FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LSC/2021/0141 V:VHS**
Property	**:**	**Flat 1, 229 Sussex Gardens, London, W2 2RL**
Applicant	**:**	**231 Sussex Gardens Right to Manage Limited**
Respondent	**:**	**Ms S Sinclair**
Type of application	**:**	**Reasonability and payability of service charges, pursuant to section 27A of the Landlord and Tenant Act 1985and of administration charges pursuant to Schedule 11 of the Commonhold and Leasehold Reform Act 2002.**
Tribunal	**:**	**Ms H C Bowers BSc MSc MRICS** **Mr K Ridgeway FRICS**
Date of Hearing	**:**	**26 January and 11 April 2022**
Date of Decision	**:**	**22 June 2022**

DECISION & REASONS

Remote Hearing Arrangements:

(A) The first hearing date, 26 January 2022, was held as a remote video hearing which had been consented to by the parties. The form of remote hearing was V:VHS. The second day was held as a face-to-face hearing at 10, Alfred Place, London, WC1 E 7LR.

(B) The Tribunal was referred to a bundle provided by the Applicant of 1,223 pages plus a three-page index and several bundles from Ms Sinclair All documents have been noted by the Tribunal. Numbers in bold and in square brackets in the reasons below refer to pages in the hearing bundle.

(C) At the remote video hearing took place on 26 January 2022, the Applicant was represented by Ms Mather of counsel and Mr Rankin of the Applicant

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company was in attendance. The Respondent, Ms Sinclair represented herself and was supported by Mr McBride. At the face-to-face hearing on 11 April 2022, the Applicant was represented by Mr Stocks of counsel and Mr Gavin Rankin, a director of the Applicant company, was present. Ms Sinclair attended in person and was accompanied by Mr S McBride.

DECISION

For the reasons given below, the Tribunal finds as follows:

- **The service charges that are payable by the Respondent are set out in the relevant sections of these Reasons.**
- **The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985, that 50% of any costs incurred as part of this application are not to be treated as 'relevant costs' for future service charge years.**

REASONS

The Application

(1) The Applicant, 231 Sussex Gardens Right to Manage Limited, made an application, dated 16 April 2021, under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) and Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) for a determination of the reasonableness of service charges and administration charges for the service charge years 2017/8, 2018/9, 2019/20, 2020/21 and in advance for 2021/22. The Tribunal issued Directions dated 19 May 2021 that set out the steps that the parties had to take to prepare for the hearing.

The Background

(2) The subject property, Flat 1, 229 Sussex Gardens, London, W2 2RL, is part of a Building known as 221-235 Sussex Gardens. From the lease plans it can be seen that the Building has basement, ground, first to fourth floors and contains 13 flats. It appears that four of the flats, 229, 229a, 233 and 233a have their own front doors, without requiring access to the common internal parts, with the remining nine flats obtaining access through a common area that has a lift. The Tribunal did not make an inspection of the property. It relied upon this description and information provided by the parties.

(3) The Respondent in this case is Ms Sinclair and she is the long leaseholder of the subject Flat. The freehold of the Building was acquired by 231 Sussex Gardens Freehold Limited (SGFL) in 2005 and the Respondent was part of a group of qualifying tenants whom came together to form SGFL. The Applicant, 231 Sussex Gardens Right to Manage Limited (SGRTM), was

established at the same time to manage the Building. G & H Z Limited, trading as Sloan Block Management act as the managing agent for the Building [73].

The Law

(4) A summary of the relevant legal provisions is set out in the Appendix to this decision.

The Lease

(5.) The Respondent holds a long lease for the subject Flat, which was granted by SGFL on 12 June 2010. The parties to the lease are 231 Sussex Gardens Freehold Limited as Landlord/Lessor, 231 Sussex Gardens Right to Manage Limited as the Management Company and Ms Shelley Rebecca Sinclair as the Tenant/Lessee. The term was for a period of 999 years from 12 June 2010. The lease defines the Building as 229-233 Sussex Gardens, London, W2. The lease is registered under Title Number NGL913294.

(6.) Under the lease the Respondent's contribution towards the service charges is 10.97%. Schedule 3 paragraph 2 states the 10.97% is payable quarterly in advance on the normal quarter days and is "*of the expenses outgoings and costs estimated by the Management Company as likely to be incurred for the ensuing year up to 24 March in connection with the matters mentioned in Schedule 7 Part B and in clauses 1-10 Part C Schedule 7 ...*".

(7.) Schedule 3 paragraph 2 also makes provision for expenditure in respect of hot water. There is an obligation to pay "*a fair proportion of the expenses outgoings and costs of supplying hot water to the demised premises determined by the Management Company acting reasonably based on the demised premises estimated share of usage likely to be incurred for the ensuing year up to 24 March in connection with the matters mentioned in clause 11 Part C Schedule 7 ....*". There are arrangements that contribution to be reduced to zero if the Lessee installs their own hot water boiler.

(8.) Under Schedule 3 paragraph 2 (a) there are provisions for the Management Company to recover sums from a lessee to reflect any underfunding of the service charges. Likewise in paragraph 2 (b) the arrangement for any over recovery of service charges is that the "*the Management Company will hold the said excess payments to the credit of a surplus sinking fund to be used exclusively towards future service charge expenditure for the services set out in clauses 1 -10 Part C Schedule 7 (the "Surplus Fund") on account of future demands for the said additional rent ....*". The paragraph also allows "*for the purpose of ascertaining the cost of the outgoings and the proportion thereof to be paid by the Lessee under this paragraph the Certificate of the Surveyor acting as an expert and not as an arbitrator shall be final and binding on the parties hereto....*". Under paragraph 2 there is a definition of "outgoings" that allows for the collection of sums for a reserve.

(9.) Schedule 7, Part C sets out the definition of the 'Reserved Property'. It also sets out the elements of Management Company's obligations, for which a lessee is obliged to contribute and these are the maintenance and repair of the

reserved property, the maintenance of plant and equipment, insurance, refuse disposal, the provision of caretakers, proceedings taken by the Management Company for compliance with legislation or other statutory requirements, a management fee, the provision of additional equipment, arrangements for wireless and television transmission, the registration of any share in the Management Company and the provision of hot water.

The Hearing, Evidence, Submissions and Determination

(10.) Before the Tribunal sets out the evidence, submissions and its decision in these reasons, it was considered useful to make some initial comments. There has been a history of cases between the parties in the First-tier Tribunal, the Upper Tribunal and in the County Court. There have been several problems in this case with regards to the documents provided. Additionally, there is a complexity about this case, that arises due to the wording of the lease for the subject flat and what appears to be a concession made to the Respondent about her contributions to the service charges. More detail about that is provided below. I should also comment that the Tribunal was provided with one bundle from the Applicant of over 1200 pages and several bundles from the Respondent together with additional pages. This has been a two-day case and as such it would be impossible to refer to ever document and all submissions in these reasons. These reasons summarise the main, relevant points that were considered. If there is not a specific reference to a document or a submission that is not to say the Tribunal did not have full consideration to what was provided or said. The Tribunal comments that it has not always been possible to see a clear audit trail on the issues in dispute and it has therefore tried to make sense of this case from what has been provided.

(11) At the start of the first day a considerable amount of time was taken up in respect of the documents that had been provided to the Tribunal. Ms Sinclair sought to include some late documents and a recording. The first documents related to an extract from Mr Rankin's lease that Ms Sinclair said was important as a contrast to the terms of her own lease; the other document related to the reserve funds and accounting practice and a recording that related to a meeting held on 12 January 2022. Ms Mather objected to these documents on the basis that the issue of payability related to the terms of Ms Sinclair's lease and in that context the terms of other leases are irrelevant. She also submitted that the Respondent was asking the Tribunal to audit the reserve funds, which was not part of the Tribunal's function and that the issue of the reserve funds had no bearing of Ms Sinclair's liability under her lease. Ms Mather also sought to include a late document being a transactional report between 2018 to 2021 to replace a document that was already in the bundle to reflect an up-to-date account. That was sent to the Tribunal and Ms Sinclair outside office hours and although Ms Sinclair objected to the timing that the document was sent, she acknowledged that if the Tribunal considered it was relevant to show her payments, then she made no major objection. The Tribunal allowed the transactional report to be included as this was an update and reflected the current position in respect of payments. However, the

Tribunal refused permission for the inclusion of the recording and the documents in relation to the reserve funds, as it accepts that it is not the role of the Tribunal to undertake a financial audit of the reserve funds. It also refused the inclusion of the extract from Mr Rankin's lease on the initial basis that the Tribunal was considering the issue of payability in accordance with Ms Sinclair's lease. However, as can be seen further in these reasons, the issue of the other leases did become relevant, and the bundles provided by Ms Sinclair included extracts of other leases that we took into consideration.

(12) At the end of the first day, it was clear that the lack of a final reconciliation was hampering the parties and the Tribunal's understanding of what was being sought from Ms Sinclair and the extent that any overpayments were being transferred into the Reserve Fund. The Applicant were directed to provide the reconciliation of Ms Sinclair's accounts and the legal invoices. Various spreadsheets were provided and we have numbered these A1-A18.

(13) The key element of Ms Sinclair's case appears to relate to the accounting treatment of four separate reserve funds, namely the External Fund, the Internal Fund, the Lift Fund and the Boiler Fund. The Applicant's position is that it is irrelevant how the reserves are held. The issue is what Ms Sinclair is obliged to pay under her lease. It is also stated that the reserve funds have been properly accounted for and that her lease does not distinguish between the reserve funds and that the Respondent is obliged to contribute to all aspects of the reserves. However, linked to the issue of the reserve funds is the construction of the lease for the subject flat and its relationship with the other leases in the building. It is submitted on the part of the Applicant, that there is no need to look at the other leases as the only issue for the Tribunal is for it to consider Ms Sinclair's liability in relation to her lease. However, one of the core issues in this case and the previous litigation is the service charge arrangements for the Building.

(14) The Applicant's position is that the Respondent has an obligation under her lease to pay for all elements of the Reserved Property including items such as the internal common parts and the lift. However, it accepts that there has been a concession over several years in that the Applicant does not recover sums due from the Respondent in relation to the internal common parts, the boiler and the lift. Indeed, as an example it was explained that for 2018/9 [307-312] there were five schedules of expenditure, Schedule 1 (the regular service charges, but includes a reserve fund for external decorations); Schedule 2 (lift expenditure), Schedule 3 (internal cleaning, electricity and internal repairs), Schedule 4 (gas) and Schedule 5 (boiler reserve). It was explained that Ms Sinclair did not contribute to Schedules 2-5. In respect of the reserves, the total as at 31 March 2021 was £110,446 [R123] and that Ms Sinclair's proportion was at 10.97%. Mr McBride for Ms Sinclair suggested that the Reserve was £77,319. This appears to be based on the 2015 balance of being £82,519 with incomes and expenditure of £59,627 [R122].

(15) Ms Mather explained that the mechanism in the lease allows for any excess collected from a leaseholder, above the estimated expenditure, would be paid into a reserve fund (Surplus Fund). For all the years in dispute, it was stated that there was no balancing account, but eventually such balancing accounts were produced for the second hearing day.

(16) Likewise, the reserve fund is a general reserve fund (with no provision for it to be separated out into different heads of expenditure) as with the general service charges sought, there seems to be a concession that Ms Sinclair does not contribute to these reserve funds for the Internal Fund, the Lift Fund and to the Boiler Fund.

(17) Ms Sinclair states that there is a need to consider all the leases and from that it is clear that there is a difference in the wording that is crucial to her level of contribution. She states that by Schedule 1 to her lease at paragraph e, that her access to any common parts are those parts edged blue on the plans at pages 135 -137 and not the internal common parts. In relation to her contributions, Ms Sinclair contrasts the list of service charge contributions for her lease at Schedule 7, part C, paragraphs 1 -11[132 -134] being a total of 11 items to the list of service charge items for flat 7 Schedule 7, Part C, paragraphs 1-16 [R24]. Flat 7 has access to the internal common parts and lists five additional items [R24]. The additional items listed as service charge items for flat 7 are to maintain fixtures and fittings in the Reserved Property, the Cleaning and Lighting of the Reserved Property, the Heating (of common parts of the Building), the Lift and the Entry Phone Systems. Ms Sinclair stated that some of the flats with access to the internal common parts had a higher service charge proportion and that if the Applicant were to collect the internal common part costs from Ms Sinclair, there would be an over collection.

(18) It was confirmed that the lease for flat 7 was granted in 2007 and that the lease for the subject Flat was granted in 2010. Mr Stocks stated in response that as a comparison exercise it would be too difficult to look at all the individual leases.

(19) In deciding the liability of a particular leaseholder, a Tribunal is obliged to construe the wording of the actual subject lease. In doing so we must determine the objective intention of the parties when granting the lease, having regard to the background factual matrix. In this case the factual background is the wording of the other leases; that the subject lease was granted at a time after the leaseholders joined together to enfranchise the building and grant themselves new leases; that the subject lease was granted in 2010, sometime after the lease for flat 7 was granted. The wording of the lease of flat 7 shows that there was an intention for that leaseholder to contribute to the service charges for the Reserved Property and to explicitly included the internal common parts and the lift. That lease includes the additional paragraphs 12-16 in Schedule 7 Part C. In the subject lease those paragraphs are missing, and we construe this lease on the basis that

paragraphs 1 -11 in Schedule 7, Part C, as meaning that the leaseholder of the subject flat is not obliged to contribute to the internal common parts and the lift. We do not consider that the payment arrangements that apply to Ms Sinclair as being a concession, but the actual practical interpretation of her lease having no obligation to the internal common parts or lift.

(20) We now turn to the issues identified in the Scott Schedule as being the items disputed by Ms Sinclair.

Accountancy:

(21) From the Scott Schedule produced by Ms Sinclair she disputes an annual sum of £85 being 10.97% of £780 for each year in dispute. In essence Ms Sinclair's position is that there is some double counting. She says that the amounts are budgeted, and the money collected but that the item is still shown as a debt. In particular she says the accounts, ledgers and bank accounts do not tally and the company accounts are important as they are in essentially the service charge accounts. As there are instances of inaccurate accounting practice, then the sums charged for accountancy fees are unreasonable. It is suggested that that there are inaccuracies in the accounts that go back to at least 2006 with the Applicant suggesting a deficit of that time being £17,823 and the Respondent stating that the debt was £5,658. Another example being a claim that £7,500 was to be collected and transferred to the internal reserve when the actual transfer was £15,000 [R109 and R119]. In respect of the fees the Tribunal were referred to two invoices dated 30 November 2020 [R50-51]. The first invoice was for £2,020 and was addressed to SGRTM, the second invoice was the same date for £780 and was addressed to SGFL both invoices were for the preparation of the accounts for the year ending March 2020 and company secretarial work and maintenance of statutory books and records for each company. Ms Sinclair complains that the first invoice to SGRTM was not on headed notepaper and although VAT was charged there was no VAT number. At R52 was a second copy of the invoice at R50 on headed notepaper. Ms Sinclair had obtained an alternative quotation from Thickbroom who provided accounting services for a similar block. The alternative quotation is for £500 plus VAT for service charge accounts, £75 plus VAT for company accounts and £35 plus VAT for an annual confirmation statement.

(22) Ms Mather submitted that alternative cheaper quotes, did not mean that the costs sought were unreasonable. Following the alternative quote from Ms Sinclair, the Applicant had agreed a reduced rate with their current accountant to £1,680 including VAT [R89]. In respect of sums due from Ms Sinclair, the Applicant has only sought a to the SGRTM accountancy fees, which is an invoice for £1,890 and seemingly it is stated that as this includes some company secretarial work the sum sought was actually £1,800. However, at [305] Ms Sinclair's contribution is 10.97% of £2,580, namely £283.03, as the estimate for the 2017/8 service charge year. The accounts at [343] show that the sum for accountancy is £1,800 but the invoices at [A348]

show the two invoices identified above totalling £2,680. It was originally stated that there was no reconciliation accounts, but it was confirmed that any overpayment went into the External Reserve.

(23) In reply, Ms Sinclair stated that the same problems occur every year, she is charged the full amount and that she had not seen the overpayments in the Reserve Fund. Ms Sinclair that stated that there were problems with the debts, with the SGFL showing as a trade debtor in the accounts.

(24) Although the audit trail through this issue is not clear, the Tribunal finds no evidence that there is double counting in respect of the accountancy fees. Ms Sinclair's contribution should only be towards the accountancy costs of SGRTM. Ms Sinclair alleges errors in the accounting practice, but in the main her claims relate to the Reserve Funds. We are satisfied that there have not been sufficient errors to the SGRTM accounts as to warrant a reduction in the sums claim to reflect any poor level of service. We agree with Ms Mather that it is not necessary for the cheapest quotation to be adopted as the relevant figure for service charge purposes. However, we do have to be satisfied that the level of fees is reasonable. Overall, we find that the sums claimed for accountancy do seem reasonable. We note that following the production of an alternative quotation, that the Applicant was reactive and obtained a concession from the current accountant that resulted in lower fees in 2020/21. Yet the estimated sum for 2021/22 does seems excessive in relation to the revised fee for the year before. In that context we consider that an estimated charge for accountancy for 2021/22 should be £1,000 and as such Ms Sinclair's contribution should be reduced to £110. The Applicant could provide no explanation why Ms Sinclair had not been charged anything for the 2019/20 service charge year, but we record that as our finding on that amount.

(25) From the additional documents provided by the Applicant before the start of the second day, the sums sought from Ms Sinclair for accountancy are shown below, together with the Tribunal's determination:

Year	Total Amount	Claimed from Ms Sinclair's 10.97%	FtT Determination
2017/18	£1,800	£197	£197
2018/19	£2,040	£224	£224
2019/20	£1,680	£0	£0
2020/21	£788	£86	£86
2021/22	£2,790	£306	£110

Legal Fees:

(26) It was explained that over the years the Tribunal has made various Rule 13 Orders against Ms Sinclair. The balance of any legal fees that were not recovered directly from Ms Sinclair were charged to the service charge

accounts. This resulted in service charges being claimed against Ms Sinclair of 10.97% of those balances.

(27) Ms Sinclair submitted that the decision of Judge Nicol in a previous 2015 FtT decision was that there was no provision in the lease for the recovery of legal costs by the service charge mechanism [154] and that he was emphatic about that point. Her view was that the subsequent decision in 2018 by Judge Silverman in the second FtT case was vague and she wasn't asked to consider the issue [217]. It was also stated that the Tribunal had not considered the case law that she had presented. Ms Sinclair's position is that an oral section 20C application was made at the hearing chaired by Judge Silverman was not mentioned in the written decision. The written decision states at paragraph 23 that there was no section 20C application and no application for costs.

(28) Mr Stocks' position was that the Respondent was incorrect in her analysis of the two FtT decisions. Paragraph 12 of Judge Silverman's decision specifically recorded that the Respondent challenged whether the lease allowed for the recovery of legal charges and went onto make a decision in that issue.

(29) In respect of whether the issue of payability had previously been determined, we consider that the decision of Judge Nicol did briefly consider the point but as it was not an issue between the parties, did not make a specific finding. In contrast the decision of Judge Silverman addressed the specific dispute of payability under the lease. Reference was made to legal precedent and even if the decision did not make a specific reference to one case put forward by Ms Sinclair, we are satisfied that the Tribunal had considered those matters. However, of more importance is that the FtT had refused any grounds of appeal and the appeal to the UT was made too late, as considered in the UT's decision to appeal. As a basic principle we consider that the issue of recovery of legal costs under the terms of Ms Sinclair's lease is Res Judicata due to the previous FtT 2018 decision. Following the decision of Judge Silverman in 2018 we find that the lease allows for the recovery of legal costs by the service charge mechanism.

(30) The next issue for the Tribunal to determine is whether the legal costs sought by the service charges are reasonable. From the Scott Schedule Ms Sinclair has identified the following legal costs as being disputed: 2018/9 the sum was £9,114 her proportion being £1,000; for 2019/20 the sum was £17,411 and her share is £1,900 and also £13,825, her share being £1,516, which may be for 2020/21.

(31) From the documents provided for the second hearing day and as explained at the hearing, the service charge reconciliations show the legal and professional fees being £2,620 for 2017/8 with legal invoices from JB Leitch of £2,495 plus a surveyor's fee of £125 and the relevant ledger report is at [357]. (10.97% of the legal fees being £273.70) [A1]; £21,996 for 2018/9 with

the legal costs being £21,039.28 (10.97% of the legal fees being £2,308) [A2]; £6,866 for 2019/20 (10.97% share £753) [A3] and a credit of £7,921 for 2020/21 (the 10.97% credit being £869 [A4]. For 2021/22 the invoices total £7,174.64 but no reconciliation was available [A18], but a 10.97% share would be £787.06.

(32) Document A5 shows a list of several invoices amounting to £33,153.88 and we were told that these costs related to first claim and the 2015 Tribunal decision. A6 seems to show that £9,500 was paid. A7, showing a total of £23,561.40 relates to the 2018 decision and A8 shows that £5,940 was paid. A9 shows the costs to date in relation to this application of £8,557.36 with A10 showing £2,500 as being paid. Documents A11 to A18 seems to show the invoices allocated to particular service charge years. It was confirmed that all the invoices have been paid and are included in the transaction records.

(33) Ms Sinclair referred to an email from the managing agent at [R224] that listed various payments to JB Leitch between 2014 and 2017. It is her position that some of the invoices do not properly describe what work was undertaken. An example if given at [R40] an invoice dated 14 March 2019 for £6,839.28 where the description of the work is "*Generally on account of costs in connection with Flat 1, 229-231 Sussex Gardens, London, W2 2RL*". This invoice comes under the list of invoices relating to the 2015 claim on A5. Ms Sinclair asks what is the period that is covered and also questions why it wasn't paid until May 2019. It was explained to her that the invoice related to County Court costs. Ms Sinclair's concerns are that the invoice was included in the 2018 Rule 13 order [239]. The decision at 239 does not refer to any specific invoices and therefore it is impossible to do any reconciliation. Ms Sinclair questions why a few of the invoices were paid on the same day and that in 2019 the only legal work was in relation to an abortive hearing in May 2019. At R38 and R39 are two invoices for the same amount and with the same description of works. They are both addressed the SGFH and each for £1,200. The first is invoice number 140833 and is dated 4 October 2018, the second invoice number 140065 and dated 24 September 2018. It is Ms Sinclair's position that there are arbitrary decisions about the allocation of the costs in the service charge years and without a reconciliation how do we know if the sums have been properly allocated.

(34) Mr Stocks' position is the information given by the managing agent [R224] was not a reconciliation of the sums actually expended. He submits that this case is not about the forensic accounting of the legal invoices on an hour-by-hour basis and the invoices that are provided should be sufficient. Regarding the invoices addressed to SGFL [R38 and R39] these were issued in the incorrect name and were subsequently re-issued. In relation to the abortive hearing, it was stated that this was in relation to the Applicant's Rule 13 application and that the hearing was aborted due to the Respondent's objection to one of the panel members, that counsel's fees were agreed in advance and were payable. As an overall position the Applicant says that it has

had details of the statement of costs and is satisfied that the time expended is reasonable and the hourly rates reflect the current guideline rates.

(35) The Tribunal can see that the two invoices 140833 (£1,200) and 140065 (£1,200) are included in the costs for the second claim [A7]. We accept the Applicant's explanation that these were erroneously issued to SGFL and were subsequently re-issued and should be included in the legal costs. Overall, whilst the invoices lack a detailed description of what work was undertaken and the exact timing of the works, we accept that the invoices are accurate to reflect the legal work that has been undertaken in dealing with the previous service charge arrears. As such any sums not covered by a Rule 13 order, can be properly recovered from the service charges.

(36) We agree that this exercise is not about forensic accounting, but a proper reconciliation is important so that any leaseholder can understand exactly what they are being asked to pay. Try as we may, the Tribunal cannot see a clear audit trail between what is being sought from Ms Sinclair and the reconciliation provided. The total legal costs from the first claim [2015] was £33,153.88 [A5] and although a Rule 13 Order was made against her for £16,800, this was set aside on appeal by the UT. In the second claim [2018] the total costs were £23,561.40 [A7] and the FtT made an order against Ms Sinclair for £9,373.41 [239]. Purely on these figures, the net sum that seems to be recoverable by the service charges is £47,341.87 (£33,153.88 + £23,561.40 = 56,715.28 less £9,373.41 the sum to be paid by Ms Sinclair under the Rule 13 order) and Ms Sinclair's 10.97% proportion is £5,193.40. On just these costs and excluding any costs for the current proceedings, the £5,193.40 is more than being claimed from Ms Sinclair (£273.70 for 2017/8, £2,308 for 2018/9, for 2019/20 £753, for 2020/21 a credit being given of £869 and for 2021/22 a sum of £787.06 – totalling £3,252.76). Therefore, we determine that the sums that the applicant seeks from the Respondent in respect of the legal fees are reasonable and payable.

<u>Internal Refurbishments:</u>
(37) For 2017/18 the sum for repairs and maintenance is £13,084 and the Respondent's share is £1,435. Ms Sinclair says that a large proportion of this relates to the internal refurbishment to the common parts. She refers to a ledger at [R36] that shows internal major works of £65,571.00 as a debit and a credit being a transfer of £54,991.34, leaving a shortfall of £10,580 that is being claimed to the general service charges. Likewise, she says that a door entry system of £270 is an internal common parts costs and she should not contribute to that cost.

(38) The Tribunal accepts Ms Sinclair's point in respect of the internal refurbishment and the door entry into the internal common parts. As considered previously the lease does not oblige Ms Sinclair to contribute towards the internal common parts. We also accept Ms Sinclair's position in respect of the door entry system and this should be deducted from the sums

sought from her. In essence we find that the repairs and maintenance outgoings for 2017/8, net of any contribution to the internal refurbishment and the door entry should be £2,234 (cost of internal refurbishment £65,571 less transfer from Internal Reserve Fund £54,991 leaving a shortfall from the internal refurbishment of £10,580 and less £270 for the door entry). The sum of £10,850 should be deducted from the £13,084, leaving £2,234. Ms Sinclair's contribution for 2017/8 for repairs and maintenance should be £245.07 in place of £1,435.

Fire Alarms:
(39) In the Scott Schedule Ms Sinclair identifies £1,710 (10.97% being £187) for 20218/9; £1,710 (her share for 2019/20; £1,710 (her share £187) for 2020/21 and £2,040 (£234.00 as her share) for 2021/22 as being in dispute. From the Applicant's position it seems that the sum being claimed from the Respondent is £231.68 for 2018/9. For 2019/20 the total costs sought are £1,820 (10.97% being £199.65) for ongoing maintenance that includes a monthly testing fee of £110 per test [A604-615]. But it is stated that no sums were claimed for 2020/21.

(40) Ms Sinclair's position is that emergency lighting, a fire alarm and smoke detectors were installed into the flats that had access into the internal common parts and that the four flats that had no access to the internal common parts, including her own flat, had not been provided with these measures. It is stated that there was no section 20 consultation.

(41) Mr Stocks stated that in principle Ms Sinclair has a right of entry into the common parts and that she benefits from the works as the alarm system will ensure that whole building is safe. The lease allows for expenditure on the 'Reserved Property', which includes the internal common parts and the work can be undertaken under paragraphs 1 (maintenance of reserved property), 2 (maintenance of plant and equipment), 3 (insurance) or 8 (additional equipment) to schedule 7 of the lease. No details were provided whether the work was carried out to the internal common parts, being part of the Reserved Property' or the individual flats having access to the internal common parts. The Applicant states that a distinction is made in respect of this item as it is a pure service charge item, rather that relating to the concession about reserve funds to the internal common parts.

(42) As we have considered previously, we find that in respect of Ms Sinclair's obligations under her lease, she has no contractual liability to pay towards the installation or maintenance of the fire alarm systems for all the years in dispute. As such her contribution for these items is to be reduced to zero for all relevant years.

Lift Charges:
(43) Ms Sinclair disputes £2,124 (10.97% being £233) as lift charges in 2020/21.

(44) From R118 the notes for the detailed income expenditure for 2020/21 show lift charges of £1,728 and this tallies with A4. However, by A4 it is shown that no sums were sought from Ms Sinclair as a service charge item. Ms Sinclair then stated that for 2020/21 within the £8,422 under the repairs and maintenance heading there is some expenditure for the lift charges. She referred to R31 that was a response from the managing agent indicating that a few of the invoices relating to the lift wheel room had been allocated to the external maintenance headings and that an adjustment will be made in the following years accounts. Following Mr Stocks' comments, Ms Sinclair stated that the managing agent had identified three items relating to the lift, namely a sign to the lift motor-room, renewing a box by the fire escape and work to the motor room doors and that expenditure totalled £1,135 but she could not identify those invoices.

(45) Mr Stocks stated that this issue would have been addressed in the reconciliation at A4. He also submitted that the Tribunal should not work in the abstract without an actual figure in dispute.

(46) We agree with Mr Stocks that we should not work in a vacuum of information, but that has been one of the challenging parts of this case is that there is a lack of transparency by the Applicant and therefore no clear audit trail to see what items of expenditure come under each heading. That being said, we are satisfied that A1-4 are an accurate reconciliation and that no lift charges have been sought from Ms Sinclair within the repairs and maintenance heading. We accept that position and note that Ms Sinclair was not able to identify the invoices within the items that made up the total of the repairs and maintenance of £8,422. On that basis we make no deduction from this item as we are not persuaded that there are any items within the £8,422 that relate to lift charges.

Set Off:

(47) Ms Sinclair is seeking a sum of £550 as set off against the service charges. Her position is that there had been a leak into her flat from another flat, but this was essentially due to the Applicant's failure to maintain the Building in relation to the rainwater downpipe. Ms Sinclair acknowledged that she did not have an expert report and had not included in the bundle the invoices for the work that she had arranged. Her position is that there is an arrangement at the subject property for matters such as this, when items of repair are urgent and are carried out by the leaseholders, then sums are directly paid/offset from the service charges and that there is an attitude within the block that there is no need for an expert report. She referred to R43 that showed a spreadsheet that listed she had expended a total of £550 on repairs.

(48) Mr Stocks submitted that Ms Sinclair had not properly evidenced her claim. The Applicant relied on the position set out in its' statement of case, namely that the Respondent needed to prove that the Applicant had an

obligation under the lease, was in breach of its obligations and to give details of quantum.

(49) The Tribunal acknowledges that there may be an arrangement at the development where items of repair that are carried out by individual leaseholders are off set against the service charges. However, a claim for set off in Tribunal procedures, as a formal application and needs to be properly evidenced to show that there the Applicant is under a covenant to carry out the repairs, that there is evidence that there has been a breach of that covenant and that has resulted in damage and that there needs to be evidence of the financial

(50) It is not sufficient to state that there has been damage caused by the Applicant without proper evidence. In the circumstances, the Tribunal refuses to make a determination on the issue of set off. In doing so we are aware that the Respondent would have other avenues to seek redress where she should be able to provide all the necessary evidence.

External Reserve Funds:

(51) The estimated service charges seek a contribution from Ms Sinclair in respect of the reserve fund. In the Scott Schedule the sums claimed from the Respondent for 2017/8 2019/20, 2020/21 was £1,755. The estimate for 2021/22 shows a sum of £16,000 for external decorations to be transferred to the reserve fund with Ms Sinclair's share being £1,755.20 [327]. The reconciliation on A1-A4 show that no sums are actually recorded as being claimed from Ms Sinclair but the note at the summation point, states that the totals are exclusive of Reserves.

(52) Ms Sinclair's main argument is not that the sums are excessive, but seems to go to the accounting of the four separate reserves and that some expenditure that relates to some of the internal costs are set off against the reserve held for the external works. She spent a considerable amount of time explaining how there had been a failure to properly account for the reserve funds. In particular she explained that there were transfers out of the External Fund into the Internal Fund, the Lift Fund and the Boiler Fund.

(53) Mr Stocks submitted that the accounting measures in relation to the reserves was not a matter for the Tribunal. He explained that the lease provides for a single reserve fund, but that in practice the reserves are divided into the four funds and these are held in four separate accounts. Given the concession made by the applicant, Ms Sinclair has not been asked to contribute to any of the reserves in relation to the internal common parts, the lift or the boiler.

(54) We agree with the Applicant that the role of the Tribunal is not to undertake an audit of the reserve funds and we can do no more than note Ms Sinclair's frustrations. In respect of the sums sought, the figure of £1,755 from

Ms Sinclair does seem quite a large amount given the extent of the reserves that are said to held. This is in the context that due to the mechanism of the lease that transfers any surplus payment into the reserves. Whilst it is always prudent for a reserve fund to be established and funds set aside for future major works, this needs to be balanced against the level of contributions. In these circumstances we find that the estimated sums sought from Ms Sinclair for the five years in dispute is excessive. As such we reduce the sum for the reserves from £1,755.20 to £1,000.00.

Rolling Debt:
(55) Ms Sinclair takes dispute in regard to what she describes as a rolling debt from 2006 of £16,000 and for which her share is £1,755. At R28 there seems to be an explanation from Mr Rankin that in 2006 there was a rolling negative balance of £17,823 and this was transferred to the Sinking Fund provisions in 2016. Ms Sinclair suggests that the sum was £5,658 [R49] and there are no details about how the £17,823 arose and what it was applied against. Mr McBride suggests that the papers show at R123 that the reserves in 2015 were £82,519 and there was expenditure of £59,627 being £41,807 for major works and £17,820 being the deficit being written off, with no proper audit trail as to how the sums were being allocated against individual leaseholders. In essence this links to Ms Sinclair's position that there has been a lack of clarity in respect of the reserve funds. However, Mr McBride did in essence say that there is nothing wrong with the accounts, it was a matter that this demonstrated a lack of transparency on the part of the Applicant.

(56) In response Mr Stocks submitted that the Respondent had not sought any particular relief in this matter. It appears that the Respondent wants a forensic audit of the accounts and that is not a matter for the Tribunal. In respect of the reserve accounts it is stated that as at February 2022 the reserves were as follows: External Fund - £67,320.66; the Internal Fund - £5,951.11; the Lift Fund - £23,600.45 and to the Boiler Fund - £3,577.08.

(57) Whilst we can understand Ms Sinclair's frustrations, there is no particular remedy that the Tribunal can provide on this issue. Nothing is being sought from her about the rolling debt, but we understand there may be a position that the debt has an impact against reserves that should be allocated towards her contributions. However, that is not a matter for this Tribunal. She should seek advice as to how she can obtain resolution on this matter.

Section 20C
(58) Ms Sinclair made an oral application for an order under section 20C of the Landlord and Tenant Act 1985 that the costs of the application should not be regarded as relevant costs and added to future service charge accounts. It is her opinion that the Applicant has a duty of care to ensure that there is a proper reconciliation of the service charge accounts and that she has proven that there have been failures on the part of the Applicant. She submitted that the Applicant undertakes expensive and time-consuming litigation in full

knowledge that she is not obligated to contribute to internal costs, a situation that has been accepted by the managing agent. In her opinion the Applicant has still not provided a full reconciliation. The Applicant did not try to resolve this case before it commenced litigation, despite being aware that there were different treatment of the service charge sums in relation to the four flats with external entrances and those flats with access from the internal common parts. It is her position that the lease allows for multiple reserve funds.

(60) Mr Stocks submits that the Applicant has provided the documents that related to the service charges being sought from Ms Sinclair and supported with ledgers, accounts and invoices. The issues in respect of the reserve funds is confused by the Respondent seeking clarity when the lease only makes provision for one reserve fund. In respect of the liability for legal fees this is a matter that Ms Sinclair has tried to re-litigate. The reason that the Applicant has had to bring the application and to re-litigate is that the Respondent has failed to pay service charges. The last credit for Ms Sinclair was in January 2021, but this was not a payment. The outstanding sum against her account is £13,293.00

(61) Both parties have had a measure of success in this case. We appreciate that due to a failure to pay service charges, the Applicant had had to make this application. However, we have found that the information provided by the Applicant has been opaque and we can understand Ms Sinclair's frustrations. In the circumstances we make an order whereby only 50% of the costs incurred in respect of this application may be treated as relevant costs for future service charge years.

(62) Finally, we would comment that over the years there has been a significant amount of money expended on legal fees to resolve these ongoing issues between the parties. There still remains some areas of dispute and the issue of transparency in respect of the accounts, reconciliation and the reserve funds has resulted in a lack of trust. Given these circumstances, there may be some merit in the parties reviewing the way forward and in doing so consider the structure of the leases and to find some final resolution. This may mean concessions on both sides, but those concessions may be significantly less that the legal costs in future disputes.

Name: Helen Bowers **Date:** 22 June 2022

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 1

LANDLORD AND TENANT ACT 1985

Section 19 Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only of 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 20 Limitation of service charges: consultation requirements

(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.

Section 20B.— Limitation of service charges: time limit on making demands.

(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.

Section 20C.— Limitation of service charges: costs of proceedings.

(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 leasehold valuation tribunal or the First-tier 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 the county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the 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 the 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.

Section 20ZA Consultation requirements: supplementary

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section *"the consultation requirements"* means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 27A Liability to pay service charges: jurisdiction
(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 it 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 subject of determination by a court, or

(d) has been 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.

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Paragraph 5A to Schedule 11

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.
(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court."