9686

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AR/LSC/2012/0611** **LON/00AR/LSC/2013/0153**
Property	:	**The Axis Development, Mercury Gardens, Romford RM1 3HJ**
Applicant	:	**The various leaseholders set out on the attached schedule**
Representative	:	**MLC Solicitors**
First Respondent	:	**Fairhold Properties No. 5 Limited ("the intermediate landlord")**
Representative	:	**Peverel Property Management**
Second Respondent	:	**OM Property Management Limited ("the management company")**
Representative	:	**Peverel Property Management**
Third Respondent	:	**Liberty One Limited and Liberty Two Limited ("the previous superior landlord")**
Representative	:	**Capital and Regional Property Management Limited**
Fourth Respondent	:	**Rockspring UK Value Romford (Jersey) Limited ("the current superior landlord")**
Representative	:	**Workman LLP**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge F Dickie** **Mr T Sennett FCIEH** **Mr P Clabburn**
Date and venue of Hearing	:	**27 and 28 January 2014** **Alfred Place, London WC1E 7LR**

Date of Decision : 10 March 2014

DECISION

Decisions of the tribunal

(1) The parties to the First Application reached a settlement.

(2) The second application is dismissed. All disputed service charges demanded from the Applicants in respect of the superior landlords' costs under the head lease (other than as specifically conceded) are reasonable and payable.

The application

1. The Applicants are the long leaseholders of The Axis Development, Mercury Gardens, Romford RM1 3HJ and for the large part members of the recognised tenants' association, Axis Residents' Association Limited. The Respondents are respectively the intermediate landlord and the Management Company named in the leases, and the former and current freeholder. The Management Company covenants under the leases to provide services and the Applicants to pay a variable service charge towards the cost of those services and in respect of the contribution to the freeholder's expenditure pursuant to covenants in the head lease. Essentially, these applications concern the residential tenants' challenges to service charges that are payable either directly or indirectly to the other parties.

2. By applications made to the tribunal on 5 September 2012 against the First and Second Respondents the Applicants sought a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to service charges payable and for an order under section 24 of the Landlord and Tenant Act 1987 appointing a manager. By an application made to the tribunal on 6 March 2013 the Second Respondent sought a determination under section 27A of the Act in respect of the contribution to both the current and former freeholders' costs. Directions were issued for the applications to be heard together, but by the date of the hearing the application to appoint a manager had been settled by the parties.

3. The relevant legal provisions are set out in the Appendix to this decision.

4. The tribunal held case management conferences in respect of the applications on 3 October 2012, 7 November 2012, 8 April 2013 and 18 September 2013.

The hearing

5. The following representatives appeared at the hearing:

   Mr Colin Challenger – Counsel for the Applicants.

   Mrs Smith – Counsel for OM Property Management.

   Ms Lindsay Armer – Property Manager Workman LLP, property manager of The Mall for the current superior landlord (accompanied by colleague Robin Howland).

   Mr Philip Evans – national property manager at Capital and Regional, representing the original superior landlord (accompanied by colleague Ian Martin).

6. The tribunal heard oral evidence from:

   Mr Ian Dowens, Chairman of the Residents' Association and leaseholder of flat 121.

   Ms Sarah De Courcy Rolls, Workmans LLP – Centre Manager for the current superior landlord.

The Premises

7. The properties that are the subject of this application are self-contained flats within a development built by Barratt Homes Limited between 2004 and 2007 which comprises 189 private leasehold flats arranged in six blocks and 40 social housing flats within two blocks (known as Holly Court) with their own entrance. The tribunal inspected the development before the hearing in the presence of the parties.

8. The residential development is sited above the footprint of an ASDA store which is part of a larger covered shopping Mall under the control of the superior landlord. The tribunal was shown shared aspects of the site to which the residential units contribute, including security cameras and security patrols around the site, shared landscaping and paved areas, external lighting and cleaning to the front, rear roadway and 'Link' to the side of the site. The security control facility within the adjoining expansive Mall, which covers the ground level development and Mall, was shown to the tribunal by the centre manager. The tribunal was shown the extent of the residential area including

vehicular access and parking, ambulatory access to front and rear of the site, the security and concierge arrangements for the residents, gardens, walkways, lighting and the gymnasium which is available for lessees.

9. The Link is a narrow triangular parcel of land to the east side of the development running between Main Road and Dolphin Approach. It is gated and provides a walkway for use as an emergency exit from the ASDA store. Within the document plans for the site it is included in that marked Appendix A which has been annotated by the superior landlord to show areas of the development to which the residential component contribute.

The Background

10. By the beginning of the second day of the hearing the dispute concerning the service charges charged by the Management Company was settled, before the tribunal had heard any evidence in relation to it, and that part of the application was withdrawn on oral application and with the consent of the tribunal. This determination therefore solely concerns the superior landlord's costs charged to the Management Company under the head lease and recovered from the residential leaseholders (and referred to in this decision as estate service charges).

11. Under the flat leases the service charge year runs from 1 August whilst under the head lease the service charge year runs from 1 January. The estate service charges in dispute are those included in the accounts for 2007/2008, 2008/09 and 2009/10; and the budgets for 2010/11 and 2011/12 that formed the basis of the on account payments demanded from them for those years.

12. Both the accounts and budgets in dispute included actual and estimated estate costs paid to the freeholder under the service charge provisions of the head lease. The previous freeholder transferred the freehold interest to the current freeholder in August 2010 when Workman LLP took over management of the development.

13. There have been numerous variations to the tribunal's directions, and three postponements of listed hearings. At the case management conference that took place on 18 September 2013 the tribunal refused permission to amend the application to include the actual service charges accounts for the year 2010/2011, which had by that time been prepared.

14. Tribunal directions required the completion of a Scott Schedule by the parties in respect of the disputed actual and estimated costs incurred by all Respondents, to include by the Applicant "a narrative as to why it disputes each amount in question". In fact, the Applicants relied on a series of five witness statements by Mr Dowens and two by

Ms Roisin Mahoney (the proposed manager in the application under section 24 of the Landlord and Tenant Act 1987 who estimated service charge savings that could be made but did not give oral evidence, and who had been appointed manager of the development by consent).

15. It was necessary to cross reference between these witness statements and sequential witness statements responding to them in order to extract and understand the parties' positions. Unfortunately, the Scott Schedule of disputed service charges was not a useful document. In the section for comments the Applicants referred in general terms to Mr Dowens' fourth and fifth witness statements, without reference to particular paragraphs or submissions. The tribunal therefore had considerable difficulty in identifying and analysing the issues in dispute and evidence in support. Mr Challenger had been instructed too late in the day to provide assistance before the hearing (previous counsel having been taken ill very shortly beforehand).

The Head Lease Terms

16. In the head lease dated 19 January 2006 Liberty One Limited and Liberty Two Limited as landlord demise the Premises to Barratt Homes Ltd. as tenant – the premises being the residential portion of the development – namely, The Axis. The Building is defined as:

"the building of which the Premises and the Retail Premises form part and each and every part of the Building and the Link and any other areas the use and enjoyment of which is appurtenant to the Building whether or not within the structure of the Building as the same is registered at the Land Registry under title numbers EGL416981, EGL 435127 and EGL 475391."

17. The Common Parts are defined as:

"those parts of the Building (whether or not within the structure of the Building) to be used in common by the Tenant with other tenants and occupiers of the Building, with the Landlord, and with those properly authorised or permitted by them to do so and Common Parts includes (but without limitation) the Link and the landscaped areas but excluding any such parts as may be within the Premises or the Retail Premises;"

18. In Clause 2.3 the Tenant covenants to pay monies payable under Schedules 2 and 3. Schedule 2 relates to insurance provisions. The landlord covenants to keep the Building insured, and the Tenant covenants to pay to the landlord on demand a due proportion of the insurance premiums incurred by the landlord.

19. Schedule 3 relates to Services. The tenant covenants to pay the landlord 50% of the Costs, being the reasonable costs and expenses incurred by the Landlord in carrying out the Services specified in parts 2 and 3 of the Schedule, by way of advance payments and adjustments after the preparation of annual accounts. The landlord has a discretion to vary that percentage.

20. Paragraph 9 of the Schedule provides for certain exclusions from the Costs, notably at 9.5 "any costs relating to any part of the Building other than the Common Parts the Structure and the Conducting Media". A management charge not exceeding 10% is permitted in Paragraph 10.

21. It is not necessary to set out in full the Services specified, though they include in Part 2:

Cleaning, lighting and maintenance of the Common Parts.

Payment of any Outgoings in respect of the Common Parts.

Refuse disposal from the Common Parts.

Cleaning and emptying of drains and other Conducting Media serving the Building.

Operation, repair, maintenance and renewal of the lifts.

Repair, decoration, maintenance and cleaning of the Structure, the Common Parts and the Conducting Media.

Operation, maintenance, repair and replacement of computer and other monitoring apparatus for the efficient operation of the Services.

Fire-fighting and security equipment.

Part 3 provides for Discretionary Building Services including

Employment of cleaners, gardeners and other staff for the Building, including provision of requisite clothing

Security arrangements for the common parts.

Common parts gardening.

22. The Applicants based their arguments concerning the contributions to the freeholders' expenditure on an interpretation of Clause 3.3.2, by virtue of which the Head Lessee covenanted:

"To refund to the Landlord on demand (where Outgoings relate to the whole or part of the Building or other property in each case including the Premises) a fair and proper proportion attributable to the Premises of the Outgoings".

"Outgoings" are defined in the lease at Clause 1.1 as

"(in relation to the Premises) all non-domestic rates, (including rates for unoccupied property), water rates, water charges and all existing and future rates, taxes, charges, assessments, impositions and outgoings whatsoever (whether parliamentary or local) which are now or may at any time be payable, charged or assessed on property, or the owner or occupier of property, but "taxes" in this contest does not include value added tax, nor any taxes imposed on the Landlord in respect of the rent reserved by this Lease, or in respect of a disposal or dealing with any interest in reversion to this Lease;"

Evidence and Submissions

23. The Applicants' challenge to the superior landlords' costs based on an interpretation of Clause 3.3.2 was set out in the evidence of Mr Dowens and in a further undated and unattributed document entitled "Contribution towards Superior Landlord's Costs". It is fair to say that Mr Challenger understandably did not pursue this argument before the tribunal.

24. Mr Dowens considered that the contribution was recoverable only to the extent of "a fair and proper proportion attributable to the Premises", and that costs that were so attributable were nominal. He thus challenged charges for administration and wages, management office expenses, telephone charges, electricity, mechanical and electrical maintenance, cleaning common parts, pest control, security equipment, staffing security costs, general rates, water rates, landscaping / flower displays and management fee. Some concessions were made by the superior landlord in respect of a number of specific challenges to items appearing in the 2011 accounts.

25. Mr Bell was Acting Centre Manager during the period when Ms de Courcy Rolls had taken maternity leave, and was in post for only four months. He had prepared a witness statement in July 2013 for a previously listed hearing of these applications, but was now no longer available to give evidence. The tribunal, after hearing an objection from Mr Challenger, determined it was appropriate to allow Ms de Courcy Rolls to adopt the statement of Mr Bell and give oral evidence at the hearing. She gave evidence as to the range of services provided by

the freeholder which were challenged by the Applicants as in the underlined headings that follow. Whilst in making his submissions for the Applicants Mr Challenger focussed on the higher value items, the Respondent's case in relation to each disputed item is summarised:

26. Expenditure on Administration Wages had been for craftsmen (replacing lighting, patch painting, drain clearance and other general repairs); an administrator whose duties included paying and splitting invoices and account liaison, and the Centre Manager, responsible for contracting, managing staff, dealing with insurance claims and health and safety. Actual expenditure on Administration Wages had been charged to The Axis in the following sums:

2010 £2617.52

2011 £3,378.23

2012 £2,982.00

27. Management Office expenses and Telephone charges were challenged, and Ms de Courcy Rolls said these were for items such as telephone and stationery for the office staff working on the management of the development. Actual charges for Management Office expenses had been made to the Axis as follows:

2010 £490.29

2011 £417.52

28. The witness explained that disputed Electricity Costs were for external lighting, charging of cleaning machines used exclusively to clean the perimeter, charging of high level access equipment, TV cameras and security radios, and power to the external Asda lift. Mr Dowens observed that the supply for which the Axis was liable indirectly to contribute was not separately metered, but Ms de Courcy Rolls said the freeholder adopted a "fair and reasonable" approach to estimate the correct contribution and noted that the cost of installation of separate metering devices might not be cost effective. Actual costs for electricity had been charged as follows:

2010 £2519.58

2011 £1923.10

and estimated costs for 2012 were £1335.50.

29. Mechanical and Electrical maintenance charges, as well as General Rates, were challenged, but evidence confirmed that no such charges had been levied.

30. Common Parts Cleaning had been charged to The Axis as follows:

2010 Actual £2581.74

2011 Actual £2667.10

2012 Budget £2719.00

31. Mr Dowens said there had been no common parts cleaning for the last four years, and referred to having conducted observations for the whole day on 30 May 2013 without seeing any cleaners or security guards working outside the internal doors of The Mall. However, Ms de Courcy Rolls gave evidence as to the existence of cleaning regime records, and that the cost covered jet washing, scrubbing (including chewing gum removal), glass cleaning (both at low and high level – and this item related to the glass around the Holly Court entrance), litter picking and graffiti removal.

32. Whilst Mr Dowens challenged Pest Control charges, Ms de Courcy Rolls confirmed that there had been no such charges since the end of 2011. Prior charges for actual expenditure had been made to The Axis in the following sums:

2010 £85.87

2011 £101.29

33. Mr Dowens disputed charges for Security Equipment stating that none was attributable to The Axis, and the freeholder disputed this, since such equipment was for the security monitoring of the centre from which the residential premises benefits. A plan of CCTV locations (marked Appendix A) was produced, and the costs included monitoring screens, radios and an electronic patrol system. The following actual charges had been made to The Axis:

2010 Actual £230.89

2011 £356.48

2012 £173.36

34. Mr Dowens disputed that Staffing Security Costs were attributable to the benefit of The Axis since staff do not patrol outside the entrances to The Mall. This Ms de Courcy Rolls disputed, explaining that the external areas of the residential premises are patrolled daily, as is recorded by an electronic system (which the tribunal observed on inspection). She remarked that the Link area, for which the residential leaseholders are required to make an indirect contribution, is the area where the highest recorded number of incidents of anti-social behaviour take place.

35. Water Rates were disputed by Mr Dowens, while Ms de Courcy Rolls gave evidence that a water supply was required for watering the landscaping, and external cleaning with appropriate specialist machinery. The amounts charged were

2010 Actual £90.41

2011 Actual £134.76

2012 Budget £190.00

36. No material challenge was made to actual charges for Landscape Flower Display, charged as follows:

2010 £5939.65

2011 £122.17

2012 £422.00

37. Mr Dowens considered there was little for which a Management Fee could be justified, and Ms de Courcy Rolls observed that the landlord is entitled under the lease to charge 10% for management.

38. The freeholder's expenditure charged to the residential development appeared in Schedule 4 of the superior landlord's accounts, which were produced to the tribunal. Ms de Courcy Rolls gave evidence as to the process used by the current freeholder to apportion expenditure to the head lessee of the residential part of the estate. Management of the entire estate was carried out from the management office within The Mall. A proportion of 2.5% of the relevant expenditure was generally estimated by the current superior landlord to be attributable to the Common Parts, Structure and Conducting Media and to be recoverable in the appropriate proportion (50%) from the intermediate landlord and ultimately from the residential lessees and housing association. Neither freeholder had ever used its discretion in Schedule 3 of the head lease to vary the 50% split.

39. Other apportionments to Schedule 4 of the accounts were made in respect of some items of expenditure where appropriate - a proportion of 10% of landscaping expenditure was charged to the residential development and 100% of all the cost of skateboard protection improvements in 2010, considered to be referable only to the residential occupants.

40. There was some initial confusion at the hearing as to whether the current freeholder in allocating in general 2.5% of estate expenditure to Schedule 4 of the accounts (and thus 1.25% of estate expenditure to the residential development) had adopted the practice of the previous freeholder. It appeared they believed they had inherited this 2.5% apportionment, though Mr Evans clarified at the hearing that the previous freeholder had in fact apportioned estate expenditure to Schedule 4 differently – the usual apportionment being 5% (i.e. 2.5% to the residential development). The former superior landlord's Schedule 4 included fixed contributions for some of the smaller items, and management was charged to Schedule 4 at 4% of overall management of the estate and was not shown to exceed the maximum management fee permitted by the head lease.

41. Mr Evans for the original freeholder made oral submissions on the basis of the disclosed documentation. He observed that at no time prior to these proceedings had any queries or challenges been raised in respect of the estate costs charged. The original superior landlord believed that its apportionment was reasonable, and Mr Evans referred to the floor areas of retail premises and residential premises being 40% of the floor area of the estate as a whole.

42. Mr Dowens' dissatisfaction regarding estate costs stemmed originally from having been provided with a service charge budget by Peverel pre-purchase, which provided an estimated contribution towards estate costs of £1000 in total, whereas actual costs charged to the leaseholders had been in the region of £15,000-20,000. However, Mr Dowens had no evidence that this figure had been provided by or derived from information provided by the freeholder, and Mr Evans denied that it had.

43. Mr Challenger submitted that the estimate must have arisen from discussions with the developers and Mr Dowens had relied on it in purchasing. He argued that the original superior landlord must produce some prima facie evidence that the charges were reasonable and properly attributable to the private residential areas and that, not having produced any witness evidence, it had failed to do so.

Insurance

44. Mr Challenger advanced an argument based on the reduction in insurance costs since the Fourth Respondent had purchased the

freehold from the Third Respondent. He conceded that the insurance charged by the Fourth Respondent was reasonable and payable. He compared the insurance premiums as follows:

Insurance premiums levied by Third Respondent:

2007/08 £16,970

2008/09 £17,599

2009/10 £19,815

Premiums subsequently levied by Fourth Respondent:

2010/11 £6,736

2011/12 £7,535

2012/13 £7,738

45. Adjusting for an average annual increase of 8.5% drawn from the Third Respondent's premiums, he compared the final such premium as being 321% more than what the Fourth Respondent's premium could have been expected to be for that year. Applying that reduction in each of the first three years, he calculated an overpayment of £11,144 (07/08), £12,017 (08/09) and £13,652 (09/10).

46. Mr Challenger acknowledged that the relevant expenditure need not be the cheapest available, so long as it is within the market norm: *Forcelux v Sweetman* [2001] 2 EGLR 173, and if insurance is obtained in the ordinary course of business it is not incumbent on the landlord to shop around for the cheapest price (see, for example, *Avon Estates (London) Limited v Sinclair Gardens Investments (Kensington) Limited* [2013] UKUT 264 (LC)).

47. However, Mr Challenger submitted that the premium was grossly excessive and that the slightest foray into the market place would have obtained a better premium. He argued that the Third Respondent should have observed the stark difference between the premiums and put in further evidence to support its figures. However, the Applicants had not obtained any alternative quotes for insurance.

The Tribunal's determination and reasons

48. It seems clear to the tribunal that the principal motivation of the Applicants (and of Mr Dowens in particular) over the extended period of this dispute was the challenge to the Management Company's costs

and the quality of service provided by them at The Axis. That dispute was finally settled and a manager appointed by the tribunal by consent. Having had sight of the correspondence and pleadings in this long standing dispute, the concerns regarding the freeholders' costs appeared to be a side issue to the principal goal of replacing the management, a goal that has been achieved. Once this principal dispute fell away, the Applicants' lack of attention to particularising a case in respect of the freeholders' costs, when compared with their close analysis of the Management Company's expenditure, was laid bare, and such positive case as was advanced was misconceived.

49. The leaseholders' principal position regarding estate expenditure was that it was not recoverable as it was not "attributable to the premises". However, the tribunal considers that their argument relies on a misunderstanding of the lease terms. Essentially, Mr Dowens' position based on Clause 3.3.2 was that the residential leaseholders should not be obliged to pay for anything that did not directly benefit them, and that very little of the superior landlord's costs provided any such benefit. He had concerns about the quality of some services provided by the superior landlord, such as ground maintenance, in that he said until recently planted areas had been left unattended. However, he confirmed he had not complained to the superior landlord prior to these proceedings about the quality or cost of the services they provided.

50. The Third and Fourth Respondents observed that requests for information to support expenditure had not been made to them and they had no knowledge of the dispute until these proceedings. During the proceedings, Mr Dowens awaited disclosure of the individual invoices for the superior landlords' expenditure, in order that he could consider whether each item of expenditure was for the benefit of the premises.

51. However, it is clear to the tribunal that none of the disputed charges have been demanded pursuant to Clause 3.3.2, which is a catch all provision allowing for the recovery of a proportion of outgoings in the nature of water and business rates for the estate (such outgoings in respect of the Common Parts are a service charge item in Schedule 2). Clause 3.3.2 is not relevant to the service charge provisions in the head lease.

52. Setting aside that misinterpretation aside, the tribunal has examined the Applicants' case to identify the substantive issues it raised for the tribunal. Issues concerning the burden of proof will rarely arise in proceedings before this tribunal, where the normal rules of pleading are observed, but the tribunal has considered both of these matters in the present case. The tribunal must consider whether the parties know the case which has has to meet and the tenant must provide a prima facie case of unreasonable cost or standard.

53. The Applicants' case was pleaded in the broadest terms, on the basis that the service charges overall were unreasonable, and was entirely silent as to any challenge to the proper apportionment to them of the estate costs. The issue of the method applied to apportioning estate charges to the residential development (and the variance in practices of the original and current superior landlord) did not arise until the hearing – it was never the subject correspondence, nor raised in a case management hearing or in any pleading. Mr Challenger argued that the Respondents bore responsibility for this, in that they had failed to provide substantiation for their costs until very late in the day, and that the tribunal should consider the issue of a proper proportion and find that it had not been shown by the superior landlords to be reasonable and payable.

54. The freeholders had not taken the same approach to apportionment of estate costs, but in the view of the tribunal that does not mean that either approach was wrong. Notably, the freeholders' produced evidence of their charges to the Applicants in around May 2013 for a previously listed hearing. The Applicants have been represented by solicitors throughout and the tribunal considers that they could reasonably have been expected to raise questions as to the methodology for incurring and allocating charges. The Applicant complained that the manner of apportionment was unclear, and this was indeed so at the start of the hearing until the tribunal had the opportunity to clarify the matter with the Respondents. However, had the question of methodology and apportionment been raised prior to the hearing and in accordance with the directions, the tribunal has no doubt that the Respondents could have addressed it, and specific directions of the tribunal could have been sought if necessary.

55. Mr Challenger observed that the Supreme Court in *Daejan Investments Limited (Appellant) v Benson and others* [2013] UKSC 14 had given consideration to the burden of proof in an application to this tribunal under s.20ZA for dispensation from the statutory consultation requirements in respect of major works. Lord Neuberger said at paragraphs 67 and 68:

"[W]hile the legal burden of proof would be, and would remain throughout, on the landlord, the factual burden of identifying some relevant prejudice that they would or might have suffered would be on the tenants.....

But, once the tenants have shown a credible case for prejudice, the LVT should look to the landlord to rebut it."

56. There is little mileage in criticising the Respondents' lack of preparedness to deal with the issue of apportionment (and a comparison between the approaches taken by the current and former superior landlord) since they could not have been aware from the pleadings that this would be raised at the hearing. In the present case,

the tribunal takes the view that the Applicants showed no credible case that the methodology of apportioning estate service charges was incorrect to place a burden on the Respondents to rebut it.

57. There was no evidence that the original superior landlord had misrepresented the likely contribution to its expenditure prior to Mr Dowens' purchase. The Applicants' lack of a particularised challenge had nothing to do with Mr Challenger's late appointment, given the amount of time over which papers had been exchanged before the original counsel was taken ill.

58. In any event, to the extent that the Applicants' pleaded case placed a legal burden of proof upon the superior landlords, in both cases 50% of the apportioned cost was applied to Schedule 4 (that total charge being reduced by 17.4% for the contributions in respect of the housing association flats to leave the resulting contributions for payment by the private leaseholders). In both cases this represented a very modest percentage of estate expenditure as referable to the Common Parts, the Structure and the Conducting Media. The tribunal would take a broad brush view of the matter. It is in the interests of the development that the shopping centre, including the structure and common arts, is well maintained and attractive and well run. This is a very secure residential development and there is a need to maintain its status as landmark development in the area. Having seen floor areas on inspection, and the plans, and having considered the range of services provided, the tribunal takes the view that the Third and Fourth Respondents have properly and reasonably apportioned to Schedule 4 any expenditure which is recoverable from the intermediate landlord under the head lease.

59. Concerning the items of expenditure challenged as unreasonable on the grounds of inadequate provision of services (notably grounds maintenance), the tribunal is satisfied that reasonable charges had been levied for the service that had been provided. The absence of specific complaints concerning these services was indicative of satisfaction with them and there was no evidence that the prices were not competitive. The disclosure and evidence of Ms de Courcy Rolls provided a useful illustration of the type of services likely to have been provided by the freeholders since construction, and was preferred to the limited observational evidence on behalf of the Applicants.

Insurance

60. The Applicants, similarly, failed to make a positive case on the challenge to insurance premiums. Rather, they suggested without evidence that they might be unreasonable and invited the tribunal using its experience to form a view. It was only at the hearing that a concession was made that the current freeholder's premiums were reasonable, and the case advanced that a comparison with the current freeholder's premiums showed that the former freeholder's premiums

were unreasonable. There was no other substance to the challenge and such an argument had not been pleaded. The tribunal does not consider that the Applicants put forward a credible factual case in relation to the insurance premiums which placed a burden on the superior landlords to meet.

61. The Respondents have not been on notice of the need to meet a more specific challenge to insurance with additional evidence. It has been open to the Applicants to seek directions from the tribunal as to documentation they sought (including insurance policies to enable them to obtain alternative quotations), but they did not do so. They were aware of the amounts recharged to them for insurance and so have been in a position to plead a case based on the reduction in insurance premiums.

62. In any event the tribunal on such analysis as was possible at the hearing observed that the two policies offered cover on different terms, and upon different valuations of the estate. Engineering insurance is included in the Third Respondent's policies only, and deductibles are different. The original freeholder's policy was for a completely new development, when assumptions about claims history and risk have to be made. It is therefore far from clear that a properly pleaded case comparing the two landlords' premiums would have resulted in a finding for the Applicants, and the figures do not speak for themselves.

Application under s.20C and refund of fees

63. The Third and Fourth Respondents indicated at the end of the hearing that they did not intend to recover their costs of the proceedings under the terms of the head lease, and in light of this the Applicant did not make an application under s.20C of the 1985 Act. Costs under that section in respect of the application against the Management Company and intermediate landlord had been the subject of the settlement agreement.

64. There was no application in respect of costs and fees.

Name: F Dickie **Date:** 10 March 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

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

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

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

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

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

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

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

Section 20B

(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

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

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

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

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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