9747

**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | : | **LON/00BH/LSC/2013/0560** |
| **Property** | : | **OAKS COURT, 224-228 CANN HALL ROAD, LEYTONSTONE, LONDON E11 3NF** |
| **Applicants** | : | **MR S LAWSON**<br>**MR N ALI**<br>**MISS M PARARAJAN**<br>**MR J IZDEBSKI** |
| **Representative** | : | **BOWLING & CO SOLICITORS** |
| **Respondent** | : | **BM SAMUELS FINANCE GROUP PLC** |
| **Representative** | : | **HURFORD SALVI CARR** |
| **Type of Application** | : | **For the determination of the reasonableness of and the liability to pay a service charge** |
| **Tribunal Members** | : | **MS L SMITH (LEGAL CHAIR)**<br>**MR A LEWICKI, FRICS MBEng**<br>**MRS L WEST** |
| **Date and venue of Hearing** | : | **10 Alfred Place, London WC1E 7LR**<br>**16 January 2014** |
| **Date of Decision** | : | **17 February 2014** |

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**DECISION**

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## Decisions of the tribunal

**(1) The tribunal determines that the service charge is only payable in relation to actual expenditure which arises in the service charge year in question and not for estimated future expenditure.**

**(2) The Tribunal determines that the agreement between BMS and HSC ("the Agreement") is not a Qualifying Long Term Agreement and is not therefore subject to s20 LTA 1985 consultation procedures.**

**(3) The Tribunal determines that the amount payable in respect of disputed service charges for 2009 is £60 for the accountant's fee, £1093.13 for repairs and maintenance and £68.75 plus VAT per flat for management fees (to be calculated once the variation issue is resolved).**

**(4) The Tribunal determines that the amount payable in respect of the disputed items for the service charge year 2010 is £325 for the accountants' fee (payable in 2011), £6027 for repairs and maintenance, £292.58 for heating and lighting (£59 payable in 2011), £36 for sundry expenses, £2140 for insurance and £275 + VAT per unit for management fees.**

**(5) The Tribunal determines that the amount payable in respect of disputed items for the service charge year 2012 is £575 for accountants' fees (payable in 2013), £236.40 for repairs and maintenance, £418 for heating and lighting (£191 payable in 2013), £20 for sundry expenses, cleaning charges of £360, gardening charges of £120 and insurance of £2296 as well as management fees of £275 + VAT per unit.**

**(6) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985**

## The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 2009, 2010 and 2012. Although the application as made included the service charge year 2013, that was not pursued at the hearing due to lack of information concerning the service charge for that year. The application as made also included the service charge year 2011 but that also was not pursued by the Applicants as there had already been a determination in that regard on application by the Landlord

(LON/00BH/LSC/2012/0471) which also included an application for variation of the Lease.

2. The relevant legal provisions are set out in Appendix 1 to this decision.

## The hearing

3. The Applicants were represented by Mr Grundy of Counsel at the hearing and the Respondent was represented by Mr Thornton, Director of Hurford Salvi Carr ("HSC"), the Respondent's managing agent. Mr Izdebski and Mr Lawson also attended on behalf of the Applicants.

4. The Tribunal was provided by the Applicants with a lever arch file of documents and a case summary from Mr Grundy for the Applicants. Two bundles were provided separately by the Respondent. Those largely replicated the Applicants' bundle.

## The background

5. The property which is the subject of this application ("the Property") is a house which was originally converted into 9 flats. Eight of the flats were sold off by the freeholder (Miss Grant) on long leases. Miss Grant granted a long lease of flat 9 to her husband which he subsequently converted to create 3 residential units which were rented out. Miss Grant also apparently erected a rear ground floor, single storey extension, possibly without planning consent (unit 10).

6. In its decision of 30 April 2013, the Tribunal decided that the Leases of the original 8 flats should be varied so that the contributions were varied from one-eighth to one-tenth. The Deed of Variation included with the documents before the Tribunal showed a variation to one-ninth and not one-tenth and also included provision for the payment days to be altered. This Deed had not been agreed or registered. The Applicants sought in their case summary to have the date of the variation decided by this Tribunal; in effect to have the variation backdated. The Tribunal indicated at the outset that it was not prepared to deal with this in the absence of a formal application. Accordingly, if the parties are unable to agree terms for the variation, there will need to be a further application to deal with this issue.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. The Applicants hold long leases of the Property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge ("the Lease"). The example of the Lease included in the bundles before the Tribunal was that of Mr

Lawson (Flat 4). Mr Grundy confirmed that the other leases were in the same form in all relevant regards. The specific provisions of the Lease are set out in Appendix 2 and are referred to below, where appropriate.

9. At the outset Mr Grundy explained the background to the involvement of BMS, the Respondent to this application. The Grants when they owned the Property had done little to the Property except to convert it and sell off the various flats. Around 2009, the Grants had disappeared and BMS became mortgagees in possession and appointed HSC, it appeared in August/September 2009 to manage the Property (see p206 of the Applicant's bundle).

## The issues

10. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the service charge is payable under the Lease only for sums actually expended in the service charge year or may include an estimate of sums to be expended in the following year.

    (ii) Whether the management costs were incurred pursuant to a Qualifying Long Term Agreement ("QLTA") and whether there had been relevant consultation in that regard.

    (iii) The payability and/or reasonableness of service charges for the years 2009, 2010 and 2012 relating to management fees, repairs and maintenance, insurance, accountants' fees, sundry expenses, cleaning, gardening and heating and lighting. Although the Applicants had made a separate application in relation to administration charges, it was agreed that what the parties referred to as administration charges were in reality service charges in relation to administration and therefore fell to be considered as service charges.

    (iv) Whether there had been compliance with s20 Landlord and Tenant Act 1985 in relation to works which exceeded the statutory maximum.

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

## Service charge payments: actual or estimated expenditure

12. The Applicants challenge a number of items for all years in question on the basis that the Lease does not allow the landlord to recover for expenditure estimated for that year but only for sums actually expended.

## The tribunal's decision

**13.** The tribunal determines that the service charge is only payable in relation to actual expenditure which arises in the service charge year in question and not for estimated future expenditure.

## Reasons for the Tribunal's decision

14. Mr Grundy referred the Tribunal to the mechanism in the Lease for payment of the service charge. The Lessee covenants to pay the service charge in accordance with the Fourth Schedule of the Lease. The Fourth Schedule provides for payment on account based on the previous year service charges and a balancing payment on the preparation of the final accounts for the relevant year. The payment date (paragraph 4) is 25th December in each year. Mr Grundy submitted that what the Lease provisions singularly failed to do was to provide for payments in advance of expenditure. "Expenditure on Services" is expressly defined as being the "expenditure of the Landlord in complying with his obligations as set out in the Sixth Schedule including interest paid on any money borrowed for that purpose." This meant that some items included in the various service charge years would not be due until the following year.

15. In response to this submission, Mr Thornton referred to Schedule 6 of the Lease which provided that the Lessor would perform its obligations in that schedule "subject to reimbursement". He referred further to Hill and Redman (para 3-823) that clear words would be required to avoid the requirement for service charges to be paid before a landlord's obligations would kick in. This was said to be a reference to the case of Yorkbrook Investments Ltd v Batten.

16. In the Tribunal's view the Yorkbrook case does not assist the Respondent at all. The case itself concerned whether the landlord could avoid carrying out its obligations on the basis that service charges had not been paid in circumstances where, as in the present case, the obligations placed on the landlord were expressed to be performed "subject to reimbursement". That is a very different issue to whether a landlord is entitled to recover the service charge as an estimate of future expenditure or only once money has been expended. Indeed, in Yorkbrook, the clause for payment of the service charges included (unlike in this case) express provision for recovery of future expenditure on the basis of an estimate. Furthermore, the Court of Appeal held in Yorkbrook that the words "subject to reimbursement" were not sufficient to allow the landlord to avoid carrying out its

obligations until the service charges were paid (if this is indeed what Mr Thornton was seeking to rely on).

17. Mr Thornton also referred to paragraph 1(4)(b) of the Fourth Schedule in relation to apportionment. This did not appear to have any relevance as this concerned apportionment on grant of the Lease. Mr Thornton then referred to accounting practices and to guidance from the Institute of Chartered Accountants of England and Wales which expects auditors to work on an accruals basis. He submitted that it would be difficult for an auditor drawing up the accounts on an accruals basis to then calculate the service charge on an actual cost basis. In the view of the Tribunal, the fact that this may cause an auditor additional work (for which the Applicants will bear responsibility to pay) is not a reason to depart from the clear words in the Lease. It may be that if further discussions are to be had in relation to variation of the Lease, this provision should also be discussed but the wording of the Lease as it stands is clear. Mr Thornton also submitted that if the accounts were not prepared on an accrual basis then pre-payments would have to be permitted. This may be a consequence of the Applicants' argument but, again, that is no reason to depart from the clear intention of the provision.

18. The Tribunal therefore agrees with the Applicants that the service charge is only payable in relation to actual expenditure which arises in the service charge year in question and not for estimated future expenditure. This has little actual effect on the items in dispute in this case (subject to other issues of reasonableness) as all will now be payable in the future years.

**Whether the agreement between BMS and HSC in relation to management is a Qualifying Long-Term Agreeement ("QLTA")and therefore within the consultation requirements of s20 LTA 1985**

19. The Agreement between BMS and HSC ("the Agreement") is dated September 2009 (although HSC appear to have been appointed in August) and is expressed to be for a term of 3 months from 1st September 2009 with a provision for notice to terminate thereafter of 3 months on the basis of a fee of £275 per unit per annum plus VAT. A setting up fee of £1000 is said to be payable in the event of the appointment being terminated by BMS within 2 years from commencement of the Agreement. The Applicants argue that this is an agreement for a fixed term exceeding 12 months and therefore subject to s20 LTA 1985. It was common ground that no consultation had taken place in relation to the Agreement and therefore if the Applicants were right, the Respondent would only be able to recover £100 per unit by way of service charge.

**The Tribunal's decision**

20. The Tribunal determines that the Agreement is not a QLTA and is not therefore subject to s20 LTA 1985 consultation procedures.

## Reasons for the Tribunal's decision

21. Mr Grundy's argument was essentially as set out at paragraph 19 above. Although the Agreement was expressed to be for an initial term of 3 months it was not a fixed term agreement but a rolling one and provided for a payment if the Agreement were terminated within 2 years. It was therefore for a term of more than 12 months, he argued.

22. Mr Thornton submitted that the provision for a setting up fee to be payable in the event of termination within 2 years did not mean that the Agreement was for a fixed term for any longer than it indicated that it was on its face ie 3 months. The £1000 setting up fee was in lieu of payment of that cost which would otherwise have been payable when HSC was appointed and to reflect that cost being passed on if in fact HSC were not retained as managing agent beyond the 3 month period.

23. In the end, the issue is one of interpretation of the Agreement. The Tribunal agrees with Mr Thornton that the Agreement is expressed to be for 3 months and the fact that the setting up costs are in effect deferred to be paid in the event of the Agreement being terminated within a 2 year period does not turn the Agreement into one for 2 years. Accordingly, in the Tribunal's view the Agreement is not a QLTA.

## Service charge year 2009

24. The Applicants challenge the accountants' fee of £60, management fees of £1186, repairs and maintenance of £1093.13 totalling £2339.13. A challenge to the insurance premium for that year of £1093 was not pursued as that issue had been decided by the previous Tribunal decision.

## The Tribunal's decision

25. The Tribunal determines that the amount payable in respect of the accountant's fee for 2009 is £60, for repairs and maintenance is £1093.13 and for management fees is £68.75 + VAT per flat (to be calculated once the variation issue is resolved).

## Reasons for the Tribunal's decision

26. The accountant's fee was subject only to a challenge on the basis that it was not incurred during the year as an invoice had been produced with the 2010 service charge documents. As the service charge for 2010 is

now overdue, the Tribunal therefore finds that this is payable and reasonable.

27. In relation to the management fees, Mr Grundy pointed out that this related only to the period from August to December 2009 (on the basis that HSC had been appointed in around August 2009 and that the Applicants' arguments had been accepted in relation to actual expenditure only being payable. The amount claimed for four months was equivalent to £355.80 if based on 1/10th contributions (as per the previous Tribunal decision) or £444.75 if based on 1/8th. No comparables were provided by the Applicants nor was any alternative figure proposed save for the statutory limit of £100 per tenant per annum if the issue relating to LTQA were resolved in the Applicants' favour. Since the Tribunal has decided that issue in the Respondent's favour that does not arise.

28. Mr Thornton pointed out that it would not be usual to charge percentages for management of residential units as managing agents were often then accused of inflating repair costs to recover more fees. His client was a mortgagee in possession (although the freehold has now apparently been sold). BMS was not unreasonable and he was not an unreasonable managing agent. He was well aware of the difficulties in this Property due to the neglect over the years and the difficult provisions of the Lease when compared to the reality on the ground. He had tried to persuade the tenants to set up a RTM company but they were not interested. He had tried very hard to find a way forward so that the disrepair could be addressed. What was a reasonable management charge depended on the circumstances of the case. In this case, he had faced a number of people not paying their service charges, people chasing repairs and numerous queries.

29. Mr Thornton also referred the Tribunal to the previous Tribunal decision where the Tribunal had decided that £275 + VAT per flat was reasonable (this being the original management charge). The Tribunal agrees that this is a relevant matter to consider where, as here, neither party has provided any comparable evidence for the Tribunal to consider. The Tribunal therefore determines that a proportion of the £275 + VAT per flat is reasonable and payable for 2009. Since HSC appear to have been appointed in August 2009, the Tribunal considers that 3 months is payable for that year (since it has decided that only actual expenses can be reclaimed). Accordingly, the amount payable per unit is £68.75 + VAT. The total amount will depend on the outcome of any further agreement or decision in relation to variation.

30. The repairs and maintenance claimed are supported by 4 invoices - £446.25 for inspection of the Property, building surveyor expenses and a report on urgent maintenance and repair, £345 for a lease condition survey and lease review, £129.38 for preparing and issuing s20 notices and £172.50 for a condition report and lease review. The basis of the

Applicants' challenge was that these were not all in connection with repairs or maintenance and were rendered by a company with obvious connections with the managing agent (Hurford Salvi Carr Building Surveyors).

31. Mr Thornton referred to the RICS code. He is a property manager. The Property is not a standard building. It is in part a dangerous structure. There is evidence of dry rot in part of the building. He would therefore seek the expert input of a surveyor. The Applicants did not dispute that the landlord was able to engage a surveyor and seek repayment within the service charge provision.

32. Whilst the Tribunal agrees that some of the items might more properly be termed as charges for management or administration (eg the lease review), the invoices show that a surveyor was engaged and some of the work carried out by that surveyor in the form of an inspection and condition report are included in the bundles. The total amount of £1093.13 is not unreasonable for the work covered.

**Service charge year 2010**

33. The Applicants challenge the accountants' fee of £325, management fees of £2908, repairs and maintenance of £6027, heating and lighting costs of £417, sundry expenses of £36 and insurance of £2140 totalling £11853.

**The Tribunal's decision**

34. The Tribunal determines that the amount payable in respect of the service charge year 2010 is £325 for the accountants' fee (payable in 2011), £6027 for repairs and maintenance, £292.58 for heating and lighting (£59 payable in 2011), £36 for sundry expenses, £2140 for insurance and £275 + VAT per unit for management fees.

**Reasons for the Tribunal's decision**

35. The Applicants did not dispute that the Respondent was entitled to recover the costs of an accountant. The challenge related to whether the Respondent could charge the costs on an accrual basis. The Tribunal has decided that the Respondent can only claim for actual charges during the service charge year. However, the service charge for 2011 is now overdue and therefore the amount of £325 is reasonable and payable.

36. The management fees of £2908 equate to £290.80 per flat if based on 1/10$^{th}$ and £363.50 if based on 1/8$^{th}$. As discussed in paragraphs 27-29 above and for the reasons set out there, the Tribunal considers that £275 + VAT per unit is reasonable and payable.

37. The charge for repairs and maintenance exceeds £250 per flat. Mr Grundy asserted that there was no s20 consultation procedure and accordingly the Respondent could only recover £250 per flat.

38. It appeared though on closer inspection of the general ledger for 2010 in the bundle that £4616.70 related to surveyors' fees in part for work leading up to the s20 consultation procedure and in part for the s20 procedure itself. Mr Grundy accepted that if this was so and assuming that those costs related to the s20 consultation procedure carried out in 2010 (which it appeared to the Tribunal that they did), then they could not be disputed on this basis.

39. Mr Grundy did continue to dispute the reasonableness of those charges based in large part on the fact that BMS had not in fact gone on to do any of the works within some 4 years later. He accepted that the remainder of the charges (£1385.45) was not subject to s20 and subject to reasonableness of quantum those charges were not disputed.

40. Invoices for all the charges were included in the bundle. Individually, the amounts appeared to the Tribunal to be reasonable. The largest single item apart from the major works was supply of a rear door and disposal of rubbish. All items claimed fell within the provisions of the landlord's obligations in the Lease. Accordingly, the Tribunal decides that the amount claimed for repairs and maintenance is reasonable and payable.

41. In relation to the major works, given the difficulties which the Respondent has faced in managing the Property and seeking to collect money to continue to manage the Property, it is scarcely surprising that it has not carried out works beyond those which were essential in order to deal with any imminent dangers.

42. Heating and lighting was claimed in the sum of £417. An invoice was produced for electricity in the sum of £184.23. A further £59 is claimed as an accrual. A further invoice appears in the bundle for £49.35 for electrical maintenance. Although the £59 is an accrual the 2011 service charge is now overdue and accordingly the figure of £292.58 is considered reasonable based on the invoices produced.

43. Sundry expenses were claimed in the sum of £36. The Applicants dispute that sum as payable on the basis that it relates to checking Land Registry ownership and liability. Mr Thornton explained that this related to the s20 consultation procedure to ensure that ownership had not changed and was recoverable under paragraph 14 of the Sixth Schedule. The Tribunal agrees that this is payable and is reasonably incurred.

44. The Applicants' challenge to the insurance premium was based on the inclusion of insurance against terrorist risk (the earlier challenge to the insurance premiums having been decided against the Applicants in the previous Tribunal application). The Applicants argued that there was no requirement for the Respondent to insure against terrorist risk and it was not proportionate and reasonable for it to do so. The Tribunal expressed the view at the hearing that it is quite usual nowadays for landlords to insure against terrorist risks and that it is advised by professional organisations. Paragraph 10(c)(ii) permits the landlord to insure against such other risks which the landlord "reasonably deems it prudent to insure". Accordingly, the Tribunal considers that the insurance premiums claimed are reasonable and payable.

45. For 2010, the Applicants also challenged the sums of £150 and £562.50 which were included within repairs and maintenance and which related to insurance inspection and valuation. Mr Thornton explained that this was the first valuation carried out after HSC took over management. The invoices were provided and whilst those were probably more appropriately included as insurance items rather than repairs and maintenance in the accounts, the Tribunal considers that they are reasonable and payable.

**Service charge year 2012**

46. The Applicants challenge the accountants' fee of £575, management fees of £3151, repairs and maintenance of £326, heating and lighting costs of £418, sundry expenses of £20, cleaning charges of £360, gardening charges of £120 and insurance of £2296 totalling £7266.

**The Tribunal's decision**

47. The Tribunal determines that the amount payable in respect of the service charge year 2012 is £575 for accountants' fees (payable in 2013), £236.40 for repairs and maintenance, £418 for heating and lighting (£191 payable in 2013), £20 for sundry expenses, cleaning charges of £360, gardening charges of £120 and insurance of £2296 as well as management fees of £275 + VAT per unit.

**Reasons for the Tribunal's decision**

48. The Applicants did not dispute that the Respondent was entitled to recover the costs of an accountant. The challenge related to whether the Respondent could charge the costs on an accrual basis. The Tribunal has decided that the Respondent can only claim for actual charges during the service charge year. However, the service charge for 2012 is now overdue. The Applicants also challenged the amount claimed on the basis that there was no invoice to support it. There are however 3 invoices in the bundle dated in 2012 which in fact support a higher

figure of £745. The Tribunal therefore considers that the amount claimed of £575 is reasonable.

49. The management fees of £3151 equate to £315.10 per flat if based on 1/10th and £393.87 if based on 1/8th. As discussed in paragraphs 27-29 above and for the reasons set out there, the Tribunal considers that £275 + VAT per unit is reasonable and payable.

50. The repairs and maintenance charge is made up of £168 for pest control in relation to the rear studio flat, and 2 amounts of £41.40 and £27 which do not appear to be evidenced by invoices but relate to electrical maintenance and repairs (and probably should fall under heating and lighting); the amounts do not appear to be unreasonable and the work is shown on the 2012 ledger as occurring during the 2012 year. Mr Grundy made no submissions in relation to the amounts, focussing only on the lack of documents. The Tribunal considers that the work carried out falls within the landlord's obligations in the Lease and the amounts are reasonable.

51. In relation to heating and lighting the charge is made up of £227 and an accrual of £191 which the Applicants dispute as before on the basis it is not an actual charge. Although Mr Grundy's summary of case disputed the £227 on the basis that the invoice had not been seen, the Applicants accepted this figure in their schedule. As the £191 was disputed only on the basis that it was an accrual and since the 2013 service charges are now overdue the Tribunal accepts that this is reasonable and payable.

52. Sundry expenses of £20 were disputed on the basis that as they were for Land Registry searches they were not payable under the Lease. For the reasons stated in paragraph 43 above, the Tribunal considers that these are reasonable and payable.

53. The cleaning and gardening costs were dealt with in evidence from Mr Izdebski at the outset of the hearing as he needed to leave part way through the hearing. Mr Izdebski has been a lessee since September 2007 and therefore before BMS took over the Property. He is still a lessee and is one of the lessees who actually lives at the Property. He was taken in evidence to the invoices for 2012 covering cleaning and gardening. These showed a charge for cleaning internally of £100 per month and a separate charge of £100 per month for gardening and external cleaning.

54. Mr Izdebski accepted in evidence that he had seen someone come in twice per month in October and November 2011 but said he had not seen anyone come in during December 2011, January or February 2012. He said when the cleaning was done it was just the ground floor corridor and not the first and second floors – this would not take longer than 1 hour on each occasion. However, he did then seem to accept that if the first and second floors were cleaned then cleaning could take up

to 2 hours. His opinion was based on the fact that he had done the cleaning before BMS were involved when the Grants were still freeholders.

55. In relation to gardening, Mr Izdebski pointed out that most of the external area was given over to parking spaces – each of the 8 flats has its own space – so that the grassed area was minimal. He appeared to accept that someone had visited in January and February 2012 (and it was not in fact clear if he accepted that the same person might then have done the internal cleaning on the same occasion).

56. In response to Mr Izdebski's evidence (which was not supported by any formal witness statement provided to the Respondent in advance), Mr Thornton pointed out that the gardener did not just do gardening – the time was spent mainly clearing rubbish. The firm concerned was not just a "man with a van" from round the corner but a properly insured firm which carried out internal and external cleaning. HSC used a list of contractors to carry out the work and were constrained in relation to this and other work to the Property to use contractors who were willing to wait for payment bearing in mind the difficulties in obtaining payment of service charges. Mr Thornton pointed out that £100 was based on an hourly rate of £25 which equated to only 4 hours per month for each of the internal and external cleaning services.

57. The Tribunal considers that the amounts claimed for cleaning and gardening totalling £480 are reasonable and payable.

58. For the reasons stated at paragraph 44 above, the Tribunal considers that the insurance premium is reasonable and payable.

## Application under s.20C and refund of fees

59. At the end of the hearing, the Applicants made an application for a refund of the fees that they had paid in respect of the application and hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondent to refund any fees paid by the Applicants. Although the Applicants succeeded in their argument relating to the way in which service charges are to be billed and paid, the Tribunal has decided the majority of the other disputed items in the Respondent's favour. The success in restricting the service charge to actual expenditure is also something of a pyrrhic victory as, if anything, the lack of income based on estimated expenditure will lead to even more reticence by the new landlord to carry out works to the detriment of the state of the Property.

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

60. In the application form, the statement of case and at the hearing, the Applicants applied for an order under section 20C of the 1985 Act. Mr Thornton urged the Tribunal not to make the order sought. He asked the Tribunal to send the message to the lessees of the Property that they needed to sort out the Property, not spend time disputing the service charge. He submitted that some of the lessees saw the Tribunal as a way of getting a reduction or delay in payment of their service charge and, in effect, that the Tribunal should be dissuading the lessees from coming to the Tribunal by imposing a liability on them as to costs. Mr Thornton indicated that his costs were about £3000. He also submitted that the Respondent would be entitled to charge back the costs as part of his management fee. Mr Grundy submitted that the order which the Tribunal made should depend on the outcome of the application. If the Tribunal was minded to allow the Respondent its costs, he submitted these should be marked down significantly.

61. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal refuses to make an order under section 20C of the 1985 Act, so that the Respondent may pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge insofar as those costs are payable and reasonable. Insofar as payability is concerned, the Tribunal agrees with the previous Tribunal decision that there is no provision allowing recovery of the costs of legal proceedings, certainly as an administration charge. If the Respondent seeks to recover the costs via the service charge, the payability and reasonableness of those costs will fall to be determined by another Tribunal in the event that this cannot be agreed and so the Tribunal expresses no view.

**Name:** Ms L Smith **Date:** 17 February 2014

## APPENDIX 1

## Appendix of relevant legislation

### Landlord and Tenant Act 1985

### 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 a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

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

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

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

## APPENDIX 2
## Relevant lease clauses

1. IN CONSIDERATION of .....now paid by the Tenant to the Landlord.... the Landlord HEREBY DEMISES unto the Tenant ALL THAT property first described in the First Schedule hereto ("the flat") .....
YIELDING AND PAYING THEREFOR.....
AND YIELDING AND PAYING by way of further rent such sums of service charge as are payable in accordance with the Fourth Schedule hereto

2. THE TENANT COVENANTS with the Landlord as follows:-
(i) To pay the rent hereby reserved on the days and in the manner aforesaid without any deductions whatsoever and without exercising any right of set off
.....
(vii) To pay all costs (including Solicitors' costs and Surveyors' fees) incurred by the Landlord of and incidental to the preparation and service of:-
(a) A notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by order of the Court
.....

4. The Landlord covenants with the Tenant as follows:-
....
(2) That so long as the Tenant shall not be in arrear in payment of the rent secondly hereinbefore reserved as set out in the Fourth Schedule hereto the Landlord will observe and perform the covenants set out in the Sixth Schedule hereto

THE FIRST SCHEDULE above referred to
THE DEMISED PREMISES
ALL THAT residential flat forming part and situate on the first floor of the Property and known as Flat 4 Oaks Court 226-228 Cann Hall Road Leytonstone London E11 as the same is delineated on the plan numbered 1 annexed hereto and thereon edged red TOGETHER WITH the car parking space area as the same is delineated on the plan numbered 2 annexed hereto thereon edged red PROVIDED THAT this demise includes the ceilings and floor within the said flat (but not the structure supporting the same) and excludes the roof and foundations of the property and the boundary walls of the flat whether or not external walls of the property (except the interior surfaces (including plasterwork) the glass in the windows and the doors herein)

THE FOURTH SCHEDULE above referred to
SERVICE CHARGE
1. In this Schedule:-
(1) "Expenditure on Services" means the expenditure of the Landlord in complying with his obligations as set out in the Sixth Schedule including interest paid on any money borrowed for that purpose
(2) "Service Charge" means one eighth part of the expenditure on services
(3) "Interim Service Charge Instalment" means a payment on account of Service Charge of one hundred and fifty pounds (£150) per annum until

service of the first Service Charge Statement and thereafter of one eighth of the Service Charge shown on the Service Charge Statement last served on the Tenant
(4) "Service Charge Statement" means an itemised statement of:-
(a) The expenditure on services for a year (or on the first occasion a shorter period) ending on the Twenty-fifth day of December
(b) The amount of the Service Charge due in respect thereof (any apportionment necessary at the beginning or end of the term hereby granted shall be made on the assumption that the expenditure on services is incurred at a constant daily rate) and
(c) Sums to be credited against that Service Charge being the Interim Service Charge Instalments paid by the Tenant for that year or period and any Service Charge excess from the previous year or period accompanied by a certificate that in the opinion of the Accountant preparing it the statement is a fair summary on the expenditure on services set out in a way which shows how it is or will be reflected in the Service Charge and if sufficiently supported by accounts receipts and other documents that have been produced by him
(5) "Service Charge Deficit" means the amount by which the Service Charge shown on a Service Charge Statement exceeds any credit shown thereon
(6) "Service Charge Excess" means the amount by which any credit shown on a Service Charge Statement exceeds the Service Charge shown thereon.

2. The Landlord shall keep a detailed account of the expenditure on services and shall procure that a Service Charge Statement is prepared for every such year or period by an independent member of the Institute of Chartered Accountants in England and Wales to whom the Landlord shall furnish all accounts and vouchers and afford all facilities necessary for that purpose

3. The Landlord shall as soon as he receives each Service Charge Statement serve it on the Tenant by sending him a copy thereof

4. On the Twenty-fifth day of December in every year the Tenant shall pay to the Landlord an interim Service Charge Instalment

5. Forthwith upon service on him of a Service Charge Statement the Tenant shall pay to the Landlord any service charge deficit shown thereon

6. Forthwith upon receipt of the final Service Charge Statement for the term hereby granted (howsoever determined) the Landlord shall pay to the Tenant any Service Charge excess shown thereon

7. Every Service Charge Statement shall be conclusive as to the information shown thereon

THE SIXTH SCHEDULE above referred to

LANDLORD'S OBLIGATIONS SUBJECT TO REIMBURSEMENT

1. To repair the Property (except such parts thereof as the Tenant covenants in this Lease to repair)

.....
5. Forthwith to make good all damage done to the flat or to the premises forming part of the Property demised by a Lease in like form to these presents in the course of fulfilling any of the obligations of the Landlord hereunder

6. To keep all parts of the Property used in common by the Tenants of more than one flat adequately cleaned and lighted

7. To keep the gardens of the Property neat tidy and adequately stocked with suitable flowers shrubs and trees

.....

10 (a) At all times to keep the Property insured to the full cost of reinstatement under a policy complying with the term of this paragraph
.....
(c) An insurance policy complies with the terms of this paragraph if:=
.....
(ii) It provides cover against loss or damage by any of the following risks ("insured risks") to the extent that such cover is for the time being available for buildings of the type insured:-
Fire lightning explosion earthquake landslip subsidence riot civil commotion aircraft aerial devices storm flood impact by vehicles and damage by malicious persons and vandals
Together with such other risks against which the Landlord shall from time to time reasonably deem it prudent to insure
.....

14. In the management of the Property and performance of the obligations of the Landlord hereunder to employ or retain the services of any employee agent consultant contractor engineer and professional advisor that the Landlord may reasonably require