FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CA/LSC/2020/0089**
HMCTS code (audio,video,paper)	**:**	**V:FVHREMOTE**
Property	**:**	**Flat 2, Victoria Court, 21 Roe Lane Southport PR9 9EB**
Applicant	**:**	**Alan Higgins**
Respondent	**:**	**Victoria Court Management (Southport) Ltd**
Respondent's representative	**:**	**Fred Halfpenny**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 27A Landlord and Tenant Act 1985 – s 20C Commonhold and Leasehold Reform Act 2002-Schedule 11 Paragraph 5A**
Tribunal Members	**:**	**Judge J.M.Going J.Faulkner FRICS**
Date of Hearing	**:**	**2 March 2022**
Date of decision	**:**	**4 March 2022**
Date of Determination	**:**	**14 March 2022**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote Full Video Hearing which has been consented to by the parties. The form of remote hearing was V.FVHREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to were in a series of documents, statements, responses and submissions as described below, the contents of which were noted.

THE DECISION

The Tribunal found that:-
(1) the statutory consultation requirements relating to the painting works undertaken in 2019 were not properly complied with, and consequently
(2) the Management Company is not entitled to recover more than £250 from an individual tenant in respect of the costs of such works, unless or until dispensation is granted.
(3) Anthony James' fees of £382 were reasonable and are payable as part of the service charges, and
(4) the Management Company is precluded from including the costs of the present proceedings within future service charges or as an administration charge.

Preliminary and background matters

1. The Applicant ("Mr Higgins") applied on 16 December 2020 to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to whether particular service charges in the 2019-2020 service charge year are payable and/or reasonable.

2. The application also included separate applications for orders under section 20C of the 1985 Act to prevent the costs incurred in connection with these proceedings from being recovered as part of the service charge, and under Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") to reduce or extinguish an administration charge in respect of litigation costs.

3. The Tribunal issued Directions on 10 March 2021.

4. The parties were either unable or unwilling to properly comply with those Directions or to agree a single bundle of documents. The paperwork included various statements and responses, copies of the Mr Higgins' Lease, the service charge accounts for 2019/2020, emails, letters, minutes of meetings, and various invoices.

5. All of the written evidence was carefully considered by the Tribunal - before, during and after the hearing. The oral evidence at the hearing was also carefully considered.

6. Because of the nature of the paperwork, which is on record and which the parties have access to, it would be superfluous and, in the Tribunal's opinion, particularly because of some entrenched positions, counter-productive to attempt to relate its full detail in this decision.

7. The Tribunal has highlighted only those issues which it found particularly relevant to, and to help explain, its decision-making.

8. The Tribunal did not inspect the development ("Victoria Court"), of which the property forms part, but was assisted by being able to view various aspects via Google Street view and satellite pictures.

9. Victoria Court was developed in the early 1990s. 11 flats on 4 floors, with a lift, are contained in a single redbrick block with pitched roofs. There are borders with a tree, some mature shrubs and grass verges, together with some car parking spaces at the front of the site. An internal access road leads around one side of the main building to blocks of garages at the rear where there are also lawns, borders and shrubs. The development is located approximately a mile from the centre of Southport and fronts onto Roe Lane, otherwise known as the A5267. There is a bus stop immediately in front of Victoria Court.

10. Mr Higgins is the owner of 1 of the 11 apartments, and it is believed that all 11 are held under long-term Leases containing comparable terms.

11. Mr Higgins confirmed that he had bought his flat in January 2019, that he was making the Application on his own and without the involvement of any of the other flat owners. He also confirmed in July 2020 he and 7 other flat owners had purchased the freehold from the previous corporate owner which had taken no interest in the development's management.

12. He explained that he had been frustrated in trying to obtain documents from the Respondent (the "Management Company") and had lodged requests for the same in November 2020. In the Application, Mr Higgins referred to Fred Halfpenny ("Mr Halfpenny") as the respondent in his capacity as Chairman of the Management Company.

13. The Application related exclusively to the charges shown in the 2019/2020 accounts as drawn up by the Management Company's accountants. Mr Higgins in the Application questioned the costs of gardening, cleaning and window cleaning where he maintained that the hourly rates paid were excessive and the work substandard, the charges made for electricity stating that in the

summer of 2019 Mr Halfpenny had agreed a 3-year deal with Scottish Power and where Mr Higgins questioned whether the flat owners had a right to prior consultation, accountancy charges of £540, various repairs costs where explanations were sought, a payment of £382 to managing agents and a figure of £258.30 which was shown in the accounts as relating to solicitors.

The Lease

14. A copy of the Mr Higgins' Lease ("the Lease") was included in the papers. It refers to 3 parties, firstly the Landlord, secondly the Tenant and thirdly the Management Company and granted a 999-year term Lease to the Tenant at a basic rent of £50 per annum for the first 21 years of the Lease term rising to £100 per annum thereafter.

15. The Lease was granted "on condition that the Tenant is and remains a member of the" Management Company". The Tenant is bound by various regulations, and (inter alia) obliged to pay to the Management Company the service charge calculated in accordance with the Fifth Schedule, under which the Management Company is obliged (inter alia) to keep a detailed account of the service costs (defined as being the amount the Management Company "spend in carrying out all the obligations imposed by this Lease and not reimbursed in any other way including the costs of borrowing money for that purpose") and have an annual service charge statement prepared which "(i) states the service costs for that period with sufficient particulars to show the amount spent on each major category of expenditure….(v) is certified by a member of the Institute of Chartered Accountants in England and Wales and is a fair summary of the service costs…. and is sufficiently supported by accounts, receipts and other documents which have been produced to him".

16. The Management Company is obliged to insure the property, to pay rates taxes and outgoings imposed in respect of the common parts and under Clause 5.2.2 "to provide the services listed in the Sixth Schedule for the occupiers of the building, and in doing so (i) …may engage the services of whatever employees, agents, contractors, consultants and advisers (the Management Company) consider necessary". It is also obliged "to maintain a reserve fund in accordance with the Seventh Schedule".

17. The Sixth Schedule setting out the services to be provided refers to: –

"

1. Repairing the roof, outside, main structure and foundations of the building and boundary walls
2. Contributing a fair proportion of the cost of repairing maintaining and cleaning any building, property or sewers, drains, pipes, wires and cables of which the benefit is shared by the occupiers of the building and occupiers of other property
3. Decorating the outside of the building once every four years
4. Repairing and whenever necessary decorating and furnishing the common parts
5. Heating, lighting and cleaning the common parts
6. Repairing and maintaining those services in the building and its grounds which serve both the property and other parts of the building

7. Maintaining the grounds of the building, including (i) providing signs and equipment to regulate vehicular traffic and parking (ii) planting and tending the gardens
8. Providing within the building reasonable facilities and arrangements for: (i) security (ii) displaying at the entrance announcements of occupiers' names and locations (iii) rubbish disposal
9. Insuring against liability to anyone entering the common parts or the grounds of the building and to those using the lift and insuring against employer's liability to anyone employed to provide any of the services
10. Paying all rates and taxes assessed on or payable in respect of the common parts
11. Obtaining insurance valuations of the building from time to time
12. If the proceeds of any insurance claim are not enough to pay for repairing the building after damage by an insured risk, contributing the extra sum needed to pay for the work
13. Keeping accounts of service costs, preparing and rendering service charge statements and retaining accountants to certify those statements."

Mr Higgins's Case

18. As matters proceeded, and after having obtained access to various documents, Mr Higgins confirmed that some of his questions had been answered.

19. It was noted that the increase in gardening charges in the accounts for the year ending on 29 February 2020 from those shown in the previous year's account was due large part to an invoice rendered in December 2018 not having been paid until March 2019. Mr Higgins still had complaints about the standards of work and maintained that the gardening hourly rate of £26.50 increasing to £27 and the cleaning rate of £17 increasing to £18 were "well in excess of the £11-£12 norm". Nevertheless, he noted that the gardener, who also latterly acted as the cleaner, had resigned in February 2021, and had been replaced by a "gardener and cleaner both of whom do a better job and only charge £15 an hour", stating "as the problem has resolved itself by the appointment of a new gardener and cleaner I would not expect the Tribunal to make any judgement on this matter but I consider Fred to have been irresponsible in the way he spent our money".

20. Mr Higgins in his statement case confirmed that he did still want the Tribunal to advise as to whether the flat owners have any right to be consulted over the choice of the electricity provider. He had suggested a change to a provider called Bulb which he maintained would be cheaper and would cover any exit charges from Scottish Power.

21. He also confirmed that "we were not happy with the choice of accountant considering her to be expensive" and stated that "her work is not of an acceptable quality" and that various residents believe an alternative provider should be sought.

22. Various individual items in the accounts were initially questioned, and more detail later emerged in the Management Company's responses.

23. Mr Higgins made particular reference to the costs of painting fascias and soffits and asked as to the flat owners' rights of consultation over large expenses such as these.

24. Having said that "most of the above are not serious matters and I would expect the Tribunal show little interest in them (other than providing advice where it is been requested) .... there remains one unresolved matter and this I do think is serious and requires a judgement by the Tribunal _ the amount of £382 paid to Anthony James for a site set-up. This is carried forward in my application to the Tribunal."

25. Mr Higgins stated "in 2019 we considered appointing a management company to take over the running the block of flats. The residents were consulted and wanted more information before proceeding. When they decisively rejected the proposed move Fred had to back down and cancel the arrangement. As Fred had already signed an agreement with the Management Company and they had consequently done some work... Anthony James issued him the bill for work they had already done". Mr Higgins considered the bill a private matter between Mr Halfpenny and Anthony James and maintained that "the service charge is to cover costs of repairs and maintenance of the building which this is clearly not".

26. Mr Higgins also, after the responses to his statement of case complained of a personal campaign and chaotic management and asked to add to the grounds for the application advice on the appointment of a manager to run Victoria Court.

The Management Company's Reply

27. The response to Mr Higgins's statement of case was provided by Mr Halfpenny, mostly by handwritten notes appended to the statement of case or the documents provided with it.

28. Both Mr Halfpenny and Mr Higgins complained about the rude and abusive behaviour of the other.

29. Mr Halfpenny stated that he was 83 (now 84) and had lived in Victoria Court for 20 years, playing an active part in its management without charge. He maintained that Mr Higgins already knew the answers or had much of the information he was requesting.

30. He disputed Mr Higgins' allegations as to the gardener/cleaner being lazy, noting that they had been employed for 20 years. An invoice from 2013 was exhibited and referred to cleaning then being charged at £17 per visit and garden maintenance at £47 per week.

31. Mr Halfpenny stated "the quotation for the painting was agreed in June 2018. 2 other quotes were for £6800 and .... for £11,000 and we only had £6000 in the bank. I agreed a price of £4900 with Trafalgar with the proviso that it would be the following year before we could start... We had given thought for UPVC replacement in 2023. I did have words with Mr Sammon mainly untidy work. I went up the scaffolding a number of times".

32. Invoices were produced to show that the accountant's charges had been maintained at the same level and not increased since 2016, and were the same and no more than those charged by their predecessors in 2013. Advance Chartered Accountants confirmed in a letter dated 8 March 2021 that their work included "the preparation of the accounts and source records (bank statements, invoices etcetera), meeting to discuss the accounts and subsequent finalisation, including submission to Companies House and provision of copies to the residents", and explained in more detail, as requested by Mr Higgins, some of the figures referred to in the Repairs Summary shown in their year-end statement. It was confirmed that the figure of £258.30 referenced against Halsall Solicitors was a receipt not a payment. Mr Halfpenny explained that "I over the years charged solicitors whenever I filled in their forms for them to complete on the sale of properties, up to £100 per sale. Cheques of course made out to Victoria Court Management".

33. Responding to the questions raised about the agreement with Scottish Power he said "it was a response to the letter from Scottish Power and if I remember correctly I had left it a little late. I thought also that it was a good choice. I am not making this an excuse. It did not occur to me to put it open for discussion, for this I apologise. I did ring ... about breaking the contract as requested by Alan Higgins and I was informed that this was not an option as it was a business contract. Would we have done better with another of the larger companies?".

34. Mr Halfpenny disputed Mr Higgins' interpretation of their joint meetings with Anthony James and the residents' meetings held on 14 June 2019 and 5 July 2019 (where minutes had been exhibited together with copies of letters sent by Mr Higgins to Mr Halfpenny).

35. Mr Halfpenny, in responding to the Mr Higgins' request that the Tribunal advise as to the processes whereby it might appoint a manager, confirmed his belief that the way forward was for managing agents to be appointed.

The Hearing

36. A Full Video Hearing was held on 2 March 2021. Mr Higgins represented himself and was connected by telephone, but not by video. The Management Company was represented by Mr Halfpenny.

Mr Elliott and Mr Davis, who are new members of the Tribunal, observed.

37. The start of the hearing was delayed because of power outages and connectivity problems.

38. The parties expanded on various matters referred to in their written submissions.

39. Mr Higgins confirmed that because of the information that had been obtained after making the initial application he no longer disputed, nor sought a determination as to, the gardening/cleaning costs, the electricity charges or the fees charged by the accountants.

40. He still sought advice as to whether the Leaseholders were entitled to be consulted in respect of the painting and as to whether the costs invoiced by Anthony James should be paid as part of the service charges.

41. Mr Halfpenny confirmed that he had been a long-standing director of the Management Company.

42. It was clear that the style of management had been relatively lax and informal over a number of years. Notwithstanding what was said in the Lease each of the 11 Leaseholders had been asked to pay equal (rather than unequal) shares of the annual service charges. Although the Lease referred to the accounting year running from 24 June and half yearly instalments of service charges, the annual accounts were in fact drawn to the end of February and with service charge instalments being paid quarterly. There appeared to be scant regard to the need under section 21B of the 1985 Act for payment demands to be accompanied by prescribed information as to leaseholders' rights and obligations. The payments were for the most part made by standing order.

43. It was noted that there were not sufficient funds in the reserves to be able to proceed with external painting works in 2018. Mr Halfpenny described a meeting in 2018 with 1 other director and 2 other flat owners at which estimates for external painting were discussed. He confirmed that one had been £6800, another which included gutter cleaning was for £5500 and he also referred to a third estimate at £11,000. There was some discussion of replacement of the fascias and soffits in UPVC at a later date when funds had been built up but minded of the obligation under the Lease to repaint every 4 years and the lack of funds in hand a cheaper quote was sought, and in the event a firm known as Trafalgar, which provided a quote of £4600 on 1 April 2019, was engaged.

44. The Tribunal referred in general terms to the statutory consultation requirements. Mr Halfpenny acknowledged that whilst some of the flat owners had been aware of the proposed outside painting, no formal attempt had been made to seek observations or nominations of contractors from all of the flat owners, nor to fully circulate or invite and consider comments from all on the details of the estimates that were obtained.

45. Mr Halfpenny explained the somewhat confusing references to Trafalgar and Mr Sammon in the accounts. Both apparently had been part of the same firm at the outset but had then parted company with each other. Mr Higgins described them as something of a cowboy firm, spilling paint and leaving empty bottles and paint cans about the premises. Mr Halfpenny acknowledged that they were untidy.

46. When discussing Anthony James' charges reference the made to a sequence of meetings. The first was a fact-finding meeting between Mr Halfpenny, Mr Higgins and the agents. The second was the meeting of 6 flat owners on 14 June 2019 which was minuted by Mr Halfpenny. It was uncertain as to who was given copies of his minutes, but he confirmed that they were accurate. Particular reference was made to a paragraph which stated "the main item was do we engage a management company Irena asked a number of questions regarding her concerns Some myself Alan and Gary could answer…. the others we would seek clarification It was agreed that we engage Anthony James as our managing agents subject to clarification of concerns raised by Irena. A meeting was to be arranged by Fred and subject to concerns being ratified we would ask Anthony James to be our managing agent". Mr Halfpenny took this to mean that if the agents provided satisfactory responses, the Management Company had a mandate to proceed. Mr Higgins said that his understanding was that there was a need to report back to the residents before any commitment.

47. Mr Halfpenny and Mr Higgins met the agents again on 21 June 2019. Mr Halfpenny later wrote to Anthony James in 2021 asking if they could confirm his recollection that "a meeting was then arranged between A Higgins and yourselves for him to voice the concerns of himself and others I was to sit in on this meeting the questions were asked and responses given to which after each question had been answered I asked Alan Higgins was he happy at the end of the meeting I asked again was he happy for me to give Anthony James books he agreed so I passed the books to Anthony James". Anthony James' senior leasehold coordinator replied by email stating "I confirm we agree with your reconciliation of the meeting between Anthony James, yourself and Alan Higgins that everyone was in agreement with the decision to appoint an agent". Mr Higgins said at the Hearing that he had been agreeing that the questions that had been put had been answered, but not any more than that.

48. He wrote to Mr Halfpenny on the next day beginning "Following on from yesterday's meeting with Anthony James I have a few concerns: – 1. That meeting was called to clarify some points and gather information yet while we were there it was agreed they were taking over from 1 July 2019 and in order to achieve this you were handing over documents to them. I think we should ask the residents if they wish to go ahead with this as it will obviously affect them. This is moving ahead faster than people thought…"and concluded "I would prefer the residents to have some say before going ahead". Mr Halfpenny said that he did not find that letter until a week later because of being elsewhere. Mr Higgins wrote again to Mr Halfpenny on 30 June 2019 stating ".. Another meeting is necessary so the residents know what is going on and this should be when Irina can attend. As far as I am concerned the second meeting with AJ was to obtain clarification and I was not happy with what AJ were saying… The reason I did not say more at the time was (1) I was shocked by some of the things that were coming out.. (2) the speed with which that meeting progressed to handing over control and documentation to AJ – I got the impression that this was a done deal (3) the amount of money we need to find in the immediate future came as a bit of a blow… ".

49. A meeting of all but 4 of the flat owners was held on 5 July 2019.The typewritten minutes produced by someone other than Mr Halfpenny recorded at the end of the section headed Anthony James that "…after the concerns were discussed, owners were asked to vote as to whether to stop proceedings with Anthony James for the foreseeable future. This was agreed. Any costs already incurred will be met from the communal fund. Peter… then proposed that we vote as to whether to continue with our current arrangements of managing Victoria Court ourselves with a view to more owners becoming involved. The vote was carried in favour of retaining the current arrangements"

50. Anthony James issued an invoice on 11 July 2019 for costs of £318. 33+ VAT i.e. £382 which referred to "site setup fee and cost of producing the Management Pack for flat 8".

The Law

51. Section 27A of the 1985 Act provides that:-
"(1) An application may be made to the appropriate Tribunal for a determination whether a service charge is payable and, if it is, as to:-
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Sub-section 1 applies whether or not any payment has been made…..
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

52. Section 18 states that: –
"(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 the service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or an earlier or later period."

53. Section 19 of the 1985 Act confirms that :-
"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

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

54. Section 20 is headed "Limitation of service charges: consultation requirements" and states: –
"(1) where this section applies to any qualifying works or qualifying long-term agreement, the relevant contributions of tenants are limited.... unless the consultation requirements have been either –
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate Tribunal...
(5) an appropriate amount is an amount set by regulations made by the Secretary of State.

55. The Service Charges (Consultation requirements) (England) Regulations 2003 (SI 2003/1987) ("the Regulations") specify detailed consultation requirements ("the consultation requirements") which if not complied with by a landlord, or dispensed with by the Tribunal, mean that a landlord cannot recover more than £250 from an individual tenant in respect of a set of qualifying works, nor recover more than £100 per annual accounting period from an individual tenant in respect of a qualifying long-term agreement, that is one for a period of more than 12 months

56. Reference should be made to the Regulations themselves for full details of the applicable consultation requirements. In outline, however, they require a landlord (or in this case the Management Company) to go through a 4 stage process when contemplating any set of major works to which any individual leaseholder will have to contribute more than £250: –

- Stage 1: Notice of intention to do the works

Written notice of its intention to carry out qualifying works must be given to each leaseholder and any recognised tenants association, describing the works in general terms, or saying where and when a description may be inspected, stating the reasons for the works, inviting leaseholders to make observations and to nominate contractors from whom an estimate for carrying out the work should be sought, allowing at least 30 days. The Management Company must have regard to those observations.

- Stage 2: Estimates

The Management Company must seek estimates for the works, including from a nominee identified by any leaseholders or the association.

- Stage 3: Notices about estimates

The Management Company must supply leaseholders with a statement setting out, as regards at least 2 of those estimates, the amounts specified as the estimated cost of the proposed works, together with a summary of any individual observations made by leaseholders and its responses. Any nominee's estimate must be included. The Management Company must make all the estimates available for inspection. The statement must say where and when estimates may be inspected, and where and when observations can be sent,

allowing at least 30 days. The Management Company must then have regard to such observations.

- Stage 4: Notification of reasons

The Management Company must give written notice to the leaseholders within 21 days of entering into a contract for the works explaining why the contract was awarded to the preferred bidder, unless, either the chosen contractor submitted the lowest estimate, or is the leaseholders' nominee.

57. The Regulations specify a comparable process with similar consultation requirements before entering into a qualifying long-term agreement under which individual leaseholders will be called on to contribute more than £100 in an annual accounting period.

58. Section 20ZA(1) states that: –

"Where an application is made to the appropriate Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement… the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

59. The Supreme Court in the case of *Daejan Investments Ltd v. Benson and others (2013) UK SC 14* set out detailed guidance as to the correct approach to the grant or refusal of dispensation of the consultation requirements, including confirming that: –

- The requirements are not a freestanding right or an end in themselves, but a means to the end of protecting tenants in relation to service charges;
- The purpose of the consultation requirements which are part and parcel of a network of provisions, is to give practical support is to ensure the tenants are protected from paying for inappropriate works or paying more than would be appropriate;
- In considering dispensation requests, the Tribunal should therefore focus on whether the tenants have been prejudiced in either respect by the failure of the landlord/management company to comply with the requirements;
- The financial consequences to the landlord/management company of not granting of dispensation is not a relevant factor, and neither is the nature of the landlord/management company;
- The legal burden of proof in relation to dispensation applications is on the landlord/management company throughout, but the factual burden of identifying some relevant prejudice is on the tenants;
- The more egregious the landlord/management company's failure, the more readily a Tribunal would be likely to accept that tenants had suffered prejudice;
- Once the tenants have shown a credible case for prejudice the Tribunal should look to the landlord/management company to rebut it and should be sympathetic to the tenant's case;
- The Tribunal has power to grant dispensation on appropriate terms, including a condition that the landlord/management company pays the tenant's reasonable costs incurred in connection with the dispensation application;

- Insofar as tenants will suffer relevant prejudice, the Tribunal should, in the absence of some good reason to the contrary, effectively require a landlord/management company to reduce the amount claimed compensate the tenants fully for that prejudice.

60. Section 20C states that: –
"(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… the First-tier Tribunal… are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
… (3) the 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."

61. Section 21B of the 1985 Act confirms that: –
(1) a demand for the payment of the service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges,…
(3) a tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

62. Paragraph 5A of Schedule 11 to the 2002 Act states that: –
"(1) A tenant of a dwelling in England may apply to the relevant court or Tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
(2) the relevant court or Tribunal may make whatever order on the application it considers just and equitable."

The Tribunal's Reasons and Conclusions

63. The Tribunal has determined the position on the basis of all of the evidence before it.

64. The Tribunal considered whether there was a need to inspect Victoria Court. The covid-19 epidemic had made an inspection impracticable and inadvisable for many months. Whilst now possible, the Tribunal concluded that it was not necessary. Having had careful regard to the parties' written submissions and the testimony given at the Hearing, it was content it had sufficient evidence to be able to make the necessary findings of fact in respect of matters which were in large part historical.

65. Section 19 of the 1985 Act imposes a general requirement of reasonableness in relation to service charge expenditure.

66. The following principles, derived from decided cases, were helpful to the Tribunal in making its decision as to what is reasonable: –

- The Tribunal must take into account all relevant circumstances as they exist at the date of the decision in a broad, common sense way giving weight as it thinks right to various factors in the situation in order to determine whether a charge is reasonable. *London Borough of Havering v MacDonald (2012) 3 E.G.L.R. 49.*
- Whether costs are reasonably incurred is not simply a question of the landlord's decision-making process. It is also a question of outcome. The requirement that costs be reasonably incurred does not mean that the relevant expenditure must be the cheapest available, although this does not give a landlord a licence to charge a figure that is out of line with the market norm. *Forcelux v Sweetman (2001) 2 E.G.L.R. 173.*
- If works are not of a reasonable standard, only the costs which could have been charged for the substandard works will be recoverable. *Yorkbrook Investments Ltd v Batten(1986) 18 H.L.R. 25 CA*
- There is no presumption for or against the reasonableness of the standard of works and the decision will be made on all the evidence made available. *Havering v MacDonald*
- It is however for the party disputing the reasonableness of sums claimed to establish a prima facie case. *Enterprise Home Developments LLP v Adam [2020]UKUT151(LC).* In the same case it is said "where… the sums claimed do not appear unreasonable and there is only very limited evidence that the same services could have been provided more cheaply, the (Tribunal) is not required to adopt a sceptical approach".

67. The initial questions to be asked are whether a landlord/management company's actions in incurring relevant costs and the amount of those costs are both reasonable, and whether the works or services are of a reasonable standard.

68. The Tribunal found that it was reasonable, and that the Lease contained the requisite authority, for the Management Company to incur costs, to be paid for by the apartment owners through the service charges, for cleaning heating and lighting the common parts, gardening, painting the common parts and exterior, and in employing accountants and if the Management Company so decided employing managing agents.

69. Although Mr Higgins confirmed at the Hearing that he had withdrawn his initial objections to the costs of gardening/cleaning, electricity and accountancy, and is now content with the sums charged, the Tribunal, for the sake of completeness, confirms that, if it had been necessary for it to determine such matters, it would have allowed all such sums as claimed, subject only to one proviso as regards the electricity charges.

70. Because the agreement with Scottish Power was for more than 12 months and because no prior consultation had taken place, the statutory limitation of £100 per Leaseholder will apply, unless dispensation is granted. It was however noted at the Hearing both that the overall costs of the electricity equally divided between 11 Leaseholders only exceeded this cap by a few pounds (£1249.38 / 11 = £113.58) and that Bulb Energy had been put into special administration by Ofgem. Mr Halfpenny also commented that because of the general rises in fuel charges the decision to secure a fixed tariff for 3 years may not be seen in hindsight as a bad one.

71. The Tribunal then turned its main attention to those items remaining in dispute, being the costs of the external painting and the invoice levied by Anthony James. Dealing with each in turn.

The £5330 costs of the painting works undertaken in 2019

72. The Lease specifically refers to an obligation to decorate the outside of the building once every four years.

73. The evidence appears to be that the works themselves were done "on the cheap" and that may well have been reflected in the quality of the work.

74. Whilst the Tribunal is in no doubt that Mr Halfpenny, acting on behalf of the Management Company, genuinely saw himself as acting in the best interests of the individual apartment owners and was probably oblivious to the statutory consultation requirements, it is clear that those requirements were not properly complied with. There was no evidence of appropriate written notifications being given to *all* of the flat owners, and no suggestion that the procedures and timescales set out in the Regulations had been adhered to. This is notwithstanding that there was ample time for the consultation requirements to have been properly complied with because the lack of reserves meant that the works had to be delayed in any event.

75. As a consequence of all of the above, the Tribunal has no option but to find that the Management Company is not entitled to recover more than £250 from an individual tenant in respect of the costs of such works, unless or until dispensation is granted.

Anthony James' fees of £382

76. As has been confirmed the Lease allows the Management Company to employ agents to assist in providing the services it is obliged to provide under the Lease, at its discretion, meaning that provided it is acting in the best interests of the shareholders/flat owners it does not need their unanimous consent.

77. The Tribunal finds that it would be entirely reasonable to incur costs in employing a suitably qualified managing agent, and for those costs to be paid as part of the service charges.

78. Mr Higgins and Mr Halfpenny disagreed as to the extent of the mandate given by the residents at the meeting on 14 June 2019. They also disagreed as to the inferences to be drawn from their second meeting with Anthony James on 21 June 2019. The Tribunal accepts that both could have legitimately interpreted the same events differently. Nevertheless, Anthony James' interpretation, as confirmed in a later email, accords with that of Mr Halfpenny which is that it was authorised to proceed at the end of the meeting on 21 June. Mr Higgins also confirmed that he did not signal otherwise at that meeting.

79. The Tribunal also found it significant that at the subsequent residents meeting on 5 July it was confirmed, after it had been decided that proceedings with Anthony James should be stopped (as minuted by someone other than Mr Halfpenny) that their fees should be met from the communal fund. Mr Higgins said that that confirmation was not voted on, but he also confirmed that no one at the meeting said that it should be otherwise.

80. The Tribunal has no reason to suppose that Anthony James' fees were out of line with the market norm, or their terms of business. It noted that the work undertaken before their retainer was terminated included, as well as setting up systems, the provision of information which Mr Halfpenny had historically provided to solicitors acting for prospective purchasers and where the flat owners had had the benefit of the fees that he had been able to charge on behalf of the Management Company.

81. The Tribunal having regard to all the circumstances, and having found that it was a reasonable to incur costs in employing managing agents, and that there was no evidence that the costs for work undertaken before the retainer was withdrawn were unreasonable, concluded that Anthony James' fees were properly payable as part of the service charges.

The Section 20C and Paragraph 5A Applications and costs

82. The Tribunal went on to consider Mr Higgins' separate applications, that the Tribunal make orders both under section 20C of the 1985 Act so that the Management Company be precluded from including within the service charges the costs incurred by the Management Company in connection with the present proceedings, and under Paragraph 5A of Schedule 11 of the 2002 Act to reduce or extinguish any liability that he might have in respect of any contractual costs in the Lease relating to the same matter.

83. The Tribunal, having regard as to what is just and equitable in all the circumstances, decided that the applications as regards Section 20C and paragraph 5A should both be granted and, therefore orders that the Management Company be precluded from including any part of the costs of the present proceedings within future service charges or as an administration charge.

Concluding comments

84. The Tribunal finds that the Management Company did not carry out full consultation procedures in the correct manner meaning that, unless dispensation is granted, the Management Company was not entitled to collect or recover specific service charges above the limits set by the Regulations – that is £100 per Leaseholder per year in respect of the long-term electricity contract, or £250 per Leaseholder for the external re painting works.

85. The Tribunal is of course aware that the consequences of this could be disastrous for the solvency of the Management Company and that its individual shareholders, and in their capacity as such, may well be content to make or have made such payments in any event.

86. Nevertheless, this case is an example of the potential perils of not having professional management to navigate the various statutory requirements. The Management Company by its ignorance and non- observance of the consultation requirements has made itself vulnerable to any flat owners who would prefer not to pay their share of the costs of major works or long-term contracts.

87. Mr Higgins asked for advice about the Tribunal appointing a manager for Victoria Court. The Tribunal referred to its separate powers briefly and in general terms. It also explained that it is not an advice service as such, but an expert tribunal tasked with deciding specific, duly made, applications where it has jurisdiction.

88. It also noted that both Mr Higgins and Mr Halfpenny had on separate occasions confirmed and agreed that assistance and direction from some suitably qualified managing agents is needed. Clearly that would come at some cost, which understandably some of the flat owners might prefer to avoid. Nonetheless the Tribunal wholeheartedly endorses the view that the Management Company requires professional help to discharge its obligations properly and is clear that the Lease allows it to include within the service charges the cost of employing agents to do so.

Tribunal Judge J Going 4 March 2022