



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/18UC/LIS/2022/0023/0024**

Property : **Flat 4 and Flat 9 Northgate House
Northernhay Gate
74 Queen Street
Exeter
EX4 3SA**

Applicant : **Northgate House Exeter Freehold
Co Limited**

Representative : **Chandler Harris LLP**

Respondent : **Mr Trystan Clarke & Ms Suki
Shearer (Flat 4)
Mr Trystan Clarke (Flat 9)**

Representative :

Type of Application : **Transferred Proceedings from
County Court in relation to service
charges**

Tribunal Members : **Judge Tildesley OBE**

**Date and venue of
Hearing** : **22 August 2022
Havant Justice Centre
Hybrid**

Date of Decision : **20 September 2022**

DECISION

Decisions of the tribunal

- (1) The Tribunal determines that the sum of £7,029.17 is **not** payable by Mr Clarke and Shearer in respect of the service charge for the period 1 February 2018 to 1 October 2021 for Flat 4 Northgate House, Northernhay Gate, 74 Queen Street, Exeter Ex4 3SA.
- (2) The Tribunal determines that the sum of £8,893.00 is **not** payable by Mr Clarke in respect of the service charges for Flat 9 Northgate House, Northernhay Gate, 74 Queen Street, Exeter Ex4 3SA.

The Application

1. The Applicant seeks, and following a transfer from the County Court a determination of service charges against the leaseholders of Flats 4 and 9 Northgate House, Exeter for the period of 1 February 2018 to October 2021.
2. The original proceedings were issued in the County Court under Claim Numbers H7QZ4X3J and H7QZ2X9J. District Judge Eaton-Hart authorised the Tribunal Judge sitting as a Judge of the County Court to determine all matters arising from the Claim including those which fell outside the Tribunal's jurisdiction.
3. The Applicant is registered with title absolute of the freehold title of the property under Title Number DN519447. The shareholders and directors of the Applicant company are eight leaseholders who acquired the freehold by Order of Deputy District Judge Simpson on 27 June 2016. By virtue of this Order the freehold of the property was transferred to the Applicant on 13 October 2016.
4. Mr Clarke and Ms Shearer are the joint leaseholders of Flat 4 under the terms of the lease between Dennis Neville Griffith, Northernhay Gate (Exeter) Management Company Limited and the Respondents for a term of 199 years from the 1 January 2006.
5. Mr Clarke is the leaseholder of Flat 9 under the terms of the lease dated 30 May 2008 between Dennis Neville Griffith, Northernhay Gate (Exeter) Management Company Limited and Mr Clarke for a term of 199 years from the 1 January 2006.
6. Mr Clarke and Ms Shearer did not participate in the purchase of the freehold, and are not shareholders of the Applicant company.
7. The property is a period building constructed of Exeter sandstone with a slate roof located in the centre of Exeter close to Exeter Central Railway Station and adjoining Northernhay Gardens. The building was converted in 2008 to eleven flats comprising studios, and one and two bedroom flats. The Tribunal did not inspect the property.

8. On 22 August 2022 Judge Tildesley heard the Claims at Havant Justice Centre. Judge Tildesley sat first as a Tribunal Judge and then as Judge of the County Court. Mr Christopher Green of Counsel represented the Applicant. Dr Alasdair Sutter a director of the Appellant attended to give evidence. Mr Green and Dr Sutter appeared on the Common Video Platform. Mr Trystan Clarke appeared in person. Ms Suki Shearer sent a written note to the Tribunal authorising Mr Clarke to speak on her behalf.
9. The Applicant prepared the hearing bundle. References to documents in the bundle in this decision are in []. After hearing the evidence Judge Tildesley reserved his decision. Judge Tildesley also directed the parties to provide various documents within seven days.

The Determination on 2 April 2019 (CHI/18UC/LIS/2019/0007/08)

10. On 2 April 2019 Judge Tildesley and Mr W Gater determined the service charges payable by the Respondents for the period from 1 February 2017 to 1 February 2018. The Tribunal decided that the sum of £888.45 was payable by Mr Clarke and Shearer in respect of the service charges for Flat 4, and that the sum of £1,137.43 was payable by Mr Clarke in respect of the service charges for Flat 9.
11. The reasons for the previous determination are relevant to this decision. At the previous hearing the Tribunal rejected Mr Clarke's arguments that the Applicant was not entitled to recover the service charges. The Tribunal found against Mr Clarke in respect of his assertions about the Respondents not being invited to participate in the collective enfranchisement, and that the Applicant had a contractual obligation to convey the freehold to the Management Company. The Tribunal decided that the Applicant was a successor in title and fell within the definition of Lessor under clause 1(7) of the lease. Under clause 3(1) of the lease the Tenant covenants with the lessor to pay a service charge.
12. The Tribunal on the 2 April 2019 considered the Respondents' submissions that they were not liable to pay the service charges because the Applicant had not been provided with audited accounts showing the computation of the charge and that the charges were not based on expenditure but on a proxy figure which had been supplied by the managing agent. The Tribunal on the 2 April 2019 accepted the Applicant's contentions that as the freehold had only been transferred in October 2016 the Applicant had not incurred a full year's costs in order to prepare accounts. In those circumstances the Tribunal was satisfied that the Applicant had complied with the lease by demanding an estimated charge based on a budget. The Tribunal, however, acknowledged that it might reach a different conclusion for future years when presumably the Applicant would be in a position to supply audited accounts.

The Issues

13. The Respondents had not made any payments for service charges since the last hearing. The Applicant had applied to the Respondent's mortgagor to discharge the debt owing from the previous determinations on 2 April 2019 which was done on 2 July 2019.
14. The Respondents' defence to the County Court claim in these proceedings was:

“It is a requirement of the lease that service charges be calculated in a specific way and the freeholders persist with non-compliance of these terms. Of particular note is that the accounts are required to be audited and an accountant's certificate be issued. It appears that the freeholders may have some form of audit process carried out but the accountants have not been willing to confirm that I as a leaseholder am entitled to rely on the contents of the report. In fact the report specifies that the report should not be relied upon by third parties unless specified in their letter of engagement. I have requested a copy of the letter of engagement but unfortunately neither the managing agent nor the accountants have provided it. In any event it does not appear that all accounts periods have been audited as was required by the lease”.
15. The Respondents in their witness statement to the Tribunal repeated their argument made at the previous hearing regarding the acquisition of the freehold. The Tribunal informed Mr Clarke that it would not be considering this issue because it had been determined by the previous Tribunal on 2 April 2019 and no appeal had been made against that decision.
16. The issue, therefore, for this Tribunal is whether the Applicant had complied with the terms of the leases for Flats 4 and 9 in regard to the process by which it was able to determine and to inform the Respondents of their liability for service charges.
17. Before the Tribunal considers the issue it is necessary to breakdown the Claims for service charges for Flats 4 and 9 into the respective accounting periods.

The Sums Claimed

18. Mr Green accepted that the Tribunal should take the amounts owed as at 1 October 2021 on the Statements of Account for Flats 4 and 9 [122 & 158] as the sums being claimed. The Tribunal then agreed with Mr Green the breakdown of those sums into accounting periods. Unfortunately the amount brought forward was not analysed at the hearing, and the Tribunal has conducted its own analysis to separate those charges into the respective accounting periods.

19. The Applicant had changed the accounting period from 2020 to 1 July to 30 June to correspond with the accounting period in the lease. This meant that the accounts produced by the Applicant did not align with the service charge year until year ended 30.6.2021.
20. The Applicant claimed a total of £7,029.17 for services charges for Flat 4 and a total of £8,893.00 for Flat 9. The Applicant also claimed ground rent in the sum of £30 for each Flat which was not a matter for the Tribunal. The breakdown of the charges together with budget and actual amounts are set out in the table below.

Accounting Period	Service Charge Demanded for Flat 4	Service Charge Demanded for Flat 9	Actual Service Charge as set out in the Accounts
1.2.18 -30.6.18	£667.20	£588.90	
1.7.18 – 30.6.19 Budget: £11,360 (£2,000 provisions) [118]	£873.60	£1,166.76	£10,471 for 1.2.18-31.1.19 [228]
1.7.19 - 30.6.20 Budget £15,083 (£2,400 provisions) [119]	£1,159.92	£1,549.08	£16,151 for 1.2.19-30.6.20 [105]
1.7.20-30.6.21 Budget £15,365.82 (£4,706.82 provisions) [120]	£3,941.81	£5,071.90	£12,520 for 1.7.20-30.6.21 [113]
1.7.21 – 1.10.21 Budget £15,302.36 per Mr Green's calculations	£386.44	£516.36	
Service Charge Total	£7,029.17	£8,893.00	
Ground Rent: 2019, 2020, 2021	£30.00	£30.00	
Total	£7,059.17	£8,923.00	

The Service Charge Machinery in Practice

21. The Tribunal did not consider that the Applicant in its statement of case was transparent about the precise arrangements in practice for operating the service charges for the property. The Tribunal did not realise until near the end of the hearing that in fact there were two companies involved in the collection of service charges. The Tribunal understood from the previous hearing that Northernhay Gate (Exeter) Management Company, the management company named in the lease had been dissolved and played no part in the service charge machinery for the property. The Tribunal on 2 April 2019 found that a direction had been issued on 3 April 2017 requiring all payments of rent and service charges to be made to the lessor (the Applicant) pursuant to clause 3(2)(e) of the leases.
22. The Tribunal makes the following findings on the arrangements in practice which was based on the evidence presented in the bundle of documents and at the hearing.
23. The Applicant, Northgate House (Exeter) Freehold Company Limited, is a dormant company under registration number 09897565 and is not required to obtain an audit in accordance with section 476 of the Companies Act. This is the company that owned the freehold of the property, and would be referred to in this decision as “the Freehold Company”.
24. Northgate House (Exeter) Owners Limited is a dormant company under registration number 08351596. This company according to Companies House records has not traded and is entitled to exemption from audit under section 480 of the Companies Act 2006. The directors of this Company comprised the leaseholders including the two Respondents at Northgate House. The Tribunal understands that this company was the successor to Northernhay Gate (Exeter) Management Company which was a party to the leases, and would be referred to in this decision as “the Management Company”.
25. Dr Souter explained in evidence that the managing agents, Whitton and Laing, held the service charge funds on trust for the Freehold Company and dealt with those funds on instructions received from the directors of the Freehold Company which included paying for such matters as building insurance and payments to contractors.
26. The Freehold Company was named as the landlord on the service charge demands. Whitton & Laing was referred to on the demands as the agents for the Freehold Company. As the Freehold Company was a dormant company it filed with Companies House dormant accounts which were not required to be audited. The balance sheet for the year ended 31 December 2021 showed nil assets and nil reserves. The

Applicant supplied no service charge accounts for the Freehold Company.

27. The Applicant supplied Minutes of the Annual General Meeting of the Management Company dated 20 August 2019 [196] and 9 September 2020 [199]. The Minutes revealed that the Management Company: (1) approved the appointment of the managing agents and the accountants; (2) considered the service charge accounts and approved the service charge budget for the forthcoming year, and (3) considered matters relating to the structure and maintenance of the buildings. The managing agent attended the meetings and kept the minutes of those meetings. Minute 10(d) of the meeting on 20 August 2019 stated that the Judge (referring to the hearing on 2 April 2019) found in favour of the *Management Company*.
28. The Management Company was described in Companies House records as “Residents Property Management”. The Management Company filed with Companies House an Annual Report and Unaudited financial statements for the year ended 30 June 2021. The Company stated under the Profit and Loss Account that it had not traded during the year and it had received no income and had incurred no expenditure. The Company declared under the Balance Sheet shareholders assets of £11, and that it was entitled to an exemption from audit under section 480 of the Companies Act 2006.
29. The Applicant included in the hearing bundle the following financial statements relating to the Management Company:
 - a) Unaudited Financial Statements for the year ended 31 January 2019 including four pages that did not form part of the statutory financial statements [220]. The first page included a Report of the Accountants to the Directors of the Management Company stating “you (*the directors*) are responsible for the preparation of the financial statements and you consider that the company is exempt from an audit. In accordance with your instructions we have compiled these unaudited financial statements in order to assist you to fulfil your statutory responsibilities from the accounting records and information and explanations supplied to us”. At page 6 an Income and Expenditure Account for the Year Ended 31 January 2019 was produced which showed service charge income of £13,737, and expenditure of £10,471 with a surplus of £3,271.
 - b) A letter from Thompson Jenner LLP dated 27 February 2020 [218] which stated that “it had carried out an audit of the accompanying service charge accounts for the year ended 31 January 2019 comprising the statement of service charge income and expenditure account, balance sheet as at 31 January 2019, and related notes”. The accounts have been prepared in accordance with the provisions of the lease on the accruals basis. Thompson Jenner expressed the opinion that “the service charge accounts of

the Management Company for the year ended 31 January 2019 have been prepared in all material respects in accordance with the provisions of the lease and on the accruals basis”.

- c) Unaudited Financial Statements for the period 1 February 2019 to the 30 June 2020 which included a page entitled “Audited Service Charge Account for the period to 30 June 2020 for Residents Information” [99]. This page was not filed with the accounts for Companies House. The page did not have a certificate from an auditor. The account showed an income of £16,874 for service charge, and expenditure of £16,151 with a surplus of £722 carried forward. There were reserves of £10,504 which with the surplus and a net movement in legal costs to the Freehold Company amounted to £11,315.
 - d) A page entitled “Audited Service Charge Account for the period to 30 June 2021 for Residents Information” [113]. The page did not have a certificate from an auditor. The account showed an income of £13,352 for service charge, and expenditure of £12,520 with a surplus of £832 carried forward. There were reserves of £11,315 which with the surplus amounted to £12,147.
30. Dr Souter in his witness statement declared that “the Applicant was required to provide audited service charge accounts and that is exactly what it has done”. Dr Souter, however, did not mention that the service charge accounts were in the name of the Management Company and not in the name of the Applicant, the Freehold Company”. This fact only became apparent at the end of the hearing, the Tribunal then asked why it had been done this way, to which Dr Souter replied that the accounts of the Management Company were available to all the leaseholders.
31. In November 2021 Mr Clarke contacted Thomas Jenner Ltd, the auditors, asking whether he was one of the parties mentioned in the letter of engagement who was entitled to rely on the report. Thomas Jenner Ltd responded by confirming that the engagement was between the Management Company and Thomas Jenner LLP. Mr Clarke then asked the Applicant’s solicitors and the managing agent for a copy of the letter. The managing agent questioned the relevance of the engagement letter to Mr Clarke’s failure to pay the service charge.
32. The statement of accounts for Flats 4 and 9 [121] and [157] revealed that the service charge was demanded on a monthly basis. The payment demanded was a fixed sum for service charge due and a separate fixed sum for future major work reserve. The fixed monthly payment for both items of expenditure corresponded to the monthly payment set out in the service charge budgets.
33. The minutes of the AGM of the Management Company dated 9 September 2020 stated that “All service charges will be collected monthly

rather than six monthly unless any leaseholder wishes to pay six monthly in advance”. Similarly, Ground Rent will be collected twice a year as per the lease” [202].

34. In addition to the fixed monthly payment levies for service charges were raised on occasions. On 4 April 2018 a levy of £200 to top up service charge was demanded against the leaseholders of Flats 4 and 9. On 11 May 2021 sums of £2,781.69 and £3,522.82 were demanded respectively from the leaseholders of Flats 4 and 9 for roof/lead gutter works. The managing agent in an email agreed to amend the flat rate levy of £200 to reflect the percentage contributions for each flat. This resulted in a reduction to £170 for Flat 4 and an increase to £226 for Flat 7. The managing agent, however, commented that it was common practice that expense levies may not be apportioned according to the lease percentage [212].
35. The Tribunal compared the 2021 budget with the “audited” account for the year ended 30 June 2020¹. The 2021 budget of £10,659 for general administrative expenses was in line with the 2020 expenditure of £10,767 for those expenses. There were, however, wide variations between the 2021 budget and the 2020 expenditure in the “audit account” for individual lines of expenditure, for example, fire precautions: £1,500 (budget) versus £664 (accounts); accountancy fees: £800 (budget) versus £2,528 (accounts); and builders and director insurance: £3,000 (budget) versus £3,677. The Tribunal observed that the surplus of £722 recorded in the audited accounts for the year ended 30 June 2020 was carried forward in reserves and did not appear to be set off against the estimated expenditure for 2021.
36. The Tribunal examined the “audited” account for the year ended 30 June 2021 against the demands for service charges during the same accounting period. The service charges demands were based on the figures given in the 2021 budget. The 2021 account recorded that an amount of £13,352 would be collected in service charges which contrasted with the amount of £15,302.36 in the budget. The 2021 account did not record the amount collected as provisions for major works. The 2021 account did not refer to the levy for the section 20 works to the roof and lead gutter.

The Lease

37. The leases for Flats 4 and 9 had identical clauses for determining liability to pay service charges except the percentage contribution. The Tribunal refers to the Clauses in the lease for Flat 9:

¹ The account for year ended 30 June 2020 was for an 18 month period. For comparison with the 2021 budget the figures in the account were adjusted by 2/3rd to reflect a 12 month period.

2. Demise

In consideration of the sum of TWO HUNDRED AND SEVENTEEN

THOUSAND POUNDS (£217,000.00) paid to the Lessor by the Tenant on or before the execution hereof (the receipt where of the Lessor hereby acknowledges) and of the rent service charge and covenants hereinafter reserved and contained and on the part of the Tenant to be paid observed and performed the Lessor with full title guarantee hereby demises unto the Tenant ALL THAT the Property known as Flat 9 Northgate House, Northernhay Gate, Exeter, Devon TOGETHER WITH the easements rights and privileges mentioned in the First Schedule hereto subject as therein mentioned (the grant of such rights being conditional upon the Tenant contributing and paying the service charge described in Clause 3 of this Lease) but EXCEPTING AND RESERVING the rights set out in the Second Schedule hereto TO HOLD the same unto the Tenant for a term of One hundred and ninety nine years from 1st January 2006 SUBJECT TO the provisions for determination hereinafter provided PAYINGTHEREFORE the yearly rent of TEN POUNDS (£10.00) payable half yearly in advance on the 30th day of June and the 31st day of December each year

3 Tenant's Covenant with the Lessor

- (1) The tenant for mutual protection of the Lessor and the tenants of the other dwellings forming part of the Estate hereby covenants with the Lessor and the other tenants and with the Management Company to pay a service charge ("the Service Charge") as a contribution towards the costs and expenses of running and maintaining the Estate and other matters more particularly specified or referred to in the Third schedule hereto ("the Services")
- (2) The Service Charge shall be paid six months in advance on the 30 day of June and the 31 December in each year as follows:
 - (a) From the date of this Lease until the 30th day of June next a proportionate part of the estimated six monthly sum of £480.00.
 - (b) From the 30th day of June next the sum for each six monthly period will be equal to 10.27% of the Lessor's estimate of the cost and expenses of providing the services during the year to which the Service Charge relates together with Value Added Tax charged thereon at the appropriate rate. Such estimates shall be based on the actual costs and expenses to the Lessor in providing the services for the previous year ended the 30 day of June (with due allowance being made for any excess or shortfall in the Service charge actually paid in the previous

year) together with the provision for any expected increase of costs in the succeeding year. The Lessor shall so far as he considers practical endeavour to equalise from year to year the amount of the Service Charge incurred in providing the services and carrying out his obligations by charging against the cost and expenses in each year such sums as he considers reasonable by way of provision for future expenses and liabilities and shall carry such amount in a property repairs service fund for expending in subsequent years and for those matters within paragraph 1(i) of the Third schedule and in a sinking fund for those matters within paragraph 1(j) of the Third schedule.

(c) The certificate of the Auditor for the time being of the lessor as to the amount due under Sub-clause (b) of this clause shall be final and binding on the parties except in the case of manifest error.

(d) Subject to sub-Clause (c) in this Clause in the event of any dispute between the parties arising out of this clause or the Third schedule hereto the same shall be referred to an Arbitrator being an independent Chartered surveyor appointed by the President for the time being of the Law Society unless the parties hereto otherwise agree.

(e) Unless the lessor otherwise directs the Tenant in writing the contribution and any other sum payable under this clause shall be paid to the Management Company or as it shall direct. Any such direction shall remain in force until a contrary direction is given by the lessor. While any direction remains in force any contribution whether in respect of a period preceding the notice or nor shall be paid in accordance with such direction and paragraphs (b) and (c) of this Sub-clause shall be construed as though the references to the lessor were the Management Company.

(3) The Lessor shall supply audited accounts showing the computation of the service charge payable or paid for the year to which the computation relates.

(4) It is agreed and declared that the allocation of expenses between the paragraphs of the Third schedule to this Lease shall be in the sole determination of the Lessor except in the case of manifest error.

4. Tenant's covenants with Lessor and the Management Company

The Tenant hereby covenants with the Lessor and with the Management Company that the Tenant and all persons deriving title under her throughout the term hereby granted will:-

(1) pay the rent and the service charge at the times and in manner aforesaid without any deduction whatsoever and pay interest at 3% above National Westminster Bank Pic base lending rate from time to time on any payments made more than fourteen days after they fall due.

(8) (a) pay all expenses including Solicitors' costs and Surveyors' fees incurred by the Lessor incidental to the preparation and service of a notice under Section 146 of the law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 and 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court.

(b) pay ail expenses including Solicitors' costs and Surveyors' fees incurred by the Lessor of and incidental to the services of all notices and schedules relating to wants or repair of the Dwelling whether the same be served during or after the expiration or sooner determination of the said term as aforesaid.

(c) pay all costs charges and expenses which may be incurred by the Lessor in connection with the recovery of arrears of the service charge from the Tenant.

THE THIRD SCHEDULE before referred to Costs expenses outgoings and matters in respect of which the Tenant is to contribute by way of Service Charge

(a) The costs and expenses incurred by the Lessor and the Management Company in carrying out the obligations in Clause 6 hereof.

(b) The provisions and maintenance of communal fire and burglar alarm systems Security Systems and communal gates serving the Estate (if any).

(c) All rates (including water rates) taxes and agreed outgoings (if any) payable in respect of any part of the Estate in its grounds and gardens other than those payable solely in respect of the Dwelling or Other Dwellings let in the Estate.

(d) The reasonable cost of management of the Estate (including for the avoidance of doubt the proper maintenance of the grounds and gardens and courtyard of the Estate).

(e) The fees and disbursements paid to any Accountant or other professional person in relation to the preparation auditing or certification of any accounts of the costs expenses outgoings and matters referred to in this Schedule.

(f) Any contributions or expense incurred in relation to the repair maintenance or renewal of drainage and other pipes wires cables and services serving the Estate.

(g) All other expenses (if any) incurred by the Management Company in and about the maintenance and proper and convenient management and running of the Estate.

(h) Any Value Added Tax or tax of a similar nature payable in respect of any costs expenses outgoings or matters paid falling within any paragraph of this Schedule.

(i) Such sum as shall be estimated by the Lessor (whose decision shall be final except in the case of manifest error) to provide a Property Repairs Fund to meet any of the costs expenses outgoings and matters mentioned in the foregoing paragraphs of a cyclical nature.

(j) Such sum as shall be estimated by the Lessor (whose decision shall be final except in the case of manifest error) to provide a sinking fund in respect of:-

(i) all costs and expenses incurred (or anticipated to be incurred in the future) by the Lessor or the Management Company in fulfilment of their obligations under Clause 6 hereof in so far as such expenditure is not included in the foregoing paragraphs of this Schedule and relates to the renewal or replacement or major overhaul of any and every part of the Estate and the appurtenances thereof including inherent structural defects in the Estate the renewal or replacement of service pipes and wires within the Estate and interest paid on any money borrowed by the Lessor or the Management Company at reasonable rates to defray any expenses incurred.

(ii) all costs and expenses for future liabilities and expenses for renewing upgrading or improving the Estate and whether certain or contingent and whether obligatory or discretionary in the reasonable opinion of the Lessor **PROVIDED THAT** and it is hereby agreed and declared that the costs of developing the Estate into 11 flats or otherwise with all necessary services provision for access over roadways and other works to comply with planning and statutory control will not fall within the provisions of this Schedule nor Clause 6 hereof”.

Consideration

38. The Applicant in this case is the Freehold Company. The Tribunal determined at the previous hearing that the Applicant had issued a direction on 3 April 2017 that service charges and ground rent should be paid to the lessor, the Freehold Company. The service charge

demands exhibited in the hearing bundle required the service charge to be paid to the Freehold Company.

39. The dispute in this case is whether the Applicant had complied with the terms of the leases for Flats 4 and 9 in regard to the process by which it was able to determine and to inform the Respondents of their liability for service charges. The Respondents in their defence identified three specific failures that (1) the service charge had not been calculated in accordance with the lease; (2) no certificate of the Auditor for the time being of the lessor as to the amount due had been provided, and (3) the Applicant had not supplied audited accounts showing the computation of the service charge payable or paid for the year to which the computation related.

40. The Court of Appeal in *Leonora Investment Co Ltd v Mott MacDonald Ltd* [2008] EWCA Civ 857 explained the approach that a Tribunal should adopt when a question arises whether a Landlord is obliged to comply fully and strictly with the steps specified in the lease before Tenant has any liability to pay. At paragraph 14 Tuckey LJ said this

“The skeleton arguments referred to a number of cases in which the courts have had to consider whether terms in a lease are conditions precedent to obligations to pay, substantive procedural provisions which have to be followed to the letter before a liability to pay is triggered, or mere mechanics which do not have to be insisted upon regardless of the circumstances. I have not found these cases particularly helpful for the simple reason that we are only concerned with an issue of construction, the rules of which are not in doubt. The leases in this case must be construed in accordance with their own terms.”

41. Thus the question which the Tribunal must ask itself in each is whether, on a proper construction of the contractual provisions, and applying them to the facts as they are found to be, liability on the part of the Tenant has arisen.

42. Lord Neuberger in *Arnold v Britton and others* [2013] EWCA Civ 902 at paragraph 15 summed up the principles of construction applicable to service charge clauses. Lord Neuberger emphasised that he was unconvinced that service charge clauses were subject to any special rule of interpretation. In his view the rules interpreting a written contract were applicable equally to service charge clauses:

“The court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean” And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in

the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions”.

43. Mr Green cited the Upper Tribunal decision in *Elysian Fields Management Co Ltd v Nixon*, [2016] L. & T.R. 4 (2015). Where HH Judge Behrens decided that the

“The service of the accountant’s certificate was not a condition precedent in the leases to liability to make payment. Clause 1 in the Fifth Schedule clearly provided for payment based on a determination of the amount estimated to be due by the management companies. There was nothing in that clause that required the provision of audited accounts and there was no reason to imply such a term. While the Upper Tribunal had sympathy for the views expressed by the FTT, there were other remedies available to the tenants for the management companies’ failures”.

44. The Tribunal refers back to the ratio in *Leonora Investment Co Ltd* that the leases in each case must be construed in accordance with their own terms. In this regard the Tribunal views the decision in *Elysian Fields Management Co Limited* as one decided on its own specific facts.
45. The Tribunal turns to the construction of the service charge clauses in the leases for Flats 4 and 9.
46. Clause 2 specifies that the Tenant’s rights and privileges under the lease are conditional upon the Tenant contributing and paying the service charge described under Clause 3 of the lease.
47. Sub-Clause 3(1) requires the Tenant to pay a service charge as a contribution towards the costs and expenses of running and maintaining the Estate and other matters more particularly specified or referred in the Third Schedule. Sub-Clause 3(2) obliges the Tenant to pay the service charge six months in advance on the 30 June and 31 December in each year.
48. Pausing there, the Tribunal construes Sub-Clauses 3(1) and 3(2) as requiring the Tenant to pay a service charge and giving the Lessor the right to demand the service charge in advance for the ensuing year 1 July to 30 June payable in two instalments on 30 June and 31 December.
49. Sub-Clause 3(2)(b) states that the sum for each six monthly period will be equal to the proportion of the Lessor’s estimate of the costs and expenses of providing the Services during the year. Such estimates shall

be based on the actual cost and expenses to the Lessor in providing the services for the previous year ended 30 June after giving allowance for any excess or shortfall together with any provision for any expected increase of costs for the succeeding year. Sub-Clause 3(2)(b) also requires the Lessor so far as he considers practical to equalise from year to year the amount of the service charge incurred by charging against the costs and expenses in each year such sums as he considers reasonable by way of provision for future expenses and liabilities.

50. The Tribunal considers that the interpretation of Sub-Clause 3(2)(b) is critical to the understanding of the service charge machinery for the leases of Flats 4 and 9. The first part of the Sub-Clause sets out the method by which the Lessor computes the service charge which is an estimate but based on the actual costs for the previous year. Thus the Tribunal is satisfied that there is a clear connection between the estimate and the actual costs of the preceding year. The second part of the Sub-Clause requires the Lessor to use his best endeavours to equalise the service charge for each year by committing sums against provisions for future expenses and liabilities so as to avoid large bills for costs in any one year. The Third Schedule permits two such provisions: (i) a property repairs fund for costs and expenses of cyclical nature, such as costs associated with redecorating the Estate, and (j) a reserve fund for costs associated with the renewal or replacement or major overhaul of the Estate, such as the replacement of a roof. The Tribunal notes that there is no authority in Clause 3 to enable the Lessor to raise supplementary levies of service charges.
51. Sub-Clause 3(2)(c) states that the certificate of the Auditor for the time being of the Lessor as to the amount due under Sub-Clause (b) of this Clause shall be final and binding on the parties except in the case of manifest error. Sub-Clause 3(3) requires the Lessor to supply audited accounts showing the computation of the service charge payable or paid for the year to which the computation relates.
52. The Tribunal takes the view that Sub-Clauses 3(2)(c) and 3(3) should be read together, and are mutually dependent upon each other. The Tribunal is satisfied that the certificate of Auditor is based on the amounts showing on the audited accounts. The certificate is not a separate document. It, therefore, follows that the obligation on the Lessor is to supply audited accounts certified by the Auditor to the Tenant. The Tribunal notes that it is the Auditor of the Lessor.
53. The next question is whether the Tenant's liability to pay the service charge is contingent upon the provision of audited accounts certified by the Auditor.
54. The Tribunal turns first to Sub-Clause 3(2)(c) which makes explicit reference to the amount due under Sub-clause 3(2)(b) and, thereby, establishing the connection between the certificate and the Tenant's s

liability to pay the service charge. The Tribunal finds that the certificate represents confirmation of what the Tenant should pay by way of service charge.

55. It could be argued that the certificate of the Auditor only comes into play if there is a dispute about the service charge, and that it is not relevant to the liability to pay the service charge. In this regard the fact that there would be an inevitable time lag between the demanding of service charges for the forthcoming year and the production of accounts suitably certified for the preceding year would appear to support the argument that the liability to pay exists independent of the requirement to produce certified accounts. The Tribunal might be inclined to accept the argument if the certificate related to a balancing payment or credit at the end of the accounting period. The Tribunal considers it noteworthy that the leases for Flats 4 and 9 do not incorporate the typical service charge clauses of advance payments based on estimates with a balancing payment or credit at the end of the accounting period.
56. The Tribunal takes the view that the machinery for determining service charges under the leases for Flats 4 and 9 is more subtle than the typical arrangements of estimates and balancing payments. Under Clause 3 the Lessor is entitled to demand service charges in advance at the beginning of the accounting year starting 1 July and ending 30 June. The first payment is due on 30 June immediately before the start of the accounting year. The service charge is based on an estimate which comprises the actual service charge from the previous year together with any allowance for expected increases in costs in the following year and the contributions to the property repairs fund and the reserves. The certificate of Auditor based on the audited accounts of the accounting year just gone is critical for determining the estimated service charge by giving the figure for the actual service charge of the preceding year, and details of the contributions to the property repairs fund and the reserves. The obligation of the Lessor to use practical endeavours to equalise the service charge from year to year provides a safety value against wide fluctuations in service charges, and minimises the impact of any delay in producing the audited accounts for the previous year. Finally the Lessor is required under the lease to produce audited accounts showing the computation of the service charge payable or paid for the year in question. The Tribunal is, therefore, satisfied that its construction of Clause 3 puts the supply of the audited service charge accounts certified by the Lessor's Auditor centre stage for determining liability to pay service charges.
57. The Tribunal now compares its construction of the service charge clauses in the leases for Flats 4 and 9 with the manner in which the Applicant has demanded service charges from the Respondents.
58. The Tribunal found that the Applicant had adopted the period of 1 July to 30 June for the accounting of service charges. The Applicant

produced a budget for the forthcoming year and issued monthly demands for a fixed sum for service charge due and a separate fixed sum for future major works reserve. The fixed monthly payment for both items of expenditure corresponded to the amount of monthly payment set out in the service charge budgets. In addition to the monthly sums for service charges the Applicant in 2018 had demanded a levy of £200 to top up the service charge and in May 2021 had demanded sums of £2,781.69 and £3,522.82 for roof/lead gutter works. The Applicant supplied no audited service charge accounts certified by an Auditor appointed by the Applicant. Instead the Applicant relied on service charge accounts produced in the name of the Management Company. None of the accounts were certified by an Auditor. The letter of Thompson Jenner LLP which accompanied the accounts for the Management Company for the period ended 31 January 2019 did not certify the amount due from the leaseholders. The Tribunal could not establish a transparent connection between the service charge budgets and the accounts for the Management Company.

59. Under the lease the Lessor is required to issue a demand at the beginning of the accounting period which is payable in two instalments. The sums demanded are those for the expected costs of the services for the forthcoming years based on the actuals for the previous years and for the contributions to the property repairs fund and to the reserve. The Lessor has no authority under the lease to levy supplementary service charges during the accounting period. The Lessor is expected to use practical endeavours to equalise the service charge from year to year. The Lessor is obliged to provide audited accounts showing the computation of the service charge payable which are to be certified as to the amount payable by an Auditor appointed by the Lessor. The purpose of the audited accounts certified by an Auditor is to ensure that the service charge has been calculated in accordance with the lease.
60. The Tribunal decides that by comparing with what happens in paragraph 59 to what should happen in paragraph 60 the Applicant has not complied with the contractual provisions of the leases for Flat 4 and 9 for determining the Respondents' liability to pay the service charges. The Tribunal, therefore, finds that the Respondents are not required to pay the service charges in dispute. The Tribunal's determination does not mean that the Applicant is prevented from recovering the same service charges in the future. It is open to the Applicant to remedy its failure to comply with the service charge provisions of the lease, and re-issue fresh demands for the service charges in question.
61. Despite its findings that the Respondents are not liable to pay the service charges in dispute, the Tribunal considered whether it should determine the reasonableness of the service charges which would ease the issue of fresh demands. The Tribunal, however, considered it was not appropriate because of the lack of transparency of the Applicant's current arrangements for demanding service charges. The Tribunal

finds incomprehensible the decision to give the Management Company the de facto responsibilities of landlord and to allow the Managing Agent who apparently is not appointed by the Applicant to hold the service charge monies. Equally the Tribunal considers that once the Applicant complies with the terms of the lease the Respondents' should fulfil their obligations to make contributions to the costs for insuring or maintaining the Estate.

The Decision

62. The Tribunal determines that the sum of £7,029.17 is not payable by Mr Clarke and Shearer in respect of the service charge for the period 1 February 2018 to 1 October 2021 for Flat 4 Northgate House, Northernhay Gate, 74 Queen Street, Exeter Ex4 3SA.
63. The Tribunal determines that the sum of £8,893.00 is not payable by Mr Clarke in respect of the service charges for Flat 9 Northgate House, Northernhay Gate, 74 Queen Street, Exeter Ex4 3SA.

Rights of appeal for the Tribunal decision

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making application by email to rpsouthern@justice.gov.uk.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.