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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HH/LSC/2015/0022 CHI/00HH/LSC/2015/0023
Property	:	3 Berry Head House, St Marys Drive, Brixham TQ5 9FH & 5 Upton House, Brixham, TQ5 9GT
Applicants	:	Mr and Mrs D P Boxall (and others under Section 20C)
Representative	:	Mr D P Boxall
Respondents	:	Millwood Homes (Devon) Ltd Sharkham Village Management No.1 Limited
Representative	:	Mr L Chittenden
Type of Application	:	Section 27A and 20C of the Landlord and Tenant Act 1985 (Liability to pay service charges) Tenants' application for the determination of reasonableness of service charges for the years 2011 to 2014.
Tribunal Member(s)	:	Judge A Cresswell Mr T E Dickinson FRICS
Date and Venue of Hearing	:	9 August 2016 at Torquay County Court
Date of Decision	:	12 August 2016

DECISION

The Application

1. This case arises out of the tenants' application, made on 18 March 2015, for the determination of liability to pay service charges for the years 2011 to 2014 inclusive. They and a number of further parties have made applications under Section 20C of the 1985 Act.

The Decision of 7 September 2015 (Corrected 5 October 2015)

2. This Decision must be read in the light of and as following on from the Tribunal's Decision of 7 September 2015 (Corrected 5 October 2015). It would be otiose to repeat here all of what is detailed within that earlier Decision.

The Issues

3. The Tribunal, at a Case Management Hearing ("CMH") on 27 May 2016, identified the following issues to be determined:

   - Whether items specified in a schedule completed by the Applicants should form part of a Reserve Fund and whether a reasonable value has been attributed to their likely cost.
   - Whether an order under Section 20C of the 1985 Act should be made

4. There were a number of issues raised by the Applicants prior to the hearing, which were agreed between the parties and so were not formally considered by the Tribunal when reaching its decision on the issues identified at the Case Management Hearing.

Inspection and Description of Properties

5. The Tribunal inspected the property on 9 August 2016 at 1000. Present at that time were Mr Boxall and Mr Chittenden, Mr and Mrs MD Hood (Flat 6), Mr J Manning (Flat 5), Mr T German MRICS (Croft Surveyors) and Ms L Sims (Blenheims Estate and Asset Management). The property in question comprises a recently constructed ground floor apartment in a three-storey block of six flats. 3 Berry Head House has its own outside entrance to the north-western side of the block leading off the parking court.

Summary Decision

6. This case arises out of the tenants' application, made on 18 March 2015, for the determination of liability to pay service charges for the years 2011 to 2014 inclusive. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 service charges are payable only if they are reasonably incurred. The Tribunal has determined that the Respondents have

demonstrated that the Applicants are required to pay service charges as contributions to a Reserve Fund.

7. The Tribunal does not allow the Applicants' and further applicants' applications under Section 20C of the Landlord and Tenant Act 1985 in respect of this hearing; but it does allow the further applicants' applications under Section 20C of the Landlord and Tenant Act 1985 in respect of the earlier hearing, thus precluding the Respondents from recovering their costs in relation to the application for that hearing from the further applicants by way of service charge.

Directions

8. Directions were issued following the Case Management Hearing on 27 May 2016.
9. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
10. This determination is made in the light of the documentation submitted in response to those directions and the submissions made in correspondence following the CMH and in the light of the Inspection and the evidence and submissions of Mr Boxall, Mr Chittenden, Mr German and Mrs Hood. At the end of the hearing, Mr Boxall, Mr Chittenden and Mrs Hood confirmed that they had been able to say all that they wished to say to the Tribunal.

The Law

11. The relevant law is set out in sections 18, 19 and 27A and 20C of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.
12. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
13. Section 19 of the 1985 Act details the requirement of reasonableness:

> **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.

14. In reaching its earlier Determination, the Tribunal took into account the Second Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. Of particular note to the issues then were the following extracts from the Code:

Part 9 Reserve funds

9.1 *Reserve funds are often permitted by the lease. A reserve fund is a pool of money created through the payment of service charges which are not immediately needed towards repairs, maintenance or management, etc. but which are collected and retained to build up sums which can be used to pay for large items of infrequent expenditure (such as the replacement of a lift or the recovering of a roof) and for major items which arise regularly (such as redecoration of the common parts). A reserve fund also helps to spread costs between successive tenants and can, if the leases/tenancy agreements allow, be used, on a temporary basis, to fund the cost of routine services, avoiding the need to borrow money. Legislation ensures that the money in a reserve fund, as is the case with service charge funds and advance payments, is held on trust – see paragraph 10.7.* ☐

9.2 *The usual method of working out how much money is to go into the fund each year, assuming the lease/tenancy does not make any other provision, is to take the expected cost of future works and divide it by the number of years which may be expected to pass before it is incurred. However, it is advisable to have new estimates of the cost of replacing the item from time to time and to adjust payments into the fund to match costs. If the fund is invested prudently, the interest earned will itself help to meet rising costs. Tax will be charged on the interest income (see also Part 11).* ☐

9.3 *You should be able to justify the contributions to reserves by reference to the work required, the expected cost and when it is to be carried out. Experience of similar work should be used in support of the calculations. It is not considered appropriate for specifications and tenders to be obtained merely to support the reserve allocation. These will be required at the time the work is to be carried out. It should be indicated to tenants that the figures may vary when the work is undertaken.* ☐

9.4 *Although some tenants may be able to achieve better returns on money they retain and invest themselves, one of the purposes of reserves is to facilitate the carrying out of expensive non-annual items*

of work. Unless money is accumulated collectively there is always the likelihood of work not being carried out due to lack of funds. Even if tenants intend to live at a property for a short period they can achieve financial benefit on sale by pointing out to purchasers the existence and extent of the reserve fund. ☐

9.10 *You should review contributions annually and base the amount you request from tenants on current up-to-date forecasts including fees and VAT.* ☐

9.11 *Where funds accumulated are considered to be low, having regard to future commitments, you should indicate this to tenants.* ☐

9.12 *A reserve fund can have benefits for both landlords and tenants alike.*

15. In reaching its current Determination, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. Of particular note to the issues here are the following extracts from the Code:

7.5 Reserve funds (sinking funds)
The lease often provides for the landlord to make provision for future expenditure by way of a 'reserve fund', or 'sinking fund'. You should have regard to the specific provisions within the lease that may, for example, provide for a general reserve fund(s) for the replacement of specific components or equipment.

The intention of a reserve fund is to spread the costs of 'use and occupation' as evenly as possible throughout the life of the lease to prevent penalising leaseholders who happen to be in occupation at a particular moment when major expenditure occurs. Reserve funds can benefit both the landlord and leaseholder alike by ensuring monies are available when required for major works, cyclical works or replacing expensive plant.

It is, therefore, considered good practice to hold reserve funds where the leases permit. If the lease says the landlord 'must' set up a fund, then this must be done. Neglecting to have a fund when the lease requires one could be deemed to be a breach of the terms of the lease. No attempt to collect funds for a reserve fund should be made when the lease does not permit it.

Where there is no provision in the lease for reserve funds, there is no entitlement to create or hold one, and any money collected for such a purpose can be demanded back by the leaseholders. In these circumstances, or where the current provisions are likely to prove inadequate, you should make leaseholders aware and encourage them to make their own long-term saving provisions towards the estimated expenditure. You should also consider recommending to your client

that consideration be given to discussing with leaseholders the benefits of a variation to the leases to allow for a reserve fund to be set up.

You should also recommend your clients to have a costed, long-term maintenance plan that reflects stock condition information and projected income streams. This should be made available to all leaseholders on request and any potential purchasers upon resale.

The level of contributions for simple schemes should be assessed with reference to the age and condition of the building and likely future cost estimates. On more complicated developments, the assessment should reference a comprehensive stock condition survey and a life-cycle costing exercise, both undertaken by appropriate professionals.

The usual method of working out how much money is to go into the fund each year, assuming the lease/tenancy agreement does not make any other provision, is to take the expected cost of future works, including an allowance for VAT and fees, and divide it by the number of years which may be expected to pass before it is incurred. The level of contributions should be reviewed annually, as part of the budget process, and the underlying survey information should be reviewed at appropriate intervals. This will vary for each scheme depending on complexity, age, condition and the relative size of funds held.

If after the termination of any lease there are no longer any contributing leaseholders, any trust fund shall be dissolved and any assets comprised in the fund immediately before dissolution shall, if the payee is the landlord, be retained by them for their own use and benefit, and in any other case, be transferred to the landlord by the payee. Again this is subject to any express terms of the lease relating to distribution, either before or at the termination of the lease.

16. "*If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the* ***Yorkbrook*** *case* **(Yorkbrook Investments Ltd v Batten** (1986) 19 HLR 25) *make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.":* **Schilling v Canary Riverside Development PTE Limited** LRX/26/2005 at paragraph 15.

17. "*Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made*

available: **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.

18. Where a party does bear the burden of proof:
"It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law... It is only rarely that the tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out...: the burden of proof is a last, not a first, resort." (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

Ownership and Management

19. The Respondents are respectively the owner of the freehold and its management company, Blenheims Estate and Asset Management, being employed by the latter as its agent by which the property is managed for it.

The Lease

20. The Applicants hold Flat 3 Berry Head House under the terms of a lease dated 14 December 2012, which lease was made between Millwood Homes (Devon) Limited as lessor and Mr and Mrs Boxall as lessees.
21. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
22. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:
Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

> *15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*
>
> *16. For present purposes, I think it is important to emphasise*

seven factors: □

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". (120. I agree, if by this it is meant that the court should lean towards an interpretation which limits such clauses to their intended purpose of securing fair distribution between the lessees of the reasonable cost of shared services.)

23. Lord Neuberger's final point above is a reference to the doctrine of "contra proferentem", which had been understood to require an ambiguity in a clause in a lease to be resolved against a landlord as "proferor".

Lease of Flat 3 Berry Head House

24. The preamble to this lease states: *"A The Demised Premises form part of the Building and the Estate".*

25. Clause 2 is headed "Definitions" and says:
"2.1 In this lease unless the context otherwise requires the following expressions shall have the following meanings respectively:
"Building" means the building constructed on the estate and edged purple on Plan 1 containing 12 residential flats of which the Demised Premises forms part including (without limitation) the roofs gutters pipes foundations doors floors and all walls bounding the flats.
"Estate" means the Landlord's development shown edged blue on plan 2 and known as Sharkham Village, St Mary's Bay, Brixham, Devon including the roads, driveways, pathways and amenity space being the whole of the land now or formerly comprised in HM Land Registry Title Number DN357856".

26. The Service Charge provisions are detailed in Schedule 4 of the lease and follow a typical pattern of interim and final payments. Part 2 of Schedule 4 sets out the relevant percentages as follows:
"1.1 the Part A Proportion of the amount attributable to the costs in connection with the matters mentioned in Part A of Schedule 6 hereto and of whatever of the matters referred to in Part C of Schedule 6 hereto are expenses properly incurred by the Company which are relative to the matters mentioned in Part A of Schedule 6 hereto.
1.2 the Part B Proportion of the amount attributable to the costs in connection with the matters mentioned in Part B of Schedule 6 hereto and of whatever of the matters referred to in Part C of Schedule 6

hereto are expenses properly incurred by the Company which are relative to the matters mentioned in Part B of Schedule 6 hereto."

27. Schedule 6 sets out the Company's obligations subject to reimbursement. Part A is headed "*Building Costs*", Part B is headed "*Estate Costs*" and Part C is headed "*Costs applicable to Parts A and/or B*".
Part B (Estate Costs) makes reference to works associated with roads, pathways, parking spaces, sewers, drains, service media, keeping the estate insured and to gardens and hard paved areas and says this:
"The Landlord or the Company may alter or modify the services referred to in this Schedule and/or provide additional services if such alteration, modification or additional services is or are in the reasonable and proper opinion of the Landlord reasonably necessary or desirable in the interest of good estate management or for the benefit of the tenants or occupiers of the building."
Paragraph 14 of Part C details *"Such sums as shall be reasonably considered necessary by the Landlord or the Company (whose decision shall be final as to questions of fact) to provide a reserve fund or funds for items of future expenditure to be or expected to be incurred at any time in connection with the Estate".*

28. Schedule 2 of the lease details "*the Included Rights*" and specifically says at Paragraph 3.3:
"The right at all times to use the common entranceway, entrance halls, landings, passages and staircases in the Building for the purpose of gaining access to and egress from the Demised Premises"

29. Schedule 6 sets out the Company's obligations subject to reimbursement. Part A is headed "*Building Costs*". Paragraph 3 says:
"As often as may be necessary to maintain repair cleanse and renew (except to the extent that the Tenant covenants in this lease to make good any want of repair)" "3.3 the passages staircases landings lifts entrances and the other parts of the Building including the ceilings enjoyed and used in common with all or any of the tenants and occupiers of the Building".

The Decision of 7 September 2015 (Corrected 5 October 2015)

30. Below, in italics, is an extract of what the Tribunal recorded in its earlier Decision:
Common Parts at Berry Head House
The Tribunal *notes that difficulties have arisen here, in part, due to a lease which could have been better drafted. The Tribunal is aware that "common parts" does not have a strict legal definition; usually 'common parts' are treated as being all those parts of a property and any associated land which the lessee or occupier has a right to use in common with others. At the most basic level, this may include only the main entrance to a property and any steps leading up to that entrance, and the hallway and any staircase that could be used to gain access to the leased premises.*
All, however, depends upon the wording of the individual leases. Here, the internal "common parts" of the Building are detailed by paragraph 3.3 of Part A of Schedule 6 as being "the passages staircases landings lifts entrances and the other parts of the Building

including the ceilings". However, the Applicants' lease in respect of 3 Berry Head House gives them no right to enjoy and used the listed parts "in common with all or any of the tenants and occupiers of the building" because they are entitled only by paragraph 3.3 of Schedule 2 "to use the common entranceway, entrance halls, landings, passages and staircases in the Building for the purpose of gaining access to and egress from the Demised Premises" and the common parts of the Building described and listed in the lease simply do not facilitate such a method of entry to or exit from their property.
This contrasts with the position at 5 Upton House, which flat can only be accessed via the common entrance to the flats in that Building, where the tenant could be expected to contribute a proper share to the maintenance of the common parts enjoyed and used by that tenant in common with the other tenants and occupiers. Properly, the Applicants make no complaint about the similar service charge made for 5 Upton House.
The Applicants' assertion does make sense, the Tribunal believes, because it would not be a very attractive clause to a prospective tenant to expect that tenant to contribute to what could be considerable costs relating to works for which four of the six other flats took benefit and he/she took no benefit whatsoever, and is an entirely reasonable way of interpreting the lease.
The presentation by the Respondents to the Applicants of a key to the external door which gives access to four of the six flats and the electricity meters cannot alter the clear terms of the lease.
The Tribunal finds that the assertion by the Applicants as to the meaning of the terms of the lease is "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."
It follows that the sums claimed from the Applicants by way of service charge for maintenance, etc. of the internal common parts of 3 Berry Head House are not payable by the Applicants under their lease.

The Reserve Funds
***The Tribunal** finds that the Respondents are able to collect and hold sums for a Reserve Fund for Buildings as well as other Estate costs, but that the Respondents have not approached their responsibilities in a wholly correct manner, as the Tribunal now explains.*
The preamble to both leases details how "Estate" is not a term to be understood simply to relate to land and pathways and the like. Paragraph A of the preamble to the leases details how all 6 flats (because all leases are in similar form) form part of the Building and of the Estate.
It is very common for a lease to separate out definitions for different purposes in that lease and not unknown, as here, for a level of confusion to result.
The Applicants point to the definition of "Estate" at Clause 2.1 as excluding the Buildings on the Estate, but that is to ignore the normal everyday meaning of the word "development". Ask any reasonable "man in the street" to describe the developments here and they are, the

Tribunal finds, first likely to mention the buildings upon the land bounded by the area detailed within the relevant Title document.
Although paragraph 14 of Part C of Schedule 6 makes no specific reference to Buildings, as the Tribunal has already detailed, the term "Estate" is inclusive of the term "Buildings" as the Tribunal has explained. It is significant too that paragraph 14 does not refer to "Estate Costs", the heading of Part B, but rather to "items of future expenditure to be or expected to be incurred at any time in connection with the Estate" which the Tribunal finds has a wider meaning than "Estate Costs".
The Tribunal's interpretation is, it finds, "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."
The Tribunal does not agree that such a term requiring service charge payments towards a reserve fund is in any way unfair. It would be the operation of such a provision that could be unfair, but any unfairness, as with all elements of the service charge, is amenable to challenge at this Tribunal.
The Respondents are able, even if the terms meant other than the Tribunal has determined them to mean, to "alter or modify the services referred to in this Schedule and/or provide additional services if such alteration, modification or additional services is or are in the reasonable and proper opinion of the Landlord reasonably necessary or desirable in the interest of good estate management of for the benefit of the tenants or occupiers of the building."
As the Tribunal has detailed above, a Reserve Fund for Buildings as well as other aspects of an Estate is recognised as being for the benefit of both landlord and tenants (see the extract from the Code above), so that it would be difficult to criticise the Respondents for creating such a reserve if there was a need to do so because the reading of the leases advocated by the Applicants otherwise required them to so act.
Although the Applicants would prefer to invest their money until an item of large expenditure arose, that is not best practice as the Code points out. Nor is it at all normal practice in modern leases, which generally endorse the Code guidance, which recognises that it is for the benefit of the tenants and the landlord that a Reserve Fund is maintained.
The Respondents have not, however, approached the requirements for a Reserve Fund in an approved or constructive manner. There was no evidence available to the Tribunal to show that any particular items of future expenditure had been identified as of major significance, had been costed and a calculation been made of the sums required proportionately from the tenants to meet those future costs. Nor was there any evidence to show that the tenants had been involved by the Respondents in such an exercise. Nor was there sufficient evidence before the Tribunal so as to allow it sensibly to attempt to calculate what reasonable sums could be demanded from the Applicants by way of Service Charge towards a Reserve Fund. That being the case, the Tribunal has avoided attempting any such calculation.

The Tribunal recognises the importance of a Reserve Fund and, accordingly, wishes to provide the parties with an opportunity to resolve the issues of identifying relevant items, their anticipated cost and the proportional contribution (following the Code guidance) which would be required of an individual tenant. Accordingly, within 42 days of the sending of this Decision to the parties, the parties are each to indicate to the Tribunal whether the issues in the preceding sentence are agreed between them or whether the parties require the Tribunal to make a further Decision. In the latter case, each party would be at liberty to present written submissions to the Tribunal, each party limited to 4 pages of typed A4 (size 12 font) and 30 supporting pages of documentation. The sequence would be for the Respondents to send their submissions and supporting documents to the Tribunal and Applicants within 28 days of the sending to them of this Decision and for the Applicants to provide their submissions and supporting documents to the Tribunal and Respondents within 14 days after receiving the Respondents' submissions and supporting documents.

Replacement of Rainwater goods

The Respondents

31. The Respondents argued that there were incidences of debris collecting and of freezing and thawing. The plan was to clean annually and to replace at the end of life expectancy of 30 years. Mr German indicated that a single-ply membrane is usually guaranteed for 20 years, but can last longer, and his estimate of life expectancy was based on his own experience in the area. He had taken his costings from the Dilapidations Pricebook of BCIS, which is suitable for small works and is realistic for actual costs in the South West, SPONS being more suitable for contracts exceeding £3,500,000. Mr German said that he had costed the replacement by reference to auto CAD drawings for the building.
32. Mr German indicated that single-ply can blister and puncture such that the waterproofing element fails and there is a susceptibility to seagull and bird puncture damage.

The Applicants

33. The Applicants argued that the goods had a durability in excess of 35 years. There had been only one annual inspection, some 18 months ago; an annual inspection would highlight any covering required. The guttering was a part of the roof and the life of the roof was covered by a BBA warranty and works should be effected on an "as and when" basis following annual inspections. Patching would be a solution.
34. Mr Boxall indicated that his own enquiries of the manufacturer suggested that damage would be unexpected, save for buildings where there was other equipment and mechanical damage might ensue from works.

The Tribunal

35. The Tribunal first makes the point, relevant to all of its findings in respect of the Reserve Fund, that it is the terms of the lease which are paramount when determining the rights and duties of the Respondents

in respect of the Reserve. The lease is the contractual agreement of the parties. Nowhere else is the term "Reserve Fund" defined specifically for these parties. Whilst the RICS Code gives guidance to landlords about Reserve Funds, it is guidance only and cannot alter the clear terms of a lease. It is, however, very important that a landlord complies with law and with the RICS Code in its identification of particular items of future expenditure, their costing and the calculation of the sums required proportionately from the tenants to meet those future costs, together with the holding of the sums gathered in trust and earning interest and the regular assessment of the composition and costing of the Reserve Fund plans.

36. A Reserve Fund ensures that tenants effectively save for future costs so that there are no "nasty surprises", but also that the costs of items are shared by those who use or have the benefit of them; as an example, the cost of a roof included within a Reserve Fund will be shared proportionately by 2 tenants in proportion to the number of years of their enjoyment. That said, tenants do not want, and should not be required, to pay more into a Reserve Fund than is reasonably required.

37. The Tribunal's task here is simply that detailed in the Issues above, i.e. to determine whether items specified in the schedule completed by the Applicants should form part of the Reserve Fund and whether a reasonable value has been attributed to their likely cost. "*Should*" in this context means "*reasonably incurred*" in accordance with the terms of the lease. "*Reasonable*" means "*reasonable*", not "*precise*". See Section 19 of the 1985 Act above.

38. Appended to the Decision is the Schedule of items challenged by the Applicants and comments submitted by the parties in advance of the hearing in accordance with the Tribunal's Directions.

39. Having made these general points of relevance to all of the below findings, the Tribunal will not repeat them.

40. There was some discussion at the hearing of downpipes, but they were not covered by this Reserve Fund item and the Tribunal makes no relevant finding.

41. The Tribunal finds that Mr German's assessment of a 30-year replacement period was reasonable, being based on his own experience within the area, the exposed location of the building, the proximity to the sea and the possibility of bird damage. His assessment did not preclude patching up to the 30-year replacement period. The Tribunal also noted the possibility of blistering. No alternative pricing was suggested by the Applicants. Accordingly, the Tribunal finds the proposals of the Respondents to be reasonable.

Cleaning of Eaves and Replacement of Eaves

The Respondents

42. The Respondents indicated that the fascia and soffits are staining. They should be cleaned every 5 years and there should be a plan for a replacement after 50 years submitted. Mr German indicated that his estimates were based on his seeing material fail during his career.

43. Mr German had allowed £1300 for access (£1,000 for scaffold towers and £300 for a cherry picker). He had allowed £2,000 for replacement based on £27 per linear metre. He had used a variety of sources to reach his valuation, including fixed prices for works from his own practice.

The Applicants

44. For the Applicants, Mr Boxall indicated considerable experience in property management for the MoD. He also explained that he had conducted enquiries in relation to this item, and other items too, with manufacturers and fitters and suppliers. Although he had been unable to source the certificate, his information was that the fascia and soffits had been powder-coated to marine grade.
45. Discolouration by algae is where the sun does not shine and this could be dealt with as part of an annual inspection.
46. The life of the eaves was indeterminate and there was no sign of deterioration, save for the algae. There was insufficient data to say when the eaves should be replaced.
47. The Applicants had no pricing alternative.

The Tribunal

48. The Tribunal finds that Mr German's assessment of a 5- and 50-year cleaning/replacement period was reasonable, being based on his own experience within the area and the exposed location of the building. The Tribunal noted signs of staining at the inspection and accepted Mr German's expert evidence that the powder-coating can peel and that there is a likelihood of this happening over the 50-year period. No alternative pricing was suggested by the Applicants. Accordingly, the Tribunal finds the proposals of the Respondents to be reasonable.

Cleaning of Marmorite Wall finish

Refurbishment of Marmorite Wall finish

The Respondents

49. The Respondents via Mr German indicated that there is staining to the Marmorite wall finish, which needs cleaning with warm soapy water. The BBA certificate reflects the need for regular maintenance. The proposal was to clean each 5 years at a cost of £650 and to paint after 30 years, the likely durability life, at a cost of £12,900, being the cost of access (£4,500 for scaffolding) and a contractor's time and materials (£8,400).

The Applicants

50. The Applicants argued that the finish could be cleaned on annual inspections avoiding the 5-year higher cost. They accepted that it may be possible that there would be a need to repaint after 30 years, but stressed that the paint was for colouring, not protection.

The Tribunal

51. The Tribunal finds that Mr German's assessment of a 5- and 30-year cleaning/repainting period was reasonable. The Tribunal noted signs of staining (and cracking) at the inspection and accepted Mr German's expert evidence based on suppliers' documentation. The Tribunal could not see how it would be more cost effective to clean each year rather

than each 5 years. The Applicants accepted the possibility of a need to repaint after 30 years and this seemed to the Tribunal to be an entirely acceptable assessment, given the likely discolouration after 6 cleaning operations and given the exposed position of the building, no matter that the prevailing wind was from the land. No alternative pricing was suggested by the Applicants. Accordingly, the Tribunal finds the proposals of the Respondents to be reasonable.

Replacement of Hardieplank Wall Cladding

The Respondents

52. The Respondents informed the Tribunal that this was guaranteed by the manufacturer for 10 years with a life expectancy of 50 years. Mr German had priced the replacement at £184 per square metre. The SPONS price was £181, but he had not used this because of the smaller size of the area in question. The resultant overall figure was £10,000 in year 50.
53. When over 25% of the thermal element is removed, there is a need to comply with building regulations and these may well change over the period, Mr German said.

The Applicants

54. For the Applicants, Mr Boxall agreed the 50-year period and indicated that he had calculated first on the basis of the SPONS figure, from which he had deducted 25% because this was a smaller job; he had taken out the price of cedar cladding (quoted in SPONS) having found its price and then added in the cost of Hardieboard, having found its price. His final figure was £7100.

The Tribunal

55. The Tribunal agreed with both parties that SPONS did not reflect small projects and that an adjustment was appropriate. The Tribunal believed that there was weight in Mr German's argument that building regulations may well change in the long period in question such as to be a realistic risk and cost factor. It was noted that the original estimate by the Respondents on 14 April 2016 was £12,000 and that their reduced estimate equated to a differential of only £11.60 per year per property compared to that of the Applicants. On the evidence available, the Tribunal finds the proposals of the Respondents to be reasonable.

Painting External Communal Windows

The Respondents

56. The Respondents referred to some bleaching and a proposal to recoat on a 15-year basis.

The Applicants

57. The Applicants did not dispute the requirement but disputed that this should be a Reserve Fund item.

The Tribunal

58. The Tribunal finds the proposals of the Respondents to be reasonable. The Tribunal could see no fault in a decision by the landlord to include a 15-year item within the Reserve Fund which appeared to it to be entirely in accordance with Schedule 6 Part C paragraph 14 of the

Lease. The Tribunal finds that this is "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".

Replace External Communal Windows

The Respondents

59. The Respondents believed that the double-glazed units of the windows would fail after 15-20 years and that working mechanisms would begin to seize up. The proposal was to replace the windows after 50 years.
60. Mr Chittenden argued that the windows were used in common with other tenants and he relied upon Schedule 6 Part A paragraph 3.3 and Clause 2.1 of the Lease to support the Respondents' contention that the replacement of these windows in the exterior wall of the communal areas was covered by the Service Charge.

The Applicants

61. The Applicants did not believe that this cost was covered by the Service Charge and relied upon the Tribunal's earlier decision (see above) and upon Schedule 6 Part A paragraph 3.3 and Schedule 1 to the Lease.

The Tribunal

62. The Tribunal took account of the terms of the lease. Clause 2.1 is drafted in wide non-exclusionary terms; "*In this lease unless the context otherwise requires the following expressions shall have the following meanings respectively: "Building" means the building constructed on the estate and edged purple on Plan 1 containing 12 residential flats of which the Demised Premises forms part including (without limitation) the roofs gutters pipes foundations doors floors and all walls bounding the flats.*"
63. Although there is no specific mention of the windows in the communal parts, the definition of "*Building*" appears clearly to refer to the whole building. Where the intention is to exclude elements from the building, the lease makes clear provision. For instance, the door and the windows of the demised properties are the responsibility (save for external decoration of the latter) of the individual tenants (Schedule 1). Works associated with the internal communal parts are defined and are the responsibility of 4 of the tenants (see the Tribunal's earlier Decision), but the costs of replacement of the external communal windows is the responsibility of all 6 tenants. Unlike the internal common parts, Flat 3 does enjoy and use the windows in common with all of the tenants and occupiers of the building because they provide the building and all occupiers with a wind- and waterproof environment.
64. The Tribunal finds that this is "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".

Decorate Communal Front Door

The Respondents

65. The Respondents indicated an intention to coat the door each 5 years

The Applicants

66. The Applicants agreed, having made enquiries, that a lacquer each 5 years, together with an annual wipe down with soapy water, would mean that the door would last indefinitely. Mr Boxall did not accept that this was a cost which should be included within the Reserve Fund and could be met as and when required.

The Tribunal

67. The Tribunal finds the proposals of the Respondents to be reasonable. The Tribunal could see no fault in a decision by the landlord to include a 5-year item within the Reserve Fund which appeared to it to be entirely in accordance with Schedule 6 Part C paragraph 14 of the Lease. The Tribunal finds that this is *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".*

Replace Communal Front Door

The Respondents

68. The Respondents argued that replacement of a timber door after 40 years was not an unreasonable plan.

The Applicants

69. The Applicants believed that with regular maintenance the door should last considerably longer than the 40 years proposed.

The Tribunal

70. The Tribunal agreed with the Respondents that it was not unreasonable to plan for the replacement of a timber door after a 40-year life. The position of the Applicants would mean that there was no plan at all. Accordingly, the Tribunal finds the proposals of the Respondents to be reasonable.

Refurbish Galvanised Balcony Screen Supports

The Respondents

71. The Respondents referred to the small amounts of corrosion observed at the inspection and had a proposal to wire-brush and repaint with zinc paint to re-galvanise the metal. It was Mr German's experience that all too often galvanised metal fails in aggressive environments. He had allowed £500 per balcony inclusive of access and scaffolding and labour.

The Applicants

72. The Applicants asserted that such work would be unnecessary. The metal should not be painted if that can be avoided as the paint would peel off. British Standards say that the life would be in excess of 100 years. There is no salt splash and the prevailing wind is off the land.

The Tribunal

73. The Tribunal found that the planned works were not unreasonable. A small area of corrosion was noted at the inspection and there were signs of discolouration. The building stands in an exposed position close to the sea and whilst the prevailing wind may be off the land the building will also experience wind from the sea. Whilst accepting that the product may well have a life in excess of 100 years, the Tribunal viewed 60 years as being a long period and agreed that, given the signs already of some minor deterioration, a plan to spend £600 per balcony (£500 + VAT) in 60 years time was entirely reasonable. Accordingly, the Tribunal finds the proposals of the Respondents to be reasonable.

Section 20c Application

74. The Applicants have made an application under Section 20C Landlord and Tenant Act 1985 in respect of the Respondents' costs incurred in these proceedings and have sought an order also for Mr and Mrs G Andrews of Flat 4 Berry Head House, Mr A Redfern and Ms C Turner of Flat 3 Coleton House and Mr C Eaton and Ms C Pike of Flat 4 Coleton House. Separate applications have been made by Mr and Mrs Manning, Mr and Mrs Hood, Mr Head and Mr and Mrs Mason of Flats 5, 1, 2, 6 Berry Head House and also Mr G Coles of 8 St Marys Drive who has sought an order also for tenants/owners of a further 24 properties within the Estate (listed on his application).

75. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: 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 ... ... leasehold valuation tribunal, ...are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(3) The ... tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

76. In considering an application under Section 20C, the Tribunal has a wide discretion. Having regard to all relevant circumstances. *"Its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them." "In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise."* (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000).

77. *"An order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances."*□ (**SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)).

78. The Applicants explained why they had required a hearing, citing intransigence and lack of proper engagement on the part of the Respondents and a concentration, in the briefing of Mr German, on a maintenance cycle rather than long-term major works. Other applicants pointed to a lack of confidence in the Respondents and their calculation of Service Charges following the Tribunal's earlier Decision of 7 September 2015 (Corrected 5 October 2015). The Respondents argued that the matters required resolution by the Tribunal because the Applicants would not agree reasonable proposals; they had engaged the expertise of Mr German following a failure to reach agreement with the Applicants and believed that this was the most reasonable way to resolve the issues.

79. The Tribunal explained first that its earlier Decision of 7 September 2015 (Corrected 5 October 2015) involved an interpretation of the lease of the Applicants and that the Decision did not amend the terms of any of the leases, which set out the contractual terms of the parties to those leases. The leases could be amended only by agreement or by further legal action. Whilst this point is not strictly relevant to the issues, the Tribunal was aware that it was a bone of contention between the Respondents and some of the tenants and appeared to have led, at least in part, to some of the Section 20C applications and wanted to make the position clear.

80. The Tribunal, in its Decision of 7 September 2015 (Corrected 5 October 2015) found it entirely reasonable that the Applicants brought their claims before the Tribunal and reflected that the claim in relation to the common parts at Berry Head House was successful and that there was some room for argument about the validity of the Reserve Fund requirements because of the way the lease was drafted and that the claims revealed a situation where the Reserve Fund demands did not accord with the guidance of the Code. Taking a rounded view, the Tribunal allowed the application under Section 20C of the Landlord and Tenant Act 1985. It directed that the Respondents' costs in relation to the application were not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the Applicants or for Mr and Mrs G Andrews of Flat 4 Berry Head House, Mr A Redfern and Ms C Turner of Flat 3 Coleton House and Mr C Eaton and Ms C Pike of Flat 4 Coleton House for the then current or any future year.

81. The Tribunal can see no reason for not making a similar direction in relation to the new applicants detailed in paragraph 74 above, and,

accordingly, so directs. Certainly no reason was suggested to the Tribunal by the Respondents.

82. So far as the current hearing is concerned, however, there are different issues to consider. The Tribunal has found wholly in the favour of the Respondents, so that the challenges made by the Applicants were wholly unsuccessful. Whilst it was the Applicants who made the challenge and not other tenants, the Respondents have been put to cost in meeting that challenge, which they should not, in all fairness, be expected to bear. It was clear from the information before the Tribunal that the Respondents were responsible for the earlier situation of a failure to plan properly and collect a Reserve Fund, but, following the earlier Decision of 7 September 2015 (Corrected 5 October 2015), they had engaged expert assistance and had been prepared to adapt their position in the light of information and arguments put forward by the Applicants and they had proposed, in the finality and before the request by the Applicants for a further hearing a Reserve Fund proposal which the Tribunal has found be reasonable. All tenants will benefit from the certainty that the Decision will bring to the proposals, but also to the declarations as to what a Reserve Fund in the terms of the lease may comprise. Accordingly, the Tribunal does not make the direction sought by the Applicants or those named by them or by the new applicants in respect of the reasonable costs incurred by the landlord in connection with this hearing.

83. The Tribunal notes a reference in the application by Mr Coles to "*tenants and freeholders*". Unfortunately, his application was received only on the day prior to the hearing and neither he nor those he named were in attendance. Only a tenant may make an application in accordance with Section 20C of the 1985 Act, but the Tribunal was not made aware which of those persons listed were tenants and which freeholders. It would have been contrary to the interests of justice, when having regard to the Tribunal's overriding objective, to delay the hearing to another day simply to establish the identities of the freeholders. The Tribunal makes clear, therefore, that its Decision in relation to the Respondents' costs incurred by the landlord in connection with the earlier proceedings and its Decision in relation to the Respondents' costs incurred by the landlord in connection with this hearing relate only to tenant applicants.

A Cresswell (Judge)

APPEAL

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

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

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

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

Anticipated Major Expenditure at 3 Berry Head, Sharkham Village
Items in Issue

Ref	Item of Expenditure	Likely Cost Per Year £	Cost to Individual Tenant £	Why Not Agreed	Landlord's Views
1.2	Replacement of Rainwater goods	150	25	Over estimated cost & too short an expected life	Estimated cost has been calculated with reference to BCIS Dilapidations Price Book – 6th Edition 2015. The life expectancy is as recommended by Croft Surveyors.
1.3	Cleaning of Eaves	151	25	Cleaning to be as seen necessary and not a reserve funded item.	An item of infrequent expenditure
	Replacement of eaves	87	14.49	Over provision in reserve funding	Includes scaffolding access costs.
1.4	Cleaning of Marmorite Wall finish	164	27.30	Frequency of cleaning cycle to short. Allow 10 years not 5 years.	5 yearly intervals considered not to be unreasonable.

	Refurbishment of Marmorite Wall finish	542	90.30	BBA certificate gives *'at least 30 years'* Allow a further 5 years.	
1.41	Replacement of Hardieplank Wall Cladding	262	43.68	Having obtained quotes for material supply, and with reference to SPONS, the estimated cost quoted to replace is considered to high.	The figures in SPONS do not suit small works items such as this. The estimate includes scaffolding access costs.
1.5	Painting External Communal Windows	25	4.20	The estimated cost of this item is not considered to fall into the category of a reserve funded item.	An item of infrequent expenditure
1.5.1	Replace External Communal Windows	63	10.50	This item is considered to be overprovision. They are manufactured from a new pultruded material that will have an extended life	The cost is an estimate.
1.5.4	Decorate	20	3.36	This item is not considered to be a	An item of infrequent expenditure. External redecorations required every 3

	Communal Front Door			reserve funded item.	years in the lease.
	Replace Communal Front Door	47	7.77	The door is of very substantial construction and with regular maintenance should last considerably longer than the 40 years proposed	Replacement of a timber door after 40 years is not considered unreasonable.
1.6	Refurbish galvanised balcony screen supports	54	9.03	The powder coated galvanised components, according to the appropriate BS Codes, will have an expected life in well excess of 100 years.	**The building is located in an aggressive marine environment and the failure will over time lead to corrosion and failure of the steel component.**
	Totals	1,836	306		