FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/OOHD/LSC/2019/0125**
Property	**:**	**Brook Court, Savages Wood Road, Bradley Stoke, Bristol BS32 9AA**
Applicant	**:**	**Roger Grimshaw**
Respondent	**:**	**McCarthy & Stone Retirement Lifestyles Limited**
Represented by	**:**	**McCarthy & Stone Management Services Limited**
Type of Applications	**:**	**(1) Landlord and Tenant Act 1985, section 27A** **(2)Landlord and Tenant Act 1985, section 20C** **(3) Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002**
Tribunal Member	**:**	**Judge M Davey**
Date of Consideration	**:**	**14 April 2020**
Date of Decision with reasons	**:**	**25 April 2020**

DECISIONS

The Section 27A application

The Tribunal's determination is set out in paragraphs 46 to 66 of these reasons below.

The Section 20C application

The Tribunal orders under section 20C of the 1985 Act that 20% of the Landlord's costs incurred in connection with the present Tribunal proceedings shall not be treated as relevant costs for the purpose of any future service charge demand made of the Applicants to the section 20C Application.

The paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 application

The Tribunal does not find it necessary to make a determination on this Application.

REASONS

The Applications

1. By an application ("the Application"), dated 02 December 2019, Roger Grimshaw, lessee of Flat 42, Brook Court, Savages Wood Road, Bradley Stoke, Bristol, BS32 9AA, ("the Development") applied, in his capacity as Chairman of Brook Court Residents Association to the First-tier Tribunal (Property Chamber) ("the Tribunal") for a determination under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the service charges payable under his lease for the service charge years ending 31 March 2017, 31 March 2018 and 31 March 2019. The Application specifies the particular heads of expenditure disputed each year. The Respondent to the Application, McCarthy and Stone Retirement Lifestyles Limited, is the Landlord of the long leaseholder apartment owners at the Development. The Applicant also seeks orders, limiting the recovery of the Respondent landlord's costs in the proceedings, under section 20C of the 1985 Act and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

Directions

2. By Directions dated 13 December 2019, Judge E Morrison directed that the Applications would benefit from a telephone case management hearing. This took place on 17 January 2020. The Applicant had filed confirmation that the lessees of 46 of the 50 flats at Brook Court wished to be a party to the section 20C Application. By Directions of the same date, Judge D R Whitney directed that the Applications were, by agreement of the parties, to be determined on the papers without an oral hearing, in accordance with Rule 31 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. The Directions set out a timetable for the case to proceed from thereon until determination of the Applications.

3. On 11 March 2020, the Respondent made a request of the Applicant to include an additional document in the bundle. The Applicant agreed provided he was able to reply. The document, which is a Questions and Answers document provided on 7 November 2019 by the then Finance Director of McCarthy and Stone Management Services (Mr Tim Martin) to the Development, and the Applicant's reply were included in the bundle of documents supplied to the Tribunal by the Applicant.

4. By an application to vary Directions, dated 20 March 2020, the Respondent asked the Tribunal to permit submission of a Witness Statement by Karen Shawcross, Financial Controller of McCarthy and Stone Management Services, in which she seeks to deal with statements made by the Applicant in his reply to the Respondent's costs submissions. The Applicant argues that the Tribunal should not permit submission of the Statement. He says that the Tribunal has stipulated that an application to vary Directions will not be considered if it is made later than 2 days before the start of the hearing (23 March 2020) unless there are exceptional circumstances.

5. The Tribunal decided that the witness statement should be considered because it has a bearing on the costs issue, albeit that it has been produced at a late stage in the day. The Directions of 17 January 2020 provided that the matter of the Applications would be considered on the papers in a four-week period beginning on 23 March 2020. They were considered on 14 April 2020. Furthermore, the Applicant has also set out a rebuttal of the claims made in the Statement. Accordingly the rebuttal has been considered along with the Witness Statement.

The Leases

6. The leases of the long leasehold dwellings ("the Lease(s)") at the Development make provision for certain costs incurred by the Landlord to be charged to the long leaseholders by way of service charge. The Tribunal was provided with a copy of the lease to Flat 42, which was granted, in consideration of a premium and a ground rent, by the Respondent to Roger Anthony Grimshaw and Gaynor Grimshaw for a term of 125 years from 1 June 2012. The Tenant's covenants are set out in Schedule 5 to the

Lease. Paragraph 1 of the Schedule obliges the Tenant to pay the service charge on the days and in the manner provided for by the Lease (that is to say in the Fourth Schedule to the Lease). The service charge year is 1 April to 31 March each year.

7. Services are defined in Clause 1 of the Lease as "the services rendered works undertaken and obligations assumed by the Landlord pursuant to the covenants by the Landlord contained in the Sixth Schedule and under the provisions of the Fourth Schedule and any other services provided by the Landlord to the Estate or for the general benefits of the tenants thereof."

8. In so far as relevant, "Annual Service Cost" is defined under paragraph 1.2 of the Fourth Schedule as "the total of all costs expenses overheads payments charges loss and outgoings suffered or incurred by or on behalf of the Landlord in any Year in connection with the repair maintenance decoration renewal improvement and management of the Estate and the Building…….. and the provision of all Services…… and any improvement and additional services from time to time and in the performance of its covenants in respect thereof herein contained together with such Value Added Tax as may from time to time by law be required or may properly be added to any of the foregoing and (without prejudice to the generality of the foregoing) the same shall include:-

1.2.1 the cost of procuring borrowing or providing any sums required in connection with the performance by the Landlord of the covenants contained in the Sixth Schedule where such sums exceed the monies for the time being held by the Landlord on account and such performance is in the opinion of the Landlord necessary at such time as a matter of good estate management

1.2.2 the cost of and incidental to the performance by the Landlord of the covenants contained in the Sixth Schedule of this Lease but excluding the cost of any repairs in respect of which the Landlord has received reimbursement under the policy of insurance referred to in clause 5 of the Sixth Schedule

1.2.5 all fees charges and expenses payable to any professional or other adviser agent or body whom the Landlord may from time to time reasonably instruct or employ in connection with the management and/or maintenance of the estate and in or in connection with the enforcement of the performance and observance by any tenant or tenants including the Tenant of apartments in the Building of their obligations and liabilities

1.2.6 the costs of and incidental to the provision by the Landlord of all Services ….provided in or in connection with the Estate and any part or parts thereof (including without prejudice to the

generality of the foregoing) any Council Tax or other similar local tax or rate from time to time charged on or raised by reference to any part or parts of the Estate not included in this demise or any Other Lease including any such charge tax or rate payable by the Manager

1.2.7 the cost and expense incurred by the Landlord in making and repairing maintaining rebuilding renewing and cleansing all roadways pavements sewers drains pipes watercourses and party walls party structures party fences or other items or conveniences which may belong to or be used for the Estate in common with other premises including the Adjoining Land near to or adjoining the Estate and (if so required) topping up the central heating boiler or tank providing hot water to the Premises

1.2.8 the costs of employing staff directly or indirectly for the performance of duties in connection with the maintenance and/or security of the Estate or any part thereof and the provision of Services and expenditure in relation to such employment which the Landlord may be required by statute or otherwise to pay or may in its discretion deem desirable or necessary to pay

1.2.9 the costs of the management of the Estate and costs associated with the employment of staff in connection therewith and the fees of any agent or agents appointed for the general management of the Estate

1.2.10 in the event that Landlord shall require employed staff to perform the functions which it might otherwise instruct an agent or agents to perform under paragraph 1.2.9 above or to carry out any other function in respect of which it may under the provisions hereof engage or instruct another party then a reasonable charge by the Landlord for performing such function or functions

1.2.13 the expenses of management and of the services provided by the Landlord for the general benefit of the tenants and occupiers of the Building and all other expenses reasonably incurred by the Landlord in or in connection with or relating to the Building and the Estate

9. Paragraph 7 of the Lease provides

7.1 in the event of the Landlord deeming it to be desirable in accordance with the principles of good estate management to add to, subtract from, change or very any of the Services to be provided under this Lease or the method of carrying out any Services or the layout of the Estate the Landlord shall be entitled to give notice to the

Tenant and to all the tenants of the Building under any Other Lease of such proposals (coupled with an indication of the anticipated costs of the provision of the same and/ or anticipated changes to the Annual Service Cost as a result of the same).

7.2 The Landlord shall be entitled to implement such additions, subtractions, changes or variations to the Services with effect from the date two months after such notices have been served and this Lease (and every Other Lease) shall be deemed to be amended appropriately unless a qualifying objection has been made.

7.3 A qualifying objection shall be deemed to have been made if the tenants of not less than twenty-five per cent of the apartments in the Building held under this or any Other Lease shall within four weeks of the receipt of the notice from the Landlord give notice to the Landlord objecting to or stating that they do not agree to the Landlord's proposals.

10. The Landlord's obligations contained in the Sixth Schedule to the Lease include:

2.1 As often as may reasonably be required to maintain repair tend cleanse repaint decorate and renew the Building and the Estate not otherwise demised by this or any Other Lease including (but without prejudice to the generality of the foregoing): -

2.1.1 the main structure of the Building including (but not by way of limitation) the foundations roofs and exterior and the load-bearing or structural walls and the windows of the same (but excluding the glass in the windows to any apartment in the Building) and the joist beams and other parts of the structure supporting the floors

2.1.2 the passages staircases landings lifts entrances and all other parts of the Building enjoyed or used by the Tenant in accordance with the terms hereof in common with all or any of the other tenants or occupiers of the Building (including without prejudice to the generality of the foregoing, the guest room(s))

2.2.3 the gas and water pipes conduits ducts telephone wires and equipment sewers drains and electric wires cables and tanks (including television and radio wiring and aerials intruder alarm systems fire detecting and fire fighting equipment) and all other installations in under or upon the Building and the Estate and the Adjoining Land enjoyed or used by the Tenant in common with all of any of the other tenants or occupiers

of the Building and the Adjoining Land but excluding such installations and services as are incorporated in and exclusively serve the Premises

2.1.4 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)

3. So far as reasonably practicable, to keep cleansed lighted and in tidy condition (and as considered appropriate by the Landlord in respect of internal areas heated and in good decorative order) the passages staircases entrances and forecourts gardens grounds and, if provided, resident's lounge(s) guest room(s) residents' kitchen laundry stores, Manager's Apartment (if any) lifts and all parts of the Estate enjoyed or used by the Tenant in common with all of any of the other tenants or occupiers of the Building.

4. To pay and discharge all rates and taxes and water and sewage charges and all assessments and outgoings whatsoever (whether or not of an annual or recurring nature) which now or may hereafter be assessed, charged or payable in respect of any part of the Estate enjoyed or used by the Tenant in common with the other tenants or occupiers or in respect of the Manager's Apartment (if any)

The Law

11. The law is set out in the Annex to these reasons.

The Applicant and Respondent's cases

12. The Applicant questions the payability of certain service charge items in the years ending 2017, 2018 and 2019. The items are as follows.

Utility charges for years ending 2017, 2018 and 2019 (£1,261).

13. The Applicant says that from November 2012 to February 2017 communal electricity charges in the service charge simply reflected the sums charged to the Respondent by the supplier, which were then passed on by the Respondent to leaseholders in the service charge. However, since that time the charges of a broker (totaling £308) and administration fees (totaling £953) have been included by way of electricity costs in the service charge. The Applicant asserts that the Management Fee should absorb these costs and therefore argues that if these functions were no longer part of that Fee the disputed charges should be refunded to the leaseholders.

14. The Applicant draws attention to the Purchaser Information Pack where it is stated that the Management Fee includes "Negotiating, overseeing and administrating National and Regional contacts" in support of his contention that this covers placing and overseeing of electricity supply contracts. He says that if that has now ceased, since the use of a broker to place such contracts, the Management Fee should have been correspondingly reduced. He says that the broker's fee is not for the supply of electricity. The Applicant also argues that the Landlord is in breach of Clause 7 of the Fourth Schedule of the Lease by reason of having varied the service charge without recourse to that provision.

15. The Respondent says that when the Purchaser Information Pack was drafted in April 2011 the Management Company tendered each development's utility contract on an individual basis taking the best rates available at the time. It says that because the cost of electricity was increasing it decided in 2017 to use a broker to tender for all developments and use their combined purchasing power to obtain the best possible rate. The Respondent says that the Management Company does not take any commission on the contract with the broker. It explains that the broker cost is not included in the management fee because the Management Company staff still needs to liaise with the broker and work to ensure that the scheme operates efficiently for all residents. The Respondent says that the broker costs are minimal at £308 for 3 years and are part of the cost incurred in supplying electricity. It further submits that the fee of £953 is for meter operating and data collection costs, which are direct pass through costs charged by Siemens.

Software recharges for years ending 2018 and 2019 (£640)

16. On 31 August 2018 McCarthy and Stone Developments Limited in voiced the Management Company for IT software overheads (Qube (their document management system), Intranet, MS Office & Desktop Network Support) incurred that year. They issued a similar invoice on 31 August 2019 for the following year. These invoices were then re charged to the residents through the service charge. (The recharged costs for the two years were £640). The Applicant argues that, as in the case of the disputed electricity charges, software charges must have been incorporated in the Management Fee for the first five years and that if they have been removed and charged separately that Fee should have been correspondingly reduced. The Applicant also argues that the Landlord is in breach of Clause 7 of the Fourth Schedule of the Lease, by reason of having varied the service charge, without recourse to that provision. The Applicant says that the overheads of the parent company are not a legitimate service charge cost.

17. The Respondent says that the software costs are charges that were incurred by the Landlord on behalf of the development and its proper management and the cost amounts to £254 pounds per development. The Respondent says that these costs were not charged to the

Management Company prior to 2017. However, it says that they have been incurred and the Respondent submits that they are recoverable as provided for by the service charge provisions of the Fourth Schedule to the Lease. The Management Company says that it does not make any profit or take any commission on this cost but simply passes it on to the residents through the service charge.

Heating invoices: Year ending 31 March 2018 (£1,368)

18. The first disputed invoice, for £744 is dated 31 January 2018. It was issued by CC5 Ventures Limited in respect of an investigation of heating flow issues and noise in the system. The second invoice (£912), also from CC5 Ventures and dated 1 February 2018, was for isolating and replacing a faulty differential pressure valve above the ceiling on the second floor of Brook Court including work on the heat pump in number 1. The Applicant submits that these invoices should not be recharged to the residents because the Respondent should have notified them to the NHBC within 2 years of the date of Completion (i.e. by 13 November 2015) under section 2 of the NHBC warranty.

19. The Respondent says that the works were carried out more than 5 years after the Development opened and would not have been reported to the NHBC as they were due to fair wear and tear, which is excluded under the policy. In any event section 2 of the warranty would not apply be cause of that exception. Furthermore, the cost did not meet the minimum claim threshold by the NHBC.

Five year fixed wiring testing in year ending 2018 (£1,721)

20. The Applicant argues that a sum charged to the contingency fund for a wiring test carried out on 2 May 2017 was not provided for in the contingency fund schedule and plan but was included in a draft update issued on 24 January 2018. He submits that because the IEE recommends testing every ten years for domestic premises the sum charged should therefore be refunded.

21. The Respondent submits that it carries out fixed wire testing to the communal parts of developments to ensure that they are safe and meet various legal obligations. It says that the Electricity Safety Council, in its guidance, "Electrical Safety in Communal Areas of Residential Properties" recommends that electrical installations are periodically inspected and tested every five years in communal areas of residential premises. The Respondent says that any recommendations for less frequent inspection of electrical wiring in domestic premises relates to the wiring in residents' apartmentsonly. Brook Court opened in November 2012 and the electrical wiring test was carried out in 2017. The Respondent says that the original asset management plan did not include provision for testing of wiring because the plan was intended to schedule the cost of major works for the purpose of

calculating the necessary contributions from the service charge to the Development contingency fund or sinking fund to cover the future costs of these works. It says that the wiring inspection is not such a cost, although it was included in the revised plan at the request of the Applicant. The Respondent submits that the charges are recoverable under the service charge provisions in the Lease.

Balcony Leaks in year ending 2018 (£2,500)

22. The Applicant submitted that there is a problem of rainwater run off from the balcony to apartment 48, which has caused discolouration of the wall render below. The Applicant submits that this is the result of an inherent design fault. The Respondent made a claim on the NHBC policy but the claim was rejected on the basis that external staining is purely aesthetic. The Applicant says that the Respondent has accepted that a solution is required but that none has been implemented so far because the Respondent proposes that this should be a service charge cost. The Applicant says that they have costed the solution at £2,500 and that as a compromise the Residents Association Committee has proposed that it would put a resolution to the residents that any excess amount be paid from the reserve fund. It says that the Respondent is responsible for the repair because it is a design fault.

23. The Respondent submits that the discolouration is aesthetic and that if it were remedied this would be a service charge cost to the development.

Gutter and soffit cleaning – year ending 2018 (£1,600)

24. The Applicant says that the Respondent incurred two charges in 2018 as a result of the gutters and soffits being cleaned twice in 2018 rather than once in 2018 and once in the following year. The Respondent agreed that the sum would be a deficit in the 2018 accounts and be carried forward and charged in 2019. However, there was a deficit of £4,033 in the year ending 31 March 2019 The Applicant says that when the rolled forward deficit of £1,600 was added to that sum it produced a deficit of £5,633. This figure was published in September 2019. The Applicant says that this should have been recovered by way of additional monthly payments from October to March 2020, rather than being taken in October and December 2019. He refers to the Purchaser Information Pack.

25. The Respondent submits that the sums due were properly invoiced.

Washing machines: Year ending 2019 (£577)

26. The Applicant referred to a draft update of the contingency fund schedule and plan, received on 24 January 2018, which included a budget of £3,600 for replacement of washing machines. However in the year ending 31 March 2019 the Respondent purchased washing machines on 28 September 2018 (£303) and 26 March 2019 (£274)

from the service charge account. The Applicant argues accordingly that if such items are being purchased from service charge funds the allocation in the reserve fund for replacement washing machines should be returned from the contingency fund to the service charge account for the year ending 31 March 2019.

27. The Respondent submits that following a change of policy it now treats appliances as consumable items to be dealt with under the service charge as permitted by the Lease. It says that this will maintain the contingency fund for future asset replacement of large and expensive works such as section 20 1985 Act works. Thus the sum of £577 was charged to the service fund and not taken from the contingency fund.

Remedial works: year ending 2019 (£1,910).

28. The Applicant argues that an invoice from PTSG Electrical Services Ltd, dated 10 March 2019, should have been charged to the contingency fund rather than the service charge. The invoice related to repair works to the earthing rods for lightning protection. The Applicant submits that in the year ending 31 March 2018 works of similar value (Heating, £1446 and five-year fixed wiring test, £1721) were both charged to the contingency fund.

29. The Respondent submits that it is entitled to use its professional expertise to determine whether an unexpected charge should be paid from the service charge or the contingency fund bearing in mind the interest of all current and future residents.

Suppliers: repairs - year ending 2019 (£755)

30. The Applicant argues that two invoices dated 8 November 2018 and 8 February 2019 were for windows and door repairs and should not have been charged to the service charge. He says that the second invoice was for replacement hinges, which were part of the apartments and not in the common areas. Accordingly the cost should not have been charged to the service charge. The Applicant says that the earlier invoice was for rectifying various installation faults by the original supplier, Plastal, which went out of business. The Applicant argues that the Respondent should have claimed under a warranty in respect of these works and therefore the cost should be refunded to the service charge.

31. The Respondent submits that to ensure the windows function correctly, occasional repairs are required and this cost is normally taken from the repairs and maintenance budget. It says that the budget is designed to deal with minor low-cost maintenance is the development and in this case was used for minor repairs to the casement windows.

MPLC Invoice: year ending 2019 (£59)

32. Each year the Respondent obtains a licence from the Motion Picture Licensing Company Limited (MPLC), permitting the development to show films and other audio-visual content to residents in the lounge, which has been deemed to be a public location. The licence runs from 1 May to 30 April. On 1 March 2019 MPLC invoiced the Respondent for a licence in respect of the year 1 May 2018 to 30 April 2020. The Applicant submits that the Respondent re-charged the fee of £59.03, to the residents twice, first, by an accrual in 2018-9 and second by a charge in 2019-20. The Applicant argues that the latter was correct and the former wrong. Accordingly he submits that the first charge should be refunded.

33. The Respondent says that MPLC issued an invoice on 1 March 2018 in respect of a licence for the period from 1 May 2018 to 30 April 2019 and an invoice on 1 March 2019 in respect of the period from 1 May 2019 to 30 April 2020. The Respondent explains that this resulted in the invoices being charged in advance in each case. It says that this will be corrected in the year ending 31 March 2020, as residents will not receive an MPLC charge for that financial year.

Other submissions

34. In its statement of case the Respondent states that in 2017/18 the service charges increased by 1% less than inflation due to its careful cost management and national purchasing power. The Applicant argues that this was not the case because total expenditure in 2017-18 was in fact £124,000 rather than £120,211. The Applicant argues that it was only reduced to the latter sum in the accounts by virtue of a contribution from the Managing Agents to reimburse the service charge account for sickness payments incurred in 2016-17. Thus the Applicant says that if this sum were added to the 2017-18 accounts the increase was more like 11%. Furthermore, he says that the budget for 2020-21 is for £139,513 "which is well above 3 years inflation"

Section 20C

35. The Applicant has requested an order under section 20C of the 1985 Act preventing the Respondent Landlord from recovering its costs incurred in connection with the present proceedings by way of any future service charge demand.

36. The Respondent says that it will seek to recover its costs from the service charge in accordance with the terms of the Lease, relying on Clause 2.6 of the Lease and Clause 1.2.5 of the Fourth Schedule to the Lease

    Clause 2.6 states that "any reference to costs or to fees which are or may be payable by the Tenant shall include but not be limited to all legal costs and barristers', surveyors' and architects' fees and other

professional fees and all other expenditure incidental to them or attendant on them incurred by the Landlord (including Value Added Tax).

Clause 1.2.5 of the Fourth Schedule provides that "all fees charges and expenses payable to any professional or other adviser agent or body whom the Landlord may from time to time to time reasonably instruct or employ in connection with the management and/or maintenance of the Estate and in or in connection with the enforcement of the performance and observance by any tenant or tenants including the Tenant of apartments in the Building of their obligations and liabilities."

37. The Respondent stated that the legal cost it had incurred for the application is £2,148.56, which is 53.5 hours at an hourly rate of £40.16 (inclusive of VAT). The Respondent provided a breakdown showing the date, time and nature of the relevant tasks involved.

38. The Applicant stated that the owners of 46 apartments had joined in the section 20C Application because of the unreasonable behaviour of the Respondent in the review of the accounts. He said that the residents had received the draft accounts in May 2019 and submitted questions in writing to the Respondent shortly thereafter but received no reply on the ten issues raised by this Application during the following six months. He said that at the accounts meeting on 7 November 2019, to review the final accounts for the year ending 31 March 2019, residents were given a letter five minutes before the start of the meeting, which replied to the ten issues but did not answer the questions raised. He said that the Respondent refused to answer any of the questions during the meeting and referred to a statement in the letter indicating that further questions would result in costs being charged to the service charge. The Applicant said that the letter was followed up immediately with a demand for the deficit of £4,033 together with the statement of the tenants' rights and obligations, which informed the recipients that the demand could be challenged by an application to the First-tier Tribunal.

39. In her witness statement of 20 March 2020, Karen Shawcross, the Financial Controller of McCarthy and Stone Management Services, stated that before promotion to her present role in February 2020, she had been its Finance Manager for four years and part of that role involved responding to finance related queries from residents of the developments managed by the Management Company on behalf of the Respondent. Ms Shawcross denied that the Respondent had failed to respond to the Applicant on the ten issues in the six months from May 2019. She provided details of communications between herself and the Applicant in the period between 13 May 2019 and 4 October 2019 together with supporting documentation, which, the Respondent submits, demonstrates that it had not failed to respond to queries in that period.

40. In response the Applicant states that the Respondent had replied to several issues which do not form part of the present Application, thereby reducing the deficit in the service charge account, but submits that the Respondent had not addressed all of the issues raised in respect of the ten matters that form the subject matter of the Application. He therefore had not sought to mislead the Tribunal.

Discussion and determinations

41. There is clear disagreement between the parties as to whether service charge increases at Brook Court have been as low as claimed by the Respondent as well as whether using a broker for the electricity contract has resulted in the savings claimed. However, these issues are outside the scope of the present section 27A Application

42. That Application stems from a deficit of £4,033 in the audited service charge accounts for the development at Brook Court in respect of the service charge year 1 April 2018 to 31 March 2019. However, residents had also made an application to the Property Ombudsman on 15 March 2019 in respect of the previous service charge year. The adjudicator had rejected that application as being outside the Ombudsman's jurisdiction. This has also played a part in the Applicant having recourse to the Tribunal.

43. The Development at Brook Court is a retirement community operated by the Respondent Landlord and opened in 2012. It contains 50 flats and common parts. Each Flat has been sold on a 125-year lease that reserves a ground rent and service charge. The ground rent and service charge contributions differ between one and two bedroom apartments. There are 21 two-bedroom apartments (including number 42) and 29 one-bedroom apartments. McCarthy and Stone Management Services Limited, ("the Management Company"), a member of the McCarthy and Stone group of companies, manages the development on behalf of the Respondent.

44. The Applicant says that, on 17 May 2019, the Residents' Association raised a number of queries with regard to the service charge accounts for the year ending 31 March 2019. He states that, not having received what the members considered to be a satisfactory resolution of the matters raised by the conclusion of the presentation of the Audited accounts on 7 November 2019, the Applicant applied to the Tribunal on 2 December 2019. The matters raised relate to the service charge years ending on 31 March 2017, 31 March 2018 and 31 March 2019. In essence the Applicant submits that in the case of each matter costs, have been wrongly attributed to the service charge account or contingency fund.

45. The Applicant is Mr Roger Grimshaw, of 42 Brook Court, who is also the Chairman of the Brook Court Residents Association. Mr Grimshaw has signed the Application in that capacity but the other leaseholders at

the Development have not applied to be joined to the section 27A Application. Nevertheless, it is hard to imagine that the Respondent would not apply any decision of the Tribunal to all of the leases at the Development. Furthermore, the owners of 46 of the 50 flats have joined the section 20C 1985 Act application made by Mr Grimshaw. Mr Grimshaw has also made an application under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002. The section 20C application seeks an order that would prevent the Landlord from treating its costs incurred in connection with the proceedings before the Tribunal as costs that could be recovered by way of a future service charge demand (if the lease would otherwise permit their recovery as such). The 2002 Act application is for an order that such costs should not be recoverable from Mr Grimshaw personally by way of an administration charge (if the lease would otherwise permit recovery of the costs as such).

46. The Tribunal's determination in respect of each of the matters raised by the section 27A application is as follows.

Utility charges: years ending 2017, 2018 and 2019 (£1,261).

47. It is not disputed that the Landlord is obliged by the terms of the Lease to keep the common parts of the Development lighted and, in the case of internal areas heated, as appropriate. This means that the Landlord will incur utility charges and these may be recovered by way of service charge. Since 2017 the Respondent has engaged the services of a broker to place the utility contract(s) for all developments with a view to making savings by economies of scale. Neither the Respondent nor the Management Company receive a commission. There is a debate between the parties as to how successful the scheme has been but, as the Applicant acknowledges, that is a side issue, which is not before the Tribunal. What the Applicant challenges is the fact that certain electricity supply related charges have been charged separately and have not been treated as management tasks covered by the fixed cost Management Fee. These charges are the broker's fee (£308 for the three years) and charges (of £953) raised by Siemens in respect of meter operation and data collection.

48. The Tribunal accepts the Respondent's submission that the use of a broker does not reduce the tasks performed by the Management Company because the staff still needs to liaise with the broker and ensure that the scheme works efficiently. It is also proper for the broker's fee to be treated as part of the costs incurred by the Respondent in fulfilling its obligation to provide the Services, which includes electricity. Those costs are not confined to the fuel costs themselves. The charges raised by Siemens are direct costs related to the electricity supply and as such are properly passed on to the residents under that head of the service charge. There is therefore no refund due to the service charge account in respect of any of the disputed costs under this head. There has also been no change in the

services provided sufficient to activate Clause 7 of the Fourth Schedule of the Lease.

Software recharges for years ending 2018 and 2019 (£640)

49. The simple question is whether overheads incurred by the Respondent with regard to its IT systems are recoverable costs under the service charge. The Respondent argues that they are because the Management Company was invoiced by the Landlord parent company and has therefore passed it on to the residents as a service charge cost. The Applicant says that it must be a service, which is provided in consideration of the Management Fee because the Management Company manages the development. Indeed these costs have never been separately charged between 2012 and 2018.

50. The Annual Service Cost, which is recoverable by way of service charges is widely defined in paragraph 1.2 of the Fourth Schedule to the Lease as "the total of all costs expenses overheads payments charges loss and outgoings suffered or incurred by or on behalf of the Landlord in any Year in connection with the repair maintenance decoration renewal improvement and management of the Estate and the Building..... and the provision of all Services....."

51. However, the Landlord has delegated management of the development to the Management Company and the service charge includes a management fee. That fee would ordinarily cover costs such as IT expenses, as it obviously did for the first five years. Had there not been a Management Company such costs would have been a recoverable expense of the Landlord. The Tribunal therefore accepts the Applicant's submission and determines that this sum is not recoverable as a separate service charge cost in respect of this development.

Heating invoices: Year ending 31 March 2018 (£1,368)

52. The Applicant's case is that because the residents had notified the Landlord of these heating faults within the 2 year NHBC warranty period, which ended on 13 November 2015, the costs of the two invoices of 31 January 2018 and 1 February 2018 were not reasonably incurred because the Respondent should have claimed under section 2 of the warranty. The Respondent's submission that the works were carried out more than 5 years after the Development opened and would not have been reported to the NHBC as they were due to fair wear and tear, which is excluded under the policy, does not answer this argument. However, whilst there were undoubted problems with the heating system that were reported to the Respondent before 13 November 2015 it has not established by the Applicant that the particular defects that were the subject of the disputed invoices were reported in that time period. Equally it has not been established by the Respondent that had that been the case the wear and tear exception would have applied at that time. However, the Respondent says that

the cost did not meet the minimum claim threshold by the NHBC. It follows that the cost of the repairs is recoverable it being the Landlord's responsibility to maintain and repair the heating system and for such costs to be recovered by way of service charge.

Five year fixed wiring testing in year ending 2018 (£1,721)

53. The sole issue is whether the charge was properly incurred. The Tribunal determines that it was. The decision to carry out the test after 5 years was a reasonable decision. The Electrical Safety Council Guide provides guidance to landlords, which recommends that testing be carried out every five years. (See page 14 of the Guidance reproduced at page 213 of the bundle). The Tribunal therefore determines that the sum charged is payable.

Balcony Leaks in year ending 2018 (£2,500)

54. The Applicant submitted that the discolouration to the façade of the building caused by water runoff from the balcony to apartment 48, is attributable to an inherent design defect and as such the cost of the remedy is not properly chargeable to the service charge. The Respondent submits that the discolouration is aesthetic and that if it were remedied this would be a service charge cost to the development.

55. This matter is in fact outside the Tribunal's jurisdiction under this Application. No repair or other remedial works have been carried out and no service charge demanded in respect of a repair or proposed repair. The Tribunal proceedings are also not an action for breach of covenant on the part of the Landlord, which would be a matter for the court. However, the Applicant's submission that the cause is a design defect (which has not been established) and that the cost of its remedy would not therefore be recoverable by way of service charge is not tenable. The Landlord's repairing obligation in paragraph 2.1.1 of the Sixth Schedule to the Lease could in principle extend to design defects dependent on the circumstances in which case the cost would be recoverable under paragraph 1.2.2 of the Fourth Schedule to the Leases. However, as explained above, it would be premature for the Tribunal to make a determination on this matter in the absence of an application and relevant evidence regarding the same.

Gutter and soffit cleaning: year ending 2018 (£1,600)

56. This head nominally concerns a sum erroneously incurred by the Respondent in the financial year ending 31 March 2018. Because the cost should have been incurred in the year ending 31 March 2019 it was agreed by the Respondent, in an email to the Applicant dated 20 August 2018 that it would be treated, for service charge payment purposes, as if it had been incurred in the financial year ending 31

March 2019. The expectation was that it would be absorbed by a surplus in that later year. However there was a deficit of £4,033 to which was added the £1,600 rolled over sum producing a deficit of £5,663. The Applicant then argues that this deficit should have been payable my monthly instalments from the time it was identified at the end of September 2019 together with the (advance) monthly service charge instalments for the year 2019-2020.

57. The Applicant relies on a passage on page 10 of the Purchaser Information Pack which, after referring to the audited accounts produced in September each year for the previous financial year, goes on to state "if the cost has been greater there is a deficit and you will have contributed less than was necessary to meet that expenditure. Therefore, in the following year's bill, that is either a credit or an extra cost item, identified as an adjustment of previous year."

58. Because the advance service charge payments are payable monthly the Applicant submits that any carried forward deficit should also be payable monthly. However, paragraph 5.2 of the Fourth Schedule to the Lease provides in effect that when the (final audited) Service Charge for a year (as opposed to the Advance Payment) has been identified it becomes payable on demand less any Advance Payments made in respect of that year. It follows that where the Service Charge expenditure is equal to or less than the Advance Payments nothing is payable. However, where the Service Charge expenditure exceeds the advance payments the surplus becomes payable on demand. Thus the Tribunal determines that the Respondent was entitled to make a demand when it did in respect of the surplus for the year 2018-2019.

Washing machines: year ending 2019 (£577)

59. Paragraph 1.2.14 of the Fourth Schedule to the Lease includes as a service charge cost "such sums as 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 interests of good estate management." (The Contingency Fund mainly consists of sums charged under schedule 5 to the Lease on re-sales of apartments).

60. The Applicant says that on 24 January 2018 the residents were provided with a draft contingency fund schedule and plan, for the year ended 31 March 2018. The draft plan, which the Applicant provided, showed anticipated Contingency Fund expenditure for a number of items. It included washing machines on the supposition that 10 machines would be required over 5 years at a cost of £300 per machine, totalling £3,000. Thus the annual sum would be £600. The total annual sum for all heads of expenditure amounted to £26,735.62. It was then calculated that there would be a likely annual contribution from the charge on re-sales of £10,475. That left £16,260.62 payable by way of service charge sinking fund payments,

amounting to £268.77 per one bed apartment and £403.16 per two bed apartment.

61. In the year ended 31 March 2019 the Respondent purchased washing machines on 28 September 2018 (£303) and 26 March 2019 (£274) from the service charge. It says that following a change of policy such items would no longer be funded from the contingency fund, which will be retained for major items of expenditure. The Applicant accordingly argues that this change should be reflected in a change to the Contingency Fund accounts. The Tribunal agrees but not in the way proposed by the Applicant, that is to say by returning £3,600 from the contingency fund to the service charge account for the year ending 31 March 2019.The £600 per annum allocated to washing machines should be removed from the contingency fund budget. This would make the annual sum £15,660.20. The reduction which should be reflected in the sinking fund sums demanded by the Respondent in the service charges for the year 2018-2019 and onwards for five years inclusive.

Remedial works: year ending 2019 (£1,910).

62. The Applicant argues that an invoice from PTSG Electrical Services Ltd, dated 10 March 2019, should have been charged to the contingency fund rather than the service charge. The invoice related to repair works to the earthing rods for lightning protection. The Applicant submits that in the year ending 31 March 2018 works of similar value (Heating, £1446 and Five-Year Fixed Wiring Test, £1721 – see above) were both charged to the contingency fund.

63. The Respondent submits that it is entitled to use its professional expertise to determine whether a an unexpected charge should be paid from the service charge or the contingency fund bearing in mind the interest of all current and future residents.

64. The Tribunal agrees with the Respondent. Indeed the contingency fund budget makes no provision for the kind of repair works covered by this invoice.

Suppliers: repairs - year ending 2019 (£755)

65. The Tribunal agrees with the Respondent that the disputed invoices dated 8 November 2018 and 8 February 2019 were for window repairs, which fall within the Landlord's repairing obligation in Clause 2.1.1. of the Sixth Schedule to the Lease and are therefore recoverable by way of service charge. There is no evidence that the Landlord had failed to claim under an applicable warranty in respect of the disrepair in question.

MPLC Invoice: year ending 2019 (£59)

66. In his Application the Applicant asked why the MPLC invoice was accrued in the year 2018-2019 when it had already been paid in the previous year? The Respondent explained in its position statement that the accrual was because the invoice had been raised by MPLC on 1 March 2019 and paid by the Respondent. However, the invoice was in respect of a licence from 1 May 2019 to 1 May 2020 and therefore it was accounted for in advance in 2018-19 and would not be charged again in the following year. Accordingly a refund was not necessary. The Applicant then argued that the residents had been charged twice, first, by the accrual in 2018-19 and then again in 2019-20. The Tribunal agrees with the Respondent that this is not the case. It is simply that the charge in respect of the licence for 1 May 2019-30 April 2020 was accounted for in advance and will not be recharged in the 2019-20 accounts.

Section 20C of the 1985 Act

Consideration and determination

67. The Applicants seek an order preventing the Landlord from recovering its costs incurred in connection with these Tribunal proceedings by way of a future service charge demand. Section 20C confers a wide discretion to make such order on the application as the Tribunal considers just and equitable in the circumstances.

68. Judge Rich QC said in *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005: "so far as an unsuccessful tenant is concerned it requires some unusual circumstances to justify an order under section 20C in his favour."

69. In the present case, the question therefore is whether there are circumstances that justify a section 20C order in respect of the whole or part of the Landlord's costs in respect of that Application. The Tribunal does not accept that the Respondent has acted unreasonably in relation to the matters raised by the Application. It has honestly sought to answer queries raised by the Applicant. However, the Tribunal also accepts that the Applicant's reference to having had no response to his ten matters between May and November 2019 was a reference to his belief that he had not had what he believed to be a satisfactory explanation. The Tribunal does not believe that either party has sought to mislead the Tribunal.

70. The Applicant has succeeded on two of the ten matters raised in the section 27A Application and having considered all relevant circumstances the Tribunal makes an order under section 20C of the

1985 Act that 20% of the Landlord's costs incurred in connection with the present Tribunal proceedings shall not be treated as relevant costs for the purpose of any future service charge demand made of the Applicants to the section 20C Application.

71. However, it is important to note that this decision is without prejudice to the question of whether the Lease would in any event permit the Respondent to recover those costs by way of a future service charge demand. That would depend on the construction of the Lease. No such demand has been made at the time of this Application and therefore the Tribunal expresses no view on this matter.

Paragraph 5A of Schedule 11 to the 2002 Act

72. No administration charge in respect of the Landlord's costs incurred in connection with these proceedings has been demanded at the time of the Application, nor has the Respondent indicated any intention to make such a demand. Thus the Tribunal expresses no view on whether the Lease permits such a charge. It follows that it is not necessary for the Tribunal to make or refuse to make an order at this stage under paragraph 5A of Schedule 11 to the 2002 Act.

Judge Martin Davey

25 April 2020

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application 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, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal

will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

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

Annex: The Law

Landlord and Tenant Act 1985

Section 18(1) defines a "service charge" as:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent:-

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

Section 19(1) provides that:

"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".

"Relevant costs" are defined for these purposes by **section 18(2)** of the 1985 Act as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

Section 20C(1) provides in so far as relevant

"that a tenant may make an application for an order that all or any of the costs incurred by the landlord in connection with proceedings before a court or 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."

Section 20C(3) provides that "The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

Section 27A provides that

(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.

Commonhold and Leasehold Reform Act 2002

Paragraph 5A of Schedule 11 provides that

(1) A tenant of a dwelling in England make 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 the kind mentioned in the table and
    (b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to these 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 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