9951

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2013/0636**
Property	:	**Flats 1, 2, 3 and 4, 2 Gilbert Street, London W1K 5HA**
Applicant	:	**Gilbert Reversions Limited**
Representative	:	**Stevensons Solicitors**
Second Applicant		**Conegate Limited**
Representative		**Stephenson Harwood LLP**
Respondents	:	**Burron Limited** **Mr Demosthenis Chrysanthou** **Watch Guru Limited** **Bankway Properties Limited**
Representative	:	**Gurney-Champion & Co.**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge F Dickie** **Mr F Coffey, FRICS**
Date and venue of Hearing	:	**24 and 25 March 2014, 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 June 2014**

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DECISION

Decisions of the tribunal

The tribunal determines that the following deductions only should be made on the service charge expenditure in dispute as set out on the relevant accounts:

> 25% reduction on Gilbert's expenditure on cleaning, entry phone maintenance contract and lift maintenance contract.
>
> 100% reduction on Gilbert's management charge.
>
> 25% reduction on Conegate's expenditure on internal cleaning.
>
> Reduction to £100 per flat per annum of Conegate's management charges (excluding M&E contract management).

The following sums in the application have been agreed:

> 2010/11 - £1867.06 (cost of insurance incurred by Conegate)
>
> 2011/12 - £1079.51 (cost of insurance incurred by Conegate)
>
> 2012/13 - £23,651.92 (estimated service charge costs incurred by Conegate)
>
> 2012/13 - £8,877.20 (estimated service charge costs incurred by Gilbert).

The application

1. The application relates to four flats on the third and fourth floors of 399, 401, 403, 405 Oxford Street and 1 and 2 Binney Street, London W1K 5HA ("the premises"). The freeholder of the building within which the premises are located is Grosvenor (Mayfair) Estate, the grantor of a head lease of the premises (together with other property) dated May 2 1953. The Second Applicant Conegate Limited ("Conegate") is the current holder of the head leasehold interest.

2. An underlease of the four flats in the premises and certain common parts was granted on 30 October 2002 and the original underlessee granted sub underleases of the four individual flats that are now held by the Respondents. Having purchased the underlease in 2005, the First Applicant ("Gilbert") is the immediate landlord of the

Respondents, and Conegate is Gilbert's immediate landlord. Gilbert 's managing agent since 2007 has been RFM Ltd, and Conegate's is Wakefield Cushman.

3. Each Respondent pays a service charge to Gilbert, but the majority of the service charge costs are incurred by Conegate, which invoices Gilbert for the gross cost pursuant to the terms of the underlease. No service charges are payable to the freeholder under the head lease. By this application, Gilbert seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the Respondents in respect of the service charge costs incurred by Gilbert and Conegate as set out in the next paragraph. The relevant legal provisions are set out in the Appendix to this decision.

4. Service Charges the subject of this application

   2009/10

   £6,384.29 (Gilbert)

   2010/11

   £24,973.91 (Conegate)

   £6,782.76 (Gilbert)

   2011/12

   £19,624.41 (Conegate)

   £7,182.98 (Gilbert)

5. The following sums in the application are not in dispute:

   2010/11 - £1867.06 (cost of insurance incurred by Conegate)

   2011/12 - £1079.51 (cost of insurance incurred by Conegate)

   2012/13 - £23,651.92 (estimated service charge costs incurred by Conegate)

   2012/13 - £8,877.20 (estimated service charge costs incurred by Gilbert).

6. The application originally brought by Gilbert as Applicant therefore relates in part to the Respondents' liability to pay Gilbert relevant costs incurred by Conegate (payable by Gilbert to Conegate and recoverable through the service charge payable by the Respondents to Gilbert).

7. A Case Management Hearing took place on 22 October 2013, at which the tribunal ordered Conegate to be added as Second Applicant to the proceedings to enable to the Respondents effectively to challenge any costs incurred by that company. Solicitors for Conegate corresponded with the tribunal concerning the lease structure in advance of a second Case Management Hearing held on 19 November 2013. At that hearing directions were issued to all parties, including for the service of statements of case, and the full hearing of the application was listed for 24 and 25 March 2014.

8. The parties served statements of case. Conegate's, dated 21 January 2014 set out the structure of the leases but did not refer to the substance of the dispute, except to say that "The Second Applicant therefore respectfully asks this honourable Tribunal to grant the First Applicant's application."

9. There had been previous proceedings in the Leasehold Valuation Tribunal (case ref. LON/00BK/LSC/2010/0299) between Conegate and Gilbert concerning the service charges payable as between them (none of which are the subject of the present proceedings). The Respondents had been interested parties in those proceedings and were represented at the two day hearing. The reasonable service charges were agreed between the parties and the tribunal's decision on various contested issued of law regarding recoverability is dated 24 January 2011.

<u>The hearing</u>

10. Gilbert was represented by Mr J Upton of counsel and the Respondents by Ms A Caferkey of counsel. There was no appearance on behalf of Conegate on the first day of the hearing. There was correspondence from those acting for Gilbert to Conegate's solicitors overnight (when Mr Upton's skeleton argument was served on them) and Mr P Taylor, Partner in Cushman and Wakefield, appeared on behalf of Conegate on the second day of the hearing only. Mr Taylor said he had been notified of the hearing by solicitors for Conegate at 7pm the evening before. Mr Upton objected to Mr Taylor giving any evidence, and the tribunal permitted his oral submissions only. The tribunal is satisfied that Conegate's solicitors were given notice of the hearing. There was no application on behalf of Conegate to adjourn.

<u>The inspection</u>

11. The tribunal inspected the premises and common parts on the morning of the second day of the hearing in the presence of the parties and their representatives. The premises are situated in a building sited on the corner of Gilbert Street, Oxford Street and Binney Street. They comprise four flats on two floors of this multi storey property evidently built around the 1960s as offices and subsequently converted in respect of the residential units. _he lower units on three floors are let as retail units together with ancillary storage. A residential lift serves only the 4 flats.

Service Charge Provisions in the leases

12. Both the underlease and the sub underlease contain covenants upon the respective tenant in clause 3.1 to *"Pay the Yearly Rent and the Additional Rent on the days and in the manner aforesaid"*. Additional Rent is defined in the underlease and sub-underlease as *"The sum of the Insurance and the Service Charge"*. The Service Charge, pursuant to clause 2.3, is to be calculated and payable as specified in Schedule 3 of the respective lease.

13. Schedule 3 of the underlease provides that the Service Charge *"shall be such yearly sum (and so in proportion for any part of a year) as shall represent the Service Charge Percentage of the costs and expenses properly incurred by the Landlord in accordance with the principles of good estate management...."*. The "Service Charge Percentage" is defined as *"the fair and reasonable proportion to be determined in accordance with the principles of good estate management."*

14. Schedule 3 of the sub-underlease provides that the Service Charge *"shall be such yearly sum (and so in proportion for any part of a year) as shall represent the Service Charge Percentage of the costs and expenses properly incurred by the Landlord and the Superior Landlord in accordance with the principles of good estate management..."*.

15. By Clause 1.1 the "Accounting Period" is from 25 December to 24 December each year and "Service Charge Percentage" means a fair and reasonable proportion to be determined in accordance with the principles of good estate management. In practice each Respondent pays 25% of expenditure and this proportion is not a matter in dispute.

16. The Tenant under the underlease has entered into covenants with the landlord in connection with the Superior Lease:

 Clause 5.4

 "To pay the rent reserved by the Immediately Superior Lease and all other sums payable under the Immediately Superior Lease "

Clause 5.5

"Subject of Clause 5.2 above and to the Tenant paying the Service Charge the Landlord covenants to comply with the repair and decoration obligations under the Immediately Superior Lease save so far as the as they are the responsibility of the Tenant hereunder".

17. The underlease and sub underleases contain almost identical covenants on the respective Landlord to provide services. In the underlease the landlord covenants at Clause 5.2:

"That the Landlord will use its reasonable endeavours in an efficient manner and in accordance with the principles of good estate management (unless prevented by any cause or event beyond its control) and subject to payment by the Tenant of the Service Charge to procure that the structure and exterior walls and roof and foundations of the Building are kept in reasonable repair and decorative condition (save in so far as they are the responsibility of the Tenant hereunder) and in addition to provide the services as detailed in Part B of the Third Schedule (which services are hereinafter referred to as the "Landlord's Services").

18. In the sub underlease the Landlord covenants at Clause 5.2:

"That the landlord will use its reasonable endeavours in an efficient manner and in accordance with the principles of good estate management (unless prevented by any cause or event beyond its control) and subject to payment by the Tenant of the Service Charge to procure that the structure and exterior walls and roof and foundations of the Building are kept in reasonable repair and decorative condition (save in so far as they are the responsibility of the Tenant hereunder) and that the additional services as detailed in Part B of Schedule 3 are provided (which services are collectively hereinafter referred to as the "Landlord's Services").

19. The Respondents are liable pursuant to Paragraph 2.4 of Schedule 3 of the sub underleases to pay in advance a provisional sum on account. Schedule 3 sets out the accounting and estimate obligations with which the Landlord must comply:

2.1 The landlord shall prepare and/or procure the preparation of:

"...as soon as practicable after the expiration of each Accounting Period a summarised account (the "Service Charge Account") of the total expenditure incurred or to be reserved by the Landlord and Superior Landlord pursuant to paragraph 1 for that Accounting Period (which shall in respect of the total expenditure incurred or to be

reserved by the Landlord be certified as fair by the surveyor or managing agents for the time being of the Landlord acting as experts and not as arbitrators and shall be conclusive if not challenged within four weeks of delivery and shall in respect of expenditure incurred or to be reserved by the Superior Landlord be certified as fair by the Surveyor or managing agents for the time being of the Superior Landlord acting as experts and not arbitrators and shall be conclusive unless challenged within four weeks of delivery.

2.1.2 shortly before the commencement of each Accounting Period (except the First Accounting Period) a reasonable estimate (the "Estimate") of the expenditure anticipated to be incurred for that Accounting Period pursuant to paragraph 1 including such information as is necessary for the Tenant to identify the estimated heads of expenditure

2.2 The Landlord shall submit to the Tenant a copy of each Service Charge Account and Estimate and a calculation of the Service Charge in respect of the Accounting Period to which the Service Charge Account relates and of the advance payments payable on account in respect of the Accounting Period to which the Estimate relates

2.4 Pending the ascertainment of the Service Charge for each Accounting Period the Tenant shall pay to the Landlord without deduction by equal quarterly payments in advance a provisional sum on account of the Service Charge which provisional sum during the First Accounting Period shall be at the annual rate off and thereafter shall be the Service Charge Percentage of the Estimate for the relevant Accounting Period

2.5 Within 5 days of receiving notification of the amount of the Service Charge for each Accounting Period the Tenant shall pay to the Landlord (or be allowed by the Landlord against future monies due to the Landlord as the case may be) the difference between the payments already made by the Tenant on account of the Service Charge in respect of such Accounting Period and the Service Charge for such period.

Background - Service Charge Estimates, Demands and Accounts

20. Mr A G Watkins, Managing Director of RFM Ltd., gave evidence as to the service of service charge demands and Gilbert's budgets on the Respondents. Copies of those demands and budgets were produced to the tribunal. Those demands had been for quarterly on account payments in respect of Gilbert's expenditure for each of the three years in dispute, and for Conegate's expenditure for the years 2010/11 and 2011/12 only (its expenditure for the year 2009/10 having been the subject of the previous LVT proceedings). The service charge budgets

for Gilbert's expenditure for the years in issue were said to have been served on 31 January 2010, 13 December 2010 and 16 January 2012.

21. Gilbert's separate demands to the Respondents in respect of Conegate expenditure were produced in evidence. Conegate had produced service charge budgets served on Gilbert, but there was no evidence that Gilbert had served such estimates on the Respondents. On 16 March 2012 Cushman and Wakefield served a service charge certificate on Gilbert for £26,370.00 in service charges for the year 10/11 (which equates to £6592.50 per flat).

22. Mr Wakefield explained that, though Conegate had provided Gilbert with service charge estimates, Gilbert did not pass those estimated costs onto the Respondents by way of a demand since it did not accept that Conegate's estimates were reasonable. Service Charge accounts in accordance with Clause 2.1 and Schedule 3 of the sub underleases for the years in question were prepared and served on the Respondents on around 23 May 2013. Copies of the accounts for the years 2009/10, 2010/11 and 2011/12 were produced to the tribunal.

23. Mr Wakefield said that Gilbert took time to deliberate the presentation of the accounts after the previous tribunal proceedings as to how the accounts should be set out, taking into account both Gilbert and Conegate expenditure, given that the lease requires both to be presented together even though Gilbert is not in control of the Conegate expenditure. Whilst Mr Wakefield conceded there had been a significant passage of time, he considered there had been no prejudice to the Respondents. Mr Watkins explained that Gilbert had difficulties serving an estimate for Conegate's costs when it did not consider it was in possession of the relevant information.

The Issues

Gilbert's Service Charge proportion

24. Ms Caferkey sought to challenge the proportion of service charges being demanded by Conegate from Gilbert as not shown to be a "fair and reasonable" proportion determined according to the principles of good estate management", pursuant to the definition in the underlease of the Service Charge Percentage. However, the Respondents' case amounted to no more than this - they put forward no positive case on the issue at all. In particular they produced no evidence or argument as to any iniquity and as to what approach to apportionment the tribunal should take as being fair and reasonable. A burden lies on the Respondents to have done so.

25. Mr Watkins in evidence referred to the four schedules in Conegate's service charge certificate, apportioning to Gilbert different percentages

of costs expended on the building. The residential premises were charged 85% of expenditure on Gilbert Street. Of the cleaning costs, 10% were attributed to the common parts of the premises for which Conegate was liable and the Respondents contributed, including the exterior. The costs for the heating and hot water, including maintenance and engineering, were allocated to those parts of the building which benefited from this service. Mr Taylor illustrated Conegate's apportionment by reference to the proportions in the breakdown in the service charge certificate, which contained a note on apportionment between four schedules – relating to (1) services that benefit the whole building, (2) services to Binney Street common areas, (3) those relating to Gilbert Street common areas and (4) those relating to the costs of Mechanical and Engineering services for the building.

26. The tribunal finds no grounds or evidence on which it could with any confidence interfere with the service charge apportionment according to the established basis. The Respondents have produced no evidence in support of an alternative approach. In any event, in the previous proceedings the tribunal determined reasonable service charges charged by Conegate, and implicit in this finding is one as to the reasonable apportionment. There was no evidence that such apportionment had changed. The apportionment of the estimated service charges for 2012/13 was not in dispute.

Have service charges been demanded in accordance with the terms of the underlease?

27. Counsel for the Respondents relied on clause 7.9 of the sub underlease which provides that "any notice required or authorised to be served shall be correctly served it if is sent by recorded delivery". However the tribunal rejects this point - the provision is not prescriptive as to the means of service of the demands.

28. Counsel further relied on the evidence of Mr. Bolt that he had not received a number of service charge demands, having hardly received anything relating to service charges until very recently. Counsel relied on the relative lack of evidence from Gilbert in support of service of service charge demands having been made. However, this issue had not been pleaded in the Respondents' statement of case. Gilbert's case as to service by first class post on or around the dates on the demands was not challenged in pleadings and the tribunal accepts it.

29. In any event, the tribunal did not find Mr Bolt's evidence sufficiently persuasive as to the point, and there was no evidence from any other witness. Mr Bolt said in oral evidence that he had not received any service charge demands (until around the time solicitors were instructed), which went further than what he said in his written statement. He did not handle all mail personally since he divided his time between his home at flat 3 and another in the country, and had a

personal assistant who works from the flat. He also said that the front door had been in disrepair for about four years (until about a year or more ago) and would not close. He suggested someone might have taken the service charge demands, though other mail had not gone missing.

30. Mr Watkins gave evidence that the service charge demands and estimates had been issued by first class post by staff, Mr Rodriquez being the property manager with day to day control.

31. The tribunal on balance was satisfied as to Gilbert's case as to service of the service charge demands and estimates and that, while it may be the case that all of these did not reach Mr Bolt, it is likely they were delivered to the building.

32. Ms Caferkey submitted that Gilbert had failed to comply with the provisions of Paragraphs 2.1.2, 2.2 and 2.4 of Schedule 3 to the sub underleases, which she construed as requiring the Service Charge Account for the Accounting Period, and the Estimate of anticipated expenditure (prepared pursuant to Paragraph 2.1.2 and including such information as is necessary for the Tenant to identify the estimated heads of expenditure) to be served before on account sums are demanded. She therefore contended that all the demands, when made, were not contractually valid.

33. The lease terms at paragraph 2.1.2 require the Landlord to produce a reasonable estimate of its own and the Superior Landlord's anticipated expenditure. In the present case Gilbert did not consider Conegate's budget to be reasonable. Regardless of whether that was so in the present case, if given an unreasonable estimate by the Superior Landlord or none at all, the Respondents' interpretation of the lease would present an obstacle to service charge recovery for the Landlord of the sub underlease. The tribunal does not consider the lease terms support that interpretation. It furthermore considers that the obligation to pay on account service charges cannot depend on producing an Estimate in compliance with an imprecise deadline such as "shortly before the commencement of each Accounting Period". There is no requirement in Paragraph 2.2 for the specified documentation to be served simultaneously and time is not of the essence under that provision. The only temporal requirement in Paragraph 2.4 is to pay quarterly and pending the ascertainment of the Service Charge.

34. The challenge to the validity of demands was made in the broadest terms in pleadings. In any event, the tribunal was persuaded by Mr Upton's oral submissions on the specific point advanced by Ms Caferkey for the first time in her skeleton argument. In contrast with Paragraph 2.5 of Schedule 3, which requires the Tenant to pay the balancing payment "within 5 days of receiving notification of the

amount of the Service Charge for each Accounting Period", the obligation on the Tenant to pay the on account payment was not expressed in Paragraph 2.4 as being contingent upon service of the Estimate and such information as is necessary for the Tenant to identify the estimated heads of expenditure.

35. Accordingly, the tribunal finds that Gilbert's service charge demands both for its own and for Conegate expenditure representing estimated expenditure were valid, whether or not the Estimate was served in accordance with Paragraph 2.2. The tribunal's interpretation, it notes, is consistent with Paragraph 3.3 of Schedule 3 which entitles the Landlord and the Superior Landlord to amend an Estimate at any time, in which event the amount payable by the Tenant is varied to take account of the amended Estimate. without there being any requirement for service of the Estimate and supporting information on the Tenant.

36. The tribunal's attention was drawn to the decision of the Court of Appeal in *Leonora Investment Company Limited v Mott MacDonald Limited* [2008] EWCA Civ 857, but does not accept Ms Caferkey's submission that it is very similar on the facts. Each lease must be interpreted on its own terms, and there are sufficient differences to make the decision in Leonora inapplicable in the subject case.

Section 20B

37. No service charge accounts or demands for actual expenditure were served in respect of the years in dispute until 23 May 2013. Specifically, the Respondents asserted that all service charges for 2009/10 (only Gilbert's in the sum of £6,384.29 being in dispute in these proceedings) and all or a proportion of them for 2010/11 (being Conegate's costs of £24,973.91 and Gilbert's costs of £6782.76), depending on when incurred, were irrecoverable by virtue of s.20B of the Act.

38. Ms Caferkey submitted that Conegate's costs were not payable as service charges by virtue of section 20B as they were incurred more than 18 months before the demands sent out on 23 May 2013. The tribunal was referred to the decision of the Court of Appeal in *Burr v OM Property Management Ltd.* [2013] EWCA Civ 479 and *Brent LBC v Shulen B Association Ltd.* [2011] 1 WLR 3014. Ms Caferkey argued that the costs were incurred by Gilbert when on account payments were demanded of them by Conegate.

39. Gilbert produced a witness statement from a Mr Darren Pither, its Director, who produced documentary evidence as to dates of payment of Conegate's service charge demands, and the witness was available in person to give evidence. As this evidence was late Ms Caferkey objected to its admission. The tribunal found no evidence of prejudice would be caused to the Respondents by the admission of this evidence, which

dealt with a factual matter of some importance to the legal arguments developed between the parties and spelled out in skeleton arguments. Mr Pither's evidence was admitted and he gave it orally on the second day of the hearing and he was not challenged as to the documents produced.

40. For the year 2010/11 the sum of £2,148.80 in estimated service charges for Gilbert's costs was demanded from each leaseholder in this year. Conegate's charges for this year are not in dispute. Since valid demands for on account payments were made which exceed the actual service charges, the tribunal finds pursuant to the decision in *Gilje v Charlgrove Securities Ltd. [2003] EWHC 1284 (Ch)* that section 20B of the Act is of no application since there was no demand for additional payment.

41. For the year 2010/11, the amount demanded on account was £9243.17, and exceeded the actual service charge expenditure. Again, the tribunal therefore concludes that s.20B is of no application.

42. The tribunal rejects Ms Caferkey's oral and subsequent written submissions that since the reality is that the sub-underlessees are being asked to pay stale charges it would make little sense for s.20B(1) not to apply in the circumstances of this case, in which demands for estimates had been made by Conegate of Gilbert and paid, and no accounts served until May 2013. The tribunal considers that *Gilje* is binding on the point in issue.

43. The tribunal has considered the position in the alternative, if no valid estimated demands from Gilbert were made – and in particular if no valid demands for Conegate's 2010/11 expenditure were made because of the failure to serve the Estimate on the Respondents. Mr Upton in oral submissions revised the position he had set out in his skeleton argument, in which he accepted that s.20B(1) was applicable to costs incurred before 22 December 2011 (unless notice was given pursuant to section 20B(2)), and that they were incurred on payment (relying on *Burr v OM Property Management Ltd.*).

44. The tribunal invited further written submissions from the parties as to whether, for purpose of [Schedule 3 Paragraph] 2.5 demands and s.20B, Conegate's costs were incurred (1) When Gilbert received the service charge certificate; (2) When the estimated costs were demanded of Gilbert; (3) When the estimated costs were paid by Gilbert or (4) When the Conegate incurred the costs.

45. Relying on dicta in *Gilje v Charlegrove Securities* Ms Caferkey developed her position in written submissions in arguing that Conegate did not "incur costs" when it served on Gilbert a service charge certificate, this being an administrative requirement pursuant to the underlease which may record, evidence or confirm costs previously

paid by Conegate, but is not of itself a cost incurred by Conegate. The provisions of Schedule 3, she submitted, make clear that "costs incurred" by Conegate is associated with actual invoices, or expenditure, and/or a reserve. Ms Caferkey concluded that as a matter of construction and of fact, Conegate does not incur costs when it serves an estimate demand on Gilbert, or when Gilbert pays to Conegate a payment on account. Rather, she said, Conegate incurred costs when the service provider in question presents an invoice to it, or when Conegate pays that invoice.

46. Ms Caferkey relied on the decision in *Burr v Om Property Manamgent Ltd.* where the Court of Appeal upheld the Upper Tribunal's decision that a liability is incurred "either by being met or paid or possibly being set down in an invoice" [8], or when they are "expended" or "become payable" (approving *Capital & Counties Freehold Equity Trust v BL Plc* [1987] 2 EGLR 49).

47. Mr Upton developed an argument in his written submissions subsequent to the hearing that relevant costs were not incurred by Gilbert until they were notified of actual expenditure upon service of the service charge accounts by Conegate. Pursuant to Paragraph 2.5 of Schedule 3 to the underlease, only upon notification of the amount of the Service Charge (being expenditure incurred) did Gilbert become liable to pay the balancing charge. Mr Upton therefore argued that, since Gilbert had served accounts and actual service charge demands within 18 months of being notified of the Service Charge for both 2010/11 and 2011/12 by Conegate, Gilbert's demands did not fall foul of s.20B. If wrong on that point, Mr Upton relied on the evidence that the dates on which Gilbert paid the Conegate demands for the disputed service charges were all within 18 months of service of 23 May 2013.

48. The tribunal was not directed to any authority on this point, though the lease structure requiring sub tenants to contribute to expenditure incurred by a head landlord is a common one. Arguably, the point is very simply answered by reference to section 18(2) of the Act, which defines relevant costs to include those incurred "by or on behalf of the landlord, or a superior landlord". Thus, if the costs were incurred by a superior landlord more than 18 months before the demand by the mesne landlord, the sub tenant was not liable to pay them. However, such an interpretation could appear draconian. The mesne landlord might not be aware of such expenditure within much or all of that 18 month period, depending in particular on when the head landlord served service charge accounts, and earlier service of a demand (or section 20(B)(2) notice) might be an impossibility.

49. The point is not an easy one, but the tribunal considers it is proper to interpret section 20B in light of the sub tenant's covenant being to pay service charges to the mesne landlord. Thus section 20B applies a limitation period from the date on which the relevant cost was incurred by the person to whom the sub tenant is liable to pay it. Pursuant to

section 18, a service charge is an amount "payable" and, subject to the sub-underlease terms, a superior landlord's costs are not payable by the sub tenant until the mesne landlord is liable for them under the head lease, and this the tribunal considers must inform the interpretation of section 20B. A limitation period in respect of a sub-tenant's liability to pay a service charge cannot start to run until the liability to pay that service charge exists.

50. In the present case the tribunal considers that Gilbert incurred Conegate's expenditure when the Service Charge certificate was served on 16 March 2012 in respect of the year 2010/11. Invoices and payments prior to that could only, pursuant to the lease terms, relate to the liability make on account payments in relation to the Estimate (in spite of the fact that some of those invoices referred to particular expenditure). Such payments Gilbert chose not to recover from the residential leaseholders (in the circumstances described in evidence) On receipt of the Service Charge certificate (which pursuant to Paragraph 2.6 of Schedule 3 of the underlease gives the right to notify of a dispute as to the Service Charge) is the Service Charge incurred by Gilbert. Indeed, Gilbert could not prepare and serve on the Respondents a Service Charge Account until it had received one from Conegate. Accordingly, if the demands for estimated service charges had been invalid as argued by the Respondents, the tribunal finds that none of Conegate's actual service charges demanded from them fall foul of section 20B.

Section 20C

51. The Respondents sought to rely on the fact that there has been no statutory consultation under s.20 of the Act in respect of any of the service charges by either Applicant. However, they did not specify in their statement of case in respect of which charges consultation was required and the statutory cap on relevant costs therefore would apply.

52. Ms Caferkey identified the service charges challenged on this ground in her skeleton argument. She said that there were potentially two qualifying long term agreements in respect of which statutory consultation should have been carried out. They were (i) RFM's management agreement, which was not for any fixed period and provided for termination by either party on three months' notice and (ii) the contract between Gilbert and the cleaners (Tradition Property Services Limited) which was for 365 days but had been allowed to run on in spite of a provision that the contractors would be invited to tender at the end of the term. Ms Caferkey also suggested Conegate's service charge expenditure suggested major works.

53. The tribunal accepts Ms Caferkey's submission that RFM's management agreement is a qualifying long term agreement, in that it is a contract to provide services indefinitely, based on her analysis of the decision in *Paddington Walk Management Ltd. v Peabody Trust*

[2010] L&TR 6. In that case, the distinguishing feature was that the agreement was expressed to be "for an initial period of one year" and then from year-to-year. It was this express periodic feature which saved it from being a QLTA and there is no such feature in the present case. Furthermore, in *Poynders Court Ltd v GLS Property Management Ltd.* [2012], upon which Ms Caferkey relied, an "open ended" contract which provided for termination on three months' notice was held to be a qualifying long term agreement.

54. In spite of Mr Upton's reliance on the judgment of HH Judge Marshall in *Paddington Walk* at 48 that the management contract was not "a contract in which the tenants would definitely have to contribute in respect of a period of more than 12 months", the tribunal was not persuaded by his attempt to distinguish *Poynders Court* as decided on written representations. That case was precisely on point and the reasoning entirely compelling. Accordingly, the tribunal finds that RFM's management fees are limited to £100 per Respondent for each of the years in dispute.

55. The tribunal is satisfied however that the cleaning contract is not a qualifying long term agreement. There were separate contracts produced in evidence for each the years 2010, and each was for a term of 365 days. In spite of there having been no evidence of a tendering process, the term of the contracts was not more than a year. It is not relevant to this that the contractual arrangement has, in fact, continued over a greater duration.

Condition Precedent

56. The Respondents had failed to pay the service charge in full since 2009/10 and it was asserted on behalf of Gilbert that it had used its best endeavours to manage the property as well as possible given the funds available. Mr Upton argued that on its proper construction Clause 5.2 2: (i) only required Gilbert to use its reasonable endeavours to procure services, (ii) did not oblige it to procure services if it is prevented by some cause or event beyond its control from doing so (e.g. lack of service charge funds); and (iii) does not oblige it to procure services if the tenants do not pay their service charge.

57. The tribunal allowed the parties to make further written submissions as to whether there is a condition precedent, and these were received. The tribunal is satisfied that no such construction can be placed upon Clause 5.2 of the sub underleases. That clause imposes a covenant "subject to payment by the Tenant of the Service Charge". The "Service Charge", however, pursuant to the definition in Paragraph 1 of Schedule 3 represents costs *incurred.* Non payment of the on account payments cannot on the proper construction of the lease amount to a non payment of the Service Charge. Since no Service Charges (as opposed to on account payments) were demanded by Gilbert until May 2013,

their non payment cannot be relied upon in respect of any failure to procure services prior to that, even if Clause 5.2 does create a condition precent.

58. It is not necessary in the circumstances to give detailed consideration to the authorities, notably *Yorkbrook Investments Ltd. v Batten* [1985] 18 HLT 25 cf. *Bluestorm v Portvale Holdings* [2004] EWCA Civ 289. However the tribunal would observe that *Bluestorm* was considered on its own particular facts, and in the present case by contrast the Respondents' non payment of service charges cannot be said to have caused the landlord's inability to perform its covenants. Gilbert had not served all necessary Estimates to which the leaseholders were entitled, had delayed substantially in preparing service charge accounts, and there had been a history of justified dissatisfaction with Gilbert which had formed the backdrop to the previous tribunal proceedings. The tribunal considers *Yorkbrook* is still good law and is applicable to in the present case.

59. Gilbert's position that, owing to lack of availability of funds, it has complied with its covenant to use its "best endeavours" is unsustainable. If there is no condition precedent then this lease term cannot be interpreted to construe one by this alternative route. The failure to pay the on account service charges appears, at least in part, to have been the result of frustrations on the part of the Respondents as to the quality of service provided by Gilbert, and the tribunal has had the benefit of an inspection. It cannot be argued by Gilbert that the lack of service charge funds was "a cause or event beyond its control" - and in any event, there is no evidence it even sent non payment reminders let alone took enforcement proceedings against any tenant. The tribunal agrees with Ms Caferkey's argument that Gilbert's attempt to use the contractual provisions of the lease (and in particular clause 5.2) as a means of avoiding the effect of section 19 of the Act is not permissible.

Effect of decision on leaseholders' liability vis a vis Gilbert's liability to Conegate

60. Mr Taylor submitted that since the recoverability of costs between Conegate and Gilbert is managed pursuant to a completely separate agreement to those between Gilbert and the Respondents, it was inappropriate for Mr Upton to have suggested limiting costs payable to Conegate owing to the decision in these proceedings.

61. Mr Taylor observed that estimated charges were notified to Gilbert in accordance with the underlease terms, paid by Gilbert, and then on preparation of the service charge accounts three months from the year end the service charge certificate was served. Conegate had not been responsible for any delay on Gilbert's part in notifying the Respondents of the estimated or actual charges.

62. Mr Upton referred the tribunal to *Ruddy v Oakfern Properties Ltd.* [2006] in which it was decided that a sub-tenant had locus standi to make an application challenging the service charge levied by the freeholder on a mesne landlord even though he was not directly liable to pay it. The First Tier Tribunal, pursuant to that decision, has jurisdiction on an application under section 27A to determine the service charges payable by the tenant in respect of costs incurred by the freeholder and charged to the mesne landlord under the head lease.

63. It was for this reason that the tribunal added Conegate as an Applicant in these proceedings, and issued the directions that it did. However, Conegate has played almost no part in these proceedings. Mr Upton and Ms Caferkey were critical of this stance, and invited the tribunal to determine the reasonable service charges payable to Conegate based on the limited evidence available.

Payable (Reasonable) Service Charges

64. The Respondents contended that the service charges demanded by both Applicants are unreasonable for the services provided and/or unreasonably incurred. The service charges for services performed by Gilbert, which were disputed for each of the three years in dispute, were for cleaning, entry phone maintenance contract, general repairs and maintenance, lift maintenance contract, bank charges, managing agents fees, professional fees. Conegate charged cleaning and maintenance for the small internal lobby and the outside, as well as charges for maintaining and fuelling a central boiler plant which serves the whole building, including the flats, and provides hot water and central heating to the flats.

65. Mr Watkins gave evidence that the basic day to day management of the premises has been carried out – and cleaning, repairs, breakdowns etc. are undertaken. Common parts redecoration had not taken place during RFM's management since 2007 but was planned, subject to payment by the Respondents of their service charges outstanding and on account. Gilbert is reluctant to enter into capital repairs if service charges are not being paid and there had always been significant arrears and disputes over service charges at this property. Mr Watkins said that common parts cleaning had been carried out on a weekly basis by the contractor, including the cleaning of interior windows and glass on a monthly basis and external windows every quarter. Copies of the specifications and 12 month contract were produced and, it was said, the only complaint received by RFM about the cleaning was made in June 2013.

66. Mr Watkins produced a schedule of repairs carried out by RFM Ltd. He considered that Gilbert had complied with its lease obligations but agreed that the premises look tired and would benefit from a refurbishment since the service charge arrears did not enable

redecoration and cosmetic improvement. Mr Watkins had not himself visited the premises in about 4 years, but said that Mr Rodriquez would visit about once a month. The lifts were maintained under contract by Temple Lifts Ltd. and the door entry system under contract by Rentrifone Ltd.

67. Mr Upton sought permission to call Mr Rodriguez to give oral evidence to answer the questions Mr Wakefield could not, but the tribunal refused the request. Both parties were legally represented and directions had required the exchange of witness statements. None was available for Mr Rodriguez however and there was a risk of prejudice to the Respondents in being unable to prepare to deal with matters of undocumented fact in relation to which he might give evidence.

68. Mr Bolt gave evidence as to the leaking roof and the disrepair to the street entrance door (which had been broken for 5 years). He also referred to inadequate communal heating which he said was of little benefit in his flat. However, since this matter had not been pleaded there was no evidence in relation to it and the tribunal was therefore unable to consider it. Mr Bolt felt that the condition of the common parts was inadequate given that the Permitted Use of the building, according to the sub underlease, was as a "high class residential unit". For example, the carpet was tired, worn and stained and discarded or stored items had been left in the common parts for 2 years.

69. Mr Bolt produced email correspondence with Mr Rodriguez from 2009 and 2010 concerning lack of window cleaning, defective front door and stolen post, entry phone problems, failure to replace lightbulbs in the common parts and lift breakdowns. He also produced an email from January 2014 to Cushman & Wakefield referring to contact "a few years ago" about roof leaks due to blocked drains.

70. Gilbert's repair log recorded a complaint of a leak into flat 3 on 28 April 2009 which the tenant was asked to monitor, and another on 3 September 2010 when remedial works to blocked drains were recorded as undertaken. There was one further record of reported water ingress into flat 3 from blocked gutters on 26 January 2012. There were numerous reports of water ingress into flat 4.

71. The cleaning of the common parts for which Conegate was responsible was observed by the tribunal on inspection to be poor – including the stairs down to the basement area which were particularly untidy. The tribunal also found on inspection that the common parts in Gilbert's control were indeed tired and the carpets soiled. The condition did not reflect the type, location and Permitted Use of the property.

72. There was no direct evidence on behalf of the Applicants as to the condition of the common parts and as to the Respondents' other complaints, but there was little supporting evidence for Mr Bolt's

account of almost the entire absence of cleaning for a number of years, However, in spite of the limitations on the evidence, it is sufficiently clear that the Respondents harboured long held dissatisfaction with common parts maintenance, including the cleaning, front door repair, entryphone operation and lifts, and that Gilbert felt itself constrained from providing a better service. The tribunal adopts Mr Watkin's description of the maintenance as "basic".

73. Notwithstanding that an underlying dispute was that the common parts had not been improved (and no cost for such improvement had therefore been charged to the service charge) the tribunal finds that an element of the service charge costs are unreasonable for the level of service. In all of the circumstances, the tribunal determines that there should be a 25% reduction on charges for cleaning, entry phone and lift maintenance by Gilbert as follows:

2009/10			Determination
1.	cleaning	£2835.70	£2126.78
2.	entry phone maintenance	£1133.56	£850.17
3.	lift maintenance	£720.86	£540.65
2010/11			
4.	cleaning	£2966.40	£2224.80
5.	entry phone maintenance	£1157.68	£868.26
6.	lift maintenance	£937.33	£703.00
2011/12			
7.	cleaning	£2828.80	£2121.00
8.	entry phone maintenance	£1157.68	£868.26
9.	lift maintenance	£786.26	£589.70

74. The tribunal, for the reasons set out above in dismissing the argument as to the existence of a condition precedent, considers RFM's excuse for the basic maintenance of the common parts was without merit. Gilbert has misunderstood that it has a positive duty to maintain the building, and its failure to comply with that duty, and to provide Estimates and timely accounts, has led to dissatisfaction among the tenants. The

tribunal considers that this should be reflected in a reduction of the management charge payable to Gilbert (which is in any event the subject of a statutory £100 cap for the failure to consult under s.20 of the Act). Whilst there have been some management, the manner of its execution has itself contributed substantially to this dispute. In light of problems persisting after criticism of the previous tribunal for the standard of management, the accounting delays and other shortcomings, the tribunal considers the reasonable management charge in the particular circumstances is nil.

75. General Repairs and Maintenance had been charged in sums from £206 to £411 pa. These were very modest costs for routine responsive repairs on a building of this nature and the tribunal allows them.

Conegate's Relevant Costs

76. The tribunal has given careful consideration to the case in respect of Conegate's expenditure. The Respondents relied on the Superior Landlord's limited participation in the proceedings. The tribunal has considered the particular directions issued in this case. Those of 19 November 2013 required Conegate to send a statement of case "explaining the title structure and the basis on which the particular Applicant claims to be entitled to demand and collect service charges under the terms of their leases, together with copies of the relevant service charge accounts for the years in dispute". The statement of case served by solicitors for Conegate complied with this basic requirement It is not clear to the tribunal the date on which the Respondents first came into possession of Conegate's service charge accounts and certificate, setting out the breakdown of expenditure within four schedules, though it is understood to have been after the Respondents' statement of case was prepared since this only challenges the global figure.

77. It does not appear that any order enforcing compliance with the direction as to service of Conegate's accounts was sought to enable the Respondents to serve a meaningful detailed statement of case in respect of those costs, but nor was objection taken to any late compliance by Conegate in serving the accounts. The directions required the Respondents to state "which charges are in dispute, the reason for the dispute and any legal submissions relevant thereto, together with a schedule setting out ... (i) the item and amount in dispute (ii) the reason for the dispute, and (iii) the amount if any the respondents suggest is reasonable for that item." Nothing of this detail was prepared sufficient to identify to Conegate what if any items of expenditure were in dispute, and the Respondents invited the tribunal to determine whether Conegate's costs were payable.

78. Notably, the directions required inspection and disclosure to be dealt with in a particular way. Direction 8 required the Respondents to seek

any particular primary invoices or bills with a request in writing by 21 January 2014. The directions then provided that the parties should liaise to enable inspection to take place not later than 14 days after the request was made. Direction 14 required Gilbert to include in the hearing bundle "all relevant invoices in relation to the disputed costs", "any other documents on which either party wishes to rely" and "any relevant consultation notices, including section 20 notice". However, there was no duty on Conegate to disclose such documents in the absence of a request.

79. There was no evidence that those acting for the Respondents sought disclosure of documents from Conegate (within the directions timetable or otherwise). Ms Caferkey advised the tribunal only of a letter to Conegate's solicitors dated 12 February 2014 concerning apportionment. The tribunal is of the view that receipt of the accounts ought to have raised certain questions for the Respondents and generated a request for disclosure from Conegate. No positive case on the content of the accounts was served on Conegate in advance of the hearing.

80. Conegate did not bring the proceedings but was added as an Applicant in order that the Respondents could bring a challenge to their expenditure. The Respondent bore the burden, seeking enforcement of tribunal directions, to put that case before the tribunal. Only challenges to cleaning and general management were adequately pleaded and evidenced. Conegate must put its case only to the extent required by the directions. The parties had the opportunity to seek to vary those directions if they considered them inappropriate. The directions placed responsibility on the Respondents to particularise their challenges and seek disclosure. They are therefore responsible for the absence of any documentation supporting Conegate's expenditure if it was not asked for.

81. Without attempts to obtain such evidence, the tribunal cannot safely determine that on balance Conegate's expenditure is unreasonable. The tribunal declines therefore to engage in an analysis of Conegate's accounts in order to determine, without documentary evidence, whether such expenditure is reasonable and if not to substitute its own view, unsupported by alternative quotations or other evidence from the Respondents.

82. Total management fees were in the region of £150 per annum per flat, excluding management of the mechanical and engineering contract. There is evidence that Conegate failed adequately to deal with the leaking roof, and the tribunal reduces its management fee to £100 per flat per annum accordingly, excluding M&E. Without sight of the M&E contract, disclosure of which could have been sought, the tribunal is unable to conclude that the management fees in respect of it are unreasonable and cannot with confidence conclude that it is a

qualifying long term agreement. Any challenge on this ground is dismissed. The unspecific challenge to consultation in the Respondents' statement of case did not mention which it any contracts were at issue.

83. The tribunal considers a 25% deduction to be appropriate in respect of Conegate's internal cleaning costs. The failures in common parts cleaning by both Applicants had been sufficiently clearly pleaded and Conegate produced no evidence to rebut that relied upon. The tribunal declines to interfere with Conegate's charges repairs and maintenance, pest control, health and safety risk assessments and audit fees since disclosure of invoices has not been sought and the Respondents produced insufficient evidence in support of any challenge. Cleaning costs are therefore determined as follows:

2010/2011

Charges £169.91 Schedule 2, £1127.17 Schedule 3 – Total £1297.08

Determination £972.81

2011/12

Charges - £209.79 Schedule 2, £1414.21 Schedule 3 – Total £1624.00

Determination £1218.00

Application under s.20C and refund of fees

84. The Respondents made an application under s.20C of the Act that the Applicants' costs in these proceedings should not be relevant costs for the purpose of the service charge. The tribunal did not hear full submissions from the parties on that application, and any party may make such submissions within 14 days of the date of issue of this decision.

85. The tribunal is minded, however, to make an order under s.20C in respect of the Respondents' costs in these proceedings. Gilbert had failed to serve Conegate's estimates, and they had caused dissatisfaction amongst the tenants by failing to maintain the common parts without good excuse. That history has, in the opinion of the tribunal, been the root of the non payment of service charges and the cause of these proceedings. Conegate has done little in response to these proceedings, and its success is not the result of any argument it advanced. The Respondents have met with some success in their dispute regarding Gilbert's charges. The tribunal, subject to any further

representations, considers that the just result is one in which the landlords must meet their own costs in these proceedings.

Name F Dickie Date 16 June 2014

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.

<u>**Section 20**</u>

(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 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.