FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/23UF/LSC/2021/0087
Property	**:**	Maple Tree Court, Old Market, Nailsworth Gloucestershire GL6 0AF
Applicant	**:**	Lessees of Flats Numbered 1 -10, 11, 12, 14, 15, 16, 17 – 19, 21, 25-30 and 31.
Representative	**:**	Mr Graham Barton and Mr Rawdon Crozier (Counsel)
Respondent	**:**	Fairhold Homes (No 20) Limited
Representative	**:**	Miss Katherine Traynor (Counsel) instructed by JB Leitch Solicitors
Type of Application	**:**	Determination of service charges – Section 27A Landlord and Tenant Act 1985 (the 1985 Act)
Tribunal Members	**:**	Judge C A Rai Mr M Woodrow MRICS
Date type and venue of Hearing	**:**	7 November 2022 Paper Determination without a hearing
Date of Decision	**:**	7 December 2022

DECISION

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1. The Tribunal decided that the Applicant's claim to "set off" an unquantified amount against the service charges demanded by the Respondent for the costs of repairing the retaining wall adjacent to parts of the boundary of the Property has not succeeded. The reasons for its decision are set out below.

Background

2. The Applicant applied to the Tribunal for a determination of liability to pay and reasonableness of service charges for the year 2021 on 22 September 2021 [48]. The Application related solely to the service charges incurred in repairing the retaining wall.

3. Maple Tree Court (the Property) is a retirement housing development of 32 leasehold flats with communal facilities, built in or about 2008 by McCarthy and Stone (Developments) Limited. The flats were designed for occupation by persons over 60 although the lease enables the Landlord to exercise some discretion with regard to the age limit.

4. A retaining wall was built as part of the external landscaping on the west boundary of the Property with returns extending around two others. The parties agreed that the wall was completed at the same time as the flats. That retaining wall has failed.

5. In the Application, dated 22 September 2021 the Applicant described the reasons for the failure of the wall by reference to some of the observations made by Jenkins and Potter Structural Engineers (JP) who were commissioned by the Respondent's Managing Agents, FirstPort Retirement Property Services (FirstPort), to inspect the wall in December 2018. It also referred to a further "condition survey" carried out in February 2019, by JP. The Applicant stated that the wall, should have an expected life of "an additional 40 years".

6. Following a case management hearing held on 14 January 2022 Directions were issued by Judge Whitney, dated 17 January 2022. Paragraph 8 recorded that Tim Barnard (who had already been identified as attending on behalf of the leaseholder of flat 18) would appear at the hearing as an expert witness for the Applicant and a representative from RSK Environment Ltd (RSK) would appear as an expert witness for the Respondent. The Directions stated that any expert report submitted to the Tribunal must contain the appropriate expert's declaration confirming that the expert understood and accepted his duty to the Tribunal [603]. It was anticipated that a hearing would take place in the last three weeks of May or early in June 2022. Subsequently the hearing date of 17 May 2022 was confirmed.

7. In reliance on the evidence before it, the Tribunal concluded that the condition of the wall was first investigated at the end of 2018. The Respondent's original statement of case contained a chronology of events [260] which suggested that AHR Building Consultancy notified FirstPort about the condition of the wall and arranged for JP to inspect it. An inspection was made in December 2018 and the first JP report is dated 14 December 2018 [325]. The diagrammatic plan in that report marked **SK01** shows both the building and the location of the crib wall [334]. JP described its inspection as a "structural condition survey". The report stated that the report was based on and limited to a visual inspection of the criblock wall that was accessible and exposed and that it was a non-intrusive survey with no opening up of the wall or sampling.

8. The report identified four locations where the wall had failed and three possible further "vulnerable" locations. It noted that the anticipated cause of the failure was:-
   a. Timber headers and stretchers not pre-treated,
   b. Granular infill material not in accordance with design specification,
   c. Uncontrolled growth of vegetation on wall had hampered drainage.

9. FirstPort issued an update to the residents of Maple Tree Court on 2 January 2019 which confirmed that JP would prepare a report on the structural condition of the wall and that AHR had been appointed to oversee and manage the project [345].

10. JP undertook further inspections of the wall in February 2019 and provided a condition survey dated 19 February 2019 [347]. The JP Survey concluded that up to 70% of the wall was "deemed as structurally compromised" so that the whole of the wall would require remediation work. They identified the cause as inadequate treatment of the timbers and also suggested that the dense vegetation had contributed to the decay.

11. On 2 April 2019 FirstPort sent a letter to the residents at Maple Tree Court updating them on both the report and the proposed works [359]. The letter confirmed the design life of the wall should have been between 20 – 25 years and that "damage which has occurred as a result of gradual deterioration" was not covered by buildings insurance.

12. A further letter updating the leaseholders was sent by FirstPort later in April 2019 (although the copy of that letter in the bundle is undated). The letter confirmed that noisy testing would be carried out as it would be necessary to drill into the wall [363].

13. In October 2019 a specification was provided by AHR in relation to the "major works" and a notice of intention (section 20 of the Act) was sent out by FirstPort on 30 October 2019 which stated that "we consider it necessary to carry out the works to enhance and prolong the component parts of your development".

14. The proposed repair was "tendered" and a residents' meeting was arranged for 27 February 2020. It was cancelled about a week before that date because one of the contractors who had tendered, subsequently withdrew. AHR advised the Respondent that the works should be re-tendered so that two quotations could be obtained.

15. On 26 March 2020 FirstPort confirmed that only one tender had been received and extended the tender period. In September 2020 FirstPort confirmed two tenders had been received and the that it would review the options available and the phasing of the works [449].

16. In March 2021 FirstPort updated the leaseholders again confirming that two tenders had been received and that the lowest was from Condor Projects Ltd (£116,856 plus "remaining fees" £10,481). The shortfall between the estimated costs and the reserve funds was identified and an example figure was given for the amount it was

anticipated would need to be paid by each leaseholder to cover the costs of the works. (This was between £710 and £1,065 approximately) [452]. The letter suggested that there would be a community meeting and that the works would start in early spring but that meeting did not take place because of government restrictions during the Covid-19 pandemic

17. Another JP report [189] was obtained in May 2021 in response to observations from Tim Barnard, made on behalf of the Applicant and other leaseholders in March 2021 [177]. Subsequently FirstPort advised the residents that it was proposed that works would start on 12 July 2021. However, before that work started a report was obtained from Lichfield Geotechnical Design Ltd (LGD) [469] which resulted in a review of the design of the works and a delay to the start of the works. FirstPort confirmed all of this in its letter dated 4 August 2021 which included a separate factsheet which "addressed the most common queries which had been raised by the Applicant, leaseholders and their relatives and friends" [498]. That factsheet identified the likely cost of repairs as £175,312 [502].

18. A meeting took place at Maple Tree Court on 25 August 2021 and following subsequent communications between FirstPort and the leaseholders, and as a result of "complaints raised by the Residents Association at the time" and the application to this Tribunal, a further report, dated 15 October 2021, was obtained from RSK Environment Ltd (RSK) [516].

19. RSK identified that the principal purpose of its investigation was to establish the likely cause(s) for the reported failure of the timber crib wall. Its conclusions are set out in section 7 of the report [529].

20. The repair work was started on 13 September 2021. The Tribunal believe it was completed at the end of June 2022 after a further delay caused by the discovery of the proximity of an electrical cable prompted the need for an adjustment to the design and to obtain consent from Western Power [266].

21. The Hearing on 17 May 2022 attended by the parties and held "virtually" was adjourned twice. Initially the adjournment was to enable the Applicant to look at the Respondent's skeleton which was only distributed on the day before the hearing and following that adjournment it was discovered that the Applicant's skeleton argument had not been received by the Tribunal.

22. Subsequently Miss Traynor raised issues as to jurisdiction and the admissibility of the Applicant's expert evidence.

23. In response, Mr Barton confirmed that the Applicant is not disputing that it is liable to pay the service charges demanded by the Respondent.

24. Miss Traynor outlined that the Respondent was unwilling to allow the "expert" evidence relied upon by the Applicant to be admitted. She submitted that the reports/statements did not comply with Rule 19 of

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules). She questioned the independence of the Applicant's expert and suggested that should the Tribunal admit any of his evidence it could attribute little weight to it because of potential conflict on account of the expert also being an Applicant.

25. The Tribunal outlined the parameters of Act and referred Mr Barton and the Applicant to Miss Traynor's skeleton which set out her submissions regarding jurisdiction. The parties agreed to discuss matters between them and, following a second adjournment, Mr Barton suggested to the Tribunal that the Applicant wished to withdraw its application. The Tribunal told the Applicant that it would in principle consent to the withdrawal but that it required the Applicant to make a written application.

26. When the Hearing recommenced, Mr Barton also complained about the late submission of the Respondent's skeleton which included its challenge to the Tribunal's jurisdiction, which he said should have been raised sooner. However, the Judge reminded him that the Respondent referred to the Tribunal's jurisdiction in its response to the statement of the case.

27. The Judge explained that the Tribunal had no jurisdiction, on the basis of the application, to make an award in favour of the Applicant by ordering the Respondent to make a monetary (or percentage) contribution towards the cost of the repairs. She said that for such a claim to be considered by the Tribunal, the Applicant would need to submit evidence that the Respondents negligence or neglect had caused or contributed to losses incurred by the Applicant. She told the Applicant that a claim in negligence would usually be made in the County Court coupled with a request to set-off the amount claimed (if successful) against the service charges demanded.

28. In the absence of receipt of a further application, and since the Tribunal was aware that Mr Barton had already claimed that a previous email he had sent had not been received, it wrote to the parties, referred the Applicant to Rule 22 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules) and reminded the Applicant that either party has a right to apply for a reinstatement of the proceedings within 28 days of a withdrawal.

29. On 9 June 2022 Mr Barton emailed a "further" copy of his skeleton argument to the Tribunal and confirmed that the Applicant did not wish to withdraw the application. He asked for clarification from the Tribunal with regard to the procedure and his claim that he had been directed to withdraw the proceedings at the Hearing, stating that "we believe there to have been consequential errors made". He complained (again) about the late submission of the Respondent's skeleton and said that the delay had denied the Applicant any opportunity to adequately prepare a response.

30. Mr Barton suggested that the Tribunal could consider the Respondent's negligence and suggested that the Tribunal's direction to withdraw the Application was potentially flawed.

31. The Tribunal issued further directions dated 27 June 2022 which recorded that:-
    a. The Tribunal had not directed the Applicant to withdraw its case,
    b. Since the Applicant has now responded to the Respondent's skeleton, its complaint relating to the late submission of that document has been addressed,
    c. Whilst it accepted the last communication from the Respondent as a "further statement of case", for it to be able to consider a claim for "set-off" the Applicant would have to submit evidence to prove its claim that the additional or increased service charges demanded by the Respondent arose, in part or entirely from the breach of an obligation owed to the Applicant by the Respondent.

32. The Tribunal directed that:-
    a. Both parties could make further submissions,
    b. The Applicant quantify the resultant financial impact (the loss to the Applicant) of such breach (if proven) with regard to the service charge costs subsequently incurred and demanded to enable the rectification of the breach (the repair of the failed crib wall),
    c. The Applicant submit a further statement to the Respondent (who was given 30 days to respond),
    d. The parties agree the content of a supplementary bundle between themselves which should not include further copies of any documents already provided to the Tribunal.

33. The Tribunal advised the parties it would determine the application without a hearing during the week commencing 22 August 2022 unless either party objected within 28 days. Neither party subsequently objected to the application being determined without a hearing. The Tribunal directed that it would not inspect the Property and neither party objected.

34. The Applicant did not comply with the directions. On 26 July 2022 it made a case management application to the Tribunal requesting an eight-week extension of time to submit its further statement of case and raised further arguments. It asked that the Tribunal order that that its expert evidence, should be admitted notwithstanding it was already aware of the Respondent's submissions why the evidence neither complied with the Tribunal directions nor the Rules. The Tribunal granted a four week extension, informed the parties it was unlikely to grant further extensions of time and consented to the revised dates for submission of the revised hearing bundle and skeleton arguments. The other applications made by the Applicant in relation to its statement of case, the acceptance of disputed expert evidence and an application for specific disclosure were rejected. The parties were (again) directed to agree which documents be included in further bundles.

35. On 25 August 2022, the Applicant made another case management application for an order requiring the Respondent to disclose further

documents. Judge J Dobson made an order that correspondence between Mr Taylor (deceased) and FirstPort in respect of the criblock wall at the Property be disclosed subject to redaction (to address any perceived breach of the GDPR regulations). He rejected the other applications made by the Applicant.

36. Prior to the date of its determination the Tribunal received the following documents from the parties:-
    a. A hearing bundle comprising (611 pages)
    b. Authorities Bundle (Respondent) (78 pages)
    c. Respondent's skeleton argument 16.05.2022 (11 pages),
    d. Applicant's skeleton argument (2 pages)
    e. Supplementary Bundle with a separate index (SB) (514 pages) 14.10.2022,
    f. Applicant's authorities bundle (304 pages),
    g. Applicant's bundle further statement (488 pages) + separate index 17.10.2022,
    h. Applicant's further statement of case (18 pages),
    i. Applicant's skeleton (15 pages),
    j. Respondent's Skeleton argument 24.10.2022 (16 pages),
    k. Respondent's second authorities bundle (182 pages),
    l. Two emails, exchanged between the parties, referring to the disclosure of correspondence in the bundle.

37. The two emails dated 24 and 25 October 2022 both addressed to the Tribunal, from the Respondent's solicitor and Tom Jarman, suggest that the parties could not agree the content of the bundle.

38. The Applicant seeks to establish a claim for set off against the service charges demanded for the repair of the wall, described in the JP Report (19.02.2019) as running parallel with the west elevation of the development (Maple Tree Court) for its full length and with return sections on the north and south elevations [94]. JP described the wall as a timber criblock wall. The parties have described the wall intermittently as a crib wall, a crib block wall and a retaining wall. In this decision the Tribunal, unless quoting from other documents, has referred to it as the wall.

39. References to numbers in square brackets in this decision are to the **pdf page numbers** of the bundle in which the document is contained and if there is no other description the pages in the original hearing bundle.

The Applicant's Case

40. It is entitled to claim equitable set off against its liability to pay the service charges for the repair of the wall if it proved that the Respondent or its managing agent was in breach of covenant (or failed to pursue a remedy against a third party).

41. Whilst accepting that historic breach of the covenant to repair or maintain the wall was not material in determining if costs for its repair

were reasonably incurred, it may be material in relation to payability of the service charge demanded.

42. Since it submits that the failure of the wall is due to an inherent structural defect, the costs of its repair cannot be classed as repair within the terms of the lease (this has been set out fully in its Counsel's skeleton argument).

43. Should the Tribunal not find in its favour entirely it requests further directions regarding the section 20C application for limiting costs.

44. The Applicant's statement contained additional submissions listed below:-
    a. A well designed wall should have had a minimum life of 60 years but the wall at the Property would not have lasted this long even if fully maintained but would have failed at a later date postponing but not avoiding the remediation costs,
    b. The increased costs of the repair works cannot be explained by reference to cost inflation in relation to construction costs as the percentage increase is far greater,
    c. The life of the repair works (estimated at 25 years) is not acceptable,
    d. The Respondent failed to insure the property particularly in the light of imputed knowledge on the part of the Respondent and or FirstPort with regard to Risingholme Court (which the Tribunal has interpreted as a submission of the Respondent's breach of its obligations to insure in the lease),
    e. That the dismissal by the Respondent of any potential claim against the NHBC and or the original developer was premature and should have been considered sooner and more fully,
    f. That the repair works should deliver a wall which will function effectively until 2068,
    g. That the Respondent, because it purchased the company out of administration, should not benefit from a new wall paid for by the leaseholders,
    h. That the Respondent should not seek to recover all the repair costs during the current service charge year.

45. In compliance with Tribunal's direction as to quantification of the losses which the Applicant claim to set-off against the service charges payable for the repair of the wall, the Applicant listed those as being:-
    a. 100% of the losses due to the failure of the wall because it was inherently defective,
    b. 100% of losses relating to the failure to pursue a third party (the original developer) and its insurers,
    c. 100% of its losses for failing to pursue the NHBC,
    d. 100% of its losses for failure to insure,
    e. 100% of its losses for failing to comply with the RICS management code by insuring against the failure of the wall,
    f. 100% of its losses arising from the accelerated deterioration of the wall (with some adjustment to take account of an accumulated contingency fund in 2068),
    g. 80% of losses caused by the delay in identifying and acting once the failure of the wall was established,

h. unquantified losses relating to the failure to adequately specify the major works. The Applicant requested an order "obliging the Respondent to pay future costs for replacement of the wall until 2068",
i. losses should be limited to the amount of the contingency fund and to ensure that there is "no increase in costs" (future service charges) to replenish it, (because the contingency fund has been used or depleted unfairly).

46. Mr Crozier's skeleton argument considered the contractual liability of the leaseholders and in addition questioned the classification of the repair works. He sought to establish if these should be classed as works to remedy an inherent defect. He concluded that the works go beyond works, the costs of which are recoverable under the lease. However, he said that should the Tribunal not agree with him, it should consider the adequacy of the works and the standard of the works and if these were reasonable.

47. Mr Crozier listed the "aspects to the equitable-set off claimed" as:-
a. R's failure to maintain the wall
b. R's failure to act within a reasonable time and to minimise potential costs
c. R's failure to adequately specify the major works to ensure an acceptable lifetime and to minimise future costs
d. The general adequacy of the repair works
e. R's failure to insure (as an alleged breach of covenant)
f. R's failure to investigate other sources of financing the repairs
g. Unjust enrichment (based on R's acquisition of the company in administration at a discount but now benefitting from the defective wall repaired at the expense of a third party)
h. Whether section 19 of the Act limits the costs recoverable by the Respondent.

48. Reports by the Applicant's experts were provided by Tim Barnard, both on his own behalf and as Barnard and Associates, and Ian Price. The conclusions listed below are contained in the statement dated 15 August 2022 made by Tim Barnard:-

a. A substantial retaining wall to the West of Maple Tree Court is essential and fundamental to provide stability to the site upon which Maple Tree Court is located [SB 454],
b. Consequences of failure of the retaining wall at Maple Tree Court - Homes will suffer a considerable loss in amenity, possible structural damage and become uninhabitable [SB 455],
c. A buyer can reasonably expect a wall of this type to last at least 60 years and provide safe and pleasant amenity. Without structural survey (which would not have been possible or reasonable when purchasing a flat) it would be reasonable to expect the retaining wall to have the necessary design life. A wall built in 2008 can and should be fully functional for the lifetime of the occupants and their successors [SB 457],

d. The defects are so serious that the repaired wall cannot function as a retaining wall and is in practice more of a dressing to the existing retained soil face [SB 463].
e. A lack of maintenance of the retaining wall by the freeholder has led to the build up of dense vegetation across the face of the wall which has accelerated the decay and also obscured problems from view.
f. A freeholder acting reasonably could have or should have known that there were defects in relation to the criblock wall. The freeholder should have informed leaseholders of any such issues and could have or should have insurances and guarantees in place which would or should cover the cost of replacement [SB 466].

The Respondent's case

49. Miss Traynor identified three primary issues in the Applicant submissions to which she should respond:-
    a. The Respondent's obligation to maintain the Criblock Wall,
    b. The payability of the costs of the major works, and
    c. Whether the contingency fund could be used to fund a substantial proportion of those costs.

50. In addition, she acknowledged the Applicant's request for an order under section 20C.

51. Separately, Miss Traynor described the Applicant's additional arguments as:-
    a. Acquisition of Maple Tree Court,
    b. Applicants' grounds for "Set-off" or removing charges to leaseholders,
    c. Alleged failure to act within reasonable timeframes,
    d. Alleged failure to adequately insure, and
    e. An allegation that the works are beyond the scope of "repair".

52. The Respondent accepted that it is and will remain liable to maintain the wall. It obtained three detailed surveys of the wall before instructing the repair works. It also confirmed that there is no disagreement between the parties that the cost of the repair works is recoverable from the leaseholders under the terms of the lease.

53. Miss Traynor submitted that, in the absence of any evidence of quantum, or a suggested percentage to which any proven negligence on the part of the Respondent has or might have contributed to the failure of the wall, it would be impossible for the Tribunal to reduce the service charges.

54. Miss Traynor submitted that whether or not costs were reasonably incurred would not depend upon the landlord's actions or inactions. She submitted that on a true analysis of what had occurred the works had been carried out within a reasonable period and to a reasonable standard.

55. Miss Traynor also stated that the provisions of the lease expressly authorised the use of the contingency fund.

56. Miss Traynor reminded the Tribunal that during the Hearing it informed the Applicant that it had no jurisdiction to make the award that the Applicant originally sought (even if it could provide evidence to quantify its loss) which by that date it had not.

57. Following the Tribunal Directions dated 27 June 2022 which recorded that liability to pay for the repair to the wall was not disputed by the Applicant and that the remaining claim, linked to the absence of any agreement as to the cause of the failure of the wall, related only to whether or not there was any breach of the repairing covenant on the part of the Respondent which had contributed to the failure or increased the extent or costs of the repair works. If that could be established and the Applicant wished to claim a set off against its service charge liability from the Respondent, it was directed to formulate its claim to establish a breach of covenant and/or negligence and to quantify the amount it wished to set off against the costs it has paid or will be liable to pay for the repair works.

58. Miss Traynor dismissed the suggestion that the Respondent's acquisition of Maple Tree Court had any relevance to the claim before the Tribunal. It had been identified at the Hearing, and not disputed by the Applicant, that the Tribunal's jurisdiction is primarily that contained in the Act but with a related consideration of whether the Applicant might be entitled to claim a "set off" from the Respondent against its liability for the full costs of the repair based on the Respondent's failures or omissions with regard to construction, maintenance or repair of the wall.

59. She also dismissed submissions that the Respondent should have insured the construction of the wall and that it was entitled to recover costs from a third party such as the NHBC or an insurer.

60. On her interpretation of the lease, even if it was the case, which the Respondent does not accept, that the works remedied an inherent construction defect, the lease enabled the Respondent to carry out those works and recover the costs from the Applicant. The Landlord's covenant in the sixth schedule to the lease is to "as often as may reasonably be required to maintain repair tend cleanse repaint decorate and renew the access road entrance ways paths forecourts and car parking spaces forming part of the Estate (including the boundary walls gates fences and garden areas of the Estate)" (2.1.4) [31].

61. In addressing the Applicant's allegation of unreasonable delay in commencing the works, Miss Traynor stated that the Respondent had been legally obliged to consult the Applicant, which it did. It was not at fault for that process taking longer than usual because of the problems with obtaining two tenders and the subsequent delay to the commencement and completion of the work because of the proximity of the power cable.

62. Miss Traynor also addressed the complaints made by the Applicant about failure to disclose evidence and the admissibility of some of the Applicant's evidence relating to correspondence between Mr Taylor and FirstPort.

63. The Respondent questioned whether the witness statement of Tim Barnard, a chartered structural engineer, could be relied upon as expert evidence. Miss Traynor said that it objected to his evidence on the grounds that he is not independent because he is also an executor of the deceased owner of Flat 18 and therefore effectively an Applicant.

64. Miss Traynor submitted that the Applicant has no permission (from the Tribunal) to rely upon Tim Barnard's Report dated 22 February 2022, the Barnard and Associates Limited Report dated 24 August 2022 and the Report and Observations on that report by Ian Price dated 25 August 2022 as expert evidence. She referred to Rule 19 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules). She stated that the duty of an expert is to the Tribunal and that duty will override any obligation to the person who has instructed the expert.

65. Furthermore, there has been no opportunity for the Tribunal to question Mr Barnard which might have enabled it to assess the objectivity of his evidence. This lack of impartiality was raised prior to, and at the Hearing, and the Applicant has not addressed the criticism.

66. Miss Traynor suggested that Mr Price has, or appears to have, a personal or professional connection with Mr Barnard. Neither has addressed this potential conflict. It is not possible on the basis of what is before it for the Tribunal to consider this objectively. Mr Price's report is entirely based on Mr Barnard's second report and therefore will have been influenced by its content. He has admitted in his report that he was not able to conduct an extensive review.

67. Miss Traynor suggests that even if the Tribunal does not accept that the "expert evidence" should not be admitted, it should attach little weight to it in the light of her observations as to the conflict in the context of the dispute.

The Law

68. The Application was made under sections 27A, section 19 and section 20C of the Act.

69. The relevant parts of the section are set out in Appendix 1 to this decision.

70. Essentially, in the context of this dispute, the Act enables the Tribunal to consider if the service charges claimed are payable and if the works to which these relate have been carried out to a reasonable standard.

71. Section 20C of the Act relates to the recoverability of the costs of these proceedings as relevant costs. Both parties have reserved making

detailed submissions about this part of the Application until after the issue of the Tribunal's decision. Paragraph 5A of CLARA relates to the limitation of litigation costs. Neither party has yet made any submissions in relation to that provision.

72. The parties have accepted in principle that, in reliance on the Lands Tribunal decision in **Continental Property Ventures Inc v White [2006] 1 EGLR 85** the Applicant may make submissions to enable the Tribunal to consider if it has a defence to its service charge liability because some or all of the costs it is contractually liable to pay under the terms of the lease have arisen because of a failure of the Respondent either under its contractual obligations in the lease, or because of a delay to act soon enough or promptly once the disrepair was identified.

The Lease

73. The Applicant has not disputed that the Respondent is entitled to recover the costs of the repairs to the wall from it as part of the service charges. Therefore, the Tribunal has not set out in full all the relevant provisions of the lease in this decision.

74. The Respondent summarised, what it described as the provisions most pertinent to the Application, in paragraph 13 – 18 of its Statement of Case but acknowledged that those provisions were not an exhaustive list [257 – 260].

75. The Applicant has questioned the ability of the Respondent to utilise the contingency fund. In its Statement of Case, the Respondent referred to paragraph 10 of the Fourth Schedule to the lease, which defines how the "Contingency Fund" is to be used.

76. The Contingency Fund is defined in the lease as being "for or towards the costs and anticipated costs and expenses of items of capital expenditure including without prejudice to the generality of the foregoing the repainting or renovation of the exterior of the Building, the replacement of any lift or repair or any roof and for upgrading and improving the Estate and generally for meeting costs and expenditure incurred less frequently than once in every year". Paragraph 10.3 states that "the Landlord may in its discretion use the Contingency Fund or any part of it (including any interest or gain derived therefrom) to discharge or reduce the Service Charge payable by the Tenant and the tenants of the Building under any Other Lease for such period and to such extent as the Landlord shall determine to be consistent with the principles of good estate management" [24].

77. The definition of Annual Service Cost in paragraph 1.2 of the Fourth Schedule includes (paras 1.2.14) "such sums the Landlord shall in its discretion and without prejudice to the provisions hereinafter contained regarding the Contingency Fund decide to retain towards anticipated future expenditure or costs in the interest of good estate management" [19].

78. The Tribunal has noted, (and it was raised by the Applicant) that on every assignment of a leasehold property within Maple Tree Court (with some specified exceptions) 1% of the gross sale price or unencumbered open market value is payable to the landlord and to be held by it upon the terms set out in the Fourth Schedule [28]. (The amount credited to the Contingency Fund in 2020/21 was confirmed by FirstPort in its Residents Meeting Follow up Queries letter sent to the leaseholders following the meeting in August 2021) [507].

Reasons for the Tribunal's decision

The Documents submitted to the Tribunal

79. Paragraphs 36 list the documents received by the Tribunal. It was unnecessary and impossible for the Tribunal to refer to all of these in its decision. It refers both parties to Rule 3, set out in Appendix 1 below. It has, insofar as possible, examined every document supplied to it, despite concluding that not all have been helpful or pertinent in enabling it to reach this determination.

Expert Evidence

80. Rule 19 of the Rules sets out an expert's duties. Regardless of by whom an expert is instructed and paid, it is his duty to help the Tribunal. No party may adduce evidence without the permission of the Tribunal. An expert's evidence must be given in a written report unless the Tribunal directs otherwise. Any written report must contain a statement from the expert that he understands the duty that he owes to the Tribunal.

81. During the telephone case management hearing on 17 January 2022 both parties indicated that they wished to rely on expert evidence and that Mr Barnard would appear for the Respondent and a representative of RSK would appear for the Respondent. It is possible this was interpreted as the Tribunal consenting to each party submitting an expert report, but neither party did.

82. The Bundle prepared prior to the Hearing contained a Report from RSK prepared on the instructions of Tom Murphy of AHR Building Consultancy Ltd dated 15 October 2021, which predates both the Application and the case management hearing [197].

83. No other report from RSK is included in the bundles but Dr John Williams of RSK made a witness statement dated 6 April 2022 in which he stated that it was made "in response to the witness statement of Mr Tim Barnard dated 22 February 2022" [562].

84. A document Expert Witness Statement Given by Tim Barnard BSc CEng, MIStructE dated 22 February 2022 [65] with 11 annexes. It referred to Tim Barnard being instructed to review the situation that exists at the Property in relation to the criblock wall and the proposed remedial works. It is not addressed to the Tribunal, nor does it comply with Rule 19. Included in the annexes are the further documents listed below.

a. An unsigned document dated March 2021 headed Initial Observations Regarding Crib Lock Wall Construction Tim Barnard BSc CEng, MIStructE [177]
b. A document dated 22 October 2021 headed Inspection of works to Crib Wall undertaken 22.10.2021 and contains a record of what Tim Barnard observed.
c. A document headed Inspection of works to Crib Wall undertaken 19 November 2021 which records further observations at the later date. The photographs referred to are not annexed.

85. Following the Hearing and the Tribunal subsequent directions, supplementary Bundles of documents were sent to the Tribunal which contained two further "Expert" Statements, the first dated 15 August 2022 from Mr Barnard headed "Barnard and Associates" and the second headed Overview of Matters dated August 2022 by Ian Price which purports to be a review of the documentation and reports in connection with the wall including the Barnard and Associates Report.

86. In addition to those documents/reports referred to above, the Respondent obtained three Reports from JP 18 December 2018 [74] 19 February 2019 [92], May 2021 [189]. When Condor was appointed to undertake the remediation works it obtained a report from Lichfield Geotechnical Design Ltd (2 July 2021) [468]. These reports all predate the application and do not purport to have been submitted to the Tribunal as "expert evidence".

87. The Tribunal agrees with the Respondent that Mr Barnard initially provided a witness statement not a report.

88. The "reports" which postdate the Application are Tim Barnard's report, Dr John William's statement, Mr Barnard's subsequent response, the Barnard and Associates Statement and the Ian Price Overview.

89. The Tribunal has concluded that none, including the statements provided by Tim Barnard and John Williams, comply with Rule 19 and therefore these cannot be regarded as expert evidence upon which the Tribunal may rely. The Tribunal did not give permission for Ian Price to submit an expert report so that report is patently inadmissible.

90. The Applicant has not addressed the Respondent's objections regarding Mr Barnard's lack of impartiality or the issue of potential conflict but sought to persuade the Tribunal to circumvent these by making a case management application "that the evidence of Tim Barnard be accepted as expert witness evidence without reduction in the weight given to such evidence as submitted by the respondent" which was rejected.

91. Since the Tribunal has read, examined, considered and inevitably been influenced by the content of all the reports, it has concluded it must not attribute substantial weight to anything in those documents save and except where it is satisfied that content is empirically factual.

92. The Tribunal concluded that there is no disagreement between the parties that the wall failed prematurely. Whilst there is little agreement

as to how long it should have lasted, it accepts submissions that it should have lasted longer than it did. The "experts" have made conflicting statements about the potential life of a "correctly constructed" crib wall. On the basis of the information disclosed the Tribunal is not persuaded that a life span of 60 years was likely. It has concluded that a life span of 60 years is an expression of hope rather than expectation.

93. In his submissions Mr Barton referred the Tribunal to NHBC design standards and included a link to the webpage, albeit when submitting that if the NHBC warranty was investigated sooner, it might have covered the failure of the wall [SB33].

94. The technical guidance 10.2/12 applicable from 1 January 2022 (not 2008) states that "NHBC Standards requires that retaining walls should be adequate for their intended purpose (Clause 10.2.4), that they should be adequately guarded and allow safe use (Clause 10.2.5) and should be of materials suitable for their intended use (Clause 10.2.7). Clause 10.2.3 asks that retaining structures that give support to the foundations of homes, or generally used in plot boundary situations should be designed with a **desired service life** of 60 years" (Tribunal emphasis).

95. The Tribunal has concluded that the parties agree that the probable cause of the failure of the wall was the use of inadequately treated timber combined with an absent membrane when it was constructed combined with the cells filled with spoil and soil rather than graded ballast.

96. Whilst it is not disputed that the wall was overgrown with vegetation, there is no proof as to whether or not that exacerbated the fungal decay identified by the RSK report and the cause of which was attributed to inadequate or absent treatment. There is also no factual evidence as to how much longer the wood might have endured had it been adequately treated before being used to construct the wall. The Applicant wishes to attribute the acceleration of the decay to a lack of maintenance but there no evidence has been provided as to whether or not this contributed to the speed of the decay.

97. Regardless of the reports and statements by Mr Barnard and Mr Price, the Tribunal has found that none of the evidence submitted on behalf of the Applicant explains why the delay in starting the repair works made a difference to the cost (and quality) of the repair to the wall.

98. The Applicant has not taken account of the length of time necessary for the Respondent to comply with the section 20 consultation procedure and the Service Charge (Consultation Requirements) (England) Regulations 2003 [SI 1987]. That procedure, applicable to all major works, will inevitably take 12 months so it is unreasonable for the Applicant to refer to a "three year delay" without making allowance for the fact that in any circumstances works would have been unlikely to have commenced sooner than 12 months after the identification of the failure of the wall.

99. Having considered Mr Barnard's statement dated 15 August 2022 [SB 453] the Tribunal find it difficult to understand his six conclusions.

100. The need for the construction of the retaining wall as part of the original development was never challenged by the Respondent.

101. Consideration of the potential consequences of a failure of the wall has no bearing on this dispute.

102. Mr Barnard's third conclusion regarding the reasonable expectations of the life of the wall is an expression of his opinion. The Tribunal disagrees. In its expert opinion, it is possible and desirable for purchasers of flats to obtain structural surveys of the building and grounds, not just the flat. Whilst lenders may not insist upon such surveys being provided as a pre-requisite of lending, professionally qualified surveyors are likely to recommend that a full building survey is obtained where the existence and proximity of a retaining wall is significant to the integrity of a development. It is naive to suggest otherwise. Generally, it would not be possible for a successor in title to rely upon an extant building warranty should it fail to obtain a survey and later discover a defect, which the survey would have disclosed. An NHBC warranty would provide no protection in such circumstances. The final part of his conclusion stating that "a wall built in 2008 can and should be fully functional for the lifetime of the occupants and their successors" is misleading, not least because it could be interpreted as suggesting that a buyer would be entitled to assume that the wall would have an indefinite life. This is not the type of conclusion which the Tribunal would expect from a professionally qualified expert.

103. In his fourth conclusion, Mr Barnard stated that the repaired wall cannot function without offering any explanation of the factual evidence which led to that conclusion.

104. Mr Barnard's fifth conclusion assumes that the vegetation which covered the wall accelerated the decay and, he said, obscured problems from view. However, both parties accepted that the decayed timbers led to the failure of the wall. The timbers were likely to have failed regardless of whether or not there was vegetation on the outside of the wall. The timber was inadequately treated. No satisfactory evidence regarding the alleged acceleration of the decay to the timbers in the wall has been provided by the Applicant.

105. Mr Barnard's final conclusion is at the centre of the Applicant's case. He suggested that it was unreasonable for the Respondent not to have regularly inspected the wall which he claims would have resulted in it identifying that there was a serious inherent defect which required immediate action. The Tribunal has not seen any evidence from the Applicant which supports this conclusion. As it has been suggested that the primary reason for the failure is the decay of the untreated timber, the Tribunal has concluded that it is probable that the repairs to the wall which have been undertaken would have been required whenever the defect to the wall was identified.

106. For all of the reasons referred to above the Tribunal has concluded that none of the evidence upon which it is entitled to rely supports the Applicant's claim that it is entitled to "set off" because of a failure on the part of the Respondent to comply with a contractual obligation in the lease relating to the maintenance of the wall.

Historic breach of covenant and if proven is it material in an assessment of whether repair costs were reasonably incurred?

107. The Respondent has not disputed it is obliged to maintain the wall. It has submitted that once the poor condition of the wall was identified it acted promptly. For the Applicant to succeed it must first provide evidence of a breach of the Respondent's repairing covenant.

108. The condition of the wall was first investigated in December 2018. Two reports were obtained from JP before consultation with leaseholders with regard to the repair costs commenced. A specification to accompany the invitation to tender was prepared in the latter part of 2019. Eventually two tenders were obtained although not until after the invitations to tender were submitted for a second time. The Respondent confirmed this to the residents in November 2020, when it said it would consider phasing the works and then again in March 2021 at a meeting with the leaseholders. The Respondent decided to accept the lowest estimate which is significant because it therefore did not need to notify the leaseholders of its reasons (paragraph 6 (2) of Schedule 4 Part 2) to The Service Charge (Consultation Requirements) (England) Regulations 2003.

109. The Applicant has provided no evidence to the Tribunal which supports Mr Crozier's submission of historical breach. The conclusions of the last report by RSK confirm the conclusions contained in the earlier reports (JP) identifying that failure to adequately treat the original timbers have inevitably led to these being susceptible to decay, which is what has occurred, but the report stated that the decay occurred <u>over years, not months.</u>

Was the failure of the wall due to an inherent structural defect?

110. The Tribunal has concluded that it is unlikely that the failure of the wall is attributable to a single factor. There appears to be agreement between all those who have reported on its condition that the original timbers were inadequately treated and protected, so prone to decay. The infill of the ballast contained the wrong materials which may have inhibited drainage and accelerated delay, although this is not proven. The wall has been covered in vegetation but the majority of those reports concluded that excessive vegetation would not have necessarily contributed to the deterioration of the wall had the original timbers been adequately treated.

111. The Applicant alleged that the failure of the Respondent to remove vegetation contributed to further deterioration alongside the three year delay. In so alleging it has relied on reports from Mr Barnard, which the Tribunal finds to be inadmissible, or which if admitted (because it has actual knowledge of the content) it would attribute little weight.

112. There are conflicting views from the parties and the experts with regard to the design life of a wall such as this, but agreement that the wall should have lasted longer than it has.

113. Whether the wall was inherently defective, perhaps on account of the failure to adequately treat the timber, which is a consistent reason for the failure, the Tribunal does not accept that this has any impact on whether the assessment of the repair was reasonable. Judge Rich, in **Continental Ventures** considered a similar argument and determined that any failure on the part of a landlord which resulted in repairs or reinstatement at the expense of the tenant could not influence the assessment of whether the works or costs are reasonable. He said that is an incorrect interpretation of section 19. However, he acknowledged that if evidence could be produced that the works were only necessary because of the negligence of the landlord, the tenant would have a defence to the payment of the service charges by claiming "equitable set-off".

114. The Applicant did not dispute its liability to pay the service charges demanded for the repair of the wall. What it has questioned is whether the works (to repair the wall) are reasonable, albeit indirectly, with Mr Crozier suggesting that because the works might go "beyond repair" these do not fall within the definition of "reasonable" within section 19 of the Act. Mr Crozier has also suggested that works, if they related to rectification of an inherent defect, are not repair but go beyond and therefore are not "reasonable".

115. Section 19 of the Act provides that relevant costs shall be taken into account in determining the amount of a service charge only to the extent that they are reasonably incurred and where they are incurred on the provision of services or works that are of a reasonable standard. In these proceedings the standard of the repair works is not in issue.

116. What Mr Crozier suggested is that works, which he described as effectively replacement works, are not repairs at all and therefore not reasonable.

117. Judge Michael Rich QC in deciding the appeal in **Continental Ventures** said "In this instance, the natural meaning of reasonably incurred given the tense used and the incorporation of the definition in section 18(2) is whether they were reasonably incurred in the circumstances appertaining when the costs of repair were in fact incurred and not whether they resulted from past neglect on the part of the lessor, or whether the repairs should otherwise have be allowed to accrue" [R's authorities 70].

118. "The reasonableness of incurring costs for their remedy could not as a matter of course depend on how the need for the remedy arose" Para 11 [R's authorities 75].

119. Judge Rich said that in **Loria v Hammer** the Judge had considered whether the failure of a landlord to carry out a necessary repair in a timely fashion meant that he was unable to recover the full cost of the repair from the tenant. He concluded that it did not, but that the Tenant would have a claim against the landlord in damages arising out of his breach of the repairing covenant. He said that if the breach gave rise to further damage resulting in an additional service charge liability this was part of what the tenant would claim as damages and he referred to it giving rise to an equitable set-off within the rules laid down in **Hanak v Green** and as such constitute a defence.

120. Judge Rich disagreed with the LVT's reason for deciding that the costs were not reasonably incurred but not with their conclusion. Helpfully he considered the jurisdiction of the Tribunal to consider damages accepting that the tribunal has jurisdiction to consider a claim for damages only in so far as the claim is a defence to the tenants' liability to pay the service charges in which the tribunal's jurisdiction was invoked. (Tribunal's underlining).

121. In these proceedings the Applicant has not demonstrated that the Respondent has been negligent. Had it been able to convince this Tribunal of the Respondent's negligence it would still have been necessary for it to demonstrate the effect of that conclusion on its service charge liability, but it has not.

122. The Applicant claimed a 100% reduction in its liability because the wall was structurally defective. Under the terms of its lease it is obliged to contribute towards the costs of repairs even if these arise as a result of a structural defect. It has not shown that the Respondent was negligent or, even assuming that it was, that the alleged negligence resulted in additional repair costs being incurred. It has omitted to take account of the fact that the wall has lasted for more than 10 years.

123. The Applicant has suggested that the Tribunal should accept that the wall should have had an expected life of 60 years but none of the reports support that this was how long the wall would have lasted if it had been properly constructed. In particular the RSK report suggests that a design life of 30 years is more realistic. Even if negligence on the part of the Landlord is a relevant factor, a more appropriate calculation for any contribution might be 8/15 (assuming a life of 30 years until 2038) against an actual life of 14 years.

124. However even that fraction is questionable given that only parts of the wall have failed, not the whole. The Applicant has not provided any information which would have enabled the Tribunal to compare the costs of replacing the entire wall against the costs of repairing the parts which have failed.

125. Instead, it listed its "set off" claim in an unhelpful way (see paragraph 45 above) ignoring the fact that the total set off cannot exceed the total cost (100%) of the repair and claiming set off in respect of theoretical claims.

126. The Tribunal has already referred to the provisions in the lease relating to the contingency fund. That contains monies paid in advance by the leaseholders on account of future repairs. Had a claim for set off been established, reliance on the fund would have been reduced. Therefore, the suggestion that in addition to a claim against 100% of its service charge liability the Applicant should be compensated in respect of a depletion of the contingency fund is mathematically unsound as well as unhelpful.

Increased costs of repair and that these cannot be attributable to inflation as the increase is higher

127. The Tribunal has interpreted this submission as relating to the claim for set off in respect of the Applicant's liability on account of the Respondent's failure to promptly repair the wall.

128. The allegation is not founded on any allegation of negligence on the part of the Respondent.

129. The Applicant has consistently failed to take any account of the timescale of a repair involving major works which will inevitably arise out of the requirement for a landlord to comply with section 20 and the Service Charge (Consultation Requirements) (England) Regulations 2003 [SI 1987].

130. For the reasons already set out above, the Tribunal does not accept that there was any unreasonable delay on the part of the Respondent in repairing the wall. The chronology set out earlier in this decision with regard to the identification of the failure of the wall and its subsequent repair was not disputed.

131. Works commenced on the wall on 13 September 2021 and were intended to be completed by the end of the first week in June 2022. The Respondent stated that the proximity of a buried incoming electrical cable prompted an adjustment to the design and methodology of the final section of the southern return of the wall which had to be agreed by Western Power.

132. Whilst the completion date for the works is almost exactly one year after the contract was awarded, the Tribunal finds that the explanation of the delays that occurred transparent. It has not been provided with any evidence from the Applicant why or how this delay could have been avoided.

The life of the repair works

133. The Applicant's statement reflects its initial submission that it should be possible to obtain a repair which would last for more than 25 years. The Tribunal has no jurisdiction to make an order in such terms. It has received no information, or admissible evidence, to enable it to assess the life of the repair to the wall or whether it would have been possible to obtain a repair to the wall which would, or might have, an estimated life of more than 25 years. Given that the Applicant has questioned the time it has taken for the repair works to be undertaken such investigation would, it seems to the Tribunal, have inevitably resulted in further delay.

Failure to insure

134. The Applicant has submitted no evidence regarding the availability or terms of insurance cover which would or might have covered the cost of repairing the wall. It has made no submissions regarding the cost of such insurance or any assessment of the cumulative cost, assuming insurance was available from the date of construction.

135. Comprehensive buildings insurance will usually only cover consequential losses arising from disrepair, not the disrepair itself. The Applicant has provided no evidence that it has ever identified any failure on the part of the Respondent with regard to its insurance obligations in the lease until it was advised that the failure of the wall was not an insured risk.

136. Any reference to imputed knowledge on the part of the Respondent and or its managing agent FirstPort in relation to another development is not relevant. A situation which has arisen in relation to another property with which the Respondent, may, or may not be associated, has no bearing on this application.

The dismissal of a claim against the NHBC

137. The Tribunal has not found it necessary to consider this allegation in detail. NHBC cover relates to retaining walls which are an integral part of the building. It provides cover in limited circumstances to individual leaseholders. The cover is always limited to a maximum of 10 years, not a longer period. It would not have been sensible for the Respondent to make a claim against the NHBC, nor would it have been cost effective for it to even investigate this. The individual leaseholder is the "insured" for the purpose of any claim not the landlord.

That the repair work should deliver a wall that will function effectively until 2068

138. The Tribunal has no jurisdiction to make such an order. From the evidence in the bundle, it has concluded that repair works of the type that have been carried out to the wall are unlikely to have a lifespan equivalent the anticipated life span of a new wall. Due to the multiple reasons identified for the failure of the original wall, it does not appear to be possible for any remedial works to be guaranteed for an extended period. The Applicant has provided no evidence that it is aware that insurance can be obtained. When a guarantee is obtained for any building works, its value will depend on the availability of satisfactory insurance and or the longevity of the contractor. In the absence of insurance being available for repair works, guarantees are rarely available. Where a guarantee is available and is backed by insurance, strict rules are usually applied to the assignability of such guarantees which tends to limit both their value and efficacy.

That the Respondent should not benefit from the leaseholders paying for the new wall

139. This claim appears to relate to the allegation, not proven, that the Respondent has obtained a financial benefit from the repair of the wall to which it is not entitled because it purchased the property out of administration. The Tribunal does not understand the submission. The Applicant has provided no evidence demonstrating the validity of this premise or how the repair of the wall benefits the Respondent. Mr Barnard's report, if it were admissible, would undermine this submission as he has suggested that the repair is not fit for purpose, albeit without explaining how he has reached that conclusion. The Tribunal has no jurisdiction to address this submission. Furthermore, the reference to the "new wall" is misleading particularly in the light of the Mr Barnard's conclusions regarding the efficacy of the repair.

That the Respondent should not seek to recover all the repair works during the current service charge year.

140. The Tribunal has no jurisdiction to address this submission. This is a contractual matter. The Respondent is entitled to recover the costs of services in accordance with the provisions of the lease.

Generally

141. Following the hearing when it was established that the Applicant needed to formulate a claim to set off its service charge liability, it had an opportunity to investigate if it was possible to procure expert evidence which supported this claim. By then the parties appeared to have agreed that the wall had failed prematurely and that the reason was it had been defectively constructed. Whilst the Respondent is not the original developer, the Applicant had an opportunity to investigate whether it could establish a claim in negligence which would support a claim for damages against the Respondent.

142. During the Hearing the Respondent's counsel, Miss Traynor made submissions which outlined the possibility of such a claim and the subsequent directions made by the Tribunal confirmed its jurisdiction to consider such a claim.

143. Although the Applicant has obtained legal advice it has, for the most part, ignored the Tribunal's directions and made no valid submissions regarding its claim for equitable "set off".

144. The Respondent has not the disputed that the wall had failed. Had the Applicant been able to demonstrate to the Tribunal that the repair costs would not have been incurred, or would or might have been less had the Respondent acted sooner, those submission might have been a defence to the payment of some or all of the service charges if formulated as a claim for damages resulting from the Respondent's breach. In such circumstances the Tribunal could have considered whether it could "set off" those potential damages against some, or all, of the Applicant's service charge liability.

145. The Applicant failed to supply any admissible expert evidence or consider or submit a realistic quantification of a potential claim.

146. For all of the reasons set out above, the Tribunal dismisses the Application for an equitable "set off".

Applications under section 20C of the Act and paragraph 5A of Schedule 11 of CLARA

147. Until now the Applicant has not submitted any reasons in support of these applications but it has reserved its position. The Tribunal will consider submissions made by the Applicant within 28 days of the date of this decision. These submissions should be contained in a brief statement (limited to two A4 pages (font size 12)) of its reasons for requesting that the Tribunal should make orders limiting the ability of the Respondent to recover its costs in connection with these proceedings and be sent to the Respondent and copied to the Tribunal at the same time.

148. The Respondent may reply to this statement within 21 working days of receipt. It must send its response (limited to two A4 pages (font size 12)) to the Applicant and copied to the Tribunal at the same time.

149. The Tribunal will determine any application received within 21 working days of receipt of the Respondent's reply.

Judge C A Rai
Chairman

Annex 1

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. (3) An application may also be made to [the appropriate tribunal]2 for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to— (a) the person by whom it would be payable, (b) the person to whom it would be payable, (c) the amount which would be payable, (d) the date at or by which it would be payable, and (e) the manner in which it would be payable.
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.

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) [the appropriate tribunal] .
(2) In this section *"relevant contribution"* , in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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 a court [, residential property tribunal] or leasehold valuation tribunal [or the First-tier Tribunal] , or the [Upper Tribunal] , or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

Schedule 11 to the Commonhold and Leasehold Reform Act 2002
Paragraph 5A

(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."

Service Charges (Consultation Requirements) (England) Regulations 2003/1987

Regulation 7(4)
Except in a case to which paragraph (3) applies, and subject to paragraph (5), where qualifying works are not the subject of a qualifying long term agreement to which section 20 applies, the consultation requirements for the purposes of that section and section 20ZA, as regards those works–
(a) in a case where public notice of those works is required to be given, are those specified in Part 1 of Schedule 4;
(b) in any other case, are those specified in Part 2 of that Schedule

Part 2 of Schedule 4

1.

(1) The landlord shall give notice in writing of his intention to carry out qualifying works–

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall–

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify–

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

3.— Overriding objective and parties' obligation to co-operate with the Tribunal

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

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

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

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

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

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

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

(3) The Tribunal must seek to give effect to the overriding objective when it—(a) exercises any power under these Rules; or (b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and(b) co-operate with the Tribunal generally.

19.— Expert evidence

(1) It is the duty of an expert to help the Tribunal on matters within the expert's expertise and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

(2) No party may adduce expert evidence without the permission of the Tribunal.

(3) Expert evidence is to be given in a written report unless the Tribunal directs otherwise.

(4) Subject to paragraph (6), each party must provide a copy of the written report of any expert witness to the Tribunal and each other party at least 7 days before— (a) the date of the hearing; or

(b) the date notified upon which the issue to which the expert evidence relates will be determined without a hearing.

(5) A written report of an expert must—

(a) contain a statement that the expert understands the duty in paragraph (1) and has complied with it;

(b) contain the words "I believe that the facts stated in this report are true and that the opinions expressed are correct"; (c) be addressed to the Tribunal;

(d) include details of the expert's qualifications and relevant experience;

(e) contain a summary of the instructions the expert has received for the making of the report; and

(f) be signed by the expert.

(6) The Tribunal may direct that—

(a) the expert's evidence must be limited to such matters as the Tribunal directs;(b) the expert must attend a hearing to give oral evidence; or (c) the parties must jointly instruct the expert.

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.