending 30th June 2016

35. The Applicant queried why no reserve fund had been collected. She stated that there was provision in the Original Lease for collection of the same and that this had been requested in the 2017 budget.

36. In relation to general repairs and maintenance and the allocation of fees generally in the accounts, she queried why fees that should have been charged as part of the Mansion costs were charged in the costs for the buildings and vice versa. In addition, she queried whether the costs in relation to gardening, insurance and management fees should have been subject to consultation under section 20.

37. Ms Petrenko, on behalf the Respondent, stated that the Respondent was not obliged to hold a reserve under the lease provisions.

38. In relation to the allocation of items of expenditure in the accounts, she stated that these were not relevant for the purposes of the proceedings, as the Tribunal was considering the reasonableness of the amounts demanded on account and whether the sums detailed in the budgets were reasonable and payable. She confirmed that, as previously stated, the Respondents had not carried out any Qualifying Works nor entered into any Qualifying Long Term Agreements, including in relation to the gardening or management services.

39. She stated that any other matters raised by Mr Jepps in his statement related to the accounts rather than the budgets, had not been detailed on pages 5 to 12 of the Applicant's statement and were, therefore, beyond the remit of the Tribunal's considerations.

Service Charge - year ending 30th June 2017

40. The Applicant, again, queried the allocation of the budget and accounts, in that all items appeared to have been allocated to the blocks of

properties, rather than having two separate allocations - one for the Building costs and one for the costs of the maintenance of the Mansion. She also, again, queried the cost of the gardening and estate management and whether consultation was required.

41. Ms Petrenko stated that the items detailed in the budgets were simply an estimated expenditure in relation to lessor's expenses, as required under paragraph 2 of Part II of the Third Schedule. She stated that this paragraph did not require the estimate to be split between items relating to the Building and items relating to the Mansion.

42. She confirmed that, as previously stated, there were no relevant Qualifying Works and no relevant Qualifying Long Term Agreements, for which a section 20 consultation would have been required.

Service Charge - year ending 30th June 2018

43. The Applicant stated that she had not received any accounts and, therefore, could not query any individual item.

44. The Respondent confirmed that the question for the Tribunal related to the reasonableness of the budget, not the accounts, and that the Applicant had not advanced any basis upon which she considered the same to be unreasonable.

Service Charge - year ending 30th June 2019

45. Although the service charges for this period was not referred to in the Applicant's application, the Applicant referred to the reasonableness of the prospective service charges for 2018 to 2019 in page 12 of her statement. She stated a prospective charge of £711.09 had been demanded for the reserve, which, she believed, related to the repair of water pipes. She queried whether this was reasonable as, she stated, the Building was in serious disrepair and the sum had been demanded without section 20 consultation.

46. Ms Petrenko submitted that the Respondent was entitled to, but not obliged to, accumulate a reserve fund under paragraph 1 of Part I of the Eighth Schedule. She stated that the Respondent had recently dealt with a number of issues in relation to corroding poly pipes in the drainage system across the Mansion. She referred to the Respondent's statement, where it was stated that in a twelve-month period approximately twenty pipes had burst. The Respondent, in its statement, also confirmed that these repairs cost approximately £350 a time and, therefore, estimated that there would be a cost of approximately £3000 to £4000 per block, which the Respondent hoped to build up in the reserve funds so that the works could be carried out as soon as possible. Ms Petrenko stated that the figure of £711.09 represented a genuine pre-estimate in relation to the proposed works and that it was reasonable. She stated that, at the moment, no section 20 consultation was required as it was a sum

requested on account and referred to *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 0365. In addition, she stated that the figure of £711.09 was for the Building, so only amounted to a sum of just under £178 per lessee, and that consultation would be carried out by the Respondent, in due course, if required.

Administration charge

47. The Applicant queried whether she was liable to pay, and the reasonableness, of an administration charge of £150, which had been levied on her by the Respondent in relation to the removal of rubbish in 2017. She stated that the Respondent had, firstly, informed her that the charge was for the removal of a boat within the communal area and, subsequently, informed her that it was for the removal of items of rubbish from a communal area that had been left by one of her tenants. In addition, she had been charged with a late payment fee from HLM.

48. She confirmed that she had contacted Countrywide/HLM (the management company employed by the Respondent) and stated that she did not believe that the sums charged were either warranted or justified. She stated that HLM had, subsequently, removed their late charge fee; however, they had stated that they were unable to waive the administration charge of £150 for the fly tipping, as the Respondent had levied this sum directly.

49. The Applicant stated that she had driven to the Property on two occasions, after having been contacted by the Respondents, and had never witnessed any evidence of fly tipping or any overflow of the bin store. She stated that there was no evidence that the items that had been left in the communal area were from one of her tenants and that there would have been no reason for her tenant to have left any items in the communal area as he could have left any unwanted items in the garage.

50. Ms Petrenko stated that Mr Nock knew the Applicant's tenant by name and saw him moving out of the Property on 14th August 2017. She stated that Mr Nock had taken a photograph of the items that had been left by the tenant and referred to the letter of 23rd of January 2018, sent by the Respondent to the Applicant, which included the photograph.

51. Ms Petrenko stated that under the terms of the Original Lease - paragraph 3 of Part I of the Third Schedule - it stated that items of refuse could only be deposited in the bin storage area. She confirmed that, in the Respondent's letter of 23rd of January 2018, as the Applicant had threatened to make an application to the Tribunal, the Respondent had agreed to reduce the administration fee for the removal of the items to £100 to match any tribunal application fee. She stated that the Respondent considered this a pragmatic solution to avoid the need for the Applicant to make such an application.

52. Ms Petrenko stated that the sum of £100 was reasonable and considerably cheaper than sums charged by local authorities for the removal of fly tipping. She stated that Mr Nock was at the site at the relevant time, that he recognised the tenant and that he had taken a photograph of the rubbish. She stated that, as the Applicant had not even been at the site at the relevant time, Mr Nock's evidence was clearly more compelling than that of the Applicant.

Application under Section 20C

53. The Applicant's submissions in relation to section 20C of the Act reiterated her reasons for the application and stated that she had reasonable grounds to make the application and that, as the application was a low value matter, it should have been dealt with proportionately.

54. She confirmed that she had been through Countrywide's complaints procedure twice in the past year four years, that she did not have access to any contracts to consider whether or not they were long term agreements and that various charges had not been properly explained.

55. She stated that the conduct of Beale & Company Solicitors LLP was unreasonable, in that there are only two items of work that had been carried out on the Building, the fascia and the bin store roof, and that it should not have been difficult to acquire those invoices and explain the income and outgoings.

56. The Applicant stated that it was not reasonable for the Respondent to incur 'devastating' costs when this was a low value matter, nor was it reasonable to seek to impose those costs on others. She stated that she was not wealthy, and was sure that other lessees were not either, and that she would not have incurred such costs herself, as they would have been completely ruinous.

57. In relation to the conduct of the Respondent, she stated that she had ongoing issues in relation to charges being put on to her account without her knowledge, some of which were later removed. She did not consider this behaviour to be just and equitable. She stated that she was persistently told that there were insufficient funds to maintain the Building and that it was impossible to tell what the income and expenditure for each property was, when the income was pooled and allocated to different schedules. In addition to this, she was informed that an £11,000 loan had been repaid, which did not appear in the accounts, and was unsure as to why a sum for legal costs appeared on the accounts. She went on to refer to the discrepancies detailed in Mr Jepps' statement.

58. The Respondent opposed the application for an order under section 20C as, it submitted, it would not be just and equitable in all of the circumstances of the case. The Respondent stated that the majority of the Applicant's submissions effectively repeated assertions made in her

application, which had already been responded to, and were not relevant in relation to an order under section 20C.

59. In relation to the Applicant's argument that "*it was a low value matter and should have been dealt with proportionately*", the Respondent stated that the Applicant did not deal with matter proportionally and left the Respondent with no option but to defend itself and the other lessees' interests against allegations and challenges, incurring substantial expenditure in the process.

60. In relation to the order, they submitted that it was not a necessary or a relevant consideration of the Tribunal to assess whether the relevant legal costs incurred were recoverable as a service charge under the provisions of the lease or whether such costs were reasonably incurred; the reason being that, if the Applicant failed in her section 20C application she would still retain the right to challenge the costs as part of the service charges under section 27A of the Act. Notwithstanding this, the Respondent went on to state that it believed that such costs were recoverable, under clause 5 of Part II of the Eighth Schedule to the Original Lease, and referred to the decisions in *Plantation Wharf Management Company Limited v Jackson and another* [2011] UKUT 488 (LC), *Conway and others v Jam Factory Freehold Limited* [2013] UKUT 592 (LC) ('*Jam Factory*') and *Schilling v Canary Riverside Property Limited* LRX/65/2005 ('*Schilling*').

61. In relation to the question of the assessment of 'just and equitable' the Respondent referred to the decision in *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 ('*Doren*'), where His Honour Judge Rich Q.C. set out guidance upon which the discretion under section 20C should be exercised (paragraphs 28 to 32), which included, "*the conduct and circumstances of all of the parties*" and "*the outcome of the proceedings*", and went on to state that "those *entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an "instrument of oppression*".

62. The Respondent also referred to paragraph 54 of *Jam Factory* in which Martin Roger QC referred to *Schilling* and stated:

> "*the ratio of the decision in [Doren] is "there is no automatic expectation of an Order under s.20C in favour of successful tenant". "So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour*."

63. As such, the Respondent submitted that the starting point for all of their legal defence costs in defending the application were that they should be recoverable as a service charge from the Applicant and the other lessees unless there were circumstances why it would not be just and equitable.

64. In relation to the conduct of the parties, the Respondent submitted that the Applicant had commenced a campaign of baseless allegations against

the Respondent over a number of years, which had caused distress to the Respondent and representatives of Respondent. It stated that the Applicant was, through its managing agents, invited to make an appointment to inspect the service charge accounts and documents at the managing agents' offices and that the Applicant did not even acknowledge these invitations, let alone take them up.

65. The Respondent further stated that the Applicant's statement did not narrow the issues in the application, but instead made further allegations, which were generic blanket challenges and that Mr Jepps' statement, which was only received four weeks prior to the hearing, detailed further items that had not been included on the Applicant's statement.

66. The Respondents referred to paragraphs 72 and 73 of the decision in *Jam Factory*, where Martin Roger QC stated, in relation to a section 20C order granted in favour of an unsuccessful appellant whose application was not supported by the majority of the lessees:

> *"…I cannot help but feel that its effect is at best ironic and at worst perverse or capricious. The majority of leaseholders did not support the appellant's application … Those leaseholders … are to contribute through the service charge to the costs incurred by the respondent in defeating the application. The [unsuccessful] appellants themselves, however, are to be protected from what would otherwise be their contractual obligation to pay their share of those costs, notwithstanding the fact that the costs have been incurred ensuring that their efforts … did not succeed. In the context of a development owned by the leaseholders through their own company it seems to me quite impossible to describe an outcome which discriminates between leaseholders in that way as just and equitable…The vice of the [section 20C] order is that it benefits the losing appellants at the expense of the members of the successful respondent, each of whom will not only be liable to pay their own share as leaseholder, but will have to make up the shortfall created by the respondent's inability to recoup an equal share from the appellants. That seems to me to be fundamentally unfair."*

67. The Respondent concluded by stating that this was not a case in which any order would be just and equitable as it would relieve the Applicant, and the other lessees specified in her application, from responsibility for contributing towards relevant legal costs through the service charge at the expense of the other lessees.

Application under Paragraph 5A

68. In relation to application under paragraph 5A of schedule 11 to the 2002 Act, the Applicant stated that the Respondent's costs should be limited to reasonable costs of a responsible lessor acting in accordance with the lease, RICS code, the articles and the applicable legislation.

69. She confirmed that she had tried to resolve the disputes over a four-year period but could not do so. She stated that Mr Nock was the only active director and his responses to her had been unreasonable throughout.

70. She stated that she had good reason to suspect the service charges were being charged unreasonably because maintenance was being refused to the Building on the grounds of insufficient funds (despite the fact that some of the other properties were not being neglected), that excuses had been made in relation to the lack of funding and that there were various discrepancies in the accounts. She stated that her evidence illustrated unreasonable behaviour amounting to victimisation which was borne out by the erroneous charges placed on her service charge account.

71. The Applicant further stated that section 20C recognised, 'where the landlord had abused its rights and used them oppressively' there should be protection for the lessees.

72. She stated that the year-end accounts for 30th June 2018 had still not been produced, which was a material breach of the lease, despite her chasing the same. She, also, did not believe that significant costs would have been saved had she examined the accounts, as suggested by the managing agents, as she would have only been permitted access to the accounts for the year ending 30th June 2017 and that many of the costs that she had queried were prior to this date.

73. She further stated that she had incurred considerable costs, £4000, on Mr Jepps' services to prepare for the hearing in order to try and advance the case, as the hearing would have taken even longer if she had not done this, as the accounts were not straightforward and did not comply with the lease provisions.

74. She believed that the service charges were high and believed that the Respondent's Representative had pursued matters which had already been resolved and that a barrister need not have been instructed on certain issues.

75. In addition, the Applicant stated that she did not believe that there was any danger of the Respondent folding, as its costs had been underwritten and queried why the costs would not, in any event, be covered by the insurance.

76. The Respondent stated that paragraph 5A of schedule 11 to the 2002 Act was enacted relatively recently and that there were not many reported decisions but considered that, as the language mirrored the language of section 20C (3) of the Act, the Respondent's position was that the principles established in relation to section 20C were applicable to any application under paragraph 5A.

77. The Respondent further stated that it was not relevant for the purposes of the application whether the legal costs incurred by the Respondent were

permitted under the lease provisions nor whether they were reasonably incurred, as the Applicant would still have a right to challenge any legal costs under paragraph 5 of schedule 11 to the 2002 Act.

78. The Respondent referred to their previous submissions, in particular the fact that there is no presumption that an order is to be made (*Doren*), and that given the Applicant's conduct - in both bringing the proceedings and her conduct of those proceedings - there was no basis for making an order. The Applicant had made serious allegations of harassment, queried a huge number of service charges without any reasonable basis, raised new issues (based of Mr Jepps' statement) which were unreasonable and unfair to the Respondent and had repeatedly failed to comply with her disclosure obligations.

79. The Respondent referred to the fact that the Tribunal was entitled to have regard to the financial and practical consequences of making an order. It stated that the Respondent was a resident owned RTM company which ran for the benefit of the lessees. The Respondent did not have any assets of its own, but collected service charges and administration costs from the lessees. Further, that it would not be just and equitable to deprive the Respondent of its ability to recover administration costs from the Applicant as it would, either, be left having to recover any uninsured legal costs from other lessees, by way of the service charge, or face serious financial difficulty.

80. For all the above reasons, the Respondent invited the Tribunal to dismiss the Applicant's application for an order.

The Tribunal's Determinations

81. The Tribunal considered all of the written and oral evidence submitted and briefly summarised above.

Service Charges

82. The Tribunal noted that the service charge demanded was an estimated service charge and that the Applicant was liable to pay the same under paragraph 2(iii) of Part II of the Third Schedule to the Original Lease. The Tribunal does not consider the fact that some of the demands had been requested a few days later than detailed in the Original Lease, to extinguish or reduce any liability of the Applicant to pay the same.

83. In cases relating to estimated charges, the Tribunal needs to determine, under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the lease. The Tribunal is not concerned as to whether any actual service costs have been reasonably incurred, as this could only be queried after the balancing service charge statement had been produced. As such, the Tribunal agrees with Ms

Petrenko, that it is the reasonableness of the demands that are the relevant consideration for the determination by the Tribunal.

84. That being said, the Tribunal notes that a balancing service charge process should have been carried out in 2015, and is conscious of the comments of His Honour Judge Huskinson in the *Warrior Quay* decision, at paragraph 25:

> [the lessor] *"… cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year…. The LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against…"* [the lessor]

85. This decision was followed in the *Pendra* decision, where Martin Roger QC stated, at paragraph 51:

> *"The absence of proper accounts for previous years may, of course, provide grounds for treating the estimate with circumspection or even suspicion; it may make it easier to justify reduction under section 19(2) on the basis that there is little to suggest the estimate is reasonable…"*

86. In this case, although the balancing service charge account had not been produced, accounts had been produced for the years ending June 2015, June 2016 and June 2017. It is clear, therefore, that the Respondent did have some information, from 2016, onwards as to likely expenditure.

87. In the recent decision of the Upper Tribunal in *Wigmore Homes* the Upper Tribunal stated, at paragraph 55:

> *"We are conscious that reasonableness is to be judged by the information at the date of the demand. We are also conscious that more information as to actual expenses became available as time went on."*

88. As such, although the reasonableness of the demands are the relevant consideration for the Tribunal, any accounts that were available at the date of the demand, is information that could be taken in to account when judging the reasonableness of the demands.

89. Having considered the Respondent's demands for the estimated service charge expenditure, it is noted that the demand made in 2014 (for the year ending June 2015) was for a sum of £861.59, which was less than the previous freeholder's estimate of £1053.52, and no accounts were available at that time. In the following year, the demand made in 2015 (for the year ending June 2016) was further reduced to £745.48.

90. The accounts for the year ending June 2015 became available in December of 2015 and indicated that the amount actually expended in

that year was less than the budgeted figure and the Tribunal notes that the demand made in 2016 (for the year ending June 2017) was reduced, this time to £727.48.

91. The accounts for the years ending 2016 and 2017 were available in the December of those years, and both indicated a deficit in the accounts. The Tribunal notes that the budgets for the year ending June 2018 and the year ending June 2019 (after those respective accounts were available) were increased. The Tribunal also notes that the estimated service charge demands for the years ending June 2017, June 2018 and June 2019, all detailed either the projected expenditure or the estimated actual expenditure for the previous year, in addition to the proposed budget for the upcoming service charge year.

92. As such, the Tribunal does consider that the Respondent was taking into account the additional information that was available to it when estimating the budgets. The Tribunal, therefore, believes that the method used by the Respondent for the calculation of the estimated service charge to be reasonable.

93. In relation to the service charges generally, the Tribunal notes the Respondent's statement, that there were no Qualifying Works nor any Qualifying Long Term Agreements that required any section 20 consultation.

94. Having considered the provisions in the Original Lease, the Tribunal is also satisfied that, although it may have been beneficial for the estimated costs to be separated in relation to those allocated for the Building and those in relation to the Mansion, this was not a necessity, although it clearly would be required in the balancing service charge accounts.

Service Charge - year ending 30th June 2015

95. In relation to the service charge for the year ending June 2015, the Tribunal does not concur with Ms Petrenko, that any legal costs would fall within the remit of service charge in paragraph 5 of Part II of the Eighth Schedule, as it does not consider that the set up costs in relation to a 'Right to Manage' company would fall within, either the definition of "*costs … of the Lessor and any Agent…employed by the Lessor*" (as the Respondent did not appear to be either of these at the time the costs appear to have been incurred), nor did the costs appear to relate to the management or administration of the estate. The Tribunal notes, however, that although legal costs may have been detailed on the accounts they did not appear to on the estimated service charge demand, therefore are not relevant to the Tribunal's determination.

96. The Tribunal notes that the Respondent had proposed to carry out works to all of the garages and believes that the figure detailed for the garage repairs in the demand to be reasonable (although the accounts may have contained an error, this was not the relevant document for considering

the reasonableness of the sum demanded). In addition, the Tribunal also considers the other items of expenditure, including the fee for the accounting, electrical and general repairs, to be reasonable. As such, the Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2015 was reasonable and that the sum of £861.59 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2016

97. The Tribunal notes that the Original Lease did not require the Respondent to set up a reserve fund. The Tribunal is also satisfied that there were no items requiring section 20 consultation for the estimate, and that the budgeted items appeared to be reasonable sums. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2016 was reasonable and that the sum of £745.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2017

98. As previously stated, the Tribunal did not consider that the estimate required a separate allocation between the costs for the Building and those for the Mansion, nor that any section 20 consultation was required. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2017 was reasonable and that the sum of £727.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2018

99. The Tribunal notes that the Applicant did not give any information as to why she considered the budget for the year ending June 2018 to be unreasonable. As such, the Tribunal determines, in the absence of any evidence to the contrary, that the estimated expenditure detailed in the budget for the year ending 30th June 2018 was reasonable and that the sum of £743.63 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2019

100. The Tribunal notes that the Original Lease does allow the Respondent to request sums towards future works, which does not appear to be disputed by the Applicant. The amount requested in relation to the works to the drains appears to be based on costs already incurred by the Respondent for existing repairs that had been carried out on some parts of the estate. The Applicant did not obtain her own quote, nor did she detail any alternative figure that she would consider reasonable. The Tribunal considers the Respondent's estimate to be reasonable and notes Ms Petrenko's comments, and is satisfied, that no section 20 consultation was required when the demand was sent.

101. In relation to the Applicant's comments regarding the Building being in serious disrepair, the Tribunal noted, on their inspection, that the

Building appeared to be in a fair state of condition and is satisfied that the drainage works are imminently required. The Tribunal, therefore, determines that the estimated expenditure detailed in the budget for the year ending 30th June 2019 was reasonable and that the sum of £800 demanded is payable by the Applicant.

Administration charges

102. The Tribunal notes that the administration charge levied by the Respondent, in relation to fly tipping in the communal area, was for a sum of £100.

103. Although the Applicant states that there was no evidence that the refuse was left by her tenant, there appears to be no dispute that the Applicant's tenant was vacating the Property at that time, and Mr Nock states that he recognised and knew him by name. The Tribunal is satisfied that Mr Nock was on site and took a contemporaneous photograph and that it was reasonable for the Respondent to levy an administration charge on the Applicant based on the provisions in the lease.

104. Regarding the reasonableness of the charge, the Tribunal notes that the original cost of the charge appears to have been £150, and that this was later reduced in line with the application fee to the tribunal. The Tribunal considers it highly unusual that a fee should be reduced in this way, as any charge should be an amount which relates to the item of expenditure, not an amount to avert potential scrutiny. The Tribunal considers the administration fee to be excessive and determines a sum of £50 is reasonable and payable by the Applicant.

Application under Section 20C

105. The Applicant has applied for an order, in accordance with section 20C of the Act, that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. In making such an order, the Tribunal must consider what is 'just and equitable' in the circumstances, taking in to account matters such as the conduct and circumstances of the parties and the outcome of the proceedings.

106. The Tribunal does accept the Respondent's submissions, in that, the issue as to whether the Respondent is entitled to recover the costs under the terms of the lease or whether the costs incurred are reasonable, are both issues which are more properly considered in an application under section 27A of the Act, should such costs be included within the service charge.

107. The Tribunal also notes the comments of His Honour Judge Rich, in the *Doren* decision, at paragraph 31:

"In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20 C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

108. Looking at the circumstances leading to the application and the conduct of the parties, the Tribunal is conscious of the fact that the application was made by the Applicant as she had noticed discrepancies in certain items in the accounts and noted that certain items of service charge did not appear to have been allocated as per the terms of the Original Lease. She was also concerned regarding the upkeep and maintenance of the Building.

109. The Tribunal also notes that the Applicant appears to have followed the Countrywide complaints procedure, she states to no avail, and that by the time of the application there clearly appeared to be a great deal of animosity and distrust between the parties.

110. That being said, the application, and subsequent statement by the Applicant, were vague in the issues involved and referred primarily to the accounts rather than the budgets, with questions rather than submissions, such as "*Is there a receipt for the £13 electrical repairs*" and "*What was £25 electrical repairs*?" In addition, at the hearing, the Applicant did not appear to recognise what matters would be defined as Qualifying Works or Qualifying Long Term Agreements.

111. The Tribunal notes that the managing agents did offer the Applicant an opportunity to inspect the accounts and that the Applicant had failed to take up this offer, as she had stated that not all of the relevant accounts would have been available for inspection.

112. The Tribunal also notes that the Respondent had raised concerns regarding the inclusion of Mr Jepps' statement four weeks prior to the hearing, which raised further issues in relation to the accounts, rather than the budgets, and referred to the fact that the Applicant had often failed to comply with timescales set down by the Tribunal.

113. On the part of the Respondent, although the estimated budgets produced by the Respondent did not require any costs to be allocated between the individual buildings and the Mansion, this separation was, also, not detailed in the accounts that had been produced and, clearly, would need to have been included in any balancing service charge accounts, as the apportionments for the lessees would vary depending on whether the costs were allocated to the Building (for which the Applicant was liable for a quarter share) or for the Mansion (where the Applicant was liable for a thirtieth share).

114. There also appeared to have been other irregularities detailed in the year-end accounts that had been referred to by Mr Jepps, which included the

legal costs. Although these did not appear in the Respondent's budget, consequently, were not a consideration for the Tribunal in relation to the reasonableness of the estimated service charge; they did not appear to be costs which could be recovered under the service charge under paragraph 5 of Part II of the Eight Schedule to the Original Lease, as submitted by the Respondent, for the reasons previously mentioned. As such, the Tribunal could understand the Applicant's concerns with regard to the accounts.

115. In addition to this, the Tribunal noted that the Respondent appeared to be under the impression, at the hearing, that, if there were insufficient funds in relation to the Building, it would not be responsible to maintain the same. The lessor's covenants under paragraph 4 of the Sixth Schedule to the Original Lease clearly states that, subject to the payment by the Applicant of her proportion of the expenses, the Respondent has a duty to maintain and repair the relevant parts of the Building and garage.

116. The Tribunal also notes that, although the Respondent referred to the late submission of Mr Jepps' statement, the skeleton argument, sent on behalf of the Respondent, was only submitted the day prior to the hearing. This document correctly identified that the relevant service charges were the estimated service charges detailed in the budget, rather than any figures in the accounts. Prior to this, both the Applicant's submissions and the Respondent's statements in relation to the service charge, referred to various items on the accounts. Copious documents were provided in relation to those accounts and corresponding invoices, the vast majority of which were not referred to at the hearing, as they were not relevant in relation to the reasonableness of the estimated figures in the service charge budgets.

117. Regarding the outcome of the proceedings, the Tribunal notes that the Applicant has failed to identify that any of the estimated service charges for the relevant years were unreasonable, although the Tribunal has found that the administration charge was excessive.

118. In such circumstances, the Tribunal is particularly mindful of the reasoning of Martin Roger QC in *Jam Factory*, in that it would seem perverse and unjust that, where the Applicant has been unsuccessful in the vast majority of her application, she should be protected from costs at the potential expense of the Respondent and the remaining lessees who were either neutral or who did not support the application.

119. Taking in to account all of the circumstances, the Tribunal does not consider that it would be just and equitable to make any order in favour of the Applicant under section 20C of the Act.

Application under Paragraph 5A

120. In relation to the application under paragraph 5A of Schedule 11 to the 2002 Act, the Tribunal concurs that items that are relevant in relation to

the application to section 20C of the Act are relevant in relation to an application under paragraph 5A. In such an application; however, the Tribunal is considering the Applicant's liability to pay administration charges in respect of litigation costs.

121. Paragraph 5A has been considered in the recent decision, *Avon Ground Rents Limited v Child* [2018] UKUT 0204 (LC). An order under paragraph 5A was not available to the tribunal in the first instance of those proceedings as they had begun before October 2016; however, in paragraph 58, Holdgate J observed:

> *"Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondents' contractual liability to pay the legal costs that the Applicant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters…"*

In addition, the Upper Tribunal found the level of costs before the First Tribunal to be "troubling" and stated, at paragraph 65:

> *"The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear."*

122. As previously stated, the Tribunal notes that the vast majority of the documents produced by both parties in their bundles related to various invoices and accounts, which were not referred to at the hearing, as the Respondent's skeleton argument, submitted just prior to the hearing, confirmed that the relevant considerations were whether the estimated budgets were reasonable and that the actual costs incurred would not be relevant until the balancing service charge adjustment process had taken place.

123. The Tribunal considers that, had the Respondent upon receipt of the Applicant's application put this argument forward, the issues in relation to the reasonableness of the service charges would clearly have been narrowed and the copious amounts of documentation produced by the Respondent would have been greatly reduced.

124. That being said, it is not clear, from the Applicant's submissions whether, if such an argument had been put to her, she might have altered her submissions, as even when the Tribunal confirmed that this was the correct position, the Applicant's subsequent submissions still appeared to focus on the discrepancies in the accounts.

125. Taking all of these matters into account, the Tribunal considers it would be just and equitable to make an order, under paragraph 5A of Schedule

11 to the 2002 Act, that the Applicant is only liable to pay 25% of any administration charges in respect of litigation arising from this application.

Appeal Provisions

126. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
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Judge M. K. Gandham

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00CR/LSC/2018/0009**
Properties	**:**	**40 Pippin Avenue, Halesowen, West Midlands, B63 2PW**
Applicants	**:**	**Ms Angela Clancy**
Representative	**:**	**Not represented**
Respondent	**:**	**14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited**
Representative	**:**	**Counsel – Ms Julia Petrenko of Falcon Chambers, instructed by Beale & Company Solicitors LLP**
Type of Application	**:**	**Applications under sections 27A and 20C of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the liability to pay administration charges**
Tribunal Members	**:**	**Judge M K Gandham** **Mr N Wint FRICS**
Date and venue of Hearing	**:**	**16th and 17th October 2018** **Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU**
Date of Decision	**:**	**22 July 2019**

DECISION

Introduction

1. On 10th May 2018, the Tribunal received an application from Ms Angela Clancy ('the Applicant') under section 27A of the Landlord and Tenant Act 1985 ('the Act') to determine whether the service charges demanded for the service charge periods from 1st July 2014 to 30th June 2018 were payable (and the amounts which were reasonably payable) in respect of the leasehold property known as 40 Pippin Avenue, Halesowen, Birmingham, B63 2PW ('the Property'). In addition, the Applicant made applications under section 20C of the Act and paragraphs 5 and 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in respect of an administration charge and the landlord's costs.

2. The Applicant is the current lessee of the Property under a lease dated 1st December 2016 made between (1) Sinclair Gardens Investments (Kensington) Limited and the Applicant ('the New Lease'), this being an extension of a lease of the Property dated 22nd August 1974 made between (1) A& J Mucklow & Co. Limited and (2) Thomas Naughton and Catherine Dunne ('the Original Lease'). The Tribunal was informed that the provisions relating to the service charge remained as per the Original Lease.

3. The Property forms part of an estate referred to, under the Original Lease, as 'the Mansion'. This encompasses six blocks of properties, thirty garages, driveways, pathways, gardens and grounds. The freehold of the Property is still held by Sinclair Gardens Investments (Kensington) Limited. 14-44 Apperley Way and 18 -44 Pippin Avenue Halesowen RTM Company Limited ('the Respondent') acquired the right to manage the Mansion on 6th April 2014.

4. A Procedural Judge issued directions on 31st May 2018. A second Directions Order, dated 11th July 2018, extended the deadline for receipt of documents referred to in the first Directions Order. On 11th September 2018, a further Directions Order was issued confirming that any allegations in respect of fraud and breach of trust were outside the jurisdiction of the Tribunal and that the Tribunal could not order a full independent audit, so the Applicant should rely on her own independent expert. The Order also confirmed that any items of service charge in dispute were as set out in pages 5 to 12 of the Applicant's Statement of Case.

5. The Tribunal received further correspondence and bundles of documents from both parties, in addition to a witness statement from Mr Paul Jepps of Haines Watts (SEM) Limited (the expert witness of the Applicant) on 20th September 2018 and the Respondent's skeleton argument on 15th October 2018, the day prior to the hearing.

6. The matter was listed for an inspection, to take place on 16th October 2018, followed by an oral hearing on 16th and 17th October 2018.

7. Submissions in relation to the section 20C Application were sent after the hearing and the Tribunal reconvened on 12th December 2018 and 21st February 2019 to discuss the same. Submissions relating to paragraph 5A of Schedule 11 to the 2002 Act were received by the Tribunal, from the Respondent on 3rd May 2019 and from the Applicant on 8th May 2019. The Tribunal wrote to both parties on 17th May 2019 to confirm that it would not entertain any further correspondence or submissions.

Inspection

8. The Tribunal inspected the Property and estate on 16th October 2019 in the presence of the Applicant and, on behalf of the Respondent - Ms Petrenko (counsel), Mr Matthee (a solicitor from Beale & Company Solicitors LLP) and Mr Nock and Mrs Nock (directors at the Respondent company).

9. The Property is accessed off Pippin Avenue and is a first floor maisonette in a block of four properties (numbered 38 to 44 Pippin Avenue) defined in the Original Lease, and referred to in this decision, as 'the Building'. The Property has the benefit of a garage, which is located within a private area containing twenty-four garages, accessed via a private drive off Apperley Way.

10. The Tribunal also inspected the remainder of the Mansion, which comprises a block of ten flats (18 to 36 Apperley Avenue), four further blocks of four maisonettes on Apperley Way (14 to 20; 22 to 28; 30 to 36 and 38 to 44) and a block of six garages located in an area, accessed via a separate drive off Apperley Way, in addition to the various pathways and grounds.

11. The estate appeared to be in a fair condition of repair generally. All of the garages appeared to have been maintained fairly recently, the doors had been painted and they had been fitted with new soffits and fascia, although the private drives leading to the garage blocks were in need of repair. In relation to the Building, two of the external doors had been replaced and the other two, the Tribunal were informed, were awaiting replacement.

The Law

12. The relevant provisions in respect of liability to pay and reasonableness of service charges are found in sections 19 and 27(A) of the Act (as amended), which are set out as follows:

Section 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.

Section 27A Liability to pay service charges: jurisdiction

(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.
…

13. Section 20c of the Act (as amended) provides:

Section 20c 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….the First-tier 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 person specified in the application.
…
(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.

14. The relevant provisions in respect of liability to pay and reasonableness of administration charges are found in paragraphs 1, 2, 5 and 5A of Schedule 11 of the 2002 Act (as amended), which are set out as follows:

Paragraph 1 Meaning of "administration charge"

(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.
…

Paragraph 2 Reasonableness of administration charges

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

Paragraph 5 Liability to pay administration charges

(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.
…

Paragraph 5A Limitation of administration charges: costs of proceedings

(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	***"The relevant court or tribunal"***
Court proceedings	*The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court*
First-tier Tribunal proceedings	*The First-tier Tribunal*
Upper Tribunal proceedings	*The Upper Tribunal*
Arbitration proceedings	*The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.*

The Lease

15. The New Lease confirmed that it was made on the same terms and subject to the same the conditions and covenants as contained in the Original Lease, other than those expressly provided in or otherwise inconsistent with the New Lease (which simply related to the term and ground rent).

16. In Part II of the Third Schedule to the Original Lease, the lessee covenanted, amongst other matters:

"*2. (i) To contribute and pay one equal fourth part of the costs expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal thirtieth part of those mentioned in the Second Part of the said Eighth Schedule together with Value Added Tax.*

...

(iii) The contribution under paragraph (i) of this clause for the period of twelve months (hereinafter called "the Service Charge Year") ending on 30th June in each and every year during the remainder of the term hereby granted shall be estimated by the Lessor (whose decision shall be final) not later than 30th June of the immediately preceding year and notified to the Lessee who shall pay the estimated contribution in advance by two instalments on 1st July and 1st January in the Service Charge Year.

(iv) As soon as reasonably may be after the Service Charge Year ending on 30th June 1976 and in each succeeding third Service Charge

Year when the actual amount of the said costs expenses outgoings and matters for the three Service Charge Years ending on 30th June 1979 or such succeeding third year (as the case may be) has been ascertained the Lessee shall forthwith pay the balance due to the Lessor or be credited in the Lessor's books with any amount overpaid.

...

4. To pay a fair share of the cost of the upkeep of any party fences walls sewers drains pipes passages footpaths entrances or garage access surface as apportioned by the Lessor.

...

11. To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 or 147 or the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

The Sixth Schedule details the lessor's covenants which include the following:

"(4) Subject to payment by the Lessee of the Lessee's proportion of the Lessor's Expenses: –

(i) To maintain repair redecorate and renew: –

(a) the main structure roof gutters and rain water pipes of the Building and garage (if any) and...

...

(iv) So often as reasonably required to decorate the exterior of the Building and the Garage in such manner as shall be agreed by a majority of the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit...

(v) To maintain the gardens and grounds of the Mansion including lawns borders trees and plants and to maintain and repair the paths driveways and garage forecourt.

(vi) Effect and maintain with the Prudential Assurance Company Limited or some other reputable insurance company nominated by the Lessor: –

(i) the insurance of the Building and the Garage...

...

(viii) To keep or cause to be kept proper books of accounts showing the expenditure incurred by it in carrying out its obligations under this Lease in respect of the Mansion."

The Eighth Schedule details the lessor's expenses in relation to the payment of the service charge. Part I of the Eighth Schedule details the expenses in relation to the Building and specifically includes the maintenance, repair, redecoration and renewing of the main structure of the Building and garage, as well as any costs and charges of any accountant employed for the purpose of auditing the accounts in respect of the lessor's expenses, and Part II deals with expenses in relation to the Mansion, which includes items such as maintaining the grounds, paths and driveways and costs and charges of the lessor or any agents employed by the lessor to manage or administer the Mansion.

Hearing

17. Following the inspection, a hearing was held at the Tribunal's hearing rooms at Centre City Tower, Birmingham. The Applicant attended on her own behalf. Ms Petrenko represented the Respondent, accompanied by Mr Matthee and Mr Nock, together with Mr Lunt (from Whittingham Riddell LLP, the Respondent's accountants).

Submissions

Preliminary issues

18. Ms Petrenko referred to the skeleton argument that she had provided to the Tribunal. She directed the Tribunal to the provisions in paragraph 2 (iv) of Part II of the Third Schedule to the Lease which, unusually, referred to a triennial balancing procedure. She confirmed that, although statutory accounts had been produced for the years ending 31st March 2015, 30th June 2016 and 30th June 2017, no balancing procedure, as required by the Original Lease, had yet been carried out. As such, she confirmed that all payments currently demanded were on account service charges.

19. Mr Lunt confirmed that a balancing service charge account was due to be carried out shortly. He confirmed that this should have been carried out in 2015; however, as the Respondent had only taken over the management at that time, it did not have the necessary information to carry out the same.

20. Ms Petrenko referred the Tribunal to the decision of the Upper Tribunal in *Knapper v Francis* [2017] UKUT 3(LC) and to the two-stage test, set out by Martin Roger QC, that the tribunal should consider when dealing with on account payments:

> "*28. … The starting point for its determination is the contractual position between the parties…*
>
> *30. The second stage of the determination is to consider whether the on-account payment required by the lease exceeded the statutory limit imposed by section 19(2). The effect of the statute is to modify the contractual obligation so that no greater amount than is*

reasonable is payable before the relevant costs are incurred. The language of the subsection suggests that the statutory ceiling applies at the time the leaseholder's liability arises. If, at that date, the on-account payment is greater than a reasonable sum, the leaseholder's contractual obligation is to pay only the lesser, reasonable, sum."

21. Ms Petrenko invited the Tribunal to adopt this two-stage process in relation to each of the service charges years. She stated that the contractual positon was clear, the lessee was required to pay the estimated service charge under paragraph 2(iii) of Part II of the Third Schedule. She submitted that the second stage was to determine what sums were reasonably payable on the date on which the payments were requested. As such, she stated that the relevant documents to be considered were the service charge demands not the accounts, which had been produced later. She submitted that it was only when the three yearly balancing service charge procedure had been carried out, that any consideration as to whether the actual expenditure was reasonable, would become relevant.

22. In relation to the failure of the Respondent to produce the balancing service charge account in 2015, Ms Petrenko referred to the decisions of the Upper Tribunal in *Warrior Quay Management Co Limited v Joachim* (LRX/42/2006) ('*Warrior Quay*'), *Pendra Loweth Management Limited v North* [2015] UKUT 91 (LC) ('*Pendra*') and *Wigmore Homes (UK) Limited v Spembley Works Residents Association Limited* [2018] UKUT 252 (LC) ('*Wigmore Homes*').

23. She stated that all of these decisions made it clear that - depending on the provisions of the lease - a failure on the part of the management company to provide certified accounts, did not suspend any obligation under the lease to pay the estimated service charge account. She referred the Tribunal to the provisions of the Original Lease relating to the payment of the estimated service charge and pointed to the fact that this did not refer to any payments demanded being subject to the receipt of the balancing service charge account. She also stated that, although two of the earlier demands were not sent by 30th June, time was not of the essence and the demands were sent shortly thereafter.

24. In addition, she stated, it was clear that from the budgets that the Respondent had produced, that the figures demanded were less than those demanded by the freeholder in the year ending 2014 and that the amounts demanded had not increased greatly year on year. Thus, she submitted, the sums demanded were reasonable.

25. In relation to specific items in dispute, Ms Petrenko referred to the fact that the Directions Order of 11th September 2018 had limited the Applicant's application to those matters set out in pages 5 to 12 of her statement. She stated that the Applicant should, therefore, not be allowed to refer to any matters detailed in Mr Jepps' statement that did not relate to those specific matters.

26. The Applicant stated that there had been many items in the accounts that she could not make sense of. She stated that, as the Tribunal had allowed Mr Jepps' statement to be submitted in evidence, the information contained in the same should be allowed.

27. The Tribunal agreed that, as no balancing process had been carried out, this was a matter dealing with the reasonableness of on account payments, as per section 19(2) of the Act. It allowed the Applicant to refer to the items detailed in Mr Jepps' statement, but confirmed that the decision could, quite clearly, only concern the matters relevant to the on account payments.

Service Charge - year ending 30th June 2015

28. The Applicant referred to an item identified as legal costs on the accounts relating to the year ending 30th June 2015. She believed this related to the costs for setting up the 'Right To Manage' company and stated that such costs were not permitted under the lease provisions as part of the service charge and should instead have been detailed in RTM company accounts. In addition, she stated that she had given a sum of £200 on account of these costs and that this was not detailed on the accounts.

29. The Applicant stated that one of the invoices for garage costs referred to 17 garages and not 30 garages, consequently, costs had been unevenly distributed in the accounts, as not all of the lessees were liable for the sum that had been expended on that invoice.

30. She stated that the accountancy fee was high, considering the fact that the accounts were unaudited, and stated that the sums relating to electrical repairs and drain charges were not reasonable. She also queried whether any of the items should have been subject to a section 20 consultation.

31. Ms Petrenko, on behalf of the Respondent, stated that the legal costs were payable as part of the service charge under paragraph 5 of Part II of the Eighth Schedule to the Original Lease, which referred to the "*costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion*".

32. In relation to the garages, she stated that the relevant costs were those detailed in the budget, not the accounts. She noted that there appeared to have been an incorrect apportionment in the accounts, as under the lease provisions the garages should have been apportioned as part of the Building (a quarter share) rather than as part of the Mansion (a thirtieth share). She stated that this was not a significant issue as the budget was for anticipated works and had been based on the fact that there would be noticeable works required to every garage. She stated that the sum requested from the Applicant, £50, was reasonable and payable under paragraph 1 of Part I of the Eighth Schedule, as were the sums requested for the drains and electrical repairs (£20 and £6.67 respectively).

33. Ms Petrenko confirmed that none of the agreements entered in to by the Respondent were for a period of more than 12 months, therefore, were not Qualifying Long Term Agreements and that none of the works undertaken involved a contribution of more than £250 per lessee, therefore, were not Qualifying Works. As such, she stated that no section 20 consultation was required.

34. Mr Lunt stated that, although the Original Lease referred to accounts being 'audited', due to the age of the Original Lease, this was not the same as what are now considered as *audited accounts*. He stated that the latest version of the RICS code endorsed this view and that the accounts that had been produced complied with the lease provisions. Ms Petrenko submitted that the budget for the accountancy fee, £17.93 per property, was reasonable and payable under paragraph 5 of Part I of the Eighth Schedule to the Original Lease.

Service Charge - year ending 30th June 2016

35. The Applicant queried why no reserve fund had been collected. She stated that there was provision in the Original Lease for collection of the same and that this had been requested in the 2017 budget.

36. In relation to general repairs and maintenance and the allocation of fees generally in the accounts, she queried why fees that should have been charged as part of the Mansion costs were charged in the costs for the buildings and vice versa. In addition, she queried whether the costs in relation to gardening, insurance and management fees should have been subject to consultation under section 20.

37. Ms Petrenko, on behalf the Respondent, stated that the Respondent was not obliged to hold a reserve under the lease provisions.

38. In relation to the allocation of items of expenditure in the accounts, she stated that these were not relevant for the purposes of the proceedings, as the Tribunal was considering the reasonableness of the amounts demanded on account and whether the sums detailed in the budgets were reasonable and payable. She confirmed that, as previously stated, the Respondents had not carried out any Qualifying Works nor entered into any Qualifying Long Term Agreements, including in relation to the gardening or management services.

39. She stated that any other matters raised by Mr Jepps in his statement related to the accounts rather than the budgets, had not been detailed on pages 5 to 12 of the Applicant's statement and were, therefore, beyond the remit of the Tribunal's considerations.

Service Charge - year ending 30th June 2017

40. The Applicant, again, queried the allocation of the budget and accounts, in that all items appeared to have been allocated to the blocks of

properties, rather than having two separate allocations - one for the Building costs and one for the costs of the maintenance of the Mansion. She also, again, queried the cost of the gardening and estate management and whether consultation was required.

41. Ms Petrenko stated that the items detailed in the budgets were simply an estimated expenditure in relation to lessor's expenses, as required under paragraph 2 of Part II of the Third Schedule. She stated that this paragraph did not require the estimate to be split between items relating to the Building and items relating to the Mansion.

42. She confirmed that, as previously stated, there were no relevant Qualifying Works and no relevant Qualifying Long Term Agreements, for which a section 20 consultation would have been required.

Service Charge - year ending 30th June 2018

43. The Applicant stated that she had not received any accounts and, therefore, could not query any individual item.

44. The Respondent confirmed that the question for the Tribunal related to the reasonableness of the budget, not the accounts, and that the Applicant had not advanced any basis upon which she considered the same to be unreasonable.

Service Charge - year ending 30th June 2019

45. Although the service charges for this period was not referred to in the Applicant's application, the Applicant referred to the reasonableness of the prospective service charges for 2018 to 2019 in page 12 of her statement. She stated a prospective charge of £711.09 had been demanded for the reserve, which, she believed, related to the repair of water pipes. She queried whether this was reasonable as, she stated, the Building was in serious disrepair and the sum had been demanded without section 20 consultation.

46. Ms Petrenko submitted that the Respondent was entitled to, but not obliged to, accumulate a reserve fund under paragraph 1 of Part I of the Eighth Schedule. She stated that the Respondent had recently dealt with a number of issues in relation to corroding poly pipes in the drainage system across the Mansion. She referred to the Respondent's statement, where it was stated that in a twelve-month period approximately twenty pipes had burst. The Respondent, in its statement, also confirmed that these repairs cost approximately £350 a time and, therefore, estimated that there would be a cost of approximately £3000 to £4000 per block, which the Respondent hoped to build up in the reserve funds so that the works could be carried out as soon as possible. Ms Petrenko stated that the figure of £711.09 represented a genuine pre-estimate in relation to the proposed works and that it was reasonable. She stated that, at the moment, no section 20 consultation was required as it was a sum

requested on account and referred to *23 Dollis Avenue (1998) Limited v Vejdani and Echraghi* [2016] UKUT 0365. In addition, she stated that the figure of £711.09 was for the Building, so only amounted to a sum of just under £178 per lessee, and that consultation would be carried out by the Respondent, in due course, if required.

Administration charge

47. The Applicant queried whether she was liable to pay, and the reasonableness, of an administration charge of £150, which had been levied on her by the Respondent in relation to the removal of rubbish in 2017. She stated that the Respondent had, firstly, informed her that the charge was for the removal of a boat within the communal area and, subsequently, informed her that it was for the removal of items of rubbish from a communal area that had been left by one of her tenants. In addition, she had been charged with a late payment fee from HLM.

48. She confirmed that she had contacted Countrywide/HLM (the management company employed by the Respondent) and stated that she did not believe that the sums charged were either warranted or justified. She stated that HLM had, subsequently, removed their late charge fee; however, they had stated that they were unable to waive the administration charge of £150 for the fly tipping, as the Respondent had levied this sum directly.

49. The Applicant stated that she had driven to the Property on two occasions, after having been contacted by the Respondents, and had never witnessed any evidence of fly tipping or any overflow of the bin store. She stated that there was no evidence that the items that had been left in the communal area were from one of her tenants and that there would have been no reason for her tenant to have left any items in the communal area as he could have left any unwanted items in the garage.

50. Ms Petrenko stated that Mr Nock knew the Applicant's tenant by name and saw him moving out of the Property on 14th August 2017. She stated that Mr Nock had taken a photograph of the items that had been left by the tenant and referred to the letter of 23rd of January 2018, sent by the Respondent to the Applicant, which included the photograph.

51. Ms Petrenko stated that under the terms of the Original Lease - paragraph 3 of Part I of the Third Schedule - it stated that items of refuse could only be deposited in the bin storage area. She confirmed that, in the Respondent's letter of 23rd of January 2018, as the Applicant had threatened to make an application to the Tribunal, the Respondent had agreed to reduce the administration fee for the removal of the items to £100 to match any tribunal application fee. She stated that the Respondent considered this a pragmatic solution to avoid the need for the Applicant to make such an application.

52. Ms Petrenko stated that the sum of £100 was reasonable and considerably cheaper than sums charged by local authorities for the removal of fly tipping. She stated that Mr Nock was at the site at the relevant time, that he recognised the tenant and that he had taken a photograph of the rubbish. She stated that, as the Applicant had not even been at the site at the relevant time, Mr Nock's evidence was clearly more compelling than that of the Applicant.

Application under Section 20C

53. The Applicant's submissions in relation to section 20C of the Act reiterated her reasons for the application and stated that she had reasonable grounds to make the application and that, as the application was a low value matter, it should have been dealt with proportionately.

54. She confirmed that she had been through Countrywide's complaints procedure twice in the past year four years, that she did not have access to any contracts to consider whether or not they were long term agreements and that various charges had not been properly explained.

55. She stated that the conduct of Beale & Company Solicitors LLP was unreasonable, in that there are only two items of work that had been carried out on the Building, the fascia and the bin store roof, and that it should not have been difficult to acquire those invoices and explain the income and outgoings.

56. The Applicant stated that it was not reasonable for the Respondent to incur 'devastating' costs when this was a low value matter, nor was it reasonable to seek to impose those costs on others. She stated that she was not wealthy, and was sure that other lessees were not either, and that she would not have incurred such costs herself, as they would have been completely ruinous.

57. In relation to the conduct of the Respondent, she stated that she had ongoing issues in relation to charges being put on to her account without her knowledge, some of which were later removed. She did not consider this behaviour to be just and equitable. She stated that she was persistently told that there were insufficient funds to maintain the Building and that it was impossible to tell what the income and expenditure for each property was, when the income was pooled and allocated to different schedules. In addition to this, she was informed that an £11,000 loan had been repaid, which did not appear in the accounts, and was unsure as to why a sum for legal costs appeared on the accounts. She went on to refer to the discrepancies detailed in Mr Jepps' statement.

58. The Respondent opposed the application for an order under section 20C as, it submitted, it would not be just and equitable in all of the circumstances of the case. The Respondent stated that the majority of the Applicant's submissions effectively repeated assertions made in her

application, which had already been responded to, and were not relevant in relation to an order under section 20C.

59. In relation to the Applicant's argument that "*it was a low value matter and should have been dealt with proportionately*", the Respondent stated that the Applicant did not deal with matter proportionally and left the Respondent with no option but to defend itself and the other lessees' interests against allegations and challenges, incurring substantial expenditure in the process.

60. In relation to the order, they submitted that it was not a necessary or a relevant consideration of the Tribunal to assess whether the relevant legal costs incurred were recoverable as a service charge under the provisions of the lease or whether such costs were reasonably incurred; the reason being that, if the Applicant failed in her section 20C application she would still retain the right to challenge the costs as part of the service charges under section 27A of the Act. Notwithstanding this, the Respondent went on to state that it believed that such costs were recoverable, under clause 5 of Part II of the Eighth Schedule to the Original Lease, and referred to the decisions in *Plantation Wharf Management Company Limited v Jackson and another* [2011] UKUT 488 (LC), *Conway and others v Jam Factory Freehold Limited* [2013] UKUT 592 (LC) ('*Jam Factory*') and *Schilling v Canary Riverside Property Limited* LRX/65/2005 ('*Schilling*').

61. In relation to the question of the assessment of 'just and equitable' the Respondent referred to the decision in *The Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 ('*Doren*'), where His Honour Judge Rich Q.C. set out guidance upon which the discretion under section 20C should be exercised (paragraphs 28 to 32), which included, "*the conduct and circumstances of all of the parties*" and "*the outcome of the proceedings*", and went on to state that "those *entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an "instrument of oppression*".

62. The Respondent also referred to paragraph 54 of *Jam Factory* in which Martin Roger QC referred to *Schilling* and stated:

> "*the ratio of the decision in [Doren] is "there is no automatic expectation of an Order under s.20C in favour of successful tenant". "So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s.20C in his favour*."

63. As such, the Respondent submitted that the starting point for all of their legal defence costs in defending the application were that they should be recoverable as a service charge from the Applicant and the other lessees unless there were circumstances why it would not be just and equitable.

64. In relation to the conduct of the parties, the Respondent submitted that the Applicant had commenced a campaign of baseless allegations against

the Respondent over a number of years, which had caused distress to the Respondent and representatives of Respondent. It stated that the Applicant was, through its managing agents, invited to make an appointment to inspect the service charge accounts and documents at the managing agents' offices and that the Applicant did not even acknowledge these invitations, let alone take them up.

65. The Respondent further stated that the Applicant's statement did not narrow the issues in the application, but instead made further allegations, which were generic blanket challenges and that Mr Jepps' statement, which was only received four weeks prior to the hearing, detailed further items that had not been included on the Applicant's statement.

66. The Respondents referred to paragraphs 72 and 73 of the decision in *Jam Factory*, where Martin Roger QC stated, in relation to a section 20C order granted in favour of an unsuccessful appellant whose application was not supported by the majority of the lessees:

> *"…I cannot help but feel that its effect is at best ironic and at worst perverse or capricious. The majority of leaseholders did not support the appellant's application … Those leaseholders … are to contribute through the service charge to the costs incurred by the respondent in defeating the application. The [unsuccessful] appellants themselves, however, are to be protected from what would otherwise be their contractual obligation to pay their share of those costs, notwithstanding the fact that the costs have been incurred ensuring that their efforts … did not succeed. In the context of a development owned by the leaseholders through their own company it seems to me quite impossible to describe an outcome which discriminates between leaseholders in that way as just and equitable…The vice of the [section 20C] order is that it benefits the losing appellants at the expense of the members of the successful respondent, each of whom will not only be liable to pay their own share as leaseholder, but will have to make up the shortfall created by the respondent's inability to recoup an equal share from the appellants. That seems to me to be fundamentally unfair."*

67. The Respondent concluded by stating that this was not a case in which any order would be just and equitable as it would relieve the Applicant, and the other lessees specified in her application, from responsibility for contributing towards relevant legal costs through the service charge at the expense of the other lessees.

Application under Paragraph 5A

68. In relation to application under paragraph 5A of schedule 11 to the 2002 Act, the Applicant stated that the Respondent's costs should be limited to reasonable costs of a responsible lessor acting in accordance with the lease, RICS code, the articles and the applicable legislation.

69. She confirmed that she had tried to resolve the disputes over a four-year period but could not do so. She stated that Mr Nock was the only active director and his responses to her had been unreasonable throughout.

70. She stated that she had good reason to suspect the service charges were being charged unreasonably because maintenance was being refused to the Building on the grounds of insufficient funds (despite the fact that some of the other properties were not being neglected), that excuses had been made in relation to the lack of funding and that there were various discrepancies in the accounts. She stated that her evidence illustrated unreasonable behaviour amounting to victimisation which was borne out by the erroneous charges placed on her service charge account.

71. The Applicant further stated that section 20C recognised, 'where the landlord had abused its rights and used them oppressively' there should be protection for the lessees.

72. She stated that the year-end accounts for 30th June 2018 had still not been produced, which was a material breach of the lease, despite her chasing the same. She, also, did not believe that significant costs would have been saved had she examined the accounts, as suggested by the managing agents, as she would have only been permitted access to the accounts for the year ending 30th June 2017 and that many of the costs that she had queried were prior to this date.

73. She further stated that she had incurred considerable costs, £4000, on Mr Jepps' services to prepare for the hearing in order to try and advance the case, as the hearing would have taken even longer if she had not done this, as the accounts were not straightforward and did not comply with the lease provisions.

74. She believed that the service charges were high and believed that the Respondent's Representative had pursued matters which had already been resolved and that a barrister need not have been instructed on certain issues.

75. In addition, the Applicant stated that she did not believe that there was any danger of the Respondent folding, as its costs had been underwritten and queried why the costs would not, in any event, be covered by the insurance.

76. The Respondent stated that paragraph 5A of schedule 11 to the 2002 Act was enacted relatively recently and that there were not many reported decisions but considered that, as the language mirrored the language of section 20C (3) of the Act, the Respondent's position was that the principles established in relation to section 20C were applicable to any application under paragraph 5A.

77. The Respondent further stated that it was not relevant for the purposes of the application whether the legal costs incurred by the Respondent were

permitted under the lease provisions nor whether they were reasonably incurred, as the Applicant would still have a right to challenge any legal costs under paragraph 5 of schedule 11 to the 2002 Act.

78. The Respondent referred to their previous submissions, in particular the fact that there is no presumption that an order is to be made (*Doren*), and that given the Applicant's conduct - in both bringing the proceedings and her conduct of those proceedings - there was no basis for making an order. The Applicant had made serious allegations of harassment, queried a huge number of service charges without any reasonable basis, raised new issues (based of Mr Jepps' statement) which were unreasonable and unfair to the Respondent and had repeatedly failed to comply with her disclosure obligations.

79. The Respondent referred to the fact that the Tribunal was entitled to have regard to the financial and practical consequences of making an order. It stated that the Respondent was a resident owned RTM company which ran for the benefit of the lessees. The Respondent did not have any assets of its own, but collected service charges and administration costs from the lessees. Further, that it would not be just and equitable to deprive the Respondent of its ability to recover administration costs from the Applicant as it would, either, be left having to recover any uninsured legal costs from other lessees, by way of the service charge, or face serious financial difficulty.

80. For all the above reasons, the Respondent invited the Tribunal to dismiss the Applicant's application for an order.

The Tribunal's Determinations

81. The Tribunal considered all of the written and oral evidence submitted and briefly summarised above.

Service Charges

82. The Tribunal noted that the service charge demanded was an estimated service charge and that the Applicant was liable to pay the same under paragraph 2(iii) of Part II of the Third Schedule to the Original Lease. The Tribunal does not consider the fact that some of the demands had been requested a few days later than detailed in the Original Lease, to extinguish or reduce any liability of the Applicant to pay the same.

83. In cases relating to estimated charges, the Tribunal needs to determine, under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the lease. The Tribunal is not concerned as to whether any actual service costs have been reasonably incurred, as this could only be queried after the balancing service charge statement had been produced. As such, the Tribunal agrees with Ms

Petrenko, that it is the reasonableness of the demands that are the relevant consideration for the determination by the Tribunal.

84. That being said, the Tribunal notes that a balancing service charge process should have been carried out in 2015, and is conscious of the comments of His Honour Judge Huskinson in the *Warrior Quay* decision, at paragraph 25:

> [the lessor] *"… cannot take advantage from its own breach of covenant and cannot unilaterally put off into the future the ability of a tenant to obtain finality of decision as to how much is payable for a particular year…. The LVT must reach the best informed decision it can upon the material available to it. The absence of any proper certificate is a matter which may weigh against…"* [the lessor]

85. This decision was followed in the *Pendra* decision, where Martin Roger QC stated, at paragraph 51:

> *"The absence of proper accounts for previous years may, of course, provide grounds for treating the estimate with circumspection or even suspicion; it may make it easier to justify reduction under section 19(2) on the basis that there is little to suggest the estimate is reasonable…"*

86. In this case, although the balancing service charge account had not been produced, accounts had been produced for the years ending June 2015, June 2016 and June 2017. It is clear, therefore, that the Respondent did have some information, from 2016, onwards as to likely expenditure.

87. In the recent decision of the Upper Tribunal in *Wigmore Homes* the Upper Tribunal stated, at paragraph 55:

> *"We are conscious that reasonableness is to be judged by the information at the date of the demand. We are also conscious that more information as to actual expenses became available as time went on."*

88. As such, although the reasonableness of the demands are the relevant consideration for the Tribunal, any accounts that were available at the date of the demand, is information that could be taken in to account when judging the reasonableness of the demands.

89. Having considered the Respondent's demands for the estimated service charge expenditure, it is noted that the demand made in 2014 (for the year ending June 2015) was for a sum of £861.59, which was less than the previous freeholder's estimate of £1053.52, and no accounts were available at that time. In the following year, the demand made in 2015 (for the year ending June 2016) was further reduced to £745.48.

90. The accounts for the year ending June 2015 became available in December of 2015 and indicated that the amount actually expended in

that year was less than the budgeted figure and the Tribunal notes that the demand made in 2016 (for the year ending June 2017) was reduced, this time to £727.48.

91. The accounts for the years ending 2016 and 2017 were available in the December of those years, and both indicated a deficit in the accounts. The Tribunal notes that the budgets for the year ending June 2018 and the year ending June 2019 (after those respective accounts were available) were increased. The Tribunal also notes that the estimated service charge demands for the years ending June 2017, June 2018 and June 2019, all detailed either the projected expenditure or the estimated actual expenditure for the previous year, in addition to the proposed budget for the upcoming service charge year.

92. As such, the Tribunal does consider that the Respondent was taking into account the additional information that was available to it when estimating the budgets. The Tribunal, therefore, believes that the method used by the Respondent for the calculation of the estimated service charge to be reasonable.

93. In relation to the service charges generally, the Tribunal notes the Respondent's statement, that there were no Qualifying Works nor any Qualifying Long Term Agreements that required any section 20 consultation.

94. Having considered the provisions in the Original Lease, the Tribunal is also satisfied that, although it may have been beneficial for the estimated costs to be separated in relation to those allocated for the Building and those in relation to the Mansion, this was not a necessity, although it clearly would be required in the balancing service charge accounts.

Service Charge - year ending 30th June 2015

95. In relation to the service charge for the year ending June 2015, the Tribunal does not concur with Ms Petrenko, that any legal costs would fall within the remit of service charge in paragraph 5 of Part II of the Eighth Schedule, as it does not consider that the set up costs in relation to a 'Right to Manage' company would fall within, either the definition of "*costs … of the Lessor and any Agent…employed by the Lessor*" (as the Respondent did not appear to be either of these at the time the costs appear to have been incurred), nor did the costs appear to relate to the management or administration of the estate. The Tribunal notes, however, that although legal costs may have been detailed on the accounts they did not appear to on the estimated service charge demand, therefore are not relevant to the Tribunal's determination.

96. The Tribunal notes that the Respondent had proposed to carry out works to all of the garages and believes that the figure detailed for the garage repairs in the demand to be reasonable (although the accounts may have contained an error, this was not the relevant document for considering

the reasonableness of the sum demanded). In addition, the Tribunal also considers the other items of expenditure, including the fee for the accounting, electrical and general repairs, to be reasonable. As such, the Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2015 was reasonable and that the sum of £861.59 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2016

97. The Tribunal notes that the Original Lease did not require the Respondent to set up a reserve fund. The Tribunal is also satisfied that there were no items requiring section 20 consultation for the estimate, and that the budgeted items appeared to be reasonable sums. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2016 was reasonable and that the sum of £745.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2017

98. As previously stated, the Tribunal did not consider that the estimate required a separate allocation between the costs for the Building and those for the Mansion, nor that any section 20 consultation was required. The Tribunal determines that the estimated expenditure detailed in the budget for the year ending 30th June 2017 was reasonable and that the sum of £727.48 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2018

99. The Tribunal notes that the Applicant did not give any information as to why she considered the budget for the year ending June 2018 to be unreasonable. As such, the Tribunal determines, in the absence of any evidence to the contrary, that the estimated expenditure detailed in the budget for the year ending 30th June 2018 was reasonable and that the sum of £743.63 demanded is payable by the Applicant.

Service Charge - year ending 30th June 2019

100. The Tribunal notes that the Original Lease does allow the Respondent to request sums towards future works, which does not appear to be disputed by the Applicant. The amount requested in relation to the works to the drains appears to be based on costs already incurred by the Respondent for existing repairs that had been carried out on some parts of the estate. The Applicant did not obtain her own quote, nor did she detail any alternative figure that she would consider reasonable. The Tribunal considers the Respondent's estimate to be reasonable and notes Ms Petrenko's comments, and is satisfied, that no section 20 consultation was required when the demand was sent.

101. In relation to the Applicant's comments regarding the Building being in serious disrepair, the Tribunal noted, on their inspection, that the

Building appeared to be in a fair state of condition and is satisfied that the drainage works are imminently required. The Tribunal, therefore, determines that the estimated expenditure detailed in the budget for the year ending 30th June 2019 was reasonable and that the sum of £800 demanded is payable by the Applicant.

Administration charges

102. The Tribunal notes that the administration charge levied by the Respondent, in relation to fly tipping in the communal area, was for a sum of £100.

103. Although the Applicant states that there was no evidence that the refuse was left by her tenant, there appears to be no dispute that the Applicant's tenant was vacating the Property at that time, and Mr Nock states that he recognised and knew him by name. The Tribunal is satisfied that Mr Nock was on site and took a contemporaneous photograph and that it was reasonable for the Respondent to levy an administration charge on the Applicant based on the provisions in the lease.

104. Regarding the reasonableness of the charge, the Tribunal notes that the original cost of the charge appears to have been £150, and that this was later reduced in line with the application fee to the tribunal. The Tribunal considers it highly unusual that a fee should be reduced in this way, as any charge should be an amount which relates to the item of expenditure, not an amount to avert potential scrutiny. The Tribunal considers the administration fee to be excessive and determines a sum of £50 is reasonable and payable by the Applicant.

Application under Section 20C

105. The Applicant has applied for an order, in accordance with section 20C of the Act, that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. In making such an order, the Tribunal must consider what is 'just and equitable' in the circumstances, taking in to account matters such as the conduct and circumstances of the parties and the outcome of the proceedings.

106. The Tribunal does accept the Respondent's submissions, in that, the issue as to whether the Respondent is entitled to recover the costs under the terms of the lease or whether the costs incurred are reasonable, are both issues which are more properly considered in an application under section 27A of the Act, should such costs be included within the service charge.

107. The Tribunal also notes the comments of His Honour Judge Rich, in the *Doren* decision, at paragraph 31:

"In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20 C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust."

108. Looking at the circumstances leading to the application and the conduct of the parties, the Tribunal is conscious of the fact that the application was made by the Applicant as she had noticed discrepancies in certain items in the accounts and noted that certain items of service charge did not appear to have been allocated as per the terms of the Original Lease. She was also concerned regarding the upkeep and maintenance of the Building.

109. The Tribunal also notes that the Applicant appears to have followed the Countrywide complaints procedure, she states to no avail, and that by the time of the application there clearly appeared to be a great deal of animosity and distrust between the parties.

110. That being said, the application, and subsequent statement by the Applicant, were vague in the issues involved and referred primarily to the accounts rather than the budgets, with questions rather than submissions, such as "*Is there a receipt for the £13 electrical repairs*" and "*What was £25 electrical repairs*?" In addition, at the hearing, the Applicant did not appear to recognise what matters would be defined as Qualifying Works or Qualifying Long Term Agreements.

111. The Tribunal notes that the managing agents did offer the Applicant an opportunity to inspect the accounts and that the Applicant had failed to take up this offer, as she had stated that not all of the relevant accounts would have been available for inspection.

112. The Tribunal also notes that the Respondent had raised concerns regarding the inclusion of Mr Jepps' statement four weeks prior to the hearing, which raised further issues in relation to the accounts, rather than the budgets, and referred to the fact that the Applicant had often failed to comply with timescales set down by the Tribunal.

113. On the part of the Respondent, although the estimated budgets produced by the Respondent did not require any costs to be allocated between the individual buildings and the Mansion, this separation was, also, not detailed in the accounts that had been produced and, clearly, would need to have been included in any balancing service charge accounts, as the apportionments for the lessees would vary depending on whether the costs were allocated to the Building (for which the Applicant was liable for a quarter share) or for the Mansion (where the Applicant was liable for a thirtieth share).

114. There also appeared to have been other irregularities detailed in the year-end accounts that had been referred to by Mr Jepps, which included the

legal costs. Although these did not appear in the Respondent's budget, consequently, were not a consideration for the Tribunal in relation to the reasonableness of the estimated service charge; they did not appear to be costs which could be recovered under the service charge under paragraph 5 of Part II of the Eight Schedule to the Original Lease, as submitted by the Respondent, for the reasons previously mentioned. As such, the Tribunal could understand the Applicant's concerns with regard to the accounts.

115. In addition to this, the Tribunal noted that the Respondent appeared to be under the impression, at the hearing, that, if there were insufficient funds in relation to the Building, it would not be responsible to maintain the same. The lessor's covenants under paragraph 4 of the Sixth Schedule to the Original Lease clearly states that, subject to the payment by the Applicant of her proportion of the expenses, the Respondent has a duty to maintain and repair the relevant parts of the Building and garage.

116. The Tribunal also notes that, although the Respondent referred to the late submission of Mr Jepps' statement, the skeleton argument, sent on behalf of the Respondent, was only submitted the day prior to the hearing. This document correctly identified that the relevant service charges were the estimated service charges detailed in the budget, rather than any figures in the accounts. Prior to this, both the Applicant's submissions and the Respondent's statements in relation to the service charge, referred to various items on the accounts. Copious documents were provided in relation to those accounts and corresponding invoices, the vast majority of which were not referred to at the hearing, as they were not relevant in relation to the reasonableness of the estimated figures in the service charge budgets.

117. Regarding the outcome of the proceedings, the Tribunal notes that the Applicant has failed to identify that any of the estimated service charges for the relevant years were unreasonable, although the Tribunal has found that the administration charge was excessive.

118. In such circumstances, the Tribunal is particularly mindful of the reasoning of Martin Roger QC in *Jam Factory*, in that it would seem perverse and unjust that, where the Applicant has been unsuccessful in the vast majority of her application, she should be protected from costs at the potential expense of the Respondent and the remaining lessees who were either neutral or who did not support the application.

119. Taking in to account all of the circumstances, the Tribunal does not consider that it would be just and equitable to make any order in favour of the Applicant under section 20C of the Act.

Application under Paragraph 5A

120. In relation to the application under paragraph 5A of Schedule 11 to the 2002 Act, the Tribunal concurs that items that are relevant in relation to

the application to section 20C of the Act are relevant in relation to an application under paragraph 5A. In such an application; however, the Tribunal is considering the Applicant's liability to pay administration charges in respect of litigation costs.

121. Paragraph 5A has been considered in the recent decision, *Avon Ground Rents Limited v Child* [2018] UKUT 0204 (LC). An order under paragraph 5A was not available to the tribunal in the first instance of those proceedings as they had begun before October 2016; however, in paragraph 58, Holdgate J observed:

> *"Had the para. 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondents' contractual liability to pay the legal costs that the Applicant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters…"*

In addition, the Upper Tribunal found the level of costs before the First Tribunal to be "troubling" and stated, at paragraph 65:

> *"The procedure before the FTT is intended to be relatively informal and cost-effective. The legal principles for assessing the reasonableness of service charges are well-established and clear."*

122. As previously stated, the Tribunal notes that the vast majority of the documents produced by both parties in their bundles related to various invoices and accounts, which were not referred to at the hearing, as the Respondent's skeleton argument, submitted just prior to the hearing, confirmed that the relevant considerations were whether the estimated budgets were reasonable and that the actual costs incurred would not be relevant until the balancing service charge adjustment process had taken place.

123. The Tribunal considers that, had the Respondent upon receipt of the Applicant's application put this argument forward, the issues in relation to the reasonableness of the service charges would clearly have been narrowed and the copious amounts of documentation produced by the Respondent would have been greatly reduced.

124. That being said, it is not clear, from the Applicant's submissions whether, if such an argument had been put to her, she might have altered her submissions, as even when the Tribunal confirmed that this was the correct position, the Applicant's subsequent submissions still appeared to focus on the discrepancies in the accounts.

125. Taking all of these matters into account, the Tribunal considers it would be just and equitable to make an order, under paragraph 5A of Schedule

11 to the 2002 Act, that the Applicant is only liable to pay 25% of any administration charges in respect of litigation arising from this application.

Appeal Provisions

126. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM
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Judge M. K. Gandham