FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LSC/2020/0076**
HMCTS code (paper, video, audio)	**:**	**V: FVHREMOTE**
Property	**:**	**90-108 Streatham Hill, London SW2 4SU**
Applicant	**:**	**Tradeleague Limited**
Representatives	**:**	**Ms Wendy Mathers (counsel)** **Bude Nathan Iwanier LLP (solicitors)**
Respondents	**:**	**(1) Creeklynn Limited; (2) Wyatt Park Mansions Flats Management Company (Lambeth) Limited**
Representatives	**:**	**(1) Daniel Bromilow (counsel)** **Teacher Stern LLP (solicitors)** **(2) Heidi Vella (director)**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Nicola Rushton QC** **Mr Stephen Mason BSc, FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**17 September 2020**
Date of decision	**:**	**28 October 2020**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: FVHREMOTE (using the Fully Video Hearings platform). 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 are in a bundle of 593 pages, together with the documents listed below which were emailed to the tribunal during the hearing. The tribunal has noted the contents of these documents. The order made is described at the end of these reasons.

Additional documents: missing page of underlease added as p.188A; skeleton arguments and authorities from Applicant's counsel and from First Respondent's counsel; 5 photographs of the electric gate; further, clearer copy of exhibit 1 to Mr Stern's statement (including the Lease).

Decisions of the tribunal

(1) The tribunal determines that the sum of **£3,757.44** is payable by the First Respondent to the Applicant in respect of the service charges sought for the current year.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

(3) The tribunal does not make any order under section 20C of the Landlord and Tenant Act 1985, none having been sought.

The application

1. The Applicant landlord seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the payability and amount of service charges by the First Respondent tenant, for the current year, in relation to the costs of installation of a pair of electric security gates ("the Gates"). The application is dated 10 February 2020.

2. During the hearing the Applicant stated it was reserving its position in respect of any application as to the payability and amount of any administration charges, pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002. None were claimed in this application.

The hearing

3. The Applicant was represented by Ms Wendy Mathers of counsel at the hearing and the First Respondent by Mr Daniel Bromilow of counsel.

The Second Respondent (the tenant management company) appeared by one of its directors, Ms Heidi Vella.

4. During the hearing the parties handed in further documents, as listed above. The tribunal considered the skeleton arguments during the lunch adjournment, and considered these and the further documents as referred to by counsel during the hearing.

5. No inspection was carried out, none being considered necessary by the tribunal nor requested by any party; nor would this have been practicable, nor proportionate to the issues. Photographs of the site were provided in the hearing bundle, and photographs of the Gates which had been installed were circulated by the Applicant during the hearing.

Procedural matters

6. Directions were given in this matter by Judge Professor Robert Abbey on 17 March 2020.

7. Statements of case were submitted by the Applicant and the Respondent, dated 4 May 2020 and 17 June 2020 respectively. The Applicant filed and served a witness statement from its managing agent Simon Stern, also dated 4 May 2020. The First Respondent filed and served a witness statement from its director Michael Garvin, also dated 17 June 2020. Ms Vella provided a witness statement on behalf of the Second Respondent, dated 19 June 2020.

8. All three witnesses attended and gave live evidence during the video hearing.

The background

9. The leasehold property which is the subject of this application is a mansion block of 24 flats, known as Flats 1 – 25, Wyatt Park Mansions, Streatham Hill, London SW2 4RN, together with 7 garages ("WPM"). (There is no flat 13.) The First Respondent ("Creeklynn") is the head lessee, holding a long lease which is registered at HM Land Registry under title number SGL399024 ("the Lease").

10. The Applicant ("Tradeleague") is the freeholder of the whole building, being 90, 92, 94, 96, 102, 104, 106 and 108 Streatham Hill and Wyatt Park Mansions, London (registered title number SGL410826) ("the Building"). The freehold title includes 13 garages, of which numbers 7 – 13 are within the WPM demise. The garages are located immediately to the rear of the Building.

11. WPM otherwise comprises the first to fourth floors and roof of the Building, plus the main ground floor front access and stairs. The remainder of the ground floor is divided into 8 shops which are separately let. The Building also has a basement.

12. The 24 flats and 7 garages which make up WPM are individually sub-let by Creeklynn under long underleases. The underleases contain mirror terms to the Lease, in particular as to rights of way and obligations to pay service charges. The Second Respondent ("the TMC") is a tenant management company which is a party to all of the underleases.

13. Tradeleague's freehold title also includes an L-shaped parcel of land to the rear of the garages, which is referred to in the Lease as "the Brown Land". It is paved with tarmac and used for car-parking and access to the garages and the rear of the shops in the Building. Other than a fire escape, there is no direct access to and from the 24 flats to the Brown Land, but their refuse bins are stored there. Access to the Brown Land (for pedestrians or vehicles, including bin lorries) is from a road at the very rear, called Blairderry Road. A private roadway, forming one branch of the "L" runs from Blairderry Road to the carpark area.

14. The terms of the Lease include a right of the tenant (now Creeklynn) to (a) pass and repass over the Brown Land, with or without vehicles, and (b) park not more than 6 cars on a specified portion of the Brown Land, subject to the tenant marking out, maintaining and repairing that portion. Creeklynn has arranged for 5 parking spaces to be marked out, which it says is the maximum appropriate for the size of that area.

15. The Lease includes covenants requiring the landlord (now Tradeleague) to maintain and keep in good repair the Brown Land, and on the tenant to contribute to those costs by way of a variable service charge. The specific provisions of the Lease will be referred to below, where appropriate.

16. The occupants of the shops on the ground floor of the Building also have rights of access over the Brown Land, although not a right to park. The shops are able to accept deliveries to the rear and at least 6 of them have a back entrance onto the Brown Land.

17. In addition, the occupiers of a neighbouring building, Telford Court, have a right of way over the Brown Land. This allows them to access the (much larger) carpark at the rear of their building. Telford Court also has shops on the ground floor (there appear from the office copy entry plan to be 13), at least some of which can be accessed at the rear.

18. Over a number of years up to at least 2018, a serious problem had developed of fly-tipping, dumping of rubbish and abandonment of cars on the Brown Land. There is no dispute that this had made the Brown

Land more difficult to use and access, as well as being unpleasant. Creeklynn says that the Brown Land had been neglected by Tradeleague for many years and that its surface was in poor condition, which encouraged dumping.

19. On 4 July 2016 Lambeth Council wrote to Tradeleague to say they had received complaints about the condition of the Brown Land due to the accumulation of waste from fly-tipping. A community safety officer had visited the site and determined that there was a large amount of waste (including furniture, fridge freezers and mattresses) which was likely to be having a detrimental effect on the quality of life of those in the locality.

20. The letter included a Warning Notice under section 43 of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") requiring Tradeleague to take steps to clear the land, adequately secure it and ensure it was maintained. The Notice stated that the Brown Land, for which Tradeleague was responsible, was having this detrimental effect as a result of (1) the accumulation of waste, refuse and fly-tipping/litter caused by illegal access onto the land; (2) *"the inadequate security of the site to prevent the above (by installing a security gate)"* (sic); and (3) the fact the land had been in this state for a considerable time. Tradeleague was required to clear, cleanse and maintain it within 14 days, carry out weekly inspections and remove any further waste.

21. Tradeleague arranged for Swift Waste Management to clear the site, which they did on 14 July 2016 at a cost of £756 including VAT, according to an invoice in the bundle. Tradeleague says it has engaged Swift to clear the site on other occasions as well.

22. On 7 October 2016 Lambeth wrote again to Tradeleague, referring to the previous Notice and stating the council had continued to receive complaints from local residents about the deposit of waste, which was harbouring pests. The letter included a Community Protection Notice ("CPN") under section 43 of the 2014 Act, requiring Tradeleague to take specific steps to ensure the nuisance did not recur. This notice required Tradeleague to comply with (among others) the following conditions:

> "*1. Remove the accumulation of waste, refuse and fly-tipping/litter deposited by the side of your locked up garages caused by illegal access onto the land.*
>
> *2. The inadequate security of the site to prevent the above by installing security gate/s (sic)...*"

23. Two years elapsed before Tradeleague complied with this CPN by installing security gates. On 27 January 2018 Tradeleague was served

with a fixed penalty notice for breaching the CPN. Tradeleague eventually arranged for the Gates to be installed in October 2018.

24. The Gates were installed by City Gate Automation. They charged a total of £15,840. However this included charges for an intercom system for the shops and a transmitter for Telford Court, none of which benefitted Creeklynn or its subtenants.

25. It is now agreed by the parties that the parts of the installation costs which are relevant to Creeklynn are (a) City Gate's charge of £11,410 plus VAT (£13,692 in total) for installing the Gates themselves and (b) the cost of the electrics for the Gates, from Lekters, of £627.90. The total for these two elements is £14,319.90, which is agreed as being the cost of the installation works. It is further agreed that this sum was reasonable, subject to issues of payability and apportionment.

26. Tradeleague is in addition claiming to have incurred managing agents' fees of £2,228.60 and legal costs apparently totalling £18,930 (solicitors costs of £13,840 plus VAT (£16,608), plus disbursements of £2,322 including VAT – paragraph [52] of Tradeleague's statement of case), all in relation to the installation of the Gates. These are wholly disputed by Creeklynn, as to payability, reasonableness and apportionment.

27. Prior to the installation of the Gates, on 3 May 2018 Tradeleague issued an application under section 20ZA of the 1985 Act for dispensation of consultation requirements. As recorded in a decision of 27 June 2018, the expected cost of the works was then £12,000 plus VAT. Shortly before the hearing, Creeklynn dropped its opposition to the application, but contends within the present application that it was unnecessary.

28. On 28 May 2019, Creeklynn was sent an invoice demanding £14,642.97 in relation to the installation of the Gates. This was said to comprise £4,700.71 for Creeklynn's proportion of the installation costs and £9,942.26 for legal costs. The invoice came from Sea Board Consulting Ltd, said by Mr Stern to be one of Tradeleague's managing agents.

29. That invoice stated that the total cost of the works was £16,600.50, of which 20% was to be apportioned to the 24 flats, 6% to 6 parking spaces and 7% to 7 garages. It is clear though that on any view the sums claimed for the parking spaces and garages must have been miscalculated, as Mr Stern accepted in evidence, since the amounts claimed (£821.52 and £559.09) do not represent 6% and 7% of £16,600.50.

30. There is no dispute that this invoice did not comply with statutory requirements for a service charge demand. On 13 March 2020 (after issue of the present application and after Creeklynn's representatives

had pointed this out) Tradeleague's solicitors served a further copy of the invoice but attaching a summary of tenants' rights and obligations.

The issues

31. The parties identified the relevant issues for determination as follows:

    (i) Whether costs related to the installation of the Gates were payable as service charges under the terms of the Lease, in particular under paragraphs 4 and/or 16 of the Fifth Schedule to the Lease;

    (ii) If such costs were payable, whether this included managing agents' fees and/or legal costs as claimed by Tradeleague;

    (iii) If managing agents fees and/or legal costs were payable, what if any part of the costs claimed was reasonable;

    (iv) If any service charges were payable, what percentage or amount should be apportioned to Creeklynn.

32. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Payability under the Lease of costs of installing the Gates

33. Tradeleague relies on paragraphs 4 and/or 16 of the Fifth Schedule to the Lease (obligations of the tenant), which state as follows:

    "(4) To pay to the Lessor within 14 days of demand a fair proportion of the cost incurred by the Lessor in maintaining and repairing the said areas coloured brown on the said plan." *(*"**the Repairs Clause**")

    "(16) At all times during the said term to do and execute or cause to be done and executed all such works and to do all such things as under or by virtue of any Act or Acts of Parliament now or hereafter to be passed and orders bye-laws rules and regulations thereunder are or shall be directed or necessary to be done or executed upon or in respect of the Demised Premises or any part thereof or in respect of the user thereof by the owner lessee tenant or occupier thereof and at all times to save harmless and to keep indemnified the Lessor and the Lessor's estate and effects against all claims demands costs expenses and liabilities in respect thereof and to pay all costs charges and expenses incurred by the Landlord in abating a nuisance or

for remedying any other matter in connection with the demised premises in obedience to a notice served by a local authority." ("**the Notices Clause**").

34. Ms Mathers' submission on behalf of Tradeleague was that:

    (i) The installation of the Gates fell within "*maintaining and repairing*" because it was a prophylactic measure taken to reduce the need for future cleaning, which would itself be maintenance or repair;

    (ii) The installation of the Gates was done in obedience to the CPN served by Lambeth, which was a notice served by a local authority. That installation amounted to abating a nuisance and/or remedying a matter in obedience to such a notice "*in connection with the demised premises*" because Creeklynn's right to pass over the Brown Land had been granted under the Lease as a benefit related to the demise.

35. Mr Bromilow's submission on behalf of Creeklynn was that the installation of the Gates was not covered by either clause because:

    (i) The installation of the Gates was not maintenance or repair but was an improvement which added a new feature which was not previously present. While prophylactic repairs could fall within the clause, this was not a repair, but was rather works which made repairing easier (relying in particular on *Princes House Ltd v. Distinctive Clubs Ltd* [2006] All ER (D) 117 (Sep) at [78]);

    (ii) It did not fall under the Notices Clause, because the Brown Land was not part of the demise, rather was land over which Creeklynn had a right of way, so the notice/nuisance was not in connection with the demised premises. This interpretation was supported by the fact that the Notices Clause gave an indemnity, rather than requiring apportionment with other users.

36. Separate submissions were not made on behalf of the TMC by Ms Vella, but in general the TMC supported the position of Creeklynn.

37. On the issue of payability in principle under the terms of the Lease, the tribunal's conclusions are that:

    (i) In the very particular circumstances of this case, the installation of the Gates did constitute works of repair or maintenance under the Repairs Clause;

(ii) The works were not in connection with the demised premises because the Brown Land did not form part of the demise but was merely land over which the tenant had a right of way. Therefore Tradeleague was not entitled to an indemnity under the Notices Clause.

38. The reasons for the tribunal's decisions on these points are as follows.

<u>The Repairs Clause</u>

39. It is clear that repair can encompass cleaning, as in *Greg v. Planque* [1934] 1 KB 669 (Court of Appeal), where cleaning of a flue was held to constitute repair. Repair here would not be limited to works to the tarmac surface itself. Therefore the removal of waste from the Brown Land by Swift plainly did fall within the Repairs Clause, and Tradeleague would have been entitled to demand from Creeklynn a fair proportion of that cost.

40. Furthermore, "repair" can cover prophylactic measures which are taken to prevent the occurrence of deterioration in the future of a kind which has already had to be repaired in the past. This is clear from the Court of Appeal decision in *McDougall v. Easington DC* [1989] 1 EGLR 93 at 95, where Mustill LJ reaffirmed the decision of Forbes J. in *Ravenseft Properties Ltd v. Davstone (Holdings) Ltd* [1980] QB 12 that the removal and replacement of all of the stone cladding on a building amounted to repair where some (but not all) of the existing cladding had fallen off due to a lack of expansion joints. Mustill LJ said: "*It seemed to me that the repairs in that case consisted of putting right a situation which had caused trouble in the past and was likely to do so in the future.*"

41. In the present case, a serious problem of fly-tipping and dumping had arisen in the past, and it was clearly likely to do so in the future. This was apparent among other things from the fact that even though Swift cleared the site in July 2016, by October 2016 more waste had been dumped.

42. In addition, Lambeth Council had specifically ordered Tradeleague to prevent future recurrence of dumping of waste by taking the particular step of installing security gates. In general, where a landlord is obliged to carry out repairs, and there is a proper choice between different suitable methods of repair, the landlord can choose which method to adopt, so long as that decision is reasonable – *Hi-Lift Elevator Services v. Temple* (1995) 70 P. & C.R. 620; *Plough Investments Ltd v. Manchester CC* [1989] 1 EGLR 244 at 247-8. The tribunal considers that *a fortiori*, if the landlord has been required by the local authority to effect repairs in a particular way, for the explicit purpose of preventing the disrepair from recurring, then that will be reasonable. This is especially so since installing the Gates will have meant that

Tradeleague no longer needed to incur repeated and future costs of engaging Swift to clear the site (or at least will have to do so less frequently).

43. The tribunal accepts that in the usual case, installation of security gates to a paved area where no gates had existed before would amount to an improvement rather than a repair. However it accepts the argument of Tradeleague that in the very particular circumstances of this case, where Tradeleague had been required by the local authority to install security gates for the express purpose of preventing the recurrence of disrepair (waste dumping) which had already repeatedly occurred in the past, then those works can amount either to prophylactic repair or to maintenance in the sense of maintaining the Brown Land in its pre-existing, "clean" state. It will also have amounted to repair/maintenance undertaken by a reasonable method.

44. This conclusion is reinforced by the Upper Tribunal decision in *Assethold v. Watts* [2014] UKUT 0537 (LC); [2015] L. & T.R. 15 at [45] in which Martin Rodger QC concluded that previous authority supported the proposition that "maintain" contemplates a result to be achieved rather than the means of achieving it, and imports prevention. (The judge also said at [49] that "maintenance" is directed at a risk of deterioration through use, rather than injury or damage caused by the exceptional activity of another, but the tribunal considers he was not thereby intending to exclude deterioration of the property through third party acts such as vandalism or fly-tipping, which was not what had happened in that case.)

45. The tribunal does not accept Creeklynn's argument that the installation of the Gates can only be an improvement because it involved the installation of a new piece of equipment or that it was merely intended to improve the amenity of the Brown Land or efficiency of its use. While the installation of the Gates has probably also improved the amenity of the Brown Land, the main purpose was to prevent further dumping and so disrepair.

46. In particular the tribunal does not accept Mr Bromilow's argument for Creeklynn that works which make repair easier or more effective cannot themselves constitute repair or maintenance. Where, as here, the works are effective at preventing a recurrence of the disrepair, the tribunal considers that it does not matter that the works were not of the same kind as the works to cure existing disrepair (as in *Ravenseft*); what matters is whether they were directed at preventing future disrepair. The installation of a plant deck in the *Princes House* case was a pure addition and improvement to the roof (in addition to not benefitting the tenant) – the point was that it did not amount to any kind of repair of the roof at all, not even a preventative or prophylactic repair. Accordingly, the tribunal considers that the case does not assist Creeklynn on this point.

47. The tribunal therefore concludes that a fair proportion of the costs of installation of the Gates (agreed as £14,319.90) is payable by Creeklynn, it being agreed that this cost was reasonable.

The Notices Clause

48. The tribunal accepts Creeklynn's submission that the Notices Clause includes a number of obligations which are intended to be read disjunctively, so that the relevant obligation here is:

"... to pay all costs charges and expenses incurred by the Landlord in abating a nuisance or for remedying any other matter in connection with the demised premises in obedience to a notice served by a local authority."

49. The Repairs Clause requires Creeklynn to pay a "fair proportion" of Tradeleague's costs of repair/maintenance. In contrast, where the Notices Clause applies, it requires Creeklynn to pay all the costs incurred by Tradeleague in abating or remedying the problem.

50. The tribunal considers that this is a strong indication that the phrase "*in connection with the demised premises*" is intended to be limited to nuisances or notices which concern the demised premises themselves. It is only in those cases that the tenant will have control (subject to underleases) of the property which is the source of the nuisance, or is the object of the notice, such that it would be appropriate for the tenant to indemnify the landlord in full, rather than paying part of the cost.

51. As a matter of interpretation therefore, while the Brown Land may be used by Creeklynn (and its subtenants) in connection with the demised premises, the tribunal does not consider that the dumping of waste on the Brown Land was a nuisance which was "*in connection with the demised premises*", nor that the CPN was "*in connection with the demised premises*".

52. Accordingly, the tribunal does not consider that Tradeleague has any entitlement under the Notices Clause to reimbursement of costs of complying with the CPN or of abating any nuisance. The tribunal does not make any finding, none being necessary, as to whether any nuisance was caused.

Do the costs covered by the Repairs Clause include managing agents fees and/or legal costs?

53. Tradeleague does not rely on any other clause in the Lease in claiming from Creeklynn a proportion of the managing agents' and legal costs which it claims to have incurred. Its case is that they are covered by the Repairs Clause (or would have been covered by the Notices Clause). The

issue is therefore whether *"cost incurred by the Lessor in maintaining and repairing [the Brown Land]"* can include those costs.

54. On behalf of Tradeleague, Ms Mathers contended that the management fees incurred were a necessary part of a multi-stakeholder project which was quite fiddly to implement. She also contended that legal costs incurred by Tradeleague in its dispute with Creeklynn over payability under the Repairs Clause were covered by that clause. She relied in particular on *Assethold* from [32]. Among other things, that case confirmed that there are no special rules for construction of service charge provisions in leases, in particular as to whether they should be treated as extending to legal costs.

55. Ms Mathers also relied on the Lands Tribunal decision in *Brent v. Hamilton* [2006] EWLands LRX_51_2005 (23 October 2006), as confirming that where management costs are a necessary and incidental part of works carried out under a repair or maintenance clause, they are recoverable even though there is no express provision for recovery of management costs.

56. Mr Bromilow on behalf of Creeklynn also relied on *Assethold*, and in particular on Martin Rodger QC's analysis at [49] – [51] that "maintain" and "repair" each connoted doing something to the subject matter of the covenant, either to restore it to its former condition or to preserve its functional condition by acts of maintenance. The judge did not consider that the expression was apt to cover activities remote from the thing to be repaired or maintained, and that providing legal services at a distance could not properly be said to be maintenance or repair, or incidental to the same.

57. The tribunal considers that, as in the *Brent* case, where managing agents' costs were incurred as a necessary part of implementing the repair or maintenance works themselves, then this will be recoverable under the Repairs Clause. However, the tribunal considers that this is limited to management time spent on arranging and paying for the actual installation of the Gates. It considers this does not extend to time spent seeking payment of service charges by Creeklynn, let alone time spent seeking advance payment of service charges when there was no entitlement to advance payments under the Lease.

58. As in the *Assethold* case, the tribunal considers that the Repairs Clause does not extend to the recovery of legal costs, since these were remote from the actual installation of the Gates. This is especially so since the legal costs were on any view said to have been incurred in relation to enforcing payment by Creeklynn or in making the dispensation application, and were not legal costs which were closely associated with completing the installation works themselves (such as dealing with a dispute with a contractor).

Reasonableness of costs incurred

59. It follows that the managing agents' fees claimed of £2,228.60 are on any view excessive since they cover many dealings with Creeklynn as well as arranging the installation itself. It is noted also that Mr Stern (who was the individual who carried out many of the managing agent functions) acknowledged in cross examination that he had no formal qualifications although he said he had gone through training in some aspects. There is no detail provided by Tradeleague as to how the sum of £2,228.60 is said to be made up.

60. Mr Bromilow also criticised Tradeleague for the fact that it took 2 years for the installation to be carried out. This is clearly a valid criticism given the fixed penalty notice served on it. He also criticised Mr Stern's competence in arranging the works, in particular because an electricity connection had to be organised at the last minute.

61. Using its expertise the tribunal considers that a reasonable managing agent's fee for arranging the installation of the Gates in October 2018 would have been £650 (including any VAT). It therefore allows this sum as part of the cost of the installation.

62. The tribunal does not consider that any of the legal costs said to have been incurred by Tradeleague are payable under the Repairs Clause for the reasons set out above. In any event, it does not consider that the legal costs claimed are reasonable because: (a) they are not properly differentiated. It is apparent that a significant element of the costs claimed relate to a dispute concerning the basement of WPM, as to which Tradeleague accepted it had no proper claim against Creeklynn; (b) the tribunal does not consider that the costs of the dispensation application were reasonably incurred. If a consultation was legally necessary at all, Tradeleague could have carried out one in the time available, as it took 2 years for the Gates to be installed. The dispensation application was therefore either unnecessary, or the result of Tradeleague's own delay; (c) in the absence of any proper narrative or bill as to the costs incurred, it is impossible to be satisfied that they were reasonable.

63. Accordingly no sum is allowed in respect of legal costs.

64. The total figure for the costs of the installation of the Gates, including managing agents' fees, which the tribunal considers reasonable is therefore **£14,969.90**.

Apportionment

65. The parties' cases on apportionment of the costs incurred (insofar as they are recoverable) were as follows:

(i) As set out in Ms Mathers' skeleton and in its statement of case, Tradeleague's case is that 28% of the costs of the installation of the Gates should be apportioned to Creeklynn. She submitted that this was reasonable on the basis that its subtenants include 78 users of the Brown Land or 47% of the total. 100% of the legal costs were also sought.

(ii) As set out in Mr Garvin's statement, Creeklynn's case is that a total of 14.76% should be apportioned to it (comprising 4.1% to five parking spaces (or 0.82% per space); 5.74% to six garages (also 0.82% each) and 4.92% to the 24 flats (or 0.205% each). This is based on its case as to how the Brown Land is used by those groups.

66. During cross examination, Mr Bromilow pointed out various arithmetical errors in the service charge notice, which Mr Stern acknowledged and which he said were due to issues with the spreadsheet he used. In particular, Mr Stern had no real explanation for why the garages had been allocated a lower amount per user than parking spaces.

67. There were also two further issues between the parties as to the number of users of the Brown Land, namely:

(i) The number of parking spaces on the Telford Court land, and so the number of potential such users. Tradeleague said this was 27 whereas Creeklynn said this was at least 35;

(ii) Whether the number of users of Creeklynn's parking space zone should be treated as 6 (the maximum allowed under the Lease) or 5 (the number of spaces which Creeklynn said could properly be marked out).

68. As to any other users of the Brown Land:

(i) Tradeleague said in its statement of case (paragraph 30.3) that 7 of the shops in the ground floor of Wyatt Park Mansions had back entrances onto the rear area, of which 6 were operative.

(ii) The owner of 41 Blairderry Road has a right of way over the Brown Land (Tradeleague statement of case at 30.5).

69. It appears that Tradeleague has already received contributions to the cost of the installation works from both Telford Court and from the shops on the ground floor of Wyatt Park Mansions; however the total amount already received was not clear from the available evidence and

was inconsistent. Mr Stern did confirm in evidence that Telford Court had agreed to pay 40% of the cost.

70. One of the photographs of the Gates supplied by Tradeleague during the hearing shows the keypad for the Gates and a list of the commercial shops which can be accessed via the Brown Land for deliveries. Eleven such shops are listed, with their access numbers. In view of the evidence of this photograph, the tribunal will proceed on the basis that there are 11 shops which have a rear access and so use the Brown Land for access for loading and unloading deliveries. Those shops appear to be a mixture of ones on the ground floor of Telford Court and on the ground floor of Wyatt Park Mansions.

71. On the issue of the number of car parking spaces for Telford Court, Mr Stern's evidence was that he had been told by the managing agent that there were 27 spaces but he had not counted them himself.

72. Mr Garvin's evidence on behalf of Creeklynn was that he had counted the number of spaces for Telford Court in May 2020, for the purposes of these proceedings, and there were "at least" 35. Ms Vella said she did not know as she had not counted them.

73. On this issue the tribunal prefers the evidence of Mr Garvin, because he himself counted the number of parking spaces. The tribunal will therefore proceed on the basis that there were 35.

74. On the issue of the number of parking spaces in the Creeklynn lot, the tribunal considers that what is relevant is the number which can reasonably be marked out on the space demised; not the maximum permitted by the Lease terms. Mr Garvin's evidence was that the company who marked out the parking spaces advised that 5 was the most for which there was space. Accordingly, the tribunal concludes that this is the number which should be taken into account when determining the number of users.

75. As to the relative user of the Brown Land by the different groups, the tribunal agrees that what is relevant is the various users' entitlement to use the Brown Land and not simply their actual use in practice. However, in determining what use might reasonably be made of the Brown Land by those different users, the tribunal considers that the layout and practical features of the demise and the Brown Land are relevant. Accordingly, the tribunal does consider that the following are relevant to apportionment:

(i) The flats do not have rear access to the Brown Land other than via a fire escape, whereas they do have a main front door. Therefore, aside from the fact that their bins are stored on the Brown Land for collection by the council, flat owners are

unlikely to make much use of the Brown Land even though they have a right of way over it. This was confirmed by the evidence of Ms Vella, who said that although she held a key fob permitting access through the Gates, it was used infrequently, most often when people were moving in or out. She was not aware of ever having "buzzed in" deliveries for the flats through the Gates. She also said there were 6 recycling bins for the flats on the Brown Land.

(ii) The fact that at least 11 of the shops have back entrances means that for them, the right of access is significant and frequently used, as evidenced by their keypad access. Mr Garvin's evidence, which was that the shop owners made extensive use of the Brown Land, is consistent with this (ignoring any parking on the Brown Land by them which was not permitted).

(iii) Those flat owners who had either parking spaces or garages could be expected to make significantly greater use of the Brown Land than those who did not. It is irrelevant whether they chose not to do so (e.g. because some garage owners used their garages for storage, as was suggested in evidence). It is also irrelevant whether Creeklynn had actually sublet all of the garages and parking spaces (Mr Garvin said that not all of the parking spaces had been let).

76. Taking into account all of these factors and applying its expertise, the tribunal considers that for the purposes of apportionment of service charges for repair and maintenance of the Brown Land, costs should be weighted for the different users by applying the ratio 5:3:1, for commercial shops; parking spaces or garages; and flat owners in WPM. Where a person has both a flat and a garage/parking space, sums will be allocated to them under both heads.

77. On the evidence available, the tribunal's assessment of the number of users and consequent apportionment is:

(i) Creeklynn:

Flats:	24 x 1	= 24
Parking spaces:	5 x 3	= 15
Garages	7 x 3	= 21
Total allocated		60

(ii) Non-Creeklynn:

Telford Court parking spaces:	35 x 3	= 105
Garages:	6 x 3	= 18
Commercial shops	11 x 5	= 55
41 Blairderry Road (like flats):	1 x 1	= 1
Total allocated		179

78. On this basis, the total to be apportioned to Creeklynn is 60/60+179, or 60/239, or **25.10%**.

79. Accordingly, the proportion of the total costs of installation of the Gates of £14,969.90 which is payable by Creeklynn by way of service charge is 25.1% or **£3,757.44**.

Tribunal's decision as to service charge amount

80. The tribunal determines that the amount payable by Creeklynn in respect of installation of the Gates, by way of service charge under the Repairs Clause, is therefore £3,757.44.

Name: Judge N Rushton QC **Date:** 28 October 2020

Rights of appeal

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

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

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

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

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) 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 .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

<u>Section 20B</u>

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

<u>Section 20C</u>

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
  (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
  (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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