FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UQ/LIS/2020/0005
Property	**:**	54a Woodbury Park Road, Tunbridge Wells TN4 9NG
Applicant	**:**	Girish Gupta Limited
Representative	**:**	Brethertons LLP, solicitors
Respondent	**:**	Mr Sergiusz Jan Przygoda
Representative	**:**	
Type of Application	**:**	Transferred Proceedings Service and Administration Charges
Tribunal Member(s)	**:**	Judge J Dobson Mr K Ridgeway MRICS
Date of hearing	**:**	27th August 2020
Date of Decision	**:**	9th December 2020

DECISION

Summary of the Decision of the Tribunal

1. **The Tribunal determines that none of the service charges and administration charges included within the claim are payable**

Applications

2. The Applicant is the freehold owner of 54 Woodbury Park Road, Tunbridge Wells TN4 9NG and brought proceedings in the County Court, issued on 12th August 2019, for unpaid monies principally comprising service charges and administration charges, and clams for unpaid ground rent, interest and costs. Those proceedings have claim number F02YM554 and an appropriate Order, reflecting the effect of this Decision, will be issued in those proceedings. The claim was defended by the Respondent, the leasehold owner of 54a ("the Property), under a lease dated 17th June 2008 (the Lease"), including challenging the reasonableness of the service charges.

3. The proceedings were transferred from the County Court to the Tribunal under the Deployment Project by District Judge Murch by Order dated 17 October 2019. The Tribunal was therefore required to make a determination under section 27A of the Landlord and Tenant Act 1985 and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as to whether certain service and administration charges claimed within the County Court claim are payable by the Respondent- the Tribunal has made no determination as to any sums post-dating those. In addition, the Tribunal Judge sitting as a Judge of the County Court was required to decide the claims for ground rent, interest and costs. The parties are referred to in this Decision by the usual titles given in Tribunal documents above and below Order.

Directions made/ history of the case following transfer to the Tribunal

4. Directions were given on 18th February 2020 following a Case Management hearing, although those Directions were not included in the hearing bundle. The Tribunal noted that the Respondent had stated that he was willing to engage in mediation. The Applicant's Counsel, Ms Lyne, stated that the Applicant was unable to make a decision until the Respondent's case was clarified. At that time a hearing in person was envisaged together with an inspection of the Property. Matters needed to be varied as a consequence of the Covid-19 pandemic. Further Directions were therefore given on 23rd March 2020 and allocating the County Court case to the Small Claims Track. Subsequent difficulties arose with service of documents and so additional Directions were given on 11th May 2020, varying dates and listing a further Case Management Hearing after service of statements of case and evidence, in part due to uncertainty as to how the Tribunal would be able to proceed to a hearing and in what manner that

could be held, in light of ongoing impact of the pandemic. The Respondent filed and served an amended statement of case, including a counterclaim.

5. That further Case Management Hearing took place on 7th July 2020, at which the Tribunal addressed issues arising in respect of a claim for set-off and any potential counterclaim- more fully dealt with below- and gave further directions, including listing the final hearing. The Applicant queried the Counterclaim lodged by the Respondent as falling outside of the case transferred by the County Court and which the Respondent had not applied for permission to bring later than the Defence in any event. The Tribunal considered that the matter would need to be transferred back to the County Court to consider permitting a late counterclaim and any referral back to the Tribunal. The Tribunal was also concerned at the potential for overlap between any defence by way of set-off and any claim which the Respondent may wish to pursue and the potential for the Respondent being precluding from pursuing such claim later if an application were not made then. The upshot was that the Respondent wished to pursue a claim for set off only within these proceedings, with any counterclaim as such being agreed by the Applicant not to be dealt with by the Tribunal in these proceedings but to be pursuable separately if so desired. Paragraph 14 of the Further Directions recorded that the Tribunal would only determine such matters as necessary to determine whether the service charges and other sums claimed were due, intended to convey that the Tribunal would address set-off to the extent of the Applicant's claim otherwise accepted but no potential counterclaim extending beyond that.

6. On 20th August 2020, the Applicant's representative applied for permission to rely on a further witness statement from one Mr Stuart Kent. A further application was made by the Respondent, to adduce further witness evidence from one Darius Clayton. Despite the late nature of those applications, the Tribunal considered that it was, on balance, appropriate to grant both of them. The Applicant provided a bundle of documents for the hearing, including the additional witness statements permitted.

The law

7. The relevant statute law related to service charges and administration charges is annexed to this Decision. The key elements in relation to the disputed service charges for the purpose of this Tribunal Decision are found in section 19 of the Landlord and Tenant Act 1985 and Schedule 11 paragraph 2 of the Commonhold and Leasehold Reform Act 2002. Those need to be considered in the context of the provisions of the Lease and in respect of such items as the Lease requires the Applicant to attend to and the Respondent to contribute to the cost of.

8. In broad terms, the questions for the Tribunal in respect of service charges are whether sums demanded on account are reasonable, whether service charges for costs and expenses are reasonable for works and services of a reasonable standard and whether such sums are recoverable pursuant to the terms of the given lease. The Tribunal will decide the sums payable as service charges.

9. There are innumerable case authorities in respect of service charge disputes and Tribunal is often referred to some, often several, of them, although many are very much a reflection of the facts of the given case. The Applicant only referred to one case in this instance, one of those often cited to this Tribunal, that of *Yorkbrook v Batten* [1986] 18 HLR 25. The aspect cited was the need for a lessee alleging unreasonableness to establish a prima facie case before the lessor must meet the allegations and prove reasonableness.

10. The Court of Appeal also explained that a lessee will need to specify the general nature of his or her case but more particularly about the prima facie case said that it the lessor gives evidence which establishes a prima facie case then the landlord will need to meet those "and ultimately the courts will reach its decision". The requirement is not an unduly high one and does not alter the requirement for the Tribunal to consider matters in the context of the Lease. The Tribunal ought also to give some allowance for the lessee being unrepresented and English not appearing to be his first language, without overdoing that and so imposing too great a disadvantage on the Applicant.

11. More particularly, the Tribunal must determine the reasonableness of the four elements the total charges for which make the sum claimed in the County Court proceeding. That is to say the July 2018 payment on account, the Autumn 2018 insurance, the January 2019 payment of account and the administration fees.

The Lease

12. The terms of the Lease governing the relationship between the parties is fundamental and any consideration of the issues must be undertaken in the context of the provisions contained in the Lease.

13. The relevant parts of the Lease firstly read as follows:

> 1.6 "the demised premises means the property described in the First Schedule hereto
>
> 1.7 "the Main Structure" means the main structure main load bearing walls foundations roof load bearing joists and beams gutters and down pipes of the Building excluding any non load bearing partition walls plaster on the walls and ceilings decorative finished floor boards windows window glass doors and door and window frames
>
> .....
>
> 3 The Lessee hereby covenants with the Lessor to observe and perform the covenants set out in the Third Schedule
>
> .....

5 The lessor hereby covenants with the Lessee:

5.1 to perform its obligation set out in the Second Schedule and

5.2 to perform the covenants set out in the Fifth Schedule

.....

THE FIRST SCHEDULE

Part 1

ALL THAT property known as 54a Woodbury Park Road Tunbridge Wells situate on the ground floor of the Building in the position shown and edged red on Plan No 2 including

1 the internal finishing surfaces of the walls
2 the entrance doors and door frames and the window panes window frames frame flashings and mastic in such walls
3 all non-load bearing walls and timbers
4 the finishing surfaces of the floors and ceilings and
5 all tanks pipes wires and cables solely serving the Demised Premises
6 the floor finishes and railings of the balcony

There is excluded from the Lease

1 all load bearing walls beams and timbers
2 the external and supporting walls beams and timbers
3 the air space and strata subjacent to the floor of the Demised Premises and
4 the main structure
5 the Common Parts

THE SECOND SCHEDULE

Maintenance of the Building

Part 1- Lessor's obligations

Subject to contribution and payment by the Lessee as herein provided the Lessor will:

1. maintain repair decorate and renew

1.1 the main structure
1.2 the gas and water pipes tanks drains watercourses gutters downpipes and electric cables and wires in under and upon

the Building and used by the Lessee in common with the owners and lessees of the other flats

1.3 the main entrance and entrance hall of the Building used by the Lessee in common as aforesaid

1.4 the boundary walls and fences of the Estate and

1.5 the Common Parts

.....

3. so often as is reasonably required decorate the exterior of the Building (including the exterior of the windows and their frames an the exterior face of the door and its frame serving the Demised Premises) with two coats of at least good quality paint at least once every four years in such manner as shall be agreed by the owners or lessees of the flats comprised in the Building or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit

14. The specific provisions in relation to the payments to be made by the Respondent and the circumstances of those then read, highlighting having been inserted by the Tribunal:

Part 2- Lessee's contribution

1. The Lessee shall pay to the Lessor **within 14 days of demand** being made a service charge being **25%** of the **costs and expenses notified** to the Lessee by the Lessor as being the **amount expected to be incurred** by the Lessor in the ensuing year as follows:-

1.1 all sums properly expended by the Lessor in the performance of its obligations under Part 1 of this Schedule

1.2 all other expenses (if any) incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Building and the Estate

1.3 the fees and disbursements paid to any managing agents appointed by the Lessor in respect of the Building and Estate provided that so long as the Lessor does not employ managing agents it shall be entitled to add the sum of 10 per cent to any of the items of administration set out in this part of this Schedule

1.4 of creating such reasonable reserves against future liabilities as to the Lessor in its absolute discretion may seem prudent or desirable

2. On or after 1 January in each year (or at the end of such other annual period as the Lessor in its discretion may from time to time determine as being that in which the accounts in relation to the Building shall be made up) **or as soon as may be thereafter** all such costs expenses and reserves actually incurred or made by the Lessor in the previous twelve months shall be **determined and certified** by the Lessor or its agents (such certificate to be final and bunding upon the Lessor and the Lessee as to the matters stated

therein expect in the case of manifest error) **and the Lessor shall in estimating the increase or reduction of service charge** (as shall be appropriate) **adjust his estimate** to take **account of any surplus or deficiency which has arisen due to the previous estimates being more or less than the actual expenditure incurred**

3. On the signing of the Lease the Lessee shall pay to the Lessor a contribution of one quarter of the insurance premium the Lessor shall have disbursed in effecting insurance of the Building as hereinbefore provided apportioned on a daily basis to the day fixed for renewal of such policy of insurance next occurring after the date of the Lease

4. The Lessee shall pay to the Lessor on the **1st January and 1st July in each year one quarter of the reasonably estimated expenditure** of the Lessor referred to under paragraph 1 of this part of the Schedule for the year from 1 January in each year to 31 December in the following year. The amount to be paid on the date hereof will be an appropriate proportion for the period ending on 31 December next following.

5. To pay the Landlord on demand all expenditure incurred by the Landlord in carrying out works of maintenance and repair to the Demised Premises and any part or parts thereof of the Lessee shall have failed to carry out such works pursuant to the Lessee's objections [intended in the Lease to read "obligations"?] under this Lease

THE THIRD SCHEDULE

Lessee's Covenants with the Lessor

1. To pay to the Lessor the rent herby reserved and the contribution or contributions set out in Part 2 of the Second Schedule hereto at the times and in the manner aforesaid

   .....

6. To pay the Lessor all expenses it may incur in enforcing any obligations of the Lessee whether or not proceedings are taken and whatever the outcome of any such proceedings including but without prejudice to the generality of the foregoing all costs and expenses (including solicitor's costs and surveyors fees together with any value added or other tax payable on such costs and fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture may be avoided otherwise that by relief granted by the Court

7. To pay the Lessor interest on all unpaid rent of the Lessees' contribution herein reserved and on all other money which properly ought to be paid to the Lessor hereunder at the rate of four per cent

above the base rate of National Westminster Bank plc from time to time in force or such other similar rate of interest as may be substituted therefor which is in arrear and unpaid for more than twenty-one days after the same shall become due or payable or if such moneys are due hereunder on demand after twenty-one days of demand being made".

The parties' statements of case

15. The statements of case started off as quite brief within the County Court but by the final hearing had become extensive, some 105 pages, including exhibits (including one of the copies of the Lease in the bundle) all told.

16. The Applicant submitted a further Statement of Case dated 2nd April within the proceedings before the Tribunal. That principally quoted various clauses of the Lease and attached the Lease (although only the front page was included in the Bundle to demonstrate the Lease had been attached), concluding by asserting breaches of covenants to make payments and re-iterating the principal claim and the claim for interest.

17. A rather longer and more detailed Statement of Case was also provided by the Respondent dated 20th June 2020. That also quoted various clauses of the Lease, attaching a full copy of the Lease (also included in full in the bundle). The document then quoted legal advice received by the Respondent as to whether the box bay corner was the Respondent's responsibility, expressing the opinion that it was not. The Respondent also quoted from a Defect Report obtained by the Applicant stating that the damp to the basement flat was due to water penetration via a decayed corner post to the box bay and identifying the necessary repairs. The Respondent asserted that the Applicant had failed to investigate and take appropriate action since 2014.

18. The Respondent specifically challenged the management fees of £1200.00 per year, referred to on the "Service charge reconciliation" prepared by the Applicant for the 2018 service charge year, because of the above failure and impact of the managing agent's approach on the Respondent and the potential additional cost of repairs, and in any event the level of the fees, asserting them to be disproportionate. The Respondent further referred to the impact of assertions originally made that he was at fault in respect of the box bay on his attempts to sell the Property, including concern by prospective purchasers of incurring expense for repairs and the agent's failure to provide information. He also asserted that an insurance claim should have been made. The Respondent exhibited various documents, including the advice received by him from a solicitor at the Leasehold Advisory Service and a report by Dan Pickford MRICS of Ibbett Mosely LLP in respect of the cause of the damp to the basement flat, including a number of photographs. It should be noted that the Applicant included that report in the bundle and raised no objection to it. The Tribunal had some concern that the report constituted expert evidence where no application had been made by the Respondent for permission to rely on it or granted by the Tribunal. However, the conclusions it reached had been accepted and acted on by the Applicant prior to these proceedings and as

such the report did not provide evidence about any matter in dispute. The Respondent otherwise attached invoices and documents related to attempts to sell the Property. Additionally, communications from the Applicant's agents to the Respondent's wife and the solicitors in the first abortive sale.

19. The Respondent also set out in an application form that the basis for the counterclaim that he wished to bring was harassment by the Applicant's managing agent about repairs and stopping a sale of the Property, the losses he had incurred because of the Applicant's breach of covenant in respect of repairs and a claim for damages for defamation by MR Stuart Kent of the Applicant's managing agent. Various losses were asserted in his statement of case which went far beyond the reasonableness of the service charges and other matters claimed by the Applicant and into more substantial County Court (and High Court in respect of defamation) claims. It was that potentially substantial claim and the impact on jurisdiction, especially of any claim for defamation, which caused concern prior to the hearing on 7th July 2020 and was dealt with at that hearing. Given the difficulty accepted in respect of any counterclaim and the agreement reached at the hearing on 7th July 2020, most of the matters went beyond the scope of these proceedings.

The hearing

20. For the purposes of the Tribunal, the hearing was confined to the claims for service charges and administration charges outstanding and to the reasonableness of those and to the payability of those. Those were the elements of the sum claimed by the Applicant in the County Court proceedings which it was the jurisdiction of the Tribunal to determine.

21. Much of the questioning of witnesses about those matters involved questions put by the Judge. However, a good number of questions were also put by Ms Lyne by the Respondent and to a rather lesser extent by Mr Ridgeway, the surveyor member of the Tribunal.

Evidence given- written and oral

22. There were, as noted above, witness statements prepared on behalf of the witnesses from whom the Tribunal heard. The oral evidence to a large degree repeated matters set out in the witness statements. The Tribunal records the relevant aspects of the evidence received below, identifying where that was received by way of oral evidence which went beyond the written witness statements. Given that the large majority of the dispute related to the Respondent's challenges to the service charges and to a lesser extent administration charges), it was agreed to take the Respondent's evidence first.

The Respondent's evidence

23. The Respondent's written evidence was contained in a witness statement dated 16th June 2020. Of the three reasons cited for opposing the claim,

being an unreasonable increase in service charge in 2018 and the conduct of the managing agents, at least insofar as relevant to the level of their fees, were matters within the jurisdiction of the Tribunal. To the extent that the conduct of the managing agents related to other matters, those within the jurisdiction by the County Court.

24. The conduct of the managing agents is therefore relevant to both jurisdictions and there is no neat dividing line such that any given action falls only one side of that. Indeed, the same conduct potentially impacted in each jurisdiction. The evidence is therefore dealt with in this Decision, albeit that is also found in the County Court Judgment.

25. The Respondent specifically disputed the arrears management fees of £542.00 shown on the statement of account on 9th January 2019, alleging that they were added without his knowledge and disputed the management fees of £1200.00 per year as disproportionately high. He referred to the manager having left the rotten structural beam for six years and alleged them "trying to recklessly shift the responsibility of repair on us", asserting all the lessees have been caused financial loss.

26. The Respondent expanded on matters related to the box bay and water leak, saying he explained in 2014 that the work should be dealt with by the freeholder. He then reiterated matters set out about the impact on attempts to sell and asserted that purchasers were told there was negligence on his part, quoting Mr Kent saying that "it would be in your interests to be able to establish to a prospective purchaser that there is no such deterioration……. especially as this matter will be noted in our responses to pre-contract enquiries" and also referring to the letter from Engel Jacobs dated 19th September 2017, which he describes as threatening.

27. The Respondent stated that he arranged the surveyor on advice from his estate agent and not because Mr Kent requested one, directly contradicting Mr Kent's evidence, which he re-iterated in oral evidence. He accepted that subsequently, although not initially, it was agreed that the cost would be reimbursed in full if the outcome of the report was in his favour. The Respondent then quoted a further letter from Mr Kent after receipt of the report then stating "I can assure you that you need to take no further action of any type. We will coordinate the preparation of a schedule of works……". The Respondent also suggested that the cost of the repair works must be limited to £250.00 each leaseholder in the absence of consulting and that there was no consultation raised for the first time in the statement. The Respondent concluded his statement by asserting that the damage caused by the freeholder outweighs the service charges.

28. The Respondent added in oral evidence that he had not placed duct tape on the box bay and did not know who had or when. He said in oral evidence that the managing agent's service had been substandard. He was adamant that the parties had argued for years about responsibility for the box bay and that but for that issue the parties would not be involved in this case. He said that the repair was the responsibility of the agent and the

Applicant was in breach, noting that the agent had also misinterpreted the Lease. The Respondent accepted in response to Ms Lyne's questions that he was frustrated about the agent saying the leaks were his responsibility.

29. He did not accept that the agent's communications had been "perfectly professional" or had behaved "like a sensible professional manager" as Ms Lyne put to him. Neither did he accept that the Applicant had changed its approach "shortly after", replying that there had been an ongoing dispute back and forth and that the Applicant had only changed its mind when proved wrong, which he accepted to be in late 2017. Water leaking had been reported by his neighbour in 2014. Whilst he accepted that the service charges claimed dated from 2018, he said the 2014 issues had been unresolved.

30. The Respondent gave additional evidence about the asserted bathroom leak-- at his request, which the Tribunal allowed. He said that he visited with his wife, speaking to his neighbour and that it was obvious to all of them the source of the leak was not the bathroom. However, he arranged a plumber to check connections were fine and there was no leak. He asserted that he had an interest in resolving the problem as soon as possible.

31. The Respondent could not say what an acceptable management fee was but said the building could be managed for much less and denied any should be payable in light of the lack of service and suggested it difficult to justify £1200.00 for the attitude adopted. He denied in response to questioning that he simply did not wish to pay a fee, asserting he did not want to pay because the service was not professional. Ms Lyne pressed the Respondent to accept that the fee was first charged in 2018, which he was unable to answer.

32. The Respondent also asserted that the repair was more expensive than necessary, would have been minimal if carried out on time and suggested the managing agent had admitted that cost would have been substantially lower, accepting the point put to him that cost incurred by the Applicant would be paid for by the lessees, including his share by him. He did not accept that the agent should be cautious where lessees would pay, saying rather that it should have been quickly established who was liable. The Respondent accepted caution may be appropriate in principle but was unable to see the caution adopted in this particular case.

33. The Respondent argued that the agent should have investigated properly the prospect of the insurance company paying out and suggested water ingress to the flat below should be covered under the policy wording, although he accepted the policy was not contained in the evidence served and in the bundle. He also accepted that there had been no damage, "direct loss" as he described it, to the Property. The Respondent was not aware of a repair in 2018, only in 2020.

34. The other written evidence for the Respondent was from Mr Darius Clayton, the lessee of the Upper Maisonette in the building. That related to problems experienced with the roof of the building since 2014 and the

failure of the Applicant or the managing agent to deal with that, as a consequence of which he paid for the repair himself at a cost of approximately £5000.00. He also asserted that costs have increased since the Applicant purchased the Property. Mr Clayton exhibited various emails from 2014 and 2015 in relation to the roof. No oral evidence was given by Mr Clayton.

The Applicant's evidence

35. The Applicant's witness Mr Kent firstly stated in his first and undated witness statement that he is a property manager at Engel Jacobs, the Applicant's agent. His statement then quoted the Lease for some three pages, quite unnecessarily and inappropriately, although the Tribunal perceives that the statement was prepared by the Applicant's solicitors and not Mr Kent and so it would be wrong to criticise him. The contents of the Lease had also been quoted at length in the Applicant's statement of case and previously exhibited, and was exhibited again to the statement of Mr Kent, producing the second copy of a long document in the Bundle. Mr Kent had no dealings with the creation of the Lease and did not even comment on the clauses which were set out in his statement, to indicate that their quotation had any purpose. The Tribunal records that a three-page quotation of Lease clauses in a witness statement was entirely inappropriate, even more so when the witness had nothing to say about them. Witness statements are there to deal with facts known to the witness.

36. The fifth to the seventh pages dealt with actual evidence. Mr Kent stated that as there are three flats in the building, there is no need for independently audited or certified accounts and RICS approved service charges certificates are suitable. He stated that all of the charges had been correctly demanded and were reasonable and that the Respondent had failed to adduce any evidence to the contrary. He quoted the Respondent's comment that work had been left unattended and there was no investigation to establish the cause of water penetration but then made no immediate comment about that allegation. Mr Kent did refer to previous County Court proceedings in 2016 for sums in 2015 and 2016, suggesting there to be ongoing failure to pay and an impact on the Respondent's credibility in respect of issues raised.

37. Mr Kent stated that his company had written to the Respondent as early as June 2016 stating that the lessee of the basement flat had been complaining about "various" leaks into his flat and stating that "as far as we could ascertain at that time" the issue originated within the Respondent's flat. Mr Kent asserted the basement tenant had identified two quite distinct areas of apparent water ingress and it was believed one related to the bathroom in the Property. In response to a question by the Respondent, Mr Kent said that the agents have a procedure, including deciding if an issue is between lessees or relates to the fabric and is within their remit, adding that it was not immediately apparent or proven that the issue was within their remit and reiterating that he acted appropriately. He suggested that the tenant of the basement flat was very frustrated with the

Respondent. Mr Kent denied telling him the leaks were the Respondent's fault.

38. He said that in April 2016 he saw duct tape covering a section of the box window frame (although it appears that he misremembered the year because his letter of July 2015 refers to the tape). Mr Kent stated that the "only apparent source of leaks" were the Respondent's bathroom, which was put to him as a cause, and "some apparent minor damage" to the vertical corner timber of that box bay window. He said the window was only apparent as a cause and reported in 2016 and that previous conversations had not gone in that direction. Mr Kent said their interpretation was that there was a defect to the window and they followed that. The Respondent asked what the window frames were made of, to which Mr Kent answered plastic/ UPVC and the structure of timber. His statement asserted that it was "assumed at that time" "by all parties" that the structure of the box bay fell within the Respondent's demise. He says, "Therefore it was his sole responsibility to repair". Mr Kent stated that it was apparent that the Respondent was not going to take action and that the Respondent was "particularly aggrieved" to be suggested to be liable. Mr Kent said that he perceived the Respondent was not informed as to what the Lease said and they read the Lease and felt the Respondent should be dealing with the matter. He said in response to cross-examination that he believed the Respondent was "trying to establish I am culpable for what I suggested was your fault".

39. After the situation had "festered", Mr Kent statement said that he managed to obtain the Respondent's agreement that the Respondent would pay the costs of a surveyor investigating, to be reimbursed to him if it transpired that he was not liable. Mr Kent did not in oral evidence accept the Respondent's evidence and said that there was a difference of opinion and that he suggested a way out, insisting it was his suggestion and that he facilitated, having discussions with the surveyor amongst others. He said his letter set out a proposal to use the Respondent's surveyor. In oral evidence, Mr Kent said the surveyor contacted him. He was adamant of having dealt with the situation in a professional manner. Mr Kent records that the investigation and examination of the Lease indicated that the Respondent was not liable and he drew a distinction between the Respondent's responsibility for the window and the Applicant's responsibility for the other timbers. Mr Kent said that he "willingly" conceded.

40. In response to it being observed that in late 2017 he still asserted that fault lay with the Respondent, Mr Kent said in oral evidence that he does not make any secret of how he interpreted the Lease at that time and suggested that leases are sometimes obscure. He that the communications written were a true reflection of what he believed at the time and that his interpretation then justified the terms of the letters. He added he would not say they were not correct in saying and writing what they did because it was not incorrect in their understanding and said the matter was closed in his mind. Mr Kent did not accept that he was wrong in what he said about not dealing with a notice of transfer and that "the imperative was to create

a degree of leverage". He said that the issue was resolved and that "If the exercise of leverage had that result, I am quite gratified by that." Mr Kent did suggest having later received further advice and accepted with the benefit of advice that the Lease was not written in the manner he had believed.

41. The witness statement explained that the Respondent claimed the agree reimbursement of the survey fee but the Respondent was in arrears so that the sum was mainly utilised to clear those, producing a credit balance of £188.58. Mr Kent stated that was not paid to the Respondent either as another invoice would be due "a few weeks later". In oral evidence, Mr Kent stated that the Respondent was "not best pleased".

42. Mr Kent stated in written evidence his understanding that leaks into the basement flat from the Property had continued. He then referred both temporary and more extensive permanent repairs to the box bay by DJ Tracy and RM Artdeco Limited respectively, leading to invoices dated May 2018 and January 2020 respectively. In oral evidence, he added that the timber fascia was required to be removed and that clearly showed various areas of protective felt and the membrane had rotted. He said that caused little or no water ingress and suggested the initial work sufficient but it was agreed further repairs were needed. Mr Kent explained that the contractor in 2020 investigated, including concluding that the box bay suffered rot in 2014 when last redecorated by the previous freeholder, who had just painted over that, hence he said the bay looked in good condition even though it was not underneath. The contractor chopped out and replaced and undertook work to pointing and flashing. Mr Kent concluded his written evidence by asserting that the "historical issues" have no effect on the ground rent payable.

43. In relation to reconciliation of finances, Mr Kent gave oral evidence that figures were prepared in 2018 by his accounts department and that the statement in 2018 covered expenditure for all for the year. In November 2017 a budget is said to have prepared with all items they felt were anticipated.

44. Mr Kent said that it was in 2018 prudent to create a reserve fund. He said that he was aware there had last been one in December 2014 and given the issues with the rear of the building money should be raised on account. Mr Kent said that there was no reserve account for 2015 to 2017 because there had been recent redecoration and there was little in the way of common parts so there was nothing to be done.

45. Mr Kent stated that the reserve fund had not been spent as at the date of the hearing of this case, the expenditure required not being within that and that (other) money raised and not utilised was transferred to the reserve. He estimated the reserve account to hold £10,000.00 or more. He only accepted that a perspective that the debt as claimed from the Respondent was nearly all from 2018 and the sum demanded had not been necessary for expenditure was fair if the service charge had been paid. He said that works anticipated in the future had not gone away and it was necessary for

service charges to be paid. He suggested a large bill would cause a fuss and it was better to smooth out in advance. Mr Kent added that one aspect of the reserve was in relation to the sums Mr Clayton said he had carried out in 2015 and if those were to be settled, although no claim had been made. Mr Kent also accepted that the budget for 2018 did not state that the Applicant was to raise a reserve, although he later changed that evidence and stated the budget did say about a reserve account, although he said the documentation to support his changed evidence was not in the bundle.

46. Mr Kent also stated that no management fee had been charged 2015 to 2017 as the building had looked after itself, there was no need for any repairing to be done and relatively little had been done by his company. He added that changed during 2017, particularly late 2017 in addressing defects. Mr Kent said that the Applicant suggested the fee level and the agents agreed. He explained that disproportionate work is required for small properties with no economies of scale and the cost falling a on a few leaseholders and they would have had some concerns but that they manage a number of properties for the Applicant and so agreed the fee.

47. In relation to the question of an insurance claim, Mr Kent said the policy only covers the insured risk and not everything can be recovered. The disrepair in question was a gradually occurring event and very often those were not recovered, unlike the effects of a storm, and was wear and tear, not recoverable. He said that water damage to the basement flat may be covered but also added he was not aware the lessee of the basement flat wanted to make a claim against the insurer. Mr Kent said that as the basement tenant was not at fault, a payment made be made to him borne by the service charge, of £200.00 or £300.00.

48. Mr Kent was asked by the Respondent whether the large time gap had an impact on repair costs, to which he replied not significantly. Mr Ridgeway asked about the repair works, including as to why the membrane had been replaced twice. Mr Kent replied that the second contractor was not happy with how the membrane had been fitted but said he thought it reasonable that contractors do work in different ways and he had said to the contractor that if he, the contractor, advised to redo the membrane then to do that.

49. Sample Service Charges- Summary of Tenant's Rights and Obligations documents were exhibited to the witness statement, although not ones with any specific demands. Various copy invoices and statements of account were also exhibited, including a statement of account showing a balance of £1538.23 outstanding as at 1st May 2018 following a balancing charge of £212.06, that outstanding sum being the same as the payment shown in the Particulars of Claim as made 15th April 2019. The statement of account was dated 20th March 2020 and so post-dated the claim. The contractors' invoices for the works to the box bay- in the sums of £300 and £810.00 were exhibited and so too three letters from the managing agents to the Respondent and the Respondent's solicitor about the leak arising from the condition of the box bay window. The invoices in respect of

service charges included an entry stating "Service Charge on account" and then the time period, then stating the amount of the payment required.

50. In addition, the Service Charge Reconciliation for the 2018 service charge year- 1st January 2018 to 31st December 2018- was provided. That shows that the service charges demanded for the building amounted to £9414.00, of which 25% was demanded from the Respondent, hence the £2353.50 total for the two 2018 demands. The entries are as follow:

Bank charges	£60.00
Bank interest received	-£3.55
Management fees S/c	£1200.00
Repairs and Maintenance	£384.00
Reserve Fund	£7773.35

51. Mr Kent said nothing in his first witness statement about the administration charges or solicitors' costs. A short second witness statement was prepared for Mr Kent and dated 11th August 2020 specifically in relation to administration charges, stating that his company has a set process, comprising a sequence of three letters at a charge said to be based on actual cost and without any profit element. £15.000 plus VAT is stated to be the fee for preparing a file and referring a matter to solicitors, said to be a "non-profit element cost". Mr Kent suggested that preparing a file took an inordinate amount of work, two to three hours' worth of time. Copies of arrears letters sent to the Respondent, each with a statement of the sum outstanding and a Summary of Tenant's Rights and Obligations, from mid-2017 are exhibited to the statement.

52. Mr Kent added in oral evidence that the September 2016 arrears management fee related to the previous court case and the £68.02 the interest on the judgment- which were both included in the £1787.65 receipt shown on the account in January 2017.

Closing Submissions

53. Oral closing comments were made by both parties. Ms Lyne made hers first. She submitted that the Defendant's claim for set off focused on breach of covenant which she contended there was no evidence of, adding that the Defendant had accepted he suffered no loss from water ingress. She denied that there was evidence to support any historic neglect having increased the service charges and asserted that there was no need for an insurance claim, having no relevance to sums payable.

54. In respect of the management fees, Ms Lyne noted those had first been charged in 2018 and not before and that it was unsurprising that the lessees were unhappy with a new figure added but that the sum was not unreasonable. Ms Lyne contended that Mr Kent had gone about matters in a diligent way to resolve the issues and it was not unreasonable for him to take a "cautious" approach to who was responsible. She suggested that his mistake about who was liable for the repair was not the big issue.

55. The Defendant replied stating Mr Kent was negligent and had not merely made a mistake and he had objected to payment of the service charges because of that negligence. He said that he was happy to pay demands provided that they were reasonable. He asserted the agents service was poor value and that the property was relatively easy to manage, however he was made to feel like the enemy.

56. The Defendant asserted that planned work and urgent work were different and that for urgent work it was crucial to act quickly, that it was difficult for him to say the extra damage due to delay but there will have been an impact. Mr Clayton's evidence was designed to demonstrate that all of the lessees were unhappy with the service received.

Discussion of issues raised and findings in respect of reasonableness of the service charges and administration charges

57. The Tribunal found the Respondent to give cogent and honest evidence. The Tribunal was disappointed with the evidence of Mr Kent to the extent that he was, most notably, adamant that the approach to the bay window had been entirely proper, which the Tribunal very firmly disagrees with, as set out below. The approach of Mr Kent to giving evidence was consistent with his approach, as found below, to management and the issue of the box bay window in particular. He was unable to accept any failing and resolutely sought to defend that which the Tribunal finds indefensible. However, it could not be said that he altered his evidence to make that more appealing and so the Tribunal had no reason to doubt the honesty of the evidence on the whole, the Tribunal's concern being instead rather more as to the content. There is one matter below in relation to which the Tribunal finds Mr Kent's evidence suggested more positive action on his part than the Tribunal accepts.

58. Indeed, the Tribunal finds the efforts to force the Respondent to accept liability for something not his responsibility, going even as far as to scupper a sale, and which the agent had not properly investigated, to be quite shocking behaviour. The Tribunal wholly rejects the efforts of Ms Lyne and Mr Kent to suggest it to be anything like professional.

59. The Tribunal finds- and the findings below flow from it- that the Applicant and/ or the Applicant's agent failed to properly consider the terms of the Lease and to deal with matters in compliance with it. That extends, most fundamentally to this dispute to the manner, to the manner in which the service charges were dealt with.

60. The Tribunal takes each portion of the overall demand for service charges and then the administration charges separately for ease of reference, then turning to the net outcome in respect of charges payable at this time.

On account demand 1st July 2018

61. The 1st January 2018 on account demand was covered by the 22nd March 2019 receipt, applying usual accounting practices, and so half of the service

charge demanded on account in 2018 had been paid at the time of issue of this claim. The two payments demanded on account for 2018 amount to £2353.50. The outstanding portion is £1176.75.

62. Given that the Service Charge Expenditure statement makes clear that most of that sum was not required for expenditure during 2018, there was, inevitably, no balancing charge following the end of the accounting year. Paragraph 2 of Part 2 of The Second Schedule requires that on or after 1st January of each year "all such costs expenses and reserves actually incurred or made by the Lessor in the previous twelve months shall be determined and certified by the Lessor". The Tribunal accepts that such certification occurred for the 2018 service charges but only by way of the Service Charge Expenditure statement. That statement was only sent to the Respondent and the other lessees by letter of 20th March of 2020.

63. Whilst nothing specific turns on the matter, it is difficult to accept that can have been "On or after 1st January in each year……. or as soon as may be thereafter all such costs……. in the previous twelve months shall be determined and certified". Even if, inexplicably, the costs and similar had only just been determined and certified and so the Statement immediately followed that, fifteen months on cannot sensibly have been "as soon as may be" and the "previous twelve months" was no longer 2018 at the time of certification. That suggests what is at best a somewhat lax approach to the financial and/ or administrative obligations under the Lease and offers further support for a failure for those to have been properly considered.

64. The Respondent is undoubtedly correct that the 2018 and 2019 service charges, especially the 2018 one, were substantially higher than the service charge had been in previous years. The demands for 2015 to 2017 inclusive were £820.31, approximately £270.00 per year. In comparison, the 2018 service charges demanded were approaching nine times that figure.

65. It may be that in the event of specific work being required, especially work which was unable to be predicted and could not be delayed, that such a proportionately large increase could be regarded as appropriate. The reason would, however, need to be very clear. In the absence of that a lessor would be likely to face an uphill struggle to demonstrate service charges that are so much higher than the sums previously demanded are nevertheless reasonable.

66. The service charges demanded on account in 2018 were not a reflection of the expenditure required that year and massively exceeded that required. The payment put into a reserve account is some 82.5% of the service charge demanded. Only 17.5% of the sum demanded was actually used for the costs incurred in 2018. Absent substantial anticipated expenditure for 2018, which has not been detailed, but which was not then required, that percentage split is powerful evidence of the service charges not having been reasonable, irrespective of whether some payment to a reserve account may be appropriate. The service charges payable by the Respondent would have amounted to £410.11 (as opposed to nigh on six

times as much- £2353.50) to meet the costs actually incurred and assuming all of that cost to be reasonable and recoverable.

67. However, the Respondent had admitted, or must be treated as having admitted, that £1176.75 of service charges was reasonable because he paid that in early 2019. The question for this Tribunal is therefore whether it was reasonable for the service charge demands to be sent demanding a greater sum than that.

68. There are two principal constituent parts of the 2018 (and 2019) service charge which caused the substantial increase, namely the management fees and the sum assigned to the reserve account. Both of those are new items of service charge expenditure as compared to the previous years. All of that is highly relevant to service charges having been due and recoverable. The point is particularly relevant where the Respondent has specifically challenged the increase in the level of the service charges from earlier years. The Tribunal therefore addresses those two elements and the other sums which form part of the costs which form the basis for the service charges as demanded on account below.

69. The question for the Tribunal to answer when considering the reasonableness of the amount of service charge demands on account is the sum reasonable on the facts known at the time of the demand being made, as explained in *Knapper v Francis* [2017] UKUT 3 (LC).

70. However, the Tribunal first addresses the payability of the 1st July 2019 demand more generally.

71. The most relevant point is that there is no indication on the invoices which constitute the service charge demands as to the costs and so charges to which the demands relate and to how the figures were arrived at. Whilst, Mr Kent referred to a calculation being undertaken and to a decision being made to create a reserve account, no supporting evidence has been provided by the Applicant of how the anticipated service charges were constituted whether in general terms or in relation to any specific sums in particular. There is no evidence that the lessees, and this Respondent in particular, were informed at any stage as to the anticipated costs which led to the on-account demands made in 2018, only of the actual costs two and a quarter after the first of the on account demands was made.

72. Paragraph 1 of Part 2 of The Second Schedule is very clear that the Lessor shall pay 25% of the costs and expenses "notified ..... as the amount expected to be expended" in the performance of obligation, expenses, fees and disbursements and of creating a reasonable reserve account.

73. The Tribunal has no evidence that the specific requirement in the Lease for notification of the amount expected to be expended for all, or any, of the four elements, was complied with. Mr Kent's evidence, whilst explaining a little more than the Applicant's written case does, certainly did not go that far.

74. There is no doubt that sums were demanded. The invoices sent simply demand a specific sum with a short description- in this instance "Service Charge On Account 01/07/2018 – 31/12/2018 S/c On Account Updated". There is nothing particularly unusual about that, indeed many demands are in much the same terms.

75. However, such demands inform the lessee of the sum the Lessor requires payment of. They do not, and do not attempt to, inform the lessee how the anticipated costs which the service charges are to provide funds for have been calculated. They do not notify of anticipated costs and expenses.

76. The problem for the Applicant is that the provision refers to that demand being for the costs and expenses notified. It is at least implicit in the wording of the clause that the notification comes first and the demand comes after. No document produced however demonstrates notification or makes any reference to it.

77. The Tribunal has considered whether there is other evidence from which the Tribunal could infer notification of the charges. The Tribunal has done so acknowledging that in the normal course, it would be expected that professional managing agents would identify and meet the requirements of a Lease. However, the Tribunal can have no such confidence in this case, given the history in respect of the box bay window and related communications- see below- and given the approach to the certification of charges and other elements of this case.

78. There is nothing from which the Tribunal can draw an inference. Even if there had been anything from which an inference could potentially be drawn, the Tribunal would have needed to be very confident of it being appropriate to draw such an inference where such an impact on the case may arise as it would in this instance.

79. The Tribunal has also considered whether it is reading the words of the Lease too literally and whether in fact the invoices themselves can be said to be both the notification required by the Lease and the demand at the same time. However, the Tribunal considers that the for the demands as made to meet the terms of the Lease would require the Lease to be read as if "costs and expenses notified" as a phrase and to define the subject of the demand did not appear in the Lease at all. The point is that if the demands notified of the costs and expenses to which they relate, it might be possible to at least see potential for the demands alone to suffice, but as identified above, the demands make no mention of such costs and expenses and so could not constitute the required notification in any event.

80. If the word "notified" did not appear and the Lessor could simply demand 25% of the anticipated costs and expenses, a demand alone would suffice. A lessee might ask what costs the demands relate to and the Applicant might sensibly explain for the purpose of sensible relations, but the Applicant would not strictly be compelled to. The Tribunal would accept that to have been the agreement reached if the word "notified" had not

been included, although would find it second best to the lessees having been informed.

81. The Tribunal finds it entirely sensible that the contracting parties to the Lease agreed a regime in which the Lessee was to be told what the anticipated costs and expenses were and so what a demand to the lessee would relate to. The Tribunal finds it entirely sensible that the demand itself would separately follow that.

82. There is nothing at all illogical about exactly that sort of arrangement being intended such that the words of the Lease taken as they read cannot properly reflect the parties' intention. A requirement for the Applicant to notify of the anticipated costs and expenses before demanding them is not unworkable or unduly onerous. The Tribunal accordingly finds no basis for interpreting the Lease to mean that the demand itself is sufficient and the lessor does not have to do that which the Lease states, i.e notify the lessee what the sums are and then make demand for payment of the on- account charges.

83. In the absence of evidence of such notification as the Lease requires, no sums were due at all and in principle that is the end of the matter. In the event, it is not quite the end of the matter, both because of the determinations below and because the Respondent has already admitted the first on account demand as reasonable by paying the sum demanded of £1176.75 and so cannot avail himself of the above determination in respect of the sum already paid.

84. For the avoidance of doubt, the Tribunal would not accept the Service Account Expenditure document as assisting in respect of "costs and expenses .....expected to be incurred in the ensuing year" because the year to which the document relates was not an ensuing one but rather one in the past. It may assist in relation to claim for a balancing charge following its provision but if it does, that does not assist the Applicant in respect of sums claimed in this case.

85. It is perhaps worth briefly noting that 2018 appears to be the first time that the service charges were deal with in the manner adopted. 2015 to 2017 appears to have been paid in 2015, save for the balancing payment in 2018 paid by part of the Respondent's 2019 payment to the account. It isn't clear what demands or similar had been made- the sums were not part of the dispute and so were not explored. However, it is clear that there were not demands on account each year. There was no established pattern which might go to support any reading of the Lease in a different manner to that determined above.

86. The distinct impression created is that the Applicant's agents did what they normally do and without giving the provisions of the Lease careful consideration. That is, if nothing else, entirely consistent with their approach to the repair and maintenance obligations.

87. There is potentially a small further point of construction of the Lease. The Lease does not provide for the payments in January and July being 50% of the sum on account of the service charge being payable. The clause actually states, "one quarter of the reasonably estimated expenditure" will be paid on each of those dates and might be taken to suggest that only half of the service charge can be demanded on account, one quarter at a time. However, the Tribunal has concluded that is simply a reflection of fractions being substituted for the percentages in clause 1 in error.

88. Even so, the clause does not say that the demand will be for 50% of the costs and expenses notified each time. As noted above, the Tribunal considers that the agents demanded half on each of January and July because that was their usual practice.

89. The Tribunal might then have determined that each of the January and July payments should be one quarter of anticipated expenditure with the rest being paid as a balancing payment. However, the Tribunal cannot identify from the wording of the Lease anywhere that such a balancing payment is provided for. Paragraph 2 refers to adjusting estimates for subsequent years but is not clear how that relates to payments and somewhere along the line payments would need to catch up with expenditure. The Tribunal cannot identify what arrangement would be workable if in fact only one quarter of estimated expenditure were payable in each of January and July and so concludes, with some caution, that the parties must have intended the "one quarter" in paragraph 4 to be the same as the "25%" in paragraph 1 and that the two payments towards the sum payable on account are intended to total that and further are reasonably half each time.

90. It might fairly be said that the provisions of the Lease in respect of the Respondent's payments to costs by way of service charges are not expressed in the usual clear terms. That lends further weight to considering the actual provisions agreed and not being waylaid in interpreting them by assuming that what was intended by the parties was something quite different and akin to the sort of provisions more commonly encountered.

91. The Tribunal is mindful that the Respondent has not specified in terms challenging the demands on the basis of the sums not being due pursuant to the terms of the Lease. That merits no little caution in addressing the above point. However, the transfer from the County Court was for consideration of the reasonableness of the service charges and the Tribunal can hardly ignore the provisions of the Lease when undertaking the task directed of it. The entitlement under the Lease is an obvious starting point for considering reasonableness and indeed reasonableness could not properly be considered in the absence of establishing and applying the terms of the Lease. The Tribunal also refers to its comments in respect of caselaw above.

92. However, in case it may be asserted that the Tribunal is wrong on the above and this matter may proceed further, or that any claim may be made

for the 2018 service charges subsequent to this Decision and now that the Expenditure document has been served, the Tribunal also considers it appropriate to explain the service charges which the Tribunal would consider to be reasonable had there been notification.

- Reserve account

93. In principle the Tribunal accepts the logic of reserve accounts being created. However, the Tribunal considers that where a sum is demanded of lessees where the money paid by them would be placed in a reserve account, it is particularly important that the sum is clear and is a reasonable approach to creating or building up a reserve account.

94. Paragraph 1 of Part 2 of The Second Schedule is clear that the Lessor shall pay 25% of the costs and expenses notified as the amount expected to be expended in, amongst other matters, creating a reasonable reserve account. There could be no realistic dispute that the Respondent would be liable to pay towards creating a reserve account if there were evidence that he was notified that such funds for a reserve account formed part of the service charge sum demanded on account, and the sum demanded to be paid into it is reasonable.

95. Significantly, not only was there no notification evidenced prior to the time of the demands that money was to be paid into a reserve account but the Tribunal further finds that there was little evidence of a reserve account having been planned. The Tribunal found the evidence of Mr Kent accurate that considerably more money had been demanded than was needed and that a decision had been made to create a reserve account generally but no more than that.

96. The sum to be paid into the reserve account from the amounts demanded in 2018 was £7773.55. That would have been a very odd figure to plan to collect, being very precise and not dividing by 4 to enable the proportionate payments required from the lessees to be specified.

97. In contrast, the distinct impression created was that there was some loose identification of a need for a reserve account and sums demanded to allow for payment into a reserve account but no specific and clear figure decided upon. If there had been, that would have been the sum assigned to the reserve account and not used for other purposes during 2018 and would almost certainly have been in a more obvious figure. The Tribunal may of course be wrong about that in fact but can only do its best on the evidence, and indeed distinct lack of it, presented to it.

98. The Tribunal found it surprising that there had been no sum demanded by way of service charges to provide any reserve account for three years and then in 2018, what was a proportionately very high sum part of the sums demanded was paid into a reserve account. Whilst the agents did not charge the Applicant any fees prior to 2018, they did manage the building from 2015. They did not apparently propose any contribution to reserve account year by year, during that time.

99. The contrast with previous years is relevant to the reasonable level of service charges for the purpose of payment into reserve account. The fact that the Respondent specifically challenged the increase in the level of the service charges in 2018, where the Tribunal finds the major reason for the increase was in the end that the large majority of the charge demanded was paid into a reserve account, demonstrates that the level of the reserve demanded in 2018 was likely to be contentious. There may well also have been an issue raised upon the statement of Expenditure being received if a different sum had been paid into the reserve account than that indicated in advance to the lessees.

100. The only specific basis provided in evidence for creation of a reserve account was the potential claim by the lessee of the first and second floors, Mr Clayton, for reimbursement of the expenditure which he inserted he had incurred in repair of the roof in or about 2016 but where no such claim had been, indeed has been, made. Of course, if the claim were properly to be met from the service charge account, much of the money paid out would be money Mr Clayton had been obliged to pay in. To that might reasonably be added the general wisdom of holding a reserve account of a reasonable level to meet planned maintenance and other significant expenditure.

101. Taking all of the circumstances into account, the Tribunal finds that the reasonable amount on account to have demanded from the lessees collectively to create a reserve against future liabilities in 2018 on the facts known would have been £3000.00, of which the Respondent's contribution would have been £750.00.

102. For the avoidance of doubt, the Tribunal does not suggest that to be the maximum sum for a reserve account for the Property to hold, but rather that additional sums ought to be sought in years subsequent to 2018.

103. The Tribunal does make a further observation, being that to the extent that sums anticipated to be required for costs and expenses were not utilised and were transferred to the reserve account, which Mr Kent stated occurred, it is not apparent to the Tribunal where the Applicant's power to do so is said to be found.

104. Paragraph 1.4 of Part of the Second Schedule provides for one of the element of the service charges payable by the Respondent being the anticipated cost of creating a reserve account. Paragraph 2 allows adjustment of the estimate for the following year to take account of any surplus or deficiency in what would then still be the current year. There is no provision for the movement of funds between the current account and the reserve account because there is more money in the current account than had been required.

- <u>Management fees</u>

105. Plainly, the instruction of managing agents requires payment of the managing agents for the services provide and so the agents are an

additional element of expense in relation to the Property. However, the Lease entitles the Applicant to instruct agents and it has been accepted in plenty of previous case authorities that where a freeholder is entitled to instruct a managing agent and does so, the freeholder is also entitled to recover managing agent fees.

106. The management of the Property left much to be desired. The agents had been adamant that the Respondent was at fault in respect of the box bay window, had not carried out a proper investigation of the cause of the leak and had failed to seek any expert assistance in respect of a matter plainly outside of their own expertise. It is abundantly clear that the Applicant's managing agent wrote to the Respondent and his solicitors asserting the box bay repair to be the responsibility of the Respondent and making comments that were threatening and, as Mr Kent said in evidence, designed to apply pressure on the Respondent to pay.

107. It is equally clear that he was entirely wrong to do so, not only because such a bullying approach is inappropriate in itself but also because of the repair not being the responsibility of the Respondent. It is abundantly clear that the agents failed to adequately and properly consider the terms of the Lease. To the extent they did consider it, they got the effect of it wrong. That is wholly unsatisfactory.

108. There is no aspect in respect of which there can be any sustainable attack on the credibility of the Respondent as suggested in the witness statement of Mr Kent. The assertion made by him and the approach of the Applicant's agent are apparent from the written communications and firmly bear out what the Respondent stated. The agents made strong assertions to and about the Respondent which the Tribunal finds were wrong. The agents failed to acknowledge their previous error or to offer any apology to the Respondent.

109. It is startling that the managing agent chose to take such a strident approach with such a potential- and indeed actual- impact without bothering to properly establish the position. It is scarcely less startling that Mr Kent appears to be unable even now to grasp the failings in that approach and that the Applicant has sought to justify such approach right through to the end of the final hearing. The Tribunal has no hesitation in condemning that approach.

110. Mr Kent claimed much of the credit for later arranging a surveyor to prepare a report and that was the only point on which the evidence of the two witnesses differed. The Tribunal is mindful that people remember what they did and are less aware of what others did but even so, considers that Mr Kent overstated his part in making arrangements, at the expenses of the Respondent's part. Nothing turns on the point.

111. However, those significant failings occurred in 2015 to 2017 when no management fees were charged and for which period no management fees are claimed in this claim. The matters for which the Respondent criticises the agents do not, in the main, fall within work charged for in the 2018

fees. The Tribunal would have been highly likely to reduce management fees during 2015 to 2017 as being unreasonable, potentially to nil, in light of the very poor standard of service provided. However, the Tribunal cannot of course reduce fees where none were charged.

112. The management fees for 2018 plainly contrasted with the lack of such fees for previous years and just as plainly caused an increase in the service charges payable by the Respondent. It is not hard to understand the Respondent's dissatisfaction with the service charge increasing to the extent of such fees where he had been dealt with in previous years in the fashion that he was. It is unsurprising if he felt he ought not to pay the Applicant a sum for the services of such agents. Nevertheless, the Applicant was not precluded from employing a managing agent and such an agent was always likely to charge fees. Equally, the Respondent has not provided evidence of alternative lower fees to demonstrate that these fees as more than the range of reasonable sums.

113. The Tribunal has not found the maximum reasonable level of management fees to be a particularly simple matter. At first blush £1200.00, £1000.00 plus VAT, is not an excessive sum and the point made by Mr Kent as to disproportionate time and lack of economies of scale was a good one. On the other hand, of £1644.00 of service charges for actual expenditure, £1200.00- nearly three-quarters- is the management fee. The remainder is bank charges and one repair invoice for the repair finally undertaken which should have been undertaken much earlier and about which there are other issues, as explained below. As the oral evidence stated, there are only small communal areas. The picture painted is that except where repairs or maintenance works are required- which ought not to prove anything like as problematic as they did- there is little to be done. There was probably quite a lot of time spent on the particular repair at one time or another in the event, although that was impacted upon significantly by Mr Kent's inappropriate approach to it.

114. On balance and in the absence of any evidence that an agent would have managed the property for less and where the fee is not excessive as compared to many other fees of which the Tribunal is aware, applying its expertise the Tribunal finds that a management fees included in the Applicants costs of £1200.00 and a proportionate service charge payable by the Respondent- £300.00- is reasonable.

115. That is the answer in respect of the claim. However, it is not quite the end of the story for 2018, because taking account of the reasonableness of the service in 2018, that merits a reduction in the actual service charge.

116. The Tribunal has found a lack of evidence that the demands for service charges were dealt with appropriately. Dealings with such demands forms a normal part of the duties of a managing agent and, as no other party has identifiably had any dealings with the service charges and related until the instruction of solicitors, the Tribunal finds that it did so in this instance. There was an ongoing failure to properly consider and act in accordance with the terms of the Lease.

117. The Tribunal finds that for 2018, and given how fundamental the above matters were, the reasonable management fees for the level of service provided were £600.00 plus VAT and the so the reasonable sum which would be payable by the Respondent is £180.00.

118. Consequently, the reasonable on account demand was £300.00 but the reasonable sum following subsequent determination of the service charges at the end of the service charge year is £180.00

- Repair costs

119. The Tribunal does not accept it to have been reasonable for there to have been two separate contractors involved with repair to the box bay area. The Tribunal also notes that the second contractor was not satisfied with the work of the first. The Tribunal considers that the work ought properly to have been undertaken once, in 2018, and that the cost of the second contractor for the fuller repair is reasonable if the same as it would have been in 2018.

120. The Tribunal would not be surprised if the cost of repair were greater in 2020 than it ought to have been in 2014 to 2016. The high likelihood is that the wood rotten to a greater extent and the membrane was damaged to a greater extent, at least up to 2018 when the first contractor attended. However, the Respondent has not shown that the second contractor would have charged more and in the absence of such evidence the Tribunal does not find that the amount of the second contractor's invoice was greater than it otherwise would have been. The Tribunal refrains from further findings given that the second contractor's invoice dates from 2020 and does not form part of this claim.

121. The Tribunal does not consider the 2018 service charge to the extent that it relates to the Respondent's 25% contribution to the 2018 contractor's fees.

- Insurance 2018/ 2019-£345.42

122. The Lease provides at paragraph 3 of Part 2 of the Second Schedule that the Respondent shall pay 25% of the initial insurance premium. That aside, the premium is simply included in the wider service charge provisions.

123. That is notable because the insurance premium is listed separately on the Particulars of Claim and as if it were a separate item to the other costs and expenses for the year. It was the subject of a separate invoice from the managing agents to the Respondent.

124. However, there is nothing in the Lease that entitles the Applicant to deal with insurance in such a manner. The Applicant is obliged to insure suitably, pursuant to paragraph 4 of Part 1 of The Second Schedule and the Respondent is obliged to meet the costs and expenses notified of

compliance with the requirements of Part 1, as previously discussed. However, there is no provision, other than for the initial premium, for the cost of the insurance policy being dealt with in any different manner to the cost of any other item.

125. The insurance premium invoice dated 29th November 2018 therefore demands a payment not due at that date. The Lease requires that the costs of insurance that will incurred within a given year is included in the costs and expenses for that year notified to the lessee before then being demanded. The anticipated cost should have formed part of the wider costs notified as expected.

126. There is no evidence of such a notification, as explained in some detail above. It might be arguable that the invoice somehow provided notification of that specific insurance cost and that some other document then constitutes the demand. However, such an argument has not been raised even in the most oblique terms and allowing any latitude that it may be suggested has been given to the Respondent on any point, and there has been no later document identified that could constitute the later demand.

127. The insurance cost therefore goes the way of the other 2018 service charges and hence no sum is payable until such time as notification and subsequent demand in accordance with the Lease takes place.

128. The Tribunal adds that it finds that the insurance cost was reasonable. The overall cost, in light of the amount of the 25% demanded from the Respondent was £1431.80. There was no basis for finding that the cost of insurance was challengeable as excessive. It may be that suitable insurance could have been obtained more cheaply but the Respondent did not identify anything unreasonable about the level of the premium and none is otherwise so obvious that the Tribunal should seek to address it. In any event, the fact that there may be a cheaper quote which could have been obtained is insufficient to find this price to be unreasonable. The price would not have been the only proper consideration.

129. The service charge contribution of the Respondent to the cost for insurance of the building for 2018/ 2019 charged would therefore be reasonable in the sum of £357.95.

- <u>Other sums within the 2018 service charge and Net Effect</u>

130. No challenge is brought to bank charges (£15 as apportioned), which the Tribunal finds to be reasonable in principle. The Tribunal did not agree with the Respondent that an insurance claim should have been made, still less that any such claim had any realistic prospect of resulting in a payment by the insurance company. It was very clear that the disrepair to the box bay had arisen over a period of time.

131. The effect of the above is that the Tribunal finds that the reasonable service charge for 2018 as and when notified in compliance with the requirements of the Lease and then demanded, will be £1422.95.

132. It should be borne in mind that the Respondent has already paid £1176.75 of that and so the net sum that the Respondent will, at the relevant time, owe from the on- account demands will be £246.20. However, as the service charge year has long since ended, the Respondent should be charged the reconciled amount in accordance with this Decision and so the service charges for management fees should be £120 lower and hence the net sum owed will be £126.20 when properly demanded following notification.

On account demand- 1st January 2019

133. The sum claimed for 2019 is purely a sum on account. The service charge year had not ended at the time of issue of the claim within which the Tribunal must determine the reasonableness of service charges. The relevant question for the Tribunal is explained above.

134. The Tribunal can deal with this demand in relatively short order. The Tribunal's determinations in respect of the 2018 charges apply. The 2019 costs and expenses anticipated had to be notified and then the demand had to be made. The Tribunal considers that the Respondent's assertion as to an unreasonable increase in service charges applies to 2019, albeit is primarily directed at 2018. The Tribunal has in any event had the reasonableness of the service charges referred to it by the County Court for determination and it must fulfil that task.

135. The payment on account of the 2019 service charges of £782.50 claimed is for the payment demanded on 1st January 2019. There is no claim within these proceedings for any further on account demand 1st July 2019, although if such a sum was demanded and unpaid, as seems highly likely, it would have been no more and no less due prior to the drafting of the Particulars of Claim on 1st August 2019 as the other sums claimed. Given the established practice shown by the documents was to demand half on each of the two occasions and that is consistent with the provisions of the Lease, the Tribunal finds that the payment for the service charge demanded on account for 2019 overall was £1565.00.

136. There is no evidence before the Tribunal that the Applicant notified the Respondent as to the expenditure anticipated that the on-account demand was a payment towards. Nor can any inference of notification be drawn from any other evidence that such notification occurred

137. The Tribunal finds that no service charges for 2019 were payable.

138. In terms of the level of the on-account service charge reasonable, the Tribunal applies some caution where the relevant specific challenge raised by the Respondent related to the management fees and the Tribunal has already found those to be at level within the bounds of reasonableness for 2018 and so in the absence of any additional evidence in respect of 2019 in particular, the challenge to them would fail. However, the Tribunal considers that the Respondent's assertion as to an unreasonable increase

in service charges as compared to earlier years applies to 2019, albeit is primarily directed at 2018, and as such some consideration should properly be given to the 2019 service charge demand. The Tribunal has in any event had the reasonableness of the service charges referred to it by the County Court for determination and it must fulfil that task.

139. It is not clear from the Applicant's case what the on-account demand related to, in the sense of the expenditure anticipated that the on-account demand was a payment towards. There are no details of that anticipated expenditure. That is a consequence of the lack of the required notification coupled with the absence of any Service Charge Expenditure Statement, so that there is no breakdown of the costs anticipated or the appropriate charge to the Respondent and hence of the appropriate first half of that.

140. None of the written witness evidence of Mr Kent addressed the issue generally, or any anticipated expenditure in 2019 in particular, and oral evidence was focused on other matters. All that the Tribunal has is that the on-account demands were lower than the demands in 2018 but more than the service charge for 2018 that the Tribunal determined to be reasonable.

141. The Tribunal does not find the reasonable service charge anticipated for 2019 to be proscribed by the 2018 expenditure. The Tribunal does consider that it is a sensible starting point and that the Applicant would have been likely to have used it as such. That would indicate a reasonable level of on account demand to have been £700.00.

142. However, the facts known would have included that the 2018 costs included payment of the DJ Tracy invoice for work to the box bay and it is not apparent that further was anticipated within the 2019 service charge year. Further, having kick-started the reserve account and in the absence by late 2018 of any or any imminent claim on it, it would only have been reasonable to demand a rather lower sum in 2019, to build up the account further but more gradually. The Tribunal finds that the reasonable increase would have been £2000.00 per year and so the reasonable service charge to the Respondent would have been £500.00.

143. Service charges prior to 2018 had been approximately £270.00 per year. As noted above, in the absence of other identified expenditure save for any bank charges, it is likely that £250.00 or so of that was the Respondent's contribution to insurance but the 2018 charge of £357.95 has not been found unreasonable and may have increased a little. The sums in 2015 to 2017 were, in any event, prior to managing agent fees of £300.00 per year or any reserve account. Allowing for £500.00 for the reserve account and modest bank charges, the reasonable amount of on account demands for 2019 would have been £1200.00 if there were no funds left over from 2018 which should properly have remained in the current account.

144. However against that should have been set the balance funds demanded in 2018 for expenses other than the creation of the reserve account and which were not properly payable into the reserve account but

which should instead have been applied in reducing the estimated charge for 2019.

145. The Tribunal finds that the reasonable on account demand in January 2019 would have been the equivalent of £600.00 less 50% of the proportionate credit balance for the Respondent which there should have been at the end of 2018 to represent service charges demanded for costs and expenses other than to create a reserve account and which were transferred into the reserve account when they ought not to have been.

146. An accounting exercise will need to be undertaken by the Applicant to reflect the reasonable service charges as found in this Decision, both as between the current account and the reserve account and more generally.

Administration charges

147. The Respondent specifically challenged the level of administration fees or arrears management fees as termed by the Respondent. The only administration fee forming part of this claim is the £150.00 charge in February 2019. The other fees predate the specific sums claimed for. Of those £218.02 relate to the 2016 proceedings, the Tribunal accepting the unchallenged evidence of Mr Kent that £68.02 shown on the statement of account. £186.00 of other arrears management fees are shown on the statement of account after January 2017 and so do not relate to the payment made in January 2017.

148. However, those fees are charged in May 2017 and June 2017. A charge of £36.00 is followed swiftly by a charge of £150, the latter of which is the sum Mr Kent identified in his second witness statement, and expanded on in oral evidence, as being the fee charged (inclusive of VAT) to prepare a file to send to solicitors. The statement identifies £36.00 (inclusive of VAT) as being the sum charged to send a letter. There were sums outstanding from the Respondent at that time, namely £341.00 for insurance demanded in October 2016 and £200.00 for ground rent demanded in March 2017. Those sums, but not the administration fees, were paid in July 2017.

149. The above sums do not form part of the Applicant's claim and are not challengeable in the claim. They are not part of the service and administration charges of which the Tribunal has been tasked with determining the reasonableness.

150. In relation to the 2019 charges, despite the above findings in respect of service charges, the payment by the Applicant which cleared the 2015 to 2017 balance, the January 2018 on account demand and the 2018 ground rent was only made after the administration charges had been incurred.

151. The Tribunal finds that the Applicant would ordinarily have been entitled to charge administration charges in respect of preparation by the agents in relation to the instruction of solicitors to pursue those sums at the time. The Tribunal has concluded that the charges are not on their face

so disproportionate to the rather limited sum properly outstanding by way of service charges and ground rent as to render the administration charges unreasonable.

152. However, it is abundantly clear that the Applicant's managing agents had given no proper thought to the considerable failings in their conduct in respect of the box bay window, to the fact that they had not, on the evidence before this Tribunal, properly demanded the 2018 service charges and that the Respondent's reasons for not making payment were the consequence of the belligerent and threatening attitude of the agents and their wholly inappropriate attempts to exercise "leverage". Having had the advantage of hearing the evidence of the Respondent and Mr Kent, the Tribunal has had no hesitation in finding the Respondent's reasons genuine and his considerable dissatisfaction well-founded.

153. The Tribunal cannot accept the reasonable response to that was to instruct solicitors to issue proceedings and for the agents to prepare a file for that purpose. Proper consideration ought to have been given to the Respondents concerns and the effects on him. Appropriate allowance should have been made for that, by which the Tribunal includes financial allowance. A sensible attempt should have been taken to resolve matters in a conciliatory manner, with due contrition on the part of the Applicant and/ or its agents. The administration fees have been charged for a step that the Tribunal finds could not reasonably be taken.

154. The Tribunal does not therefore find the administration charges to be reasonable and recoverable.

The Decision

155. No service charges or administration charges as claimed by the Applicant in the proceedings in the County Court numbered F02YM554 were payable at the time of the claim.

Rights of appeal- Tribunal decision

1. By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

2. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

3. The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

4. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means 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.

(2) The relevant costs are 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.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.
(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1
(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.
(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2
A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5
(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Sub-paragraph (1) applies whether or not any payment has been made.
(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).