Y TRIBIWNLYS EIDDO PRESWYL (CYMRU)

THE RESIDENTIAL PROPERTY TRIBUNAL (WALES)

LEASEHOLD VALUATION TRIBUNAL

References:	LVT/0028/09/18 LVT/0049/02/19
Tribunal:	Dr Christopher McNall (Lawyer – Chairperson) Mr David Jones FRICS (Surveyor Member) Mr Bill Brereton (Lay Member)
Applicants:	Mr Andrew Norton (Apartment 8) (LVT/0028/09/18) Mr Ian J P Adams (Apartment 2) and Dr Clive Perraton Mountford (Apartment 14) (LVT/0049/02/19) CYG RTM Company Ltd (joined by the Tribunal on 6 February 2020)
Respondent:	Gedol Ltd (Represented by Mr Marcello Amodeo, a Property Services Analyst in the employ of Residential Management Group Ltd)
Hearing:	Heard on 16 September 2020, via the Welsh Tribunals' Video Platform, but as if heard at this Tribunal's office, Oak House, Cleppa Park, Celtic Springs, Newport NP10 8BD
Property:	Apartments 2, 8, and 14, Cors y Gedol, High Street, Barmouth, Gwynedd LL42 1DP
Applications:	Liability to pay service charges. Sections 27A and 20C of the Landlord and Tenant Act 1985

DECISION

(i) The Applications under section 27A of the Landlord and Tenant Act 1985 are allowed in part, to the extent set out in the Reasons which are set out below.

(ii) The Applications under section 20C of the Landlord and Tenant Act 1985 are allowed. The costs incurred by the Respondent in connection with

these proceedings shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants to the Respondent.

REASONS

1. These are the reasons for our decisions in relation to two separate applications made by three leaseholders of apartments in the building known as Cors-y-Gedol. Cors-y-Gedol is a stone-built four and five-storey Grade II listed building prominently situated on the High Street in the bustling and popular town of Barmouth. It has shops on the ground floor, and apartments above. Some of these have striking bay windows looking out to sea. Cors-y-Gedol was originally built as a staging inn at the end of the eighteenth century and was remodelled in the 1870s. At various times in its history, it was a hotel and (during the Second World War) an Officers' Training School (see John Elwyn's famous wartime memoir, 'Pum Cynnig i Gymro'). It was converted into the present apartments in the mid 2000s.

2. Mr Norton holds the long lease of Apartment 8. His application was received by the Tribunal on 20 September 2018. Mr Adams is the head lessee of Apartment 2, and Dr Mountford is the head lessee of Apartment 14. Their application was made jointly on 14 February 2019. Their respective applications originally challenged the service charges for the years beginning on 1 July 2017 and 1 July 2018. They also sought orders that the Respondent's costs should be disregarded as relevant costs to be taken into account in determining the amount of any service charge payable by them.

3. Mr Norton's application specifically identified the following matters of concern: £602 late payment fee in July 2018; building insurance fees; various charges for works carried out by 'distant' contractors; 'increases in costs for works that should have been carried out years ago'.

4. The application by Mr Adams and Dr Mountford traversed similar ground, but was expressed in somewhat more energetic terms. They commented that they had not been provided with correct versions of the service charge and administration charge notices, and that the versions they had received were misleading. They alleged that the building had not been maintained adequately, or that a reasonable reserve fund had been built up over time, 'resulting in recent unaffordable demands for immediate payment'. They also alleged that no adequate 'section 20' procedure (i.e., a procedure of consultation) had been carried out, 'whilst plundering our reserves without explanation/justification'. The latter gives a flavour of the vigour

of this dispute. They expressed concern that the services were not value for money, and that out of area contractors had been used for simple works.

5. The amount in dispute for 2017/18 was said by them to be £4320.24 and for 2018/19 was said to be £3153.14. The Statement of Anticipated Expenditure for 2017/18 sets out how £4320.24 was arrived at. It is made up of charges to six funds:

   (i) 'Reserve Apts' (£1122)
   (ii) 'Reserve Fund' (£1571)
   (iii) 'Reserve Insurance' (£36)
   (iv) 'Service Charge' (£799)
   (v) 'Service Charge Insurance' (£416)
   (vi) 'Service Charge Fund' (£385).

   The Statement of Anticipated Expenditure for 2018/19 sets out a similar breakdown between these six funds.

6. The landlord is Adriatic Land 3 Ltd (**'the Landlord'**). It engaged a Right to Manage company (called Gedol Ltd: '**Gedol**', **'Old RTM'**), a limited company registered in England and Wales with number 6354872. In turn, Gedol engaged a managing agent, Residential Management Group Ltd ('**RMG**'), of RMG House in Hoddesdon, to manage the property.

7. On 10 April 2019, the present panel of the Tribunal convened to hear Mr Norton's application. We visited and inspected the whole building, both inside and outside. After that visit, and at the beginning of the hearing which immediately followed, this panel was made aware of the existence of the other service charge application. For the reasons set out in a written decision issued to the parties in April 2019, we took the view that it would be better for us to adjourn Mr Norton's application so that we could hear and determine both applications together.

8. In the meanwhile, another application - a right to manage application ('**the RTM Application'**) - was made, by CYG RTM Company Ltd ('**New RTM'**). New RTM sought to take over management of the building from Old RTM. We were told that New RTM involves all the leaseholders of the building, with the exception of Apartment 5, which is in a separate building. According to publicly available Companies House records, the three present applicants, Mr Norton, Mr Adams, and Dr Mountford, are the three statutory directors of New RTM. The parties to the RTM Application were New RTM (as Applicant), Old RTM (it seems, as First Respondent), and the Landlord (it seems, as Second Respondent).

9. On 7 October 2019, a differently constituted panel of the Tribunal convened to hear the RTM Application. However, before the hearing, the parties came to an agreement that New RTM should acquire the right to manage (which was to happen on 27 December 2019), leaving only the issue of costs to be determined by the Tribunal. The decision in relation to the costs of the RTM Application was released on 21 October 2019 with reference LVT/0015/05/19. On that occasion, it seems as if the Tribunal was invited only to decide the amount of costs which were to be paid by New RTM to Old RTM. It does not appear as if the terms upon which New RTM was to take over management were actively in dispute.

10. Latterly (and understandably) Mr Adams wrote to the Tribunal to ask it to also deal with the service charge year beginning 1 July 2019. However, and as a result of the transfer of the right to manage from Old RTM to New RTM, this was a part year, up to and including 26 December 2019.

11. On 6 February 2020, the chair of this panel considered the matter on the papers and decided that the service charge (part) year beginning on 1 July 2019 should also be dealt with at the hearing, if practicable. He also joined New RTM as a party to these applications.

12. The applications were listed to be heard on a conventional 'face to face' basis which was to have taken place on 26 March 2020. COVID-19 restrictions meant that hearing could not go ahead. However, the Tribunal decided that the hearing could go ahead by 'remote' means and without re-visiting and re-inspecting the building in connection with the later application. We considered that we already had sufficient knowledge about the condition of the building to fairly and justly decide the applications.

13. The applications were heard using the Welsh Tribunals' video platform, with all participants taking part remotely. We were happy with the technical arrangements made. We are confident that all parties who wished to take part were able to do so, fully and fairly, and we were able to deal with this dispute fairly and justly.

14. Mr Adams represented all the Applicants. At the hearing before us, the New RTM was not formally represented, but we were told that New RTM wished to associate itself with the Applications.

15. Mr Marcello Amodeo, a Property Services Analyst in the employ of Residential Management Group Ltd, represented the Respondents.

The evidence

16. We considered a 432 page hearing bundle, which was (helpfully) provided electronically. A large part of this bundle consisted of lengthy emails passing between the parties over a significant period of time, raising a multitude of arguments about a whole swathe of issues. We have endeavoured to deal only with the matters which remained in dispute between us at the time of the hearing.

17. We also heard submissions, which we have treated as in the nature of evidence, from Mr Adams and Mr Norton, Mr Amodeo, Mr Rose, and Mr Hitcher. Although witness statements had been filed by the Respondents from Mr Pearce and Mr Black, those persons are no longer in the Respondent's employ and we did not hear from them.

18. After the hearing, and having informed the parties that we intended to do so, we obtained from the Tribunal's records the correspondence and schedules of costs which had been filed with the Tribunal when deciding the RTM Application. We considered that we needed to consider these documents in order to consider that element of the present applications which challenged the Respondent's treatment of the costs of the RTM Application.

The law

19. Insofar as relevant to this dispute, section 19 of the Landlord and Tenant Act 1985 reads:

> **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 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."

20. Insofar as relevant to this dispute, section 27A of the Landlord and Tenant Act 1985 reads:

Liability to pay service charges: jurisdiction

(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.

21. Section 20C of the Landlord and Tenant Act 1985 says:

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

[...]

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

22. This is a civil jurisdiction, and the Applicants bear the burden of proof in showing that the Tribunal should exercise its powers in their favour. Where a fact or matter is in dispute, the standard of proof is the usual civil standard - that is to say, the balance of probabilities, or whether something is likelier than not.

23. In arriving at our conclusions, we take into account the whole 'basket' of evidence - both oral and documentary. As an expert Tribunal, we also take account of our own expert knowledge and experience.

The issues

24. It was helpfully confirmed that the following issues were the only ones which remained in dispute between the parties:

(1) Insurance cover

(2) Cleaning contract / fire alarm testing

(3) Legal fees relating to the RTM Application

(4) Treatment of old RTM debtors

(5) Summary of the tenant's rights and obligations

25. It was helpfully confirmed that a late payment charge applied to Mr Norton's account had been disapplied by Old RTM.

The Lease

26. We were provided with a copy lease relating to Apartment 2, dated 30 September 2008, for a term of 999 years from 1 July 2007. We were told that the other leases were in materially identical form. The landlord at that time was Urban Build (Special Projects) Ltd. Gedol was named as the Management Company.

27. Clause 2.2 of the Lease provides that the Tenant shall pay, by way of further rent, the Service Charge Percentage (as defined) of The Expenses (as defined) of the Services (as defined) and of insurance (where payable to the Landlord) payable in accordance with Schedules 7 and 8. By Schedule 5 Part 1 Clause 5.18, the Lessee agreed (in relation to Service Charge and services) to observe and perform his obligations contained in Schedule 7.

The Service Charge Accounts

28. We have also considered the service charge accounts for 2017/18 (signed by CHW Accounting Ltd on 26 September 2018, and approved by RMG on 2 October 2018), and 2018/19 (10 October 2019, and approved by RMG on 11 October 2019). These are important sources of evidence. Although these are unaudited, the Applicants have not sought to challenge the accuracy of the figures in them.

The build-up of the reserve fund

29. A significant part of this dispute concerns the sums - see the breakdown of Statement of Anticipated Expenditure for 2017/18 above - charged by the Landlord in the relevant service charge years to reserve funds. In 2017/18, about £2700 of £4320 (or about 62.5%, or almost two-thirds) was accounted for in this way, as opposed to a service charge of only about £800 (which figure is not itself radically dissimilar from the 'Initial Provisional Service Charge' provided for in the Lease, which was £500).

30. It is not difficult to see why this level of charge (i.e., in the thousands of pounds) especially if coming out of the blue, would have antagonised the tenants. We have a certain amount of sympathy for the lessees. There is no

reason not to believe the lessees' complaint that the Landlord, in previous years, had failed to build up a sufficient reserve fund, leaving it in the position where it needed (in effect) to catch up quickly. Indeed, it seemed to be common ground that this was the position. But the Landlord could then only do that by way of charges of this sort of size. With the benefit of hindsight, it perhaps would have been better for the Landlord - both financially, and in terms of preserving its relationship with the lessees (even if they, as is alleged, had previously asked for their contributions to the reserve to be kept low) - to have anticipated likely expenditure more carefully and to have built up the reserve fund by way of more manageable annual payments.

31. Be that as it may, and notwithstanding the degree of ill-feeling which this obviously caused to some of the lessees, the Lease makes express provision for sinking and reserve funds (see Schedule 7.2.3.1.1) and allows the Landlord to make 'reasonable provision for anticipated expenditure .... as the Landlord in his reasonable discretion allocates to that financial year'. Here, there is just no evidence that the Landlord, in doing what it did when it did, had taken steps outside the scope of its reasonable discretion so as to disentitle the Landlord from catching-up as it has done.

32. It was common ground that, by 2017/18, the structure of the building had deteriorated to some degree, and it is clear from the documents that the Landlord did have to undertake significant work on the building in 2017/18 - in that year, there were repairs to the roof as well as other major works being external redecoration and repairs to render and wood.

The insurance cover

33. Clause 1.1.10 of the Lease defines 'The Insured Risks' as 'the risks of loss or damage by fire, storm, tempest, earthquake, lightning, explosion, riot, civil commotion, malicious damage, *terrorism*, impact by vehicles and by aircraft and aerial devices and articles dropped from aircraft or aerial devices (other than war risks), flood damage and bursting and overflowing of water pipes, apparatus and tanks and such other risks, whether or not in the nature of the foregoing, as the Landlord or the Management Company from time to time decides to insure against' (italics added by us).

34. Clause 1.1.12 provides that the Landlord may recover, by way of Service Charge, the cost of insuring the building, including insuring for loss of rent, the cost of third party insurance, and valuations.

35. Schedule 8 of the Lease makes detailed provision for insurance.

36. For 2017/18, the total cost of the buildings insurance was £7,752. The Respondent's position was that this is reasonable, "considering the building is Grade II listed." This included terrorism cover, as it needed to under the terms of the Lease. There was also separate directors' and officers 'insurance of £430 and engineering and lift insurance of £392: see page 212 of the bundle. The building sum insured was £4.398m.

37. For 2018/19, the total cost of the buildings insurance was £8,907. There was also directors and officers insurance of £437 and engineering and lift insurance of £417: see page 223 of the bundle. The reinstatement cost of the building was revalued and increased to £4.678m.

38. For 2019/20 the premium is charged at £10,831, but divided by two to take account of the part year is £5,048.

39. Old RTM organised all its insurance via St Giles Insurance and Finance Services Ltd and the policy(ies) was(were) provided by Axa Insurance UK PLC.

40. New RTM organised all its insurance via McClarrons, a firm of brokers in Yorkshire, but the insurer was the same - Axa. The total portfolio cost for this for the whole of 2019/20 was £4,508 - i.e. less than half of the Old RTM cost. That was £4006.05 for the building; £218 for a management liability package (page 403); and £283 for a lift inspection (page 402). There does not seem to have been directors and officers insurance or engineering and lift insurance (at least, not as so described).

41. The stated rebuild cost was £4.949m. This is not challenged by the Applicants, and it was in fact adopted by New RTM from Old RTM's preceding insurance proposal.

42. We accept that the state of the evidence put forward by the Applicants is not entirely complete. We have not seen the actual policy wording for either the Old RTM policy, or the New RTM policy. However, we accept the applicants' oral evidence that the insurance cover obtained by New RTM was on a 'like for like' basis with the cover obtained by Old RTM. We also accept the evidence that the new policy was obtained on a footing where the insurer was made aware of the claims history (which, in any event, as the standing insurer, it would have known). This is borne out by the Property Request form at page 410 of the bundle which declares three claims between July 2017 and November 2019.

43. The Respondent's argument that the Grade II listing of the building has impacted the costs of the building insurance therefore loses force because the same insurance, on the same building, with the same rebuild cost, with the same insurer, was obtained by New RTM at significantly less cost.

44. The natural conclusion to be drawn from this is that the insurance cost being charged by Old RTM was unreasonably high. We do not need to speculate as to the reason, although we note that Old RTM said that it did not take a commission: see page 261 of the bundle. Old RTM did not have much knowledge of the insurance position, because the insurance was placed by the Landlord (from whom there was no evidence), through a broker, and was not placed by Old RTM. There is no evidence that the landlord tested the market more widely - its position is that only Axa would offer insurance. But this does not explain why Axa offered significantly cheaper insurance, albeit through another broker, to New RTM. Mr Rose, a Senior Property Analyst with Old RTM, accepted that the figures 'stood out', but could not explain why this was.

45. We find that the correct annual sum of buildings insurance (including terrorism cover) for 2017/18, 2018/19, and 2019/20 (adjusted for the part year) was £4006. Any sum in excess of that was unreasonable in amount.

46. Insofar as the Applications are made in relation to directors and officers insurance, or engineering and lift insurance, the Applications are dismissed. There is nothing to demonstrate that the sums charged in relation to those items were unreasonable.

The cleaning contract / fire alarm

47. This is challenged on the basis that it was unreasonable in amount.

48. For 2017/18, the cleaning contract was £2,271 including VAT (£189 per month gross, or £43 per week): see page 211 of the bundle. It was with a company called CEM Contract Services Ltd in Denbigh. Mr Norton challenges the reasonableness of this charge on the basis that the cleaners are based in Denbigh 'and spend more time travelling to and from Barmouth than on the cleaning.' From Denbigh to Barmouth is a round trip of about 120 miles, and about 3 hours driving. There is no differentiation between travel time and cleaning time - i.e., the cleaner is being paid more to drive to and from the building than to actually do the cleaning.

49. In 2018/19, the cleaning contract was £9,261 gross including VAT (£771 per month): see page 221 of the bundle. The increase in cost is striking. The identity of the cleaner changed to Chemsol Cymru Ltd, based in Conwy. The change of cleaner seems to have happened at the beginning of July 2018: see page 318 of the bundle. From Conwy to Barmouth is a round trip of about 110 miles and still about 3 hours. Chemsol was charging £175 plus VAT per week: £210 per week inclusive of VAT. This was for what was described as routine cleaning services for 5 floors, and the basement, stairways and landings, and the price included cleaning (4 hours), travelling time (3.5 hours), and fuel allowance. Again, a significant proportion of the cost (3.5/7.5, or just under half) relates to travel time, which, on the face of it, is charged for at the same rate as cleaning time.

50. There is evidence that the new cleaning contractor was also required to test the fire alarm, which was done once a week, and (notwithstanding what was said in Chemsol's Quotation of 20 April 2018: page 406) was done at one trigger point only - being that nearest to the control point in the foyer, next to the front door: see the document at page 203 of the bundle. But we do not see how this could realistically have added cost to the cleaning contract so as to even remotely justify an increase of about £7,000 per year. The only evidence (see bundle at page 203) is that the testing was being done from March 2019.

51. In 2019/20, the cost claimed for the part year is £5,880 gross including VAT (£980 per month).

52. When it took over, the New RTM employed a Barmouth-based contractor - a Ms Hollingworth trading as 'Maid to Shine' - for £40 a week. She is not registered for VAT. She was both cleaning and testing all the fire alarms, throughout the building, in the different zones, and not just the one by the front door. She was working for 3 hours a week - i.e., slightly, but not much, less than the Chemsol. We were told that her cleaning services were satisfactory. We were told that the cleaning services being provided previously were unsatisfactory, but, in the absence of evidence on that point, we are unable to make any findings. When we visited the building, during the period when Chemsol were still in charge of cleaning it, it appeared clean and tidy. We were told, and we accept, that Ms Hollingworth carries public liability insurance.

53. Taking all of the above into consideration, we do consider that the cleaning costs being charged by Old RTM were unreasonable in amount. This was not specialist or technical cleaning. It was keeping the common parts of this ordinary building in decent condition.

54. There is no hard and fast rule of law as to the location of the cleaners. This has to be a matter of fact and degree, and common sense. But the cost must not be unreasonable. It may become unreasonable if distant cleaners - as, in our view, cleaners in both Denbigh and Conwy were - are engaged when there are cleaners closer to hand. We are satisfied that an appropriate cleaner could have been found in Barmouth. We are also satisfied that it was not reasonable to engage cleaners from Denbigh or Conwy on the terms upon which they were engaged (e.g., charging for travel time, without any apparent deduction in hourly rate). Barmouth is not a remote or sparsely occupied place. It is a bustling town with lots of establishments such as hotels and guest houses which call for cleaning services. We accept that there is a decent supply of cleaning contractors in Barmouth. We were told, and accept, that Ms Hollingworth had been located very straightforwardly and even without the need for advertising.

55. We reject the Respondent's evidence that 'contractors within the local area have previously been requested to provide a quote for the various services, however, they either did not provide a response, or the quotes provided were less reasonable than those received from the other contractors, including those recommended by the residents. In addition, there are particular services that require necessary qualifications and accreditations to ensure the services are carried out appropriately.' There is no contemporary documentary evidence to support the assertion that Old RTM had tried but failed to engage cleaners in or nearer to Barmouth (they are said by Mr Pearson not to have responded, but there is no evidence of Old RTM asking, let alone anyone responding). Moreover, it is inherently unlikely that Barmouth cleaners would have turned down a once-weekly straightforward cleaning contract worth (in the latter two charge years) almost £10,000 a year. The 'particular services' referred to are not particularised, but pushing a button to test that a fire alarm is working are not a 'particular service' requiring any qualification or accreditation. No other 'particular service' was described to us.

56. Moreover, what Old RTM said does not stand up against what actually happened under the New RTM: namely, that the New RTM managed, quickly and easily, to find a satisfactory local cleaner, who - because they were local - were able to provide as much or perhaps even more cleaning for less money.

57. We consider that the appropriate amount to be charged for cleaning in 2017/18, 2018/19, and 2019/20 (part year) is £2,080 (being £40 per week). That is a VAT exclusive sum. Any sum in excess of that was

unreasonable in amount. We include in 'cleaning' a notional sum to test the fire alarms, being done as the cleaner moves through the common areas of the building, but excluding the specialist services described below.

58. In 2017/18, the fire equipment maintenance was charged at £1,272. This includes a sum for maintaining the emergency lighting, smoke vents, and fire alarms on a quarterly basis (£580 per year), as well as maintaining the fire extinguishers on an annual basis (£192 including VAT). The contractor in 2017/18 was Beara Properties Ltd, based in Sale, south Manchester.

59. We do not consider that the amount charged to maintain the fire equipment was unreasonable. It is specialist work. There is more to this aspect of the management of the building than simply testing the fire alarms. It is not suggested that Ms Hollingworth was doing anything other than testing the alarms. It was not suggested that she was (for example) testing or warranting the fire extinguishers. There is no evidence that she would have been qualified to do so.

60. For the sake of completeness, we reject the Applicants' challenge that the cleaning contract failed the £100 per flat long term contract test. The point is not a good one. We are satisfied that Old RTM approached the cleaner(s) on an annual basis, year-on-year, and did not enter into any open-ended, indefinite, contract with Chemsol (the same could not be said for the previous cleaner, whose appointment ended in June 2018).

61. Given our findings on the above, we do not need to decide whether any issue arose from the fact that most of the cleaning invoices issued by Chemsol were addressed to Abacus Land 4 Ltd, which is not the Landlord. Whatever the relationship between Abacus Land 4 and Adriatic Land 3, in any event, we accept the evidence - page 350 of the bundle - that a credit note was given by Chemsol.

Legal costs

62. This is an issue which arises out of the RTM Application, which was dealt with and disposed of by a different panel of the Tribunal in October 2019. There were three parties to the RTM application. New RTM was the Applicant. We have treated Old RTM as First Respondent and the Landlord as Second Respondent, but ultimately (given our analysis below) nothing material turns on which Respondent was which.

63. We remind ourselves as to the scope of the task which the Tribunal undertook in October 2019. It was applying section 88 of the Commonhold and Leasehold Reform Act 2002. That reads:

Costs: general

(1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any premises,

(b) party to such a lease otherwise than as landlord or tenant, or

(c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal.

64. Section 88(1)(a) refers to the Landlord's costs, whilst section 88(1)(c) refers to the management company's costs. That is to say, the two sets of costs are differentiated by the statute. The 2019 decision does not say whether the costs were being sought under section 88(1)(a), or (c), or both. The decision sometimes refers to Respondent (singular) and Respondents (plural).

65. We have retrieved from the Tribunal's records and had opportunity to consider New RTM's 'Statement of Outstanding Issues' dated 3 October

2019. That is written on the clear footing that New RTM accepted that it was liable to the *Old RTM's* costs of the RTM Application, but it said nothing expressly about its liability to the costs of the *Landlord.*

66. The only costs information submitted seems to have been from the First Respondent, i.e., Old RTM. That information appears on an N260 Schedule dated 3 October 2019, supported with an indemnity certificate signed by a partner of Womble Bond Dickinson, as £3,515, excluding VAT.

67. On that footing, the only costs which the Tribunal assessed in 2019 were Old RTM's costs.

68. On that footing, the Tribunal did not assess, nor does it seem to have been invited to assess, the *Landlord's* costs of the RTM Application.

69. The Tribunal determined that New RTM should pay Old RTM £3206.40 plus VAT if applicable plus £24 for disbursements. The total sum including VAT was £3871.86. That was New RTM's liability for the reasonable costs under section 88 of the Commonhold and Leasehold Reform Act 2002.

70. The payee's position before the LVT in October 2019 was that the issue of recovery of costs pursuant to service charge provisions 'is an entirely separate issue' (i.e., as we understand it, entirely separate from the assessment of costs being undertaken under section 88) "which would need to be pursued by the residents and cannot be pursued by [New RTM] in [the RTM Application]." The First Respondent to the RTM Application - Old RTM - went on to confirm "that any costs recovered from [New RTM] pursuant to this assessment will be credited back to the service charge and as such there is no danger of double recovery of any sums."

71. But, and whether in fact double recovery or not, legal and other professional costs have been debited by way of service charge. In Old RTM's Service Charge accounts for 2017/18, £2718, said to relate to legal and professional fees, appears as a cost not yet paid. Legal and professional fees of £1818 were debited from the 'reserve fund' and the provision of legal services of £2,256 were debited from the 'reserve fund schedule apartment'. In 2018/19, legal and professional fees of £780 were debited from the Reserve Fund, and £851 from the Reserve Fund Schedule Apartment. In the 2019 part-year (i.e., to 27 December 2019) £6,288 is recorded as expenditure on legal and professional fees in the Service Charge Fund.

72. Neither party provided any worked-out reconciliation of those sums. We have not been able to completely reconcile those deductions against the sums which Old RTM sought to recover and did actually recover in the RTM Application. But much of it seems to be by way of legal fees paid to Womble Bond Dickinson. Although the fee notes which we have seen are addressed to Old RTM it is unclear whether, in relation to any individual fee note, Old RTM was being invoiced in its own right, or whether it was being invoiced simply as the agent for the Landlord. The solicitors' reference PAJ3/459925.001 relates to Gedol Ltd as the client. We have not seen any document which names the Landlord as the client.

73. Mr Adams' position is that these sums relate to the RTM Application, and should not be charged to individual leaseholders, but are a matter between Old RTM and the Landlord. His position is that 'these funds have in effect been quietly laundered through our reserves entirely at the control of RMG'.

74. The Respondent says that those costs are lawfully recoverable as service charge, and invites us to consider Clauses 7.3-14 and 7.3-17 of Schedule 7 of the Lease in support of this proposition.

75. Clause 7.3.14 reads:

> "The Services
>
> The Services are:
>
> [...]
>
> employing such persons as the Landlord, acting reasonably, considers necessary or desirable from time to time in connection with providing any of the Services, performing the Landlord's other obligations in this Lease and collecting rents accruing to the Landlord from the Estate, with all incidental expenditure including, but without limiting the generality of the above, remuneration, payment of statutory contributions and such other health, pension, welfare, redundancy and similar or ancillary payments any other payments the Landlord, acting reasonably, thinks desirable or necessary, and providing work clothing"

76. Clause 7.3.17 reads:

> "administering and managing the Building, performing the Services, performing the Landlord's other obligations in the Lease and

preparing statements or certificates of and auditing the Expenses of the Services and of Insurance"

77. We disagree that the Landlord's costs of dealing with the RTM Application are, in principle, recoverable under Clause 7.3.14. Responding to an RTM Application is not a 'Service' within the proper meaning and effect of Schedule 7.

78. In our view, Clause 7.3.17 does not authorise recovery of these costs by way of service charge. Whilst it is true that Old RTM was 'administering and managing the Building', it does not seem to us that this clause, read objectively, and in its proper context, and in the light of the ordinary principles of contractual interpretation, extends to the Landlord's costs incurred in responding to an RTM Application, even though the *consequence* of a successful RTM Application would have been transfer of responsibility for at least some of the Services from Old RTM to New RTM. That is to stretch the proper meaning and effect of the clause too far.

79. Clauses 7.3.14 and 7.3.17 are the only two clauses which the present Respondent invites us to consider. In neither instance, can it safely be said - as a matter of the ordinary reading and construction of these clauses - that the legal and other professional costs by a landlord incurred in connection with a RTM Application (especially where the landlord, having engaged a management company, is, in effect, at one remove from the management) are 'Services' within the proper meaning and effect of Schedule 7 entitling the landlord to recover those costs as service charge.

80. We therefore conclude that the Landlord is not able to recover its legal and professional costs of responding to the RTM Application through the service charge, and, to the extent that it has sought to do so, or has in fact done so, those sums are disallowed as service charge.

81. Even if, contrary to our conclusion above, the Landlord's legal and professional costs of responding to the RTM Application were in principle capable of being recovered as service charge, it nonetheless still seems to us, as a matter of principle (arising from and by reason of the very existence of the assessment mechanism provided by section 88 of CLARA 2002) that the Landlord could not seek to recover those costs through service charge on a full indemnity basis - i.e., without assessment. Parliament has provided, in primary legislation, an assessment mechanism which must inevitably affect the contractual provisions set out in the Lease. Those contractual provisions must be read in the light of section 88. Section 88 must have primacy. Otherwise, the clear statutory purpose of section 88

would be undermined because a landlord could circumvent section 88 by simply not putting its costs forward for assessment.

82. Likewise, and for the same reason, Old RTM could not recover, by way of service charge, costs which had been disallowed on assessment under section 88 of CLARA 2002. If it could do so, then section 88 would be rendered otiose - costs could be incurred in relation to an RTM Application which, even if disallowed by the Tribunal on assessment, could nonetheless be recovered. As a matter of principle, that cannot be right.

83. Finally, and even if all the foregoing were wrong, this present panel of the Tribunal cannot undertake any assessment of any costs arising in connection with the RTM Application, regardless of who incurred them. We are not seized of the RTM Application. We do not know anything about it. We cannot form any evidentially sound view as to whether any of the costs sought were reasonably incurred, or reasonable in amount.

The aged debtor reconciliation

84. This concerns sums still shown as owing to Old RTM. Old RTM has debited those sums from the service charge balance paid over to New RTM. If it had not done so, then New RTM would have received more money.

85. The overall sum in dispute here is £21,124: see the schedule at page 200 of the bundle. Of this, and as at 27 December 2019, Mr Adams owed £2,518.12 to Old RTM; Mr Norton owed £6,423.43; and Dr Mountford owed £3,826,27. There was one other significant debtor, which was Apartment 10 owing £4,914.86. Other debtors were modest - owing in the hundreds. So about 60% of the total owed to Old RTM was owed by the present three (natural person) applicants.

86. As we understand it, the gist of this element of the dispute is that Old RTM, in debiting the entire sum (and therefore in not crediting New RTM with £21,124) has no interest or incentive in seeking to recover these sums (which ultimately would enure for the benefit of New RTM).

87. The Applicants say that New RTM "is not responsible for adopting debts, long term or otherwise that the respondent has failed to resolve or recover, some of which relates to commercial and non RTM members". But it is also said that New RTM "will accept the debt of £12,768 relating to payments legitimately withheld under dispute by the three applicants in these cases, subject to the Tribunal ruling." The Applicants say that Old RTM should have collected the debts, or gone down the process of chasing those debts

- even though this is (in effect, and oddly) an invitation by the Applicants for Old RTM to sue them personally. The Applicants also say that New RTM should not have to chase these debts, but this submission also has to be viewed in the light that the only three directors of New RTM would, on the above figures, be its three largest debtors.

88. The Respondent's response here is that the reconciliation (variously) of the aged debtors/reserves and loans to service charge/debtors is not a Service, but are "pieces of financial information", which are not subject to the reasonableness claims against the Service Charges.

89. It was perhaps unhelpful that - despite the size of the sum in dispute in relation to this element and the vigour with which it was contested - neither party, apart from bare assertion that their respective positions were correct, sought to identify or referred us to any statutory provision or reported decision of any court or tribunal. We asked the parties about the legal position. Both said that they had no idea, and could not comment on it. But this is an adversarial jurisdiction, and it is not the work of the Tribunal to act as a surrogate lawyer for either party, or to fashion for any party the legal argument.

90. The Applications in this regard must be dismissed. The Applicants have failed to satisfy us, even to the relevant standard, that this is a matter with which we can deal. Even if that were not the case, we would have agreed with the Respondent that this part of the Applications is outside the scope of our jurisdiction. Reconciliation as between Old RTM and New RTM is not within section 27 of the Landlord and Tenant Act.

91. Section 27 gives two jurisdictional gateways: sections 27(1) and 27(3). In our view, this is not an application which falls within the proper meaning and effect of section 27(1) ('a determination whether a service charge is payable') and so the question of amount under section 27(1)(c) does not arise. Nor does it fall within the proper meaning and effect of section 27(3) ('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 so the question of amount under section 27(3)(c) does not arise either.

92. We are fortified in our conclusion insofar as other legislation is suggestive (in the absence of submissions on the point, we cannot put it any higher than that) that the Respondent's position is better founded. Notwithstanding the acquisition by New RTM, Old RTM remained solely entitled to collect service charges in respect of costs incurred prior to the

acquisition date: see Service Charges and Management (4th edition) §29-16. Over and beyond this, the provisions dealing with the payment over of accrued uncommitted service charges are in any event different to those under section 27: see section 94 of the Commonhold and Leasehold Reform Act 2002. No such application has been made.

The demands

93. The Respondents acknowledged that the 'Summary of tenant's rights and obligations' initially sent out - both in relation to Service Charges and Administration Charges - were incorrect, and the same were 're-issued' (sic) in June 2019: see the letter at page 246 of the bundle.

94. The original summaries were wrong. They are the versions for use in England - see, for example, their reference to the First-tier Tribunal and not to this Tribunal. No Welsh language versions were provided, as they should have been. The situation was described as 'an oversight'. The cover letter dated 10 June 2019, inaptly, says that the invoices for 1 July 2017 to 30 June 2019 (i.e., service charge years 2017/18 and 2018/19) were being 'raised again' 'as per recent advice from the Leaseholder (sic) Valuation Tribunal'. No such 'advice' was given. It is not part of the Tribunal's role to give legal advice to a party. The Tribunal had limited itself to commenting, in April 2019, "The Tribunal identified that there was (at least potentially) an issue of law arising from this situation."

95. At the hearing, the Applicants did not pursue any argument that the giving of incorrect demands meant that the service charges were not recoverable *at all* but did argue that no late payment fees should properly or reasonably be chargeable in relation to these demands.

96. We agree with the Applicants. We consider that the disallowance of those sums, if not already removed, is a fair and proportionate consequence of serving notices which were non-compliant with the law.

97. On 25 June 2019, Old RTM indicated that late payment fees on the Applicants' accounts had been removed. However, on 18 March 2020, it was said that legal and administrative fees were still remaining on Mr Norton's account, and had been applied due to him cancelling a direct debit. One sum seems to have been £360 plus VAT (£432) charged to Old RTM by 'Property Debt Collection Ltd' in July 2018, said to be 'taking your instruction in collection of the following service charge arrears." That sum is otherwise unexplained, and in our view is unreasonable in amount, and is not allowed in any event. Late payment fees of £592 may also have been

applied to Mr Norton's account. Those apparently relate to a cancelled direct debit. Those should also be removed from his account, if not done already (as Mr Marcello indicated in his email of 8 September 2020: page 421).

Section 20C

98. Here, our jurisdiction is to make such order on the application as we consider just and equitable in the circumstances.

99. The following circumstances are relevant.

100. Standing back, and looked at overall, the Applicants are the successful parties. The Applicants have succeeded in large measure on those parts of their Applications which remained in dispute: the insurance charges, the cleaning charges, and the legal costs of the RTM Application. The dismissal of their application in relation to the aged debt reconciliation does not materially affect this conclusion.

101. The sums involved are not trivial. There were genuine issues of genuine value to be determined, and, in the absence of agreement between the parties, the Applicants were entitled to pursue their Applications to this Tribunal. The Applicants had refused to engage in mediation, and we take this into account, but overall we do not consider that it changes the overall position in relation to section 20C. We also take into account the concessions made by Old RTM in relation (for example) to the late payment etc charges being applied.

102. The just and equitable order is that the costs incurred by the Respondent in connection with these proceedings may not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any of the Applicants to the Respondent.

Dated this 6th Day of November 2020

C McNall
Chairman