FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/00GL/LIS/2020/0023**
HMCTS Code	**:**	**A:AUDIOREMOTE**
Properties	**:**	**10 and 10A Garbett Street, Goldenhill, Stoke-on-Trent, ST6 5RQ**
Applicant	**:**	**James Maurice Kiernicki (1)** **Tarnia Bennett (2)**
Representative	**:**	**Mrs H Bennett**
Respondent	**:**	**Long Term Reversions (Torquay) Ltd**
Representative	**:**	**Mr Andrew Beaumont (counsel)**
Type of application	**:**	**Application for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985 ("the Act")**
Tribunal member	**:**	**Judge C Goodall** **Mrs A Rawlence MRICS**
Date and place of hearing	**:**	**8 October 2020 by telephone hearing**
Date of decision	**:**	**16 October 2020**

DECISION

Covid-19 Pandemic: Audio Video Hearing

This determination included a remote audio hearing which has been consented to by the parties. The form of remote hearing was audio (A:AUDIOREMOTE). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal, the Tribunal has directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as audio proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Background

1. This an application for determination of the payability of service charges for 2014 (from 1 March 2014 to 31 December 2014), 2015, 2016, 2017, 2018, 2019 which have been levied upon the Applicants by the Respondent. The Applicants are the two lessees of a modest end terrace property in Stoke on Trent. Their original landlord was Mr Herman Horowitz. In or by 2014, the Respondent acquired the freehold interest.

2. The property was converted in about 2007 into two flats, one on the ground floor and one on the first floor. There is a front door off the street into a small entrance hall opposite which other doors provide access to the ground or first floor flat. This small, unassuming, entrance hall ("the Entrance Hall") has considerable significance in the outcome of this case.

3. Prior to 2014, no service charge had been demanded from the Applicants. On acquisition by the Respondent, their agent began to demand service charges which they have paid ever since.

4. All service charges stem from the provision of a cleaning service to the Entrance Hall. As a result of charging for the cleaning, the cost of which is in the region £12 per month, they say they need to charge management fees, accountants fees so they can account for the charges levied, bank fees, further costs in relation to the entrance hall, such as signs and displays, and replacement of locks, and because they need to send a cleaner to the Entrance Hall who is an employee, they must also carry out fire risk assessments, health and safety risk assessments, asbestos surveys and incur various other costs.

5. In consequence, between 2014 and 2019, the Applicants have each been charged the following service charges:

Year	Cost per flat (£)	Total for the house (£)
2014	917.25	1,834.50
2015	741.50	1,483.00
2016	650.00	1,300.00
2017	703.00	1,406.00
2018	624.00	1,248.00
2019	675.50	1,351.00
Totals	**4,311.25**	**8,622.50**

6. For the avoidance of any doubt, the figures given in this table are the higher of the total charge for each service charge year after a balancing charge for the actual outturn of each year was demanded from the Applicants, or the amount demanded as an interim demand in respect of anticipated costs for each year. No balancing charges were levied for 2018 and 2019 and no credit was given for an excess of service charge in 2016. The Applicants have paid all the charges set out above.

7. In 2019, the Respondent planned to install up to date fire protection equipment in the entrance hall. As the cost would have been above £250 per flat, they applied for dispensation from consultation. The Tribunal (on which the Judge in this application also sat), refused the application for six reasons. The first was that in that Tribunal's view the lease did not allow or require the Respondents to do the work for which they were seeking dispensation. What was said in that decision on that point was:

> "12. The leases contain no obligation upon the freeholder to carry out any maintenance or repair of the Property. In relation to installation of a fire system, the leases contain no provisions which oblige the freeholder to carry out the Works. They also contain no provisions which entitle the freeholder or agent to claim any charges at all from the Respondents save for:
>
> (a) Ground rent;
> (b) Insurance premium;
> (c) Payment of any repairs carried out by the freeholder if the Respondent has failed to carry out those repairs following service of a notice from the freeholder to do so following a permitted inspection of the Property by the freeholder;
> (d) A fee for registration of an assignment, transfer, sub-letting or charge of the Property;
> (e) The costs incurred by the landlord in or in contemplation of the service of a section 146 or section 147 notice served under the Law of Property Act 1925;
> (f) The costs of the landlord in enforcing covenants against the other lessee at the Property.
>
> 13. The Works do not fall within the preceding list of situations under which any payment for them can be demanded from the Respondents. Costs of installing a fire system cannot be demanded under the leases.
>
> 14. Expanding this point, because the Respondents have raised this issue in their letter, the lease also does not allow the Applicant or the freeholder to demand a fee for accountancy, bank charges, cleaning, fire risk assessment, health and safety risk assessments, management fees, or repairs and maintenance costs which do not fall within paragraph 12c above.
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> 15. As the Applicant has no right or obligation to carry out the Works, it will never be entitled to claim the costs of the Works from the Respondents. It is therefore pointless for it to seek dispensation from the consultation requirements in section 20. Those requirements exist in order to protect lessees from being charged costs of works as a service charge unless they have been given the opportunity to comment on the works. As the Respondents in this case can never be charged for the Works anyway, it is wholly unnecessary for the Applicant to consult, or seek dispensation from consultation."

8. As a result of the comments made in paragraph 14 of the decision, the Applicants have been attempting to recover service charges paid in previous years. The Respondent's contention is that the reasoning in paragraph 14 is flawed, and the service charges are due.

9. This application is being made to determine whether the service charges were in fact payable for the years in question. In addition, the Applicants have challenged the amounts they have been charged for insurance premiums, which they say are excessive.

10. The application was considered at a telephone hearing on 8 October 2020. The Applicants were represented by Ms Bennett's mother. We were told that "after years of contending with the Respondent's monetary demands and threats of extra interest charges added, [the Applicants] are too stressed, afraid and worried to speak". The Tribunal did explain that we conduct our hearings in an informal and friendly way and Mrs Bennett was invited to see if the Applicants wished to join the hearing just to listen. She said that would not be possible and the Tribunal therefore proceeded to hear the application. The Respondent was represented by Mr Beaumont of counsel, and its legal manager, Mr Philips was with Mr Beaumont on the telephone and was able to contribute to the hearing when necessary.

11. No inspection took place. Some photographs of the exterior and the Entrance Hall were provided. Judge Goodall had of course seen the property in 2019.

The Leases

12. The ground floor and the first floor are leased by separate leases. The ground floor lease ("Downstairs Lease") is dated 6 August 2007 and is for a term of 125 years from 1 January 2007. A premium was paid and there is a ground rent of £100 per annum. The lessee is the First Applicant.

13. The first floor lease ("Upstairs Lease") is dated 17 May 2007 for the same term and also at a premium and a ground rent of £100 per annum. The lessee is the Second Applicant. The Downstairs Lease and the Upstairs Lease are described as "the Leases".

14. The premises demised by the Leases are (with variations between the two shown in bold):

    a. The Downstairs Lease:

    "All the **ground** floor flat **and yard at the rear thereof ("the rear yard")** situate at and known as 10 Garbett Street, Goldenhill, Stoke on Trent ST6 5RQ as the same is shown edged red **and coloured green respectively** on the plan annexed hereto ("the Plan") together with the **foundations and lower** part of the structure of that part of the Building and shall also include:-

(a) The entirety of the walls bounding the Demised Premises and the doors and door frames and window frames fitted in such walls

(b) The entirety of the walls and partitions lying within the Demised Premises and the **ceilings and** including the joists **above** the **ceilings** of the Demised Premises supporting the floors **of the Adjoining Property**

(c) All conduits which are laid in the Demised Premises whether or not exclusively serving the Demised Premises

(d) All fixtures and fittings in or about the Demised Premises not expressly excluded from this demise.

b. The Upstairs Lease

"All the **first** floor flat situate at and known as 10**a** Garbett Street, Goldenhill, Stoke on Trent ST6 5RQ as the same is shown edged red on the plan annexed hereto ("the Plan") together with the **roof, gutters and upper part** of the structure of that part of the Building and shall also include:-

(a) The entirety of the walls bounding the Demised Premises and the doors and door frames and window frames fitted in such walls

(b) The entirety of the walls and partitions lying within the Demised Premises and the **floors** but not including the joists **below** the floor of the Demised Premises supporting the floors

(c) All conduits which are laid in the Demised Premises whether or not exclusively serving the Demised Premises

(d) All fixtures and fittings in or about the Demised Premises not expressly excluded from this demise.

15. The plans attached to the Leases outline what appears to be the whole of the relevant part of the building of which the flat is part. Importantly, the plan in the Downstairs Lease includes the Entrance Hall. The green area on the plan of that lease is a yard to the side and rear of 10 Garbett Street.

16. Each Lease includes rights set out in the Second Schedule and excepts rights set out in the Third Schedule. Of relevance, the Upstairs Lease includes a right of way for the purpose of access and egress from the Demised Premises over the entrance hall leading to the Demised Premises. The Downstairs Lease excepts, for the benefit of the Adjoining Owner, a right of way for the purpose of access to and egress from the Adjoining Property over the entrance hall leading to the Adjoining Property.

17. There are tenant covenants set out in clause 3(4) and 3(5) of the Leases as follows (words identical to the covenants in the other lease are shown in normal text. Words where the provisions depart from the obligations in the other lease, they are shown in bold):

    a. The Downstairs Lease:

    "3(4) To repair maintain renew uphold and keep the Demised Premises and in particular the **foundations** and all parts thereof including so far as the same form part of or are within the Demised Premises all window glass and doors (including the entrance door to the Demised Premises) locks fastenings and hinges sanitary water gas electrical apparatus and walls and ceiling drains pipes wires cables and all fixtures and additions thereto in good and substantial repair and condition.

    3(5) At all times during the said term to pay and contribute (including an amount in advance if so required) one half of the costs and expenses of making repairing maintaining painting supporting re-building and cleansing where necessary the **roof** and the main structure of the Building, the entrance hall of the Building leading to the front door of the demised premises and all pathways passageways sewers drains pipes watercourses waterpipes cisterns gutters chimneys party walls and fences party structures easements and appurtenances belonging to or used or capable of being used by the Tenant in common with the Landlord or the Adjoining Owner."

    b. The Upstairs Lease:

    "3(4) To repair maintain renew uphold and keep the Demised Premises and in particular the **roof** and all parts thereof including so far as the same form part of or are within the Demised Premises all window glass and doors (including the entrance door to the Demised Premises) locks fastenings and hinges sanitary water gas and electrical apparatus and walls and ceiling drains pipes wires cables and all fixtures and additions thereto in good and substantial repair and condition.

    3(5) At all times during the said term to pay and contribute (including an amount in advance if so required) one half of the costs and expenses of making repairing maintaining painting supporting re-building and cleansing where necessary the **foundations** and the main structure of the Building, the entrance hall of the Building leading to the front door of the demised premises and all pathways passageways sewers drains pipes watercourses waterpipes cisterns gutters chimneys party walls and fences party structures easements and appurtenances belonging to or used or capable of being used by the Tenant in common with the Landlord or the Adjoining Owner."

18. Clause 4 of the Leases contains four landlord covenants. The first is to insure and the second is a covenant of quiet enjoyment. The other two are:

> "4(3) That every long lease of the Adjoining Property hereafter granted by the Landlord shall contain covenants to be observed by the Adjoining Owner in substantially similar terms to those contained in Clause 3 of this Lease and that until such time as such a long lease shall be granted and after the grant thereof in the event that the Adjoining Property shall come into the possession of the Landlord by the determination or expiration of the lease thereof at all times during the term hereby granted to observe and perform the covenants contained in clause 3 in respect of the Adjoining Property as if the Landlord were the Tenant.
>
> 4(4) At the request of the Tenant and subject to payment by the Tenant of (and provision beforehand of security for) the costs of the Landlord on a complete indemnity basis to enforce any covenants entered into with the Landlord by the Adjoining Owner of a similar nature to those contained in Clause 3 of this Lease."

19. The Leases contain no express covenants by the Respondent to provide any services. There is a right for the Landlord to enter the Demised Premises at reasonable times and by appointment to examine the state of repair of the premises. In default of the lessee defaulting on any repairing covenants, the Landlord has a right of access to carry out the repairs required. The Landlord has no other rights of access.

The arguments put by the parties in relation to service charges

20. Unsurprisingly, Mrs Bennett did not advance any legal arguments in support of her contention that service charges were not due. Her case was that prior to the Respondent's acquisition of the freehold, the Applicants had looked after the Entrance Hall themselves very satisfactorily and they have been astounded and disturbed to receive astronomical demands for payments which were for nothing. Nobody had invited the Respondents to come in and clean. They had forced entry and changed the locks in order to acquire keys when they had started to provide a cleaning service to the Entrance Hall. The charges were unbelievable. She relied on the statement in the previous Tribunal decision to support her claim that the service charges were not payable.

21. For the Respondent, Mr Beaumont's argument was based upon clause 3(5) in the Leases. What it requires, he said, is that the lessee must pay certain costs, including the cost of cleaning the Entrance Hall. He said that this had to be interpreted as not just a right but also a requirement that the freeholder do the cleaning. It would make no sense for the leaseholders to do it and then pay half of the cost to each other. He relied upon the case of *Barnes v City of London Real Property* [1918] 2 Ch 18 for the proposition that if the tenant has to pay for cleaning, the landlord has to clean even though the obligation to do so is not expressly stated in the lease.

22. All other charges stem from the obligation to clean. There is a right to a management charge, arising from the case of *Norwich City Council v Richard Marshall* 2008 WL 4698929. If charges are levied, proper accounts must be kept (allowing accountancy fees and back charges) and statutory requirements regarding the protection of employees required regular risk assessments, fire risk assessment, asbestos surveys and various other on-costs.

23. A right of access must necessarily be implied as the Respondent was obliged to clean the Entrance Hall.

24. The service charges were therefore due and payable.

Law

25. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain important statutory provisions relating to recovery of service charges in residential leases. Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

26. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

- The person by whom it is or would be payable
- The person to whom it is or would be payable
- The amount, which is or would be payable
- The date at or by which it is or would be payable; and
- The manner in which it is or would be payable

27. Section 19(1) of the Act provides that:

> "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:
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> and the amount payable shall be limited accordingly."

28. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. If the tenant gives evidence establishing a prima facie case for a challenge, then it will be for the landlord to meet those allegations and ultimately the court will reach its decisions on the strength of the arguments.

Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten* [1985] 2EGLR100 / *Daejan Investments Ltd v Benson* [2011] EWCA Civ 38).

29. When interpreting a written contract, the Tribunal has to identify the parties' intention by reference to what a reasonable person having all the relevant background knowledge would understand the terms to mean. We have to focus on the meaning of the words in their context and in the light of the natural meaning of the clause; any other relevant provisions; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense (*Arnold v Britton* [2015] UKSC 36).

30. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

> "39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> 40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. The second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market."

31. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

> "103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

Discussion on the Service Charge Issue

General observations

32. When a developer creates flats in a larger building, he will almost always grant leases of parts of the building. This is because the leasehold system allows contractual promises to be given by and to the landlord and the tenant, which are then enforceable between them and their successors for the remainder of the term. The system is almost universally used at present for long leases of parts of a building. Leases can be structured in different ways. For blocks of flats, it is normal for the common parts, including the structural elements of the building, to be retained by the freeholder with the

freeholder or a management company then taking on the repair and maintenance obligations. Another approach is for a lease of the common parts to be granted to a management company, which is then obliged to maintain them. Each tenant then promises to pay a service charge for their share of the costs of the repair and maintenance either to a management company or to the landlord. The service charge provisions are usually spelled out – often in considerable detail – in the lease.

33. In a situation where a development of a single house into two units is undertaken, the developer will often discard the structures described for a block of flats because it would be an expensive luxury, and one that is unlikely to be attractive to purchasers, for a third party to provide costly services. The argument is that a single split domestic house in a terrace needs no more professional management than a house which is not split, and there is no need to burden the lessees with additional cost. It is their joint property so they can be responsible together to repair and maintain it, rather than requiring the landlord to become involved. Sometimes this form of lease is called a self-repairing lease.

34. If this sort of lease is chosen, the features it will have, which are close to diametrically opposite to the features normally included in a service charge lease, are that the whole of the house, including the roof, foundations, walls, windows and doors, will be leased to the lessees. There will obviously be no need for the landlord to retain possession of any part of the building, so there are no common parts (in the sense of common parts being parts of the building which are not owned by the lessees but over which they have rights of access). The lessees will covenant to pay all of the costs, between them, of keeping the house (including its structure – roof – foundations, walls etc) in good repair, one being responsible for one half of the house and the other for the other. There will be no need to create any service charge clauses. In essence, the developer lets the whole house by granting the two leases and takes no further part in repairing or maintaining it. He still obviously owns the freehold, so he has an interest in making sure the maintenance is carried out, so will retain rights to inspect and will take covenants from the tenants to do the repairs, but generally that is all.

35. There is a problem with this solution; neither lessee enters into contractual obligations to the other lessee. The leases are between the lessee and the landlord only. So, if one lessee fails to maintain their half, how does the other lessee legally require him to do so? There have been a number of drafting solutions to this problem. One is to require the lessee to promise to repair, or to pay for half of the cost of the other lessee's repairs, to the landlord. The lease then includes provisions requiring the landlord to sue the non-compliant lessee for breach of that other lessee's lease.

Our view of the meaning of clause 3(5) in the Lease

36. Mr Beaumont has argued that the wording used in the Leases does not allow an interpretation that they are self-repairing leases and instead clause 3(5) requires the landlord to do works (namely the cleaning of the Entrance

Hall), and as a result a service charge regime exists in the Leases, and the service charges set out in paragraph 5 above have properly become due.

37. Everything turns on whether the Respondent has an obligation to clean the Entrance Hall. That is the only service which the Respondent actually provides on a regular basis to the property, (though there is one invoice for cleaning the gutters on one occasion). If the Respondent is obliged to clean the Entrance Hall, the arguments runs, the Applicants have to pay for that service under clause 3(5), and that results in the Respondent having to keep accounts, keep the payments in a separate bank account on trust, and incur the health and safety and fire risk obligations assessment obligations under statutory provisions and fees to manage the whole process.

38. We need to interpret the correct meaning of clause 3(5). In looking at this, we must follow the principles set out in *Arnold v Britton*; that is to examine the words actually used and it they permit a clear meaning, then we must adopt that meaning. If the words are unclear, we will need to look at their context, any other relevant provisions, the overall purpose of the clause and the lease, the facts and circumstances known by the parties at the time, and commercial common sense.

39. Firstly, let us look closely at the precise wording of clause 3(5). It contains an obligation to pay half the costs of making repairing maintaining painting supporting re-building and cleansing, where necessary:

    a. the roof/foundations and the main structure of the Building,

    b. the entrance hall of the Building leading to the front door of the demised premises, and

    c. all pathways passageways sewers drains pipes watercourses waterpipes cisterns gutters chimneys party walls and fences party structures easements and appurtenances belonging to or used or capable of being used by the Tenant in common with the Landlord or the Adjoining Owner.

40. We think that these three elements have been chosen because they are the elements of the property which are shared between the two lessees. Without an obligation to contribute half the cost of looking after the shared elements, the individual lessee would have to pay the whole cost under clause 3(4). The roof is wholly within the demise of the Upstairs Lease, and the foundations wholly within the demise of the Downstairs Lease. The Entrance Hall is also wholly within the demise of the Downstairs Lease. The paths and fences are within the Downstairs Lease and the gutters are within the demise of the Upstairs Lease. It is entirely to be expected that the cost of maintenance of these shared elements should also be shared, even though each lessee would be paying for something they are not otherwise obliged to pay for.

41. Clause 3(5) introduces the word “cleansing”, which does not appear in clause 3(4). We do not regard that as introducing a distinct additional

service. Clause 3(4) requires that the lessees must "repair maintain renew uphold and keep the Demised Premises … in good and substantial repair and condition". We think that list is extensive enough to embrace a need to keep the property cleansed (or clean). We note this extract from Woodfall on Landlord and Tenant at paragraph 13-025:

> "Words are not necessarily to be given their strict literal meaning. It is the "good sense of the agreement" which has to be ascertained. The covenant "must not be strained, but reasonably construed, on the principle of 'give and take'". Nevertheless, effect should be given to each part of the covenant, although due regard must be paid to the habit of many draftsmen to adopt a "torrential style" of drafting, in which draftsmen use many words either because it is traditional to do so or out of a sense of caution so that nothing which could conceivably fall within the general concept they have in mind should be left out."

42. The first and the third elements of clause 3(5) (see paragraph 37 above) are closely matched with corresponding provisions in clause 3(4) and we think the second element is also effectively included within clause 3(4).

43. We note that the obligation to pay for cleansing of the Entrance Hall only arises "where necessary". This in any event negates the Respondent's practice of cleaning monthly. The Applicants could simply do the cleaning themselves, so that each monthly visit by the Respondent becomes unnecessary, and therefore not required under clause 3(5).

44. The correct meaning of the words used in clause 3(5) is that they impose an obligation upon the lessee to pay to the other lessee half of the costs of complying with the three obligations set out in the clause. Clause 3(5) makes no sense unless viewed alongside the corresponding clause 3(4) in the other lease. When viewed together, we think clauses 3(4) and 3(5) were intended to be complimentary to each other.

45. Let us assume that the roof is in disrepair. In accordance with her covenant in clause 3(4), the Second Applicant repairs the roof and pays the whole cost. She then approaches the First Applicant and points out that in his clause 3(5) he has covenanted to pay half the cost of repairing the roof. The only way of making sense of the First Applicant's obligation to pay half the cost of the roof is to read that obligation as being the mechanism by which the Second Applicant recovers half the cost from the First Applicant. It is a rather clunky mechanism as if the First Applicant were not to pay, the Second Applicant would have to ask the freeholder to enforce the covenant to pay half the cost (using clause 4(3) and (4) of her lease). Even though the covenant says the cost is paid to the freeholder, why would it need the money. It has not repaired the roof.

46. We do not think the Respondent can pick and choose which part of clause 3(5) it regards as its own obligation. The logical extension of Mr Beaumont's argument that the clause requires the Applicants to contribute to the cleaning of the Entrance Hall is that, as clause 3(5) also obliges the Applicants to pay half of the costs of repairing the roof / foundations, the

freeholder is also obliged to carry out those repairs. That would drive a coach and horses through the express provisions of clause 3(4) in the Leases which imposes that obligation upon the lessees. They cannot both be responsible.

47. It is of course true that the obligation is to pay the money to the freeholder, but there cannot be any reasonable doubt that any payment made by the First Applicant to the freeholder would have to be passed to the Second Applicant.

48. Our interpretation of clause 3(5) is therefore that the obligation to pay half the costs of the three elements to the freeholder is intended as the mechanism by which each lessee obtains a contribution towards the sums that lessee will have expended in complying with his or her corresponding covenant in clause 3(4) of his or her lease. It is intended that the payments to the freeholder are that lessee's contribution to the costs of the other lessee complying with clause 3(4). There is no other provision in the Leases under which the lessees can recover half of the cost of complying with clause 3(4) from the other lessee.

49. But the Respondent reads the lease in a different way. To remind ourselves, the argument is that the second element of clause 3(5) must, according to the Respondent's argument, imply an obligation upon the Respondent to clean the Entrance Hall, because if the Applicants have to pay for the cleaning, the only way of making sense of clause 3(5) is by holding that therefore the Respondent has to do the cleaning. We therefore need to examine the other elements contained in *Arnold v Britton* that may shed light on the meaning of clause 3(5).

Other relevant provisions in the Leases and the overall purpose of the Leases

50. When looked at in the round, the Leases contain all the features that strongly suggest they were intended to be self-repairing leases including:

    a. demising the whole structure to the lessees entirely (including in particular the Entrance Hall which is demised as part of the Downstairs Flat) leaving no part in the freeholder's possession;

    b. including covenants by the two lessees to repair and maintain the whole property;

    c. making provision for each lessee to be responsible for their half of the costs of repairing the part of the property the other tenant is responsible for (we accept that covenant was given to the freeholder but it makes no sense if it was not intended as a mechanism for the sharing between the tenants of the cost);

    d. requiring the landlord to enforce the covenant against the other tenant;

e. not imposing any covenant on the landlord to maintain or repair any part of the property; and

f. omitting any service charge references or mechanisms.

51. Additionally, the Leases do not contain any provisions giving the Respondent a right to access the Entrance Hall to carry out cleaning. Arguably, entry into the Entrance Hall is a breach of the covenant for quiet enjoyment.

52. Further, there is no other provision in the Leases that explains how else one Applicant is to recover half of the cost of structural repair from the other tenant apart from clause 3(5). We think it is obviously the intention of the Leases that the costs were to be shared by the lessees, and we think clause 3(5) is the mechanism for that.

The facts and circumstances known by the parties at the time

53. We think it is material that for the first seven years of the Leases, the freeholder did not claim a right / obligation to carry out any cleaning. It seems to us that the facts and circumstances pertaining when the Leases were granted were such that neither party thought that the Leases were service charge leases.

Commercial common sense

54. We stress that the Entrance Hall is a very small room, comprising about 4sqm. It has no purpose other than to be the passageway to the two flats. It is a very uncomplicated piece of building structure, with a hard floor, four walls, a front door with door light above, and two internal doors to the flat. Where is the commercial sense in preparing a lease which takes away the responsibility for cleaning just that very small area of accommodation, the cost of which ought to be minimal, from the only two users of it and passes it to a commercial landlord which may be (and is) located remotely from the property.

55. We therefore cannot see any commercial benefit to the Respondent in retaining that obligation in the Leases. We realise it is to the commercial advantage of their agent, but that is a wholly different thing from being of commercial value to the Respondent. Of course, for the Applicants, their position is that they deeply resent the levying of a service charge by the Respondent and they derive no commercial benefit whatsoever from the Respondent's interpretation of the Leases.

56. It is correct that this covenant in clause 3(5) is given to the freeholder, not the other tenant. But if it is also correct that the covenant means the freeholder is obliged to clean the Entrance Hall, why is the freeholder also not obliged to carry out the other two elements of clause 3(5), namely repairing the structure (including roof and foundations and walls) and all pipes passageways etc (see the same point in paragraph 46 above). But that would be in direct conflict with the Applicants covenants in clause 3(4) in

their respective leases, and that cannot have been the intention of the draftsman.

57. It is arguable that the cleaning of the Entrance Hall is also included within the phrase "maintain … and keep … in good condition" in clause 3(4). This is a similar argument to the previous paragraph, for if this is so, there would be a covenant by the Applicant to do that in clause 3(4) followed by a covenant to pay half of the cost of doing that to the freeholder. If so, it is difficult to make much sense of the two covenants when read together apart from the interpretation we have described above to the effect that the clause is the mechanism to allow half of the costs which a tenant must incur to be recovered from the other tenant.

58. Our conclusion is that clause 3(5) is not a covenant to pay for works carried out by the freeholder. It is a mechanism (jointly with clauses 4(3) and 4(4)) whereby a tenant can recover half of that tenant's expenditure in complying with clause 3(4) from the other tenant.

Absence of a covenant by the Respondent to clean the Entrance Hall

59. We have already said that the absence of a covenant by the Respondent to carry out cleaning is one of the factors that persuaded us that the Leases are self-repairing leases with no rights or obligations upon the Respondent to provide services and no corresponding right for a service charge to be levied (see paragraph 47(e) above). Mr Beaumont's argument, however, was that the freeholder was obliged to do the cleaning work, following *Barnes v City of London Real Property*. We do not accept that proposition.

60. *Barnes* was a case in which landlords accepted rent in return for a promise to provide a housekeeper who would carry out cleaning services. Unsurprisingly, the court held that having accepted rent for that purpose, there was a correlative obligation upon the landlord to provide the service. This case is entirely different. We do not think that clause 3(5) can be construed as if it is a payment of consideration by the Applicants for a cleaning service. It does not mention any service which is to be provided by the freeholder. The consideration in the Leases was the payment of the premium and the ongoing payment of the ground rent, in return for which the Applicants expected to have peaceable enjoyment of their property. They had no expectation or requirement that the Respondents should impose a cleaning service upon them; quite the contrary. We do not think that *Barnes* helps the Respondent.

61. We therefore do not accept that the Respondent had a right, let alone an obligation, to provide a cleaning service to the Entrance Hall. If this conclusion is correct, the inevitable consequence is that logically if there is no cleaning service to be provided, there is no need to charge for any other costs. Therefore, none of the service charges claimed and paid were due under the Leases.

Management and other expenses

62. If we are wrong in our conclusion above, the next issue for us to consider is whether, if the Applicants have to pay for cleaning services, they also have to pay management fees. There is of course no provision in the Leases allowing these to be claimed. Mr Beaumont's case is that they are payable because an obligation to do so should be implied if clause 3(5) requires the provision of a cleaning service.

63. The principle that should be adopted, in our view, is that clear and unambiguous words are needed to bring in an obligation to pay management fees. We set out below some of the authorities for this proposition.

64. The starting point is the dicta of Mummery L J in *Gilje v Charlgrove Securities Ltd* [2001] EWCA Civ 1777 where he approved of a comment in the Encyclopaedia of Forms and Precedents which stated:

> "31. … The draftsman should bear in mind that the courts tend to construe service charge provision restrictively and are unlikely to allow recovery for items which are not clearly included."

65. In *Philips v Francis* 2014 WL 5411967 the Master of the Rolls said:

> "74. … the reported cases are generally consistent with a broad principle that it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease: see, for example, *Gilje v Charlgrove Securities Ltd* [2002] 1 EGLR 41 at [31] (Mummery LJ). It is to be expected that the tenant will wish to be fully aware of any such additional obligation on which his or her continuing right to possess the land and to occupy it may depend. It is to be expected that the lessor will wish to make such a continuing additional obligation clear because it arises under a lease which will subsist through successive ownerships of the reversion and the tenancy and because the lessor will not wish to be out of pocket in respect of services provided for the benefit of the tenant."

66. Mr Beaumont relied on *Norwich City Council v Richard Marshall* 2008 WL 4698929 which he says established that a landlord is entitled to be paid management fees for its management functions even when the lease does not expressly provide for those fees. A similar conclusion was reached in other cases, such as *Haveli Ltd v Glass* LRX/22/2005 Lands Tribunal. However, these cases were clearly not on all fours with this case and they both preceded *Philips v Francis* which must be regarded as the authoritative statement of the current law. The point about both *Norwich City Council* and *Haveli* is that these concerned leases with full service charge provisions. They concerned former council properties, where the council had covenanted to provide services, in return for which the lessees had covenanted to pay a service charge. There was therefore both an express covenant for the landlord to provide services, and an express covenant for

the lessee to contribute towards the cost. Both of these elements are of course absent in this case.

67. In the absence of clear and unambiguous words to the effect that the Applicants would be obliged to pay management fees to the Respondent, we would therefore have found that these fees would not be payable.

68. We see no real distinction between management fees and all other service costs claimed by the Respondent. The question is whether, when looking at the Leases, the Applicants are given a clear understanding of the fees and expenses which they will be obliged to pay throughout the currency of the Leases. If they are not, then the proper construction of the Leases is that such fees are not payable. That would have been our determination as regards accountancy fees, bank charges, and statutory risk assessments for fire and health and safety.

Are the service charges reasonable?

69. It may be that we were wrong to interpret clause 3(5) in the way we did, and that we were wrong to hold that the Leases do not allow the additional costs of management, accountancy etc. If this is so, we would than have had to consider this application on the basis of whether the service charges were reasonably incurred, in accordance with section 19 of the Act.

70. Our decision, had we reached that point, would have been to hold that the cleaning costs for the Entrance Hall were not reasonably incurred, mainly on the basis that they were entirely unnecessary. It cannot be reasonable to incur a cost for a service that can only benefit the people who so vehemently wish it were not provided. It benefits nobody. The Applicants are perfectly capable of doing their own cleaning of a very small part of their own property. Why would anyone reasonably decide to impose that service upon them? It would then have followed that as it would not be reasonable to provide any services to the property, it would not be reasonable to levy any charges for not doing so.

Decision on service charges

71. Our decision on the question of what service charges are payable for the service charge years in issue in this application is that no service charges are payable.

72. The Applicants have asked for the Tribunal's help in "getting our money back". We have no jurisdiction to order repayment of overpaid service charges. If service charges are overpaid, a tenant may be able to recover them on the basis that they were paid under a mistake of fact or of law. An application would have to be made to County Court. Advice agencies, including Citizens Advice, may be able to offer help in making any application to that court, or the Applicants' could take their own legal advice.

Insurance premiums

73. Clause 3 of the Leases contains the lessees' covenants. By clause 3(2), the lessees covenant:

> "To pay by way of additional rent on demand in advance one half of the sum or sums of money which the Landlord may expend in effecting or maintaining the insurance of the Building."

74. The Applicants' claim is that the insurance premiums charged were excessive. Each year, the Respondent has demanded an insurance premium and a management fee for managing the insurance. The figures provided to us are:

Year	Premium (£)	Management fee (£)
2013	201.02	11.94
2014	220.32	19.99
2015	231.14	19.99
2016	250.93	19.99
2017	221.70	14.99
2018	279.18	19.99
2019	288.82	19.99
Total		**146.87**

75. In addition, the Applicants paid a fee of £240 each for a reinstatement valuation in 2018.

76. Mrs Bennett told us that she had obtained a quotation on the telephone from a web-site called "Protect Your House" for a premium of £225 for the property with a building reinstatement value of £175,000.00. This was not available in writing and we were only told about it at the hearing. She said that she thought the building reinstatement value for the current Respondent arranged policy of £450,000 was too high. She also said that the Applicants had been charged for a building insurance revaluation in early 2018 but it had taken a year for this to be carried out and the result was that the building insurance value was lower and therefore the premium should have reduced.

77. The Respondent's managing agent had provided a statement to the Tribunal which asserted that the freeholder had a block policy, and did not insure each of its investments via individual policies. They use an FCA regulated broker to arrange the insurance, who market tests when there is a renewal.

78. We asked whether any commission was paid. The statement said that the group of which the Respondent was part did benefit from commission on the insurance premium paid. We asked for information on the amount of the commission, but the Respondent's agent did not know. This point had not been specifically raised by the Applicants' in their application.

79. The statement set out the legal position on insurance premiums so far as the Respondent understood it. Reference was made to a number of cases said to

establish the principle that the landlord had to make a reasonable decision on the insurer it would place its business with, having tested the market, but it did not have to accept the cheapest premium offered.

80. All we were told about the process that had been undertaken by the Respondent was that "the broker undertakes market testing on behalf of the Respondent". We were not told how often, when the last market testing exercise had been undertaken, who had been asked to quote, what quotes had been obtained, what decisions had been made, and why the decision to accept the quote for the current premium had come about.

81. Mr Beaumont informed us that his clients had made a decision not to pursue an argument to justify the management fees in respect of insurance, and arrangements would be made by the freeholder for these fees to be refunded to the Applicants.

Discussion

82. In relation to the revaluation fee, we think this is covered by the covenant to pay the costs of "effecting or maintaining" the insurance. Our view is that the cost is reasonable.

83. Regarding the annual premium, in order for us to make a decision that an insurance premium (which is an amount paid for insurance which may vary, and so is amenable to our jurisdiction) is unreasonably incurred, we would need to have evidence of what sum might be a reasonable sum for the insurance premium if a claimant wishes us to reduce the premium.

84. Whilst we had some sympathy with the Applicants' claim that the premiums charged exceed the sums that a single house owner might be able to insure their property for, the Respondent is correct in its claim that this is not the test for whether an insurance premium is reasonable. We were not able to examine the Respondent's processes for selecting the policies under which the premiums for the years in question had been derived as the Respondent did not bring that evidence to the Tribunal. Had we done so, it may have been the case that we would not have been satisfied that the processes were reasonable, and so we might have reduced the premiums.

85. However, we did not have sufficiently robust evidence from the Applicants of what a reasonable premium might be. We were only told of telephone quotes, without sufficient detail about the insurer, the terms of the policy, the full cover provided, the claims handling processes that would be in place, the building reinstatement value and the sum insured, the available policy extensions, and the perils insured. We and the Respondent were not provided with any written evidence concerning the alternative quotes.

Decision on insurance charges

86. On the basis that we lacked adequate evidence to make any other decision in favour of the Applicants, we determine that the insurance premiums for 2013 to 2019 and the revaluation fee were reasonably incurred.

Costs and fees

87. The application includes two requests for orders relating to costs. The first is an application for an order under section 20C of the Act that any of the Respondent's costs are not to be included in the amount of any service charge payable by the Applicants. The second is an application for an order extinguishing the Applicants' liability to pay an administration charge in respect of litigations costs.

Section 20C

88. Our decision in this case is that the Leases do not allow any service charges to be levied anyway. In our view it is therefore not possible for the Respondent to seek costs via a service charge as a matter of contract. If it were, we would be of the view that it would not be right for the Applicants to pay any costs incurred by the Respondent. We believe the main motivation for bringing the application was to determine the position on service charges, in which the Applicants have been successful. As an abundance of caution, we make the order requested. We order that any costs incurred by the Respondent in this case may not be regarded as relevant costs in any service charges sought from the Applicants.

Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002

89. We take the same stance on the question of administration charges for costs. We do not think they can be demanded under the terms of the Leases anyway. We will make the order requested, again out of an abundance of caution. We order that any administration charges sought by the Respondent in respect of th costs in these proceedings from the Applicants are extinguished.

Fees

90. The Applicants have paid £100 to bring this application and £200 hearing fees. Under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, we may make an order requiring a party to reimburse to any other party the whole or part of any fee paid by the other party.

91. Our view is that on the predominant issue in this application, the Applicants have succeeded, and they should not be out of pocket as a result of bringing entirely meritorious proceedings. We order that the Respondent do reimburse £150 to each Applicant.

Other matters

92. Mrs Bennett asked whether the Tribunal could help in recovery of an expense to change the locks in 2020 in order to prevent the Respondent from accessing the Entrance Hall. The short answer is that we cannot. That

is not within our jurisdiction. We repeat the comment above concerning taking advice.

Appeal

93. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)