FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UL/LIS/2021/0005
Property	**:**	47 Coolinge Road, Folkestone. CT20 1EW
Applicant	**:**	Steven Newman
Respondents	**:**	Ms Joanna Lucille Birch-Phaure (Ms Phaure) (Basement) Mr Russell John Taylor (GFF) Mr Komla Etouassigno (FFF) Mr and Mrs Kevin George England (SFF)
Type of Application	**:**	Liability to pay and reasonableness of service charges. Section 27A the Landlord and Tenant Act 1985 (the Act)
Tribunal Members	**:**	Judge C A Rai Mr M Woodrow MRICS
Date and Venue of Hearing		17 June 2021 CVP Video Hearing (remote)
Date of Decision	**:**	19 July 2021

DECISION

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1. The Tribunal determine that the service charges demanded from the leaseholders for that part of the service charge year 2019/2020 during which the Applicant was the freeholder are reasonable.

2. The Tribunal determine that the service charges demanded "on account" for the service charge year 2020/21 are reasonable.

3. The Tribunal makes a section 20C order in favour of Ms Phaure that only 25% of the Applicant's costs relating to these proceedings are "relevant costs" and a section 20C order in favour of Mr Taylor that only 50% of the Applicant's costs relating to these proceedings are "relevant costs.

4. The reasons for its decisions are set out below

Background

5. The Applicant has stated that he applied to the Tribunal for this determination because he had concluded that the Respondents were either challenging, or intended to challenge, the reasonableness of the sum demanded on account of service charges to be incurred during the current service charge year 2020 – 2021 to fund "Qualifying Works".

6. The Application to the Tribunal, dated 5 February 2021, referred to the service charges:-

    a. Incurred for 25.12.19 to 24.12.20 and
    b. On account for 25.12.20 to 24.12.21

7. In addition, the Applicant asked for determinations from the Tribunal:- <u>regarding the service charges for 2019/2020 [page 27]:-</u>

    a. The monies due from each Respondent under the request (demand) for payment dated 6 January 2021 and the date upon which the monies requested under that demand fell due.
    b. If disputed by the Respondents whether he has complied with the section 20 consultation requirements with regard to the Qualifying Works.

    <u>regarding the service charges for 2020/2021 [page 30]:-</u>

    c. The monies due from the First Respondent (Ms Phaure) under the request for payment dated 24 November 2020 and the date upon which the monies requested fell due.

8. The Tribunal issued Directions dated 15 February 2021 [page 695] attached to which was a schedule in which the Respondents could identify the items disputed, explain their reasons and suggest alternative amounts which would be reasonable. A copy of this schedule completed by the Applicant and Ms Phaure (the Scott Schedule) is in the bundle [page 519].

9. This Hearing was a remote hearing which was consented to by all parties. The form of hearing was **V** video fully remote. A face to face hearing was not practical as the hearing took place during a period of Government restrictions during the Covid-19 pandemic. The documents to which the Tribunal was referred are contained in a single agreed electronic Hearing Bundle comprising 852 pages. In this decision references to pages in that bundle are shown within square brackets.

The Leases

10. The leases of the four flats in the building are not identical. The leases of the basement and ground floor flats (the lower flats) are similar with service charge provisions in the Second Schedule. The service charge provisions in the leases of the first and second floor flats (the upper flats) are in the Fourth Schedule. The ground rent payable by the leaseholder of the basement flat is less than the ground rent reserved by the leases of the other three flats.

11. The payment dates, on which service charges fall due, are identical in all four leases. Each leaseholder covenants to make service charge payments biannually on 25 December and 24 June.

12. The leases of the lower flats define "Total Expenditure" [page 49] as the "total expenditure reasonably and properly incurred by the Landlord in any Accounting Period in carrying out its obligations under clause 4 of the Lease and the amount of such reserves (if any) as may reasonably be required in respect of its liability for maintenance and repair". (Paragraph 1 (a)). The definition includes payments towards insurance, costs expended by the landlord in carrying out internal and external repairs, maintenance and decoration, including decoration of the common parts, and such sum as may reasonably be required by the Landlord on account of anticipated or future expenditure so as to form an adequate reserve or sinking fund.

13. It is an agreed fact that the previous landlord had not demanded payments "on account of future expenditure" to form a reserve.

14. In addition, the Landlord can include (paragraph 1(v)) "all other costs and expenses reasonably incurred by the Landlord in connection with the Building (including the management thereof) and the reasonable fees of any Managing Agent employed by the Landlord (if any) for carrying out his obligations under the provisions of this Lease".

15. "Service charge" in the leases of the lower flats [page 50] "means a fair and reasonable proportion of the Total Expenditure". "Interim Charge" is defined as "such sum as the Landlord or its managing agents shall from time to time specify at their discretion to be a fair and reasonable interim payment".

16. If the Service Charge in respect of any Accounting Period exceeds the Interim Charge paid by the Tenant in respect of that period, the **Tenant shall pay the excess to the Landlord within 21 days** of service upon the Tenant of the Certificate (referred to in paragraph 5 of the same schedule) (See paragraph 21 below).

17. In the leases of the upper flats service the lessees are required to pay the Interim Charge and the Service Charge in the manner provided in the Fourth Schedule. The Fourth Schedule contains a definition of "The Total Service Cost" as "the aggregate amount in each year running from the twenty-fifth day of December (the Accounting Period) reasonably and properly expended by the landlord in carrying out his obligations under Clause 4 of this lease and the amount of such reserves (if any) as may be reasonably required in respect of his liability for maintenance and repair" [page 111]. The same items are listed as those referred to in the leases of the lower flats.

18. The Service Charge is defined as "25% of the total service cost of the whole building". The Interim Charge is £300 [page 111].

19. The leases of the upper flats provide that, if the service charge in respect of an accounting period exceeds the Interim Charge paid by the Tenant, the Tenant shall pay the excess to the Landlord within **twenty eight days after service upon the tenant of the certificate referred to paragraph 4 of the Fourth Schedule**.

20. Paragraph 4 provides "As soon as reasonably practicable **after the end of each Accounting Period** there shall be served upon the Tenant by the Landlord or by the Managing agent **a certificate signed by the Landlord** containing the following information:-
(i) the amount of the total service cost of that accounting period
(ii) the amount of the Interim Charge paid by the Tenant in respect of that accounting period
(iii) the amount of the service charge in respect of that accounting period and of any excess of the Service Chare in relation to the Interim Charge
(iv) the amount standing to the credit of the reserve or sinking fund at the end of that accounting period [page 112].

21. In the leases of the lower flats the Certificate, which must be served on the Tenant by the Landlord or its agents, after **the expiration of each Accounting Period and signed by the Landlord's agents auditors or accountants (at the discretion of the Landlord)** and must contain the following information:-
(i) the amount of the Total Expenditure for that Accounting Period
(ii) the amount of the Interim Charge paid by the Tenant in respect of that Accounting Period together with details of any surplus carried forward from the previous Accounting Period
(iii) The amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge
(iv) the amount standing to the credit of the reserve or sinking fund at the end of that Accounting Period [page 51].

22. Another difference between the leases of the lower and upper flats is that the service charge contribution is defined as 25% in the leases of the upper flats. However, none of the Respondents has suggested to the Tribunal that he or she is not liable to pay 25% of the amount due from the leaseholders collectively. The Tribunal has therefore assumed that each leaseholder has accepted that he has a liability to pay 25% of the service charge incurred in each service charge year.

23. The Certificate defined in the leases, and to be provided by the landlord must be signed. Mr Newman accepted that the copies in the bundle were not signed but did not confirm whether or not signed copies had ever been provided to any of the Respondents. None of the Respondents present at the Hearing raised any comment regarding the Certificates disclosed in the bundle.

24. The leases of the lower flats define the Interim Charge as "such sum as the Landlord or its managing agents shall from time to time specify at their discretion to be a fair and reasonable interim payment" [page 50].

The Hearing

25. The Applicant was in attendance together with three Respondents - Ms Phaure, Mr Taylor and Mr England.

26. At the beginning of the Hearing the Judge confirmed that having reviewed the papers the Tribunal had concluded:-

    a. In relation to 2019/2020 the Respondents' objections to the charges proposed were not entirely clear. The Applicant purchased the property on 22 May 2020. He prepared an end of year certificate for period which spanned only the period between 22 May 2020 and 24 December 2020, and sought to recover his actual expenditure, together with a substantial payment on account to fund Qualifying Works (being those works listed in the Schedule prepared by Collier Stevens) by sending a demand for £14,363.84 to each of the four leaseholders.
    b. In relation to 2020/2021 the Applicant prepared a budget in November and demanded a half yearly contribution of £462.50 from Ms Phaure on 24 November 2020 [Page 167]. There is no provision in the leases of the upper flats (FFF and SFF) to demand anything other than a fixed interim charge pending provision of the certificate of expenditure due at the end of the service charge year.
    c. The consultation process carried out by the Applicant was primarily sound and compliant with the legislation. The Judge therefore suggested to the parties that the dispute between them related solely to the reasonableness of the amounts demanded.
    d. Since both Mr Taylor and Mr England attended the Hearing, it would be appropriate for them to indicate to the Tribunal whether or not they are disputing the reasonableness of the payments demanded by the Applicant.

27. Whilst not referred to during the Hearing, both Ms Phaure and Mr Taylor made applications to the Tribunal for orders under section 20C of the Act [pages 187 and 198].

28. The Respondents have not disputed that the works itemised in the Schedule of Works prepared by Collier Stevens are Qualifying Works within the definition in the Act.

29. The potential cost of the Qualifying Works was quantified following a section 20 consultation. Although the Applicant stated that he has made the application so that "if disputed by the Respondents" the Tribunal can determine whether or not the landlord has complied with the consultation requirements in section 20 of the Act, none of the Respondents present at the Hearing suggested that this was not carried out properly.

30. The Tribunal therefore concluded that the Respondents accepted there has been appropriate consultation and since the parties agree, there is no need for it to make any determination about the consultation.

31. Notwithstanding that, some of the Respondents remained unhappy with the amount of the proposed cost of the works. There is no clear evidence that the extent of the works is disputed or that the Respondents are resistant to anything other than the cost, and possibly the choice of contractor.

32. 47 Coolinge Road Folkestone CT20 1EW (the Property) (referred to in the leases as the "Building") is a four storey semi detached property converted into four flats. One flat is located on each floor. The basement flat has a separate entrance but access to the other three flats is shared.

33. The Applicant bought the freehold of the Property on 22 May 2020 [page 33]. He is a solicitor and his management company, D&S Property Management is employed as managing agent for the Property. The website for the company refers to D&S Management Services Ltd trading as D&S Property Management. The Applicant is one of two shareholders in that company and shown on the Companies House register as a person with a significant interest in the company.

34. Mr Taylor, the leaseholder of the Ground Floor Flat, is the only Respondent resident at the Property. The other Respondents live elsewhere. Mr Etouassigno, named as a Respondent because he is the leaseholder of the first floor flat, has not disputed the Applicant's demands for service charges, was not present at the Hearing and has had no active involvement in these proceedings.

35. The service charge year for the building runs from 25 December to 24 December in each year. The leases provide for service charges to be payable in two equal instalments on 25 December and 24 June. When the Applicant completed the purchase of the freehold of the Property, he received information regarding the service charges paid by the four leaseholders during the current service charge year ending 24 December 2020. Only Ms Phaure, leaseholder of the Basement Flat, had paid ground rent in advance until 24 December 2020.

36. The Applicant insured the Property from the date of his acquisition when the previous owner cancelled its policy and presumably credited each leaseholder with their share of any refund of the premium. That was not disclosed at the Hearing save, and insofar as it was accepted, that Ms Phaure's service charge account was credited with the sum she had paid in advance for 2019/2020 (part of which related to insurance).

37. The bundle contains a demand for Ground Rent and the half yearly interim charge dated 24 November 2020 in respect of the Basement Flat [page 167]. The second payment of Ground Rent and Interim Charge are due under the leases of the flats on 25 December 2020. The first payment of ground rent in 2020 was due on 24 June 2020 and had been paid to the previous owner by Ms Phaure and passed on to the Applicant. The interim charge was calculated by reference to a budget for 2020/2021, dated 23 November 2020, a copy of which accompanied that demand [page 173]. The budget referred to the management fee, annual building insurance between 22 May 2021 and 21 May 2022, communal electricity fire protection and a provision against general expenditure. It stated that there were no monies held on reserve.

38. The Applicant has not disclosed whether or not he demanded a similar amount from Mr Taylor (Ground floor flat). He acknowledged during the Hearing, that the leases of the upper flats only enabled him to recover the fixed sum of £300 as the Interim Charge.

39. A payment of £200 from Ms Phaure is shown as a credit against her invoice dated 6 January 2021 [page 136].

40. The "Request for Payment" dated 6 January 2021 [page 152] sent to Mr Etouassigno, shows a deduction of £775 for "Interim service charges paid on account". There is no indication when this amount was invoiced or paid. There is no explanation as to why it is not shown as a credit on the Certificate. The second interim payment falls due under the leases on 25 December 2020 but the Applicant told the Tribunal he could only recover £300 from the leaseholders of the upper flats. None of the other invoices disclosed in the bundle refer to these "fixed" interim payments.

41. When Miss Phaure asked the Applicant how he held the advance service charge payments, he said that a separate bank account is held by the management company in the name of the Property. That is consistent with the banking details on the demands or request for payments which refer to the address of the Property in the account title. However, the two identified credits on the Applicant's invoices, being advance payments from Ms Phaure and Mr Etouassigno, apparently held "on account" prior to 6 January 2021, are not referred to on the Certificate dated 5 January 2021 [page 133]. No evidence was provided as to whether or not the previous freeholder had produced a "closing" service charge certificate for the period between 25 December 2019 and 21 May 2020.

42. The Tribunal has concluded that the Applicant has "more or less" complied with the provisions of both leases save and except in relation to the demand issued to Ms Phaure on 24 November 2020.

43. The Applicant submitted that following his inspection of the Property "it was immediately apparent that remedial works would be required in order to comply with the landlord's repairing covenant in the leases. Added to this, as access was provided to the Second Floor Flat, it was apparent that the Second Floor Flat was suffering from water ingress" [page 25].

44. He appointed Collier Stevens, Chartered Building Surveyors, which he described as a firm recommended by the first Respondent, [page 25] shortly afterwards and sent each Respondent a notice of intention dated 12 June 2020 to carry out qualifying works [page 538] (Taylor). The Respondents were invited to make written observations about the proposed works and nominate proposed contractors by 17 July 2020.

45. He told the Tribunal that at that time, he was waiting for Collier Stevens to prepare a specification of required works to enable the Applicant to comply with the repairing covenant for the external parts of the Building, obtain estimates following the initial phase of the section 20 consultation and supervision of the instructed works.

46. The Applicant stated that observations and nominations were received from some of the Respondents which, he said, he had taken into account and to which he had replied [page 25]. Collier Stevens were tasked with obtaining estimates from the nominated contractors and other contractors known to them. However, none of the contractors which they approached provided estimates for the works identified in the schedule of works prepared by Collier Stevens. Collier Stevens were only able to obtain a single estimate [page 26].

47. The Applicant obtained another estimate from A T Building Services described as "a contractor known to, but not connected to, the Applicant". In paragraph 34 of his statement the Applicant stated that he served a Statement of Estimates with an accompanying notice on the leaseholders on or about 21 September 2019. No evidence in support of that statement was included in the bundle.

48. The Applicant then stated that observations made by the Respondents were considered and in the light of those the "Applicant decided to provide the leaseholders with a further opportunity to nominate contractors by 29 October 2020" [page 26 paragraph 36], which resulted in the submission of an estimate from Wayne Carew [pages 594 – 600] dated mid November 2020, sent in response to an email from the Applicant dated 30 October 2020 [page 598].

49. CCBS provided an estimate dated 13 November 2020 [page 623]. Later, Trevor Harman trading as TH Building provided an estimate dated 9 December 2020 [Page 646]. The latter was not a "nominated" contractor so the Applicant referred the quotation to Collier Stevens who discounted it as being unlikely to be correct because it was in excess of 20% below the general average figure.

50. Collier Stevens' Schedule of Works Specification is dated 24 July 2020 [page 310]. It is not clear to the Tribunal when this was first shared with the Respondents but a copy was provided with the Statement of Estimates sent to the leaseholders on 25 November 2020 [page 533] copies of which addressed to each of the Respondents are in the bundle.

51. The result of the somewhat extended consultation was that Wayne Carew was the preferred contractor although Collier Stevens also "approved" the A T Building Services' quotation.

52. On 25 November 2020, a statement of estimates was sent to each Respondent referring to the three estimates from A T Building Services CCBS and Wayne Carew. The Respondents were invited to make observations on or before 31 December 2020.

53. The demand for service charges issued to all the Respondents on or about 6 January 2021 reflected the estimated costs of the proposed works (£46,550) and in the Applicant's words is "a reasonable provision to be allocated to the reserve for the required repairs and maintenance to the external parts of the Building" [page 158].

54. Alongside invoicing for the cost of the Qualifying Works the Applicant also sought to recover both the service charges payable on account for 2020/2021 as well as the balance of service charges due for that part of 2020 during which he was the freeholder.

55. The division between the amounts due over the two years is not distinct because the sums which the Applicant has demanded "on account" for the Qualifying Works are included as a "balancing charge" for the 2020 service charge and the monies demanded on account of the service charge for 2020/2021 includes insurance for a period from 2021/2022 because the next annual premium will fall due in May 2021. The invoices for six months management, insurance between 22 May 2020 until 21 May 2021, the fees for the section 20 consultation and the preparation of the schedule of works are included in the balancing charge.

56. There is some further confusion because the only copy of a demand for the interim charge for 2021 in the bundle is that which was sent to Ms Phaure, dated 24 November 2020, [page 167] and includes her ground rent, (payment of which was not disputed) albeit she did comment that the second payment was not contractually due until 25 December 2020.

57. The Applicant confirmed, albeit there are no copies of demands in the bundle that he cannot demand anything other than a "fixed" interim payment from the leaseholders of the upper flats. In his statement of case, he has asked the Tribunal to determine the monies due from the First Respondent under the request for payment dated 24 November 2020 [page 167] and the date upon which those monies fell due [page 30] (paragraph 50 of the Applicant's Statement).

58. The Application form however refers to the service charges between 25 December 2019 and 24 December 2020 and to those demanded on account for 25 December 2020 until 24 December 2021.

59. The Tribunal has concluded that the correct period of its determination is that between 22 May 2020 until 24 December 2020 (inclusive) because the parties all agree that the Applicant only acquired the freehold of the Property 22 May 2020 and none of the amounts demanded relate to an earlier period.

60. Although there is correspondence between the parties regarding the service charges demanded for the second half of 2020 the Respondents did not dispute the amounts charged during the Hearing but the bundle includes a Scott Schedule, completed by the Applicant and Ms Phaure in response to the Directions dated 15 February 2021 [Pages 519- 522].

61. It is suggested by the Applicant that only the First Respondent has disputed the service charges but, during the Hearing, both Mr Taylor and Mr England indicated their concerns about the amount of the demand dated 6 January 2021.

62. Collier Stevens' fees, for preparing the Schedule of Works were initially disputed because the contribution of each Respondent exceeded £250. The insurance contribution demanded from Ms Phaure was queried because she did not understand how the monies paid to the previous freeholder for insurance had been dealt with on the transfer of ownership.

63. In addition, questions were raised regarding the need for and the cost of the fire protection works. In each case the Applicant responded and during the Hearing it appeared that none of those queries remained in dispute. No submissions regarding those invoices were made to the Tribunal during the Hearing.

64. Queries were also raised by the Respondent regarding specific costs demanded on account of the costs of the Qualifying Works, in particular the scaffolding costs. However, since those costs have not been incurred all that this Tribunal has to determine is whether the demand for the payment "on account" is reasonable. The Respondents have not disputed the legitimacy of the consultation process.

65. The Tribunal has concluded that the consultation took longer than legally required on account of the difficulties encountered by the Applicant and Collier Stevens in obtaining quotations from suitable contractors.

66. The Applicant issued service charge demands dated 6 January 2021 to all the Respondents. Those were accompanied by a letter which stated that "the only way forward appears to be to refer the matter to the First-tier Tribunal to determine whether or not the estimate of Mr Carew (and the other estimates included in the Statement of Estimates) is reasonable and thus the reserve provision is also reasonable. The above-said, as a gesture of goodwill, the Landlord has no objection to you withholding £12,674 of the requested monies, being your contribution towards to the (sic) proposed reserve allocation. In the event you decide to withhold the £12,674 the said monies or such sum provided by the First-tier Tribunal, are to be paid within 14 days of the decision of the date of the First-tier Tribunal." [page 135].

67. During the Hearing, those Respondents in attendance all stated that there had been no need for the Applicant to make the Application and that his primary motive was to enable recovery of his costs.

68. Mr Taylor had emailed the Applicant on 6 January 2021 stating that he could not afford the sum of £14,363.84 which the Applicant had demanded be paid by 5 February 2021 [page 293].

69. He expressed disappointment that Collier Stevens had not consulted with Trevor Harman. He said that he disputed the analysis that the scaffolding costs were too low but acknowledged that the Applicant had made a decision regarding instructing a contractor. He sought a payment plan to cope with what he termed the financial burden. He stated "I am making this payment strictly without prejudice to my right to challenge the payability and reasonableness of the charges retrospectively in accordance with the Landlord and Tenant Act 1985 and any other rights that I may have. For the avoidance of doubt this payment does not constitute an admission that these monies are due and I fully intend to challenge them" .

70. The Applicant responded to Mr Taylor's email on 11 January 2021 and copied in all the other Respondents [page 291]. He stated: "you have made it clear that you dispute that the price obtained from Wayne Carrew (sic) (and the other potential contractors) is reasonable and thus the matter will be referred to the First-tier Tribunal…"

71. This prompted a response from Ms Phaure on the same day (11 January 2021) [page 290]. She acknowledged that the email had not been addressed to her and enquired whether or not the Applicant intended to apply to the tribunal.

72. Mr Newman rebutted this suggestion, stating that he had emailed all the Respondents on 15 January 2021. He stated that the email was unequivocal [page 517]. In it he said that in order for things to move forward he sought confirmation that they agreed:-

    a. The works set out in the Collier Stevens schedule, subject to a further inspection once the scaffolding has been erected, are required,
    b. The Carew estimate is a reasonable price for the works,
    c. That Mr Carew should be appointed as the contractor to undertake the works, and
    d. That they had been consulted in accordance with the requirements of section 20 of the Act.
    e. That the monies set out in the Certificate dated 5 January 2021 are due under the terms of the lease.

73. Mr Taylor referred to an email dated 5 February 2021 in which he said all the leaseholders agreed the costs of the work. He does not accept that any leaseholder had either suggested that Collier Stevens had not carried out a proper analysis of the quotations or the firm was not independent of the Applicant.

74. In response, Mr Newman stated he needed a proper unequivocal decision from each Respondent and that therefore had no alternative but to make the application on account of Mr Taylor and Ms Phaure. He said that both had quoted from the Landlord and Tenant Acts and appeared familiar with relevant legislation, so he took their challenges seriously.

75. When asked by the Tribunal about the lease provisions, and particularly in relation to the absence of any mechanism to enable a landlord to return overpayments made on account of future costs, he said that he had no wish to retain credits of advance service charges paid by leaseholders and would undertake to return any substantial credits remaining after the works were carried out (and paid for). The Tribunal told Mr Newman that it had no power to order him to do so but would record his offer in its decision.

76. In response, Ms Phaure stated that she recognised her obligations and understood why works were necessary. She had sent the Applicant a long and complicated email dated 6 January 2021 [page 369] in which she suggested that she would make a "first instalment payment" 21 days after 24 December which would be a reasonable attempt to meet

her obligations. Thereafter she raised specific queries on the service charge budget for 2020/2021. An email sent in response from D&S Property Management [page 373] contained a request for payment of the balancing charge for the year "25th December 2019 to 24th December 2020". It stated "Please note the requested monies fall due on 5th February 2021. It was in fact identical to the letter dated 6th January 2021 sent to each of the leaseholders.

77. Mr England, who had not made any written response to the Application, explained to the Tribunal that it would be difficult for him to provide his share of the monies required to fund the works. Affordability was his primary concern. He told the Tribunal that he is a pensioner and would have preferred to spread the costs of the works over a longer period. He expressed disappointment that the freeholder had sought to "drag the leaseholders through the tribunal process".

78. Underlying the objections made by Ms Phaure is an unrelated dispute with the Landlord which resulted in her incurring substantial costs. Although she has included information regarding this dispute in the bundle of documents, the Tribunal has not referred to it or taken account of it being satisfied that it is not relevant to the current application.

79. Whilst sympathetic to the economic concerns raised by Mr England the Tribunal is not able to take these into account when making its decision.

80. It has been unnecessary for the Tribunal to consider the ambit of the Qualifying Works in detail. No leaseholder has suggested that the works are unnecessary or questioned the specification. The concerns that the Respondents have identified relate almost entirely to the estimated costs of the works and that monies have been demanded in advance of any contractual commitment by the Applicant to do the works. There was no suggestion, from those Respondents present at the Hearing, that the Applicant has not undertaken an appropriate consultation prior to choosing a contractor.

Decision and Reasons

Service charges demanded for year ending 24 December 2020.

81. None of the leaseholders suggested at the Hearing that they disputed the reasonableness of the invoiced charges.

82. The Tribunal finds that the service charge demanded on account for the Qualifying Works are reasonable, being based on the estimates obtained, following the consultation. The Respondents will, should they so wish, be able to question the reasonableness of the actual costs once the works have been completed and those costs have been incurred.

83. The Applicant has asked the Tribunal to determine the date upon which those monies demanded by him on 6 January 2021 fell due. The Tribunal found this a surprising question given the extensive commentary in the Applicant's statement of case about the provisions of the leases.

84. The leases of the lower flats state that the payment is due within 21 days of the issue of a certificate with a demand for payment of the amount due in so far as it is in excess of any interim payment made. The leases of the upper flats refer to a period of 28 days rather than 21 days. (Paragraphs 16 and 19 above).

Service charges on account for 2020/2021

85. These service charges were identified in the budget dated 23 November 2020. It refers to the anticipated expenditure for the 2020/2021 [page 173]. This budget can only be relevant to payments demanded from the leaseholders of the lower flats as the leases of the upper flats provide for payment of a fixed interim sum of £300 on 25 December and 24 June.

86. The specific questions in the Applicant's statement of case relate to the First Respondent, Ms Phaure, and the demand dated 24 November 2020.

87. The lease of the lower flats defines the Interim charge as the amount the Landlord or his managing agent shall from time to time specify at their discretion to be a fair and reasonable interim payment. It falls due on 25 December and 24 June. Therefore, notwithstanding the date of the demand no payment was due from Ms Phaure on the date the Applicant demanded it. The demand stated in bold type "**This Demand requires you to pay all sums demanded by 25th December 2020"** This was not correct under the terms of the Ms Phaure's lease which required the leaseholder to make the payment within 21 days of the provision of the end of year Certificate.

88. The leases of the lower flats provide that after the end of each Accounting Period the landlord shall serve a certificate (signed as previously explained) containing the amount of total expenditure for that Accounting Period, the amount of the Interim Charge paid by the Tenant for that period and the details of any surplus carried forward from the previous period. Therefore, the Applicant was not entitled under the terms of the leases to demand anything (other than the ground rent) from Ms Phaure on 24 November 2020. He also raised additional questions regarding the timing of payments notwithstanding that by the date of the Hearing she had already paid all the sums demanded, save and except her contribution towards the costs of the Qualifying Works.

89. The interim payment from Ms Phaure fell due within 21 days after the Applicant had served the Certificate, which was the date upon which he should have identified the Interim Charge due from the tenants of the lower flats.

Section 20C Applications

90. Ms Phaure and Mr Taylor both applied for orders under Section 20C of the Act. Section 20C provides that a tenant may make an application to the Tribunal for an order that all or any of the costs incurred or to be incurred by a landlord in connection with proceedings before the

tribunal are not relevant costs to be taken into account in determining the service charges.

91. Prior to considering the two applications it is necessary for the Tribunal to consider whether or not the provisions contained in the leases of the flats in the Property would enable the Applicant to recover his costs in connection with the proceedings as part of the service charges.

92. The Tribunal has already referred to the provisions of the leases in some detail earlier in this decision. One of the categories of recoverable costs (within the definition of service charges) is "all other costs and expenses reasonably incurred by the Landlord in connection with the Building (including the management thereof) ..... for carrying out his obligations under the provisions of this lease" . (set out in paragraph 14 above).

93. The Tribunal is satisfied that the Applicant has a contractual right to recover his reasonable legal costs in relation to these proceedings.

94. In making their section 20C applications Ms Phaure and Mr Taylor have submitted that the Applicant should not recover costs against them as leaseholders. No reasons are included in their respective applications.

95. The Tribunal have found in favour of the Applicant landlord but have also concluded that it was probably unnecessary for him to have made the application at all.

96. In the case of Church Commissioners v Mrs Khadia Derdabi [2011] UKUT 380 (LC) HHJ Gerald said "18. In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (i.e. was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account.

19. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs *via* the service charge. By parity of reasoning, the landlord should not be prevented from recovering *via* the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights. ...

22. Where the landlord is to be prevented from recovering part only of his costs *via* the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the costs recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.

23. In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal..."

97. The Applicant, in his skeleton argument simply stated "It is the Applicants intention to rely on the case of Canary Riverside Development PTE Ltd v Schilling [LRX/65/2005] and in particular Paragraphs 12 through 14" .

98. There are four Upper Tribunal decisions relating to this litigation, but it is the last one to which the Applicant has referred which dealt with the Upper Tribunal decision on several matters; an appeal against the LVT determination under section 20C; an application by the tenants for an order under 20C relating to the landlord's costs incurred on the appeals and application by the landlord for costs. His Honour Michael Rich QC said that the sole guidance as to how applications under section 20C are to be determined is contained in subsection (3) which provides that "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". In that appeal he was also dealing with an application for costs under provisions of CLARA which have since been repealed but which are replicated in Rule 13 of the Tribunal Procedure Rules. The point that he alluded to was that if a Tribunal refused a landlord application for costs it should also consider making a section 20C order to avoid the possibility of a landlord who had been refused an order for costs recover those costs as part of the service charge. That is not relevant to this application.

99. His Honour Michael Rich went on to consider what he had said about section 20C orders in another case (relating to the appointment of a manager) but recorded that considerations as to outcome would be different in a service charge case stating in paragraph 14, "Weight should be given rather to the degree of success, that is the proportionality between the complaints and the Determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of the service charges on the one hand the and costs of the dispute on the other hand".

100. Since he was unsatisfied with the reasoning of the LVT in reaching its earlier conclusion he dealt with the appeal against the section 20C order by rehearing the evidence and concluded that since the tenants had succeeded in part there was a prima facie case for making the section 20C order, but since he had held that the tenants reasons for making the application were wrong and had led to the landlord

incurring what were essentially unnecessary costs it would not be just and equitable to deprive the landlord from recovering some of those costs. He referred to an "appropriate part" of the costs so incurred .

101. This Tribunal has found in favour of the Landlord, so prima facie there is no reason to make a section 20C order as the Respondents have not succeeded. However, this Tribunal has concluded that there are underlying facts and considerations which have persuaded it that is just and equitable to make limited section 20C orders.

102. One of the Respondents, Mr Etouassigno never opposed the Applicant's demands for service charges. During the Hearing the other three accepted their liability to pay the sums demanded. Whilst not directly disclosed by the Applicant, it appeared that one of the Respondents (Mr Taylor) has either paid or expressed his intention to pay to the Applicant the sums demanded [page 293].

103. In her section 20C application, [page 187] Ms Phaure stated that she has paid everything the Applicant has demanded, save for the on account payment in respect of the Qualifying Works, which is not causing any difficulty because the costs are for the contractor who has not yet been employed. Notwithstanding that the estimated costs of the Qualifying Works have been demanded by the Applicant as a balancing charge in respect of the service charges due for 2019/2020, the "reserve" element of that charge is a payment on account as the costs have yet to be incurred.

104. The Applicant's skeleton argument, just before the Hearing was extremely long. Although he has referred to case law for the most part it has not clarified any previously submitted arguments. In fact, in the skeleton, he stated that:- "..in the event the Tribunal determine that the Respondents are not obliged to pay all of the requested monies, the only likely basis will be due to the financial impact on the Respondents". His statement of case was supplemented by 146 pages of legal authorities contained lengthy extracts from the leases and submissions regarding the charges made falling within the definitions of service charges within the leases.

105. The Tribunal accepted that the Tribunal Directions [page 695] provided that the application would be dealt with on paper and without a hearing. However, the length and complexity of the bundle, which included evidence of the parties disagreement as to facts, prompted the Tribunal on reviewing the bundle to decide that the application was unsuitable for determination without hearing the parties. The Tribunal's decision was influenced by the Applicant's extensive submissions in the bundle.

106. During the course of the Hearing, it soon emerged that the Respondents had never suggested that there was any dispute about their liability to pay in their submissions. This was confirmed by all of those present at the Hearing.

107. The Tribunal did not find the Applicant's submissions as to why he had concluded the Respondents would not agree to pay the full amount he had demanded in January 2021 convincing.

108. Furthermore, the Applicant repeatedly suggested that it was only the First Respondent who had queried the amount of the charges. He also said that despite the fact she has paid the sums demanded (excepting the payment towards the reserve fund), he wanted a determination as to reasonableness.

109. At the Hearing it quickly emerged that both Mr Taylor and Mr England also had reservations about the amount of the service charges demanded from them by the Applicant. Mr Taylor had clearly told the Applicant about his concerns. The Applicant's evidence referred to an email from Mr Taylor in which that Respondent stated that he had paid the monies but that the payment does not constitute an admission that these monies are due. The Applicant also told the Tribunal that both Ms Phaure and Mr Taylor had quoted from the Act so he took their challenges seriously (see paragraph 74 above).

110. The Applicant's lengthy response to the Respondents' statement contained legalistic submissions to justify the extent of the works. However, this Tribunal does not find that the extent of the works, or the need for them to be carried out was ever disputed or queried by any of the Respondents.

111. The First Respondent's submissions related, for the most part, to the cost, not the extent of the works. Her reference to financial hardship experienced by many people during the pandemic was a statement of the obvious, rather than an excuse for being reluctant to pay. She also suggested to the Applicant that being able to pay the amount demanded in January in two instalments might have made it easier for those Respondents who were experiencing financial hardship to contribute [page 210]. That suggestion does not appear to have been considered by the Applicant.

112. The bundle contains factual evidence of Ms Phaure's disability. Whilst the Applicant acknowledged that Ms Phaure has learning difficulties which contribute to her difficulty in dealing with correspondence, he made no concessions with regard to the content of the correspondence he sent to her. That correspondence was identical to that which he sent to the other three leaseholders.

113. When she queried why he had only demanded the ground rent due from her on 24 June 2020 in November 2020, the Applicant stated that ground rent does not fall due until demanded. When responding to an email from Miss Phaure he stated, in his email to her dated 12 January 2021, in response to her query as to why he had not demanded the ground rent due on 24 June 2020 "Ground rent does not fall due until it is requested, thus it is not six month overdue, it fell due on the date specified in the request for payment" [page 378]. However, he said he was "fully aware" that Ms Phaure had paid the ground rent to the

previous owner up to 24 December 2020 and that he had credited her account on the demand dated 6 January 2021 [page 368].

114. What Mr Newman told Ms Phaure is not entirely correct. Under the terms of the leases ground rent is payable in advance on 24 June and 25 December and is payable whether or not demanded. He was right that a leaseholder is not liable to make a payment of rent unless the landlord has given him notice relating the payment and the date upon which he is liable to make that payment is specified in that notice. (Section 166 Commonhold and Leasehold Reform Act 2002 (CLARA). Section 166(2) states that the notice must specify the amount of the payment and the date on which the tenant is liable to make it, and if different from that date, the date on which he would have been liable to make it in accordance with the lease.

115. The Applicant produced a budget to support demanding an interim payment from Ms Phaure. His statement of case included extensive extracts from the leases so the Tribunal has concluded that he must have been aware that he could not demand the payments until he had provided the end of year Certificate. The bundle does not contain copies of such a demand issued to any of the other leaseholders so the Tribunal does not know whether or not such demands were issued or whether he has just singled out Ms Phaure because of her disability.

116. Mr Newman referred the Tribunal to correspondence and emails from Ms Phaure which he said are offensive. He has also submitted that the Applicant should not be penalised by not being able to recover the cost of a reasonable application.

117. The Tribunal has concluded that Ms Phaure's learning difficulties must have made it difficult for her to deal with these proceedings and in particular the extensive bundle and the complexity of some of the Applicant's correspondence. Whilst that might not excuse her offensive language, it offered an explanation. She has explained why the timing, length and complexity of the emails sent by the Applicant exacerbated her inappropriate responses [page 523 onwards].

118. During the Hearing all the parties in attendance were cooperative to each other and in their engagement with the Tribunal. Those Respondents present accepted that the service charge demands were reasonable. The Respondent who did not attend has never challenged the Applicant's demands.

119. The Tribunal suspects that none of the parties expected the Tribunal would require a hearing to determine the Application and to the extent that that may have increased the Applicant's costs, the Tribunal are reluctant to allow the Applicant to recover those costs, notwithstanding his success.

120. The Tribunal have concluded, notwithstanding the Applicant's contrary submissions, that he always intended to make an Application to the Tribunal for a determination of reasonableness. He suggested this in

the letter which accompanied his service charge demands dated 6 January 2021.

121. The Tribunal is also however conscious of the need to exercise caution before exercising its jurisdiction under section 20C taking into account the sub-section which enables the tribunal to make such order on the application as it considers just and equitable in the circumstances.

122. Nevertheless, whilst the Applicant dismissed Miss Phaure's submissions that any of the underlying issues relating to other disputes between them with her were relevant to these proceedings, the bundle disclosed that she has already agreed to pay him a significant amount of costs, (in excess of £9,000) in connection with an earlier unrelated lease dispute [page 229].

123. The Tribunal has therefore concluded that it is just and equitable for it to take account of the conduct of the Applicant in determining whether or not to make a section 20C Order and to make a limited section 20C Order in relation to the two Respondents who have applied for such an Order.

124. In relation to Miss Phaure's application it makes a limited order under section 20C that only 25% of any reasonable legal costs incurred by the Applicant in relation to these proceedings are relevant costs. This deduction is made for the following reasons:-

    a. Firstly, it would be unfair for Ms Phaure to pay any additional costs incurred by the Applicant because these proceedings have been determined following a hearing.
    b. Secondly, the Tribunal has found that the statements submitted by the Applicant were unnecessarily long and complex, which confused rather than clarified the issues in dispute notwithstanding that the Applicant has acknowledged that he was aware of Ms Phaure's difficulties in dealing with correspondence.
    c. Thirdly, had the Applicant explained matters more clearly to Ms Phaure, she may have agreed to pay the entirety of the sums demanded as she has set out in paragraph 22 of her response to item 50 of the Applicant's statement of case [page 217].

125. In relation to Mr Taylor's application, it makes a limited order under section 20C that only 50% of any reasonable legal costs incurred by the Applicant in relation to these proceedings are relevant costs. This deduction is made to take account of the fact that the proceedings have been determined following a hearing (see sub-paragraph 124.a above).

126. It has made these two limited section 20C orders because it is not satisfied that the Applicant made sufficient attempts to engage with the two relevant Respondents about his "requests" for payment of the service charges. The Applicant, although well aware of Ms Phaure's difficulties, has singled her out in his application. It has concluded that his actions contributed to her difficulties in dealing with his correspondence and understanding his demands for payment.

Essentially, the Applicant appeared to be relying on his previous success in recovering extensive legal costs from her and have assumed that he will be able to do so again in connection with this application.

127. Although it has found the amount of the "on account" service charges demanded by the Applicant reasonable, the Tribunal remains concerned that the Applicant made no enquiries of the Respondents regarding their financial circumstances during a global pandemic. That conduct has influenced its consideration as to the justice and equity of the applications for section 20C Orders.

128. The Applicant must have been aware that it was likely that some if not all of the Respondents would be affected by the economic repercussions of the Covid 19- pandemic. The Tribunal has accepted that that such considerations cannot influence its decision. However, the Applicants actions reinforce its conclusion that he always intended to make an application to the Tribunal and to seek to recover his costs from the Respondents by his referring to making an application to the Tribunal when he issued the demands dated 6 January 2021 which is another reason for the Tribunal concluding it to be just and equitable to make limited section 20C orders in favour of both Ms Phaure and Mr Taylor.

129. It is still possible for the two Respondents who have not applied for section 20C orders to consider doing so. Similarly, all the Respondents could consider making applications under paragraph 5A of schedule 11 of CLARA in relation to particular administration or litigation costs. This Tribunal would expect that any such applications, albeit not time limited, to be submitted within 14 days of the date of receipt of this decision with the Applicant being afforded the opportunity to respond within the subsequent 14 days.

Judge C A Rai
(Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Chamber must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. Where possible you should send your further application for permission to appeal by email to **rpsouthern@justice.gov.uk** as this will enable the First-tier Tribunal to deal with it more efficiently.

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

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