12339

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/OOHB/LSC/2017/0002**
Property	:	**Grantham Apartments, 327-329 Two Mile Road, Bristol, Avon BS15 1FE**
Applicant	:	**The Leaseholders of flats 1-13**
Represented by	:	**Ms C Burrows (Flat 1)**
Respondent	:	**Floorweald Limited**
Represented by	:	**Aldermartin, Baines and Cuthbert (ABC Real Estate)**
Type of Applications	:	**(1) The Landlord and Tenant Act 1985, section 27A (2) The Landlord and Tenant Act 1985, section 20C (3) Costs. Rule 13(1)(b) The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**
Tribunal Members	:	**Judge M Davey LL.B Mr J Reichel, B.Sc. MRICS Mr P Smith FRICS**
Date and venue of Hearing	:	**24 May 2017 Bristol Civil and Family Justice Centre**
Date of Decision with reasons	:	**26 July 2017**

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DECISIONS

The Section 27A application

The budgeted service charge costs for the years 2015-2016 and 2016-17 are to be adjusted as detailed in the reasons below on the ground that they were unreasonably incurred or unreasonable in amount.

The Section 20C decision

The Tribunal makes an Order that none of the costs incurred by the Landlord in connection with these Tribunal proceedings shall be recoverable by way of a future service charge demand.

The Rule 13 costs application

The Application is refused

REASONS

The Applications

1. By an application received on 22 December 2016 ("the section 27A Application"), the 12 leaseholders ("the Applicants") of flats 1-13 at Grantham Apartments 327-329 Two Mile Road, Bristol, Avon BS15 1F ("the Property") applied to the First-tier Tribunal (Property Chamber) ("the Tribunal"), under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to the payability and reasonableness of the service charge, under the leases of the flats ("the Lease"), for the service charge years 2015/2016 and 2016/2017. The Respondent to the Application is the freeholder landlord, Floorweald Limited. ('The Landlord"). Aldermartin, Baines and Cuthbert, ("ABC") who are managing agents, manage the property for the Landlord.

2. Following an oral case management hearing, conducted on 10 February 2017 by Judge Tildesley OBE, the judge issued Directions on the same date. Paragraph 8 of those Directions set out an agreed position statement with regard to the issues, which the Tribunal was asked to decide, in addition to the challenge to the Service Charge budget heads for 2015-16 and 2016-17 which were to be covered by a Scott Schedule. They are:

(1) whether the service charge demands comply with the requirements of section 47 of the Landlord and Tenant Act 1987;

(2) whether the Respondent is entitled under the lease to issue a demand for a supplemental service charge in the sum of £300, which was to cover the shortfall occasioned by the non-payment of service charge by the tenants of the business premises at the Property;

(3) whether the Respondent is entitled to recover service charges from the leaseholders for the period prior to a leaseholder acquiring ownership of the lease of the flat;

(4) whether some leaseholders are obliged to pay sums in respect of service charges in advance on completion of the purchase of their flats.

3. By a letter to the Tribunal, dated 19 April 2017, the Applicants stated that in early April 2017 the Respondent served the leaseholder Applicants with the 2017-2018 Service Charge budget and service charge demands. The Budget was £23,799. At the same time the Respondents made a demand in respect of the costs of proposed internal and external major works to the Building in the sum of £50,000. The Applicants asked the Tribunal to extend their application to cover these matters.

4. However, both parties agreed at the hearing that the 2017-2018 charges were not part of the current application and that it was open to the Applicants to make a fresh application to the Tribunal in respect of these matters, in which case the Tribunal would issue Directions in the usual way.

The Inspection

5. The Tribunal members, Judge Martin Davey (Chairman), Mr Jan Reichel, and Mr Paul Smith, inspected the property on the morning of 24 May 2017 in the presence of Caroline Burrows (leaseholder of flat 1), Fiona Baker (leaseholder of flat 4), Mr Tony Fischer (a director of the Respondent Landlord (Floorweald Limited) and Mr Richard Davidoff (of ABC).

6. The Property is a block of 13 flats on 3 floors. Flats 1, 2 and 3 are on the ground floor. Flats 4 to 11 are on the second floor and flats 12 and 13 are on the third floor. There are seven marked and numbered parking places to the rear. The first floor flats open to a courtyard area, which is bounded on two sides by parapet walls. A balcony and a timber balustrade wall front the second floor flats, which overlook the first floor courtyard area. There are front and rear entrances to the common parts of the block. The property fronts onto Two Mile Hill Road. The building of which the flats form a part also includes two commercial units on the ground floor.

7. Following the inspection, the Tribunal conducted an oral hearing of the section 27A Application at Bristol Civil and Family Justice Centre. At

the hearing the Applicant's case was presented by Caroline Burrows. Mr Richard Davidoff of ABC presented the Respondent Landlord's case. At the conclusion of the hearing the Tribunal adjourned to consider its decision on the section 27A application. It reconvened for that purpose on 15 June 2016. By directions dated 8 June 2016, the Tribunal invited written submissions from the Applicants and Respondent with regard to an Application made by the Applicants for an order under section 20C of the Landlord and Tenant Act 1985 and an Application, made orally at the close of the hearing, for an order for costs against the Respondent under rule 13(1)(b) of the First-tier Tribunal (Property Chamber) Rules 2013. The Applicants' submissions were received on 22 June 2017 and the Respondent's submissions on 4 July 2017. The parties agreed that these Applications should be dealt with on paper without the need for an oral hearing.

The Leases

8. The Building was converted into 13 flats and two shops some time in 2013. All the flats were sold on long leases. The Tribunal was provided with the Lease for Flat 1, which was dated 7 November 2014. The parties to the Lease were Ingenious Properties Limited (the Landlord) and Caroline Burrows (the Tenant). The Lease was granted for a term of 125 years from 25 July 2014 until 24 July 2139. The relevant parts of the Lease are as follows.

Clause 1.1 Definitions

Default Interest Rate: 4% above the base rate from time to time of Barclays Bank, or if that base rate is no longer used or published, a comparable commercial rate reasonably determined by the landlord.

Insurance rent:

(a) a fair and reasonable proportion determined by the Landlord of the cost of any premiums (including any IPT) that the Landlord expends (after any discount or commission is allowed or paid to the Landlord), and any fees and other expenses that the Landlord reasonably incurs, in effecting and maintaining insurance of the Building in accordance with its obligations in paragraph 2 of schedule 6 including any professional fees for carrying out any insurance valuation of the Reinstatement Value;

(b) the cost of any additional premiums (including any IPT) and loadings that may be demanded by the Landlord's Insurer as a result of any act or default of the Tenant, any undertenant, their workers, contractors or agents or any

person at the Property with the express or implied authority of any of them.

Rent: rent at the initial rate of £300 per annum until and including 25th of July 2039 and then £600 per annum until and including 25th July 2064 and then £1200 per annum thereafter

Rent payment dates: 25 March and 29 September in each year

Service Charge: a fair and reasonable proportion determined by the Landlord of the Service Costs

Service Costs: the total of

(a) All of the costs reasonably and properly incurred or reasonably and properly estimated by the Landlord to be incurred of:

  (i) providing the Services; and
  (ii) complying with all laws relating to the Retained Parts;

(b) the reasonably and properly incurred costs fees and disbursements of any managing agent or other person retained by the Landlord to act on the Landlord's behalf in connection with the Building or the provision of the Services; and

(c) all rates, taxes, impositions and outgoings payable in respect of the Common Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Building).

Services

(a) cleaning, maintaining, decorating, repairing and replacing the Retained Parts and remedying any inherent defect;
(b) where reasonably possible to provide heating to the internal areas of the Common Parts during such periods of the year as the Landlord reasonably considers appropriate, and cleaning, maintaining, repairing and replacing the heating machinery and equipment;
(c) lighting the Common Parts and cleaning, maintaining, repairing and replacing lighting machinery and equipment on the Common Parts ;
(d) cleaning, maintaining, repairing and replacing the furniture, fittings and equipment in the Common Parts;
(e) cleaning, maintaining, repairing, operating and replacing security machinery and equipment on the Common Parts;
(f) cleaning the outside of the windows of the Building other than those comprised within the demise of the Commercial Premises;

(g) cleaning, maintaining, repairing and replacing the floor coverings on the internal areas of the Common Parts;
(h) any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building.

Tenant covenants: the covenants on the part of the Tenant set out in Schedule 4 and the regulations.

Tenants proportion: such percentage as the Landlord may notify the Tenant from time to time

Schedule 4 Tenant Covenants

2. SERVICE CHARGE

To pay to the Landlord the Service Charge demanded by the Landlord under paragraph 4 of Schedule 6 by the date specified in the Landlord's notice.

3. INSURANCE

3.1To pay to the Landlord

(a) the Insurance Rent demanded by the Landlord under paragraph 2 of schedule 6 by the date specified in the Landlord's notice;

....

4. INTEREST ON LATE PAYMENT

To pay interest to the Landlord at the Default Interest Rate both before and after any judgment on any Rent, Insurance Rent, Service Charge or other payment due under this lease if not paid within 21 days of the date it is due. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment.

7. COSTS

To pay to the landlord on demand the costs and expenses (including any solicitor's, surveyor's or other professionals' fees, costs and expenses and any VAT on them) assessed on a full indemnity basis incurred by the Landlord (both during and after the end of the Term) in connection with or in contemplation of any of the following:

(a) the enforcement of any of the Tenant Covenants;

(b) preparing and serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections, notwithstanding forfeiture is avoided otherwise than by relief granted by the court;

(c) preparing and serving any notice in connection with this lease under section 17 of the Landlord and Tenant (Covenants) Act 1995; or

(d) preparing and serving any notice under paragraph 4(c) of Schedule 3 or

(e) any consents applied for under this lease, whether or not it is granted.

Schedule 6: Landlord Covenants

2. INSURANCE

2.1 To effect and maintain insurance of the Building against loss or damage caused by any of the Insured Risks with reputable insurers, on fair and reasonable terms that represent value for money, for an amount not less than the Reinstatement Value subject to

(a) any exclusions, limitations, conditions or excesses that may be imposed by the Landlord's Insurer; and

(b) insurance being available on reasonable terms in the London insurance market.

2.2 To serve on the Tenant a notice giving full particulars of the gross cost of the insurance premium payable in respect of the Building (after any discount or commission but including IPT). Such a notice shall state:

(a) the date by which the gross premium is payable to the Landlord's insurer; and

(b) the Insurance Rent payable by the Tenant, how it has been calculated and the dates on which it is payable.

2.3 In relation to any insurance effected by the Landlord under this clause, the Landlord shall

(a) at the request of the Tenant supply the Tenant with:

(i) a copy of the insurance policy and schedule and

(ii) a copy of the receipt for the current year's premium

....

4. SERVICES AND SERVICE COSTS

4.1 Subject to the Tenant paying the service charge, to provide the Services

4.2 To serve on the Tenant a notice giving full particulars of the Service Costs and stating the Service Charge payable by the Tenant and the date on which it is payable as soon as reasonably practical after incurring, making a decision to incur, or accepting an estimate relating to, any of the Service Costs.

The Law

9. The law is set out in the Annex to these reasons.

The Hearing

Issue 1. Whether the service charge demands comply with the requirements of section 47 of the Landlord and Tenant Act 1987.

The Applicants' case

10. Section 47 of the Landlord and Tenant Act 1987 provides that a service charge demand must contain the landlord's name and address. The Applicants argue that the service charge demands issued on behalf of the Landlord do not comply with that provision because they do not give the Landlord's name **and** address. They submit that it is insufficient simply to provide another address at which the tenants many send post to the Landlord. The Applicants state that the address provided to the tenants is that of the Landlord's accountant rather than that of the Landlord. The Applicants rely on the decision of the Upper Tribunal in *Beitov Properties Limited v Elliston Martin* [2012] UKUT 133 (LC), which says that the address given must be that of the landlord. They submit that it follows that any service charge demands are ineffective and associated penalty charges incurred at times when there was non-compliance with section 47 would also be irrecoverable.

The Respondents' case

11. The Respondent submits that the service charge demands comply with the requirements of section 47 of the Landlord and Tenant Act 1987. This is because the address given, i.e. c/o Leigh Philip and Partners, 2nd Floor Devonshire House, 1 Devonshire Street, London W1W 5DS, is the registered address of the Respondent Landlord, Floorweald Ltd. The Respondent states that any correspondence sent to it at that address would be dealt with in the usual manner. Mr Davidoff accepted that if the Tribunal were to find otherwise the Respondent would rectify the matter immediately.

Issue 2: whether the Respondent is entitled under the lease to issue a demand for a supplemental service charge in the sum of £300, which was to cover the shortfall occasioned by the non-payment of service charge by the tenants of the business premises.

The Applicants' case

12. On 4 August 2015, ABC took over management of the Property, which had been bought at auction by its client in May 2015. On 21 August 2015 they wrote to leaseholders enclosing a "Service Charge" budget for the period 25 March 2015 to 24 March 2016. The letter stated "that it should also be noted that the figures noted herein are a projected expenditure and that if we do not expend these monies they can be rolled over or credited to supplement next year's expenditure, this is of course subject to the provisions contained within the Lease that you entered into upon purchasing your Property." A similar letter was sent on 25 February 2016 in respect of the budget for the period 25 March 2016 to 24 March 2017. Leaseholders were invoiced for service charges and reserve fund charges twice yearly. The second invoice for 2016-17 was dated 31 August 2016. On 30 November 2016 ABC issued all leaseholders with an invoice for a "Supplemental demand" without any further information on the demand as to what this related to. All the invoices gave the Landlord's address for the purposes of sections 47 and 48 of the Landlord and Tenant Act 1987 as C/o Leigh Philip & Partners, 2nd Floor Devonshire House, 1 Devonshire Street, London W1W 5DS.

13. It is the Applicant's case that such a charge was not permitted by the terms of the Lease. They say that the leaseholders should not have to pay charges that were made to cover a shortfall in service charge payments by a commercial tenant, as revealed in the Respondent's statement of case.

The Respondent's case

14. The Respondent says that when the supplemental demand was made, the cover emails that accompanied the demands were very clear as to the reasons and purpose of the demand. That is to say that it was to pay for the insurance premium that had fallen due and for which the Landlord account had insufficient funds to make payment. ABC state that prior to making this demand they had recently refunded to leaseholders the previous service charge year's surplus and had they not done so they would have had funds to pay the insurance premium. They also submitted that paragraph 4.2 of the Sixth Schedule to the Lease permitted a service charge demand as soon as reasonably practical after the Landlord incurred, made a decision to incur, or accepted an estimate relating to any of the service charge costs. Mr Davidoff accepted that such a provision was, in his experience, very unusual in leases but that it was in this lease and was therefore binding on the leaseholders. It followed, he said, that because the Landlord had incurred an obligation to pay the insurance premium it was entitled to raise a service charge demand in respect of that cost. Furthermore, Mr Davidoff says that this is now a moot point. The

reason for a shortage of funds was a long running dispute with a non-paying commercial tenant, which had now been resolved enabling the Landlord to credit or refund leaseholders with the supplemental charge. In fact most leaseholders had not paid the supplemental demand and those that did pay did so under protest.

Issue 3: whether the Respondent is entitled to recover service charges from the leaseholders for the period prior to a leaseholder acquiring ownership of the lease of the flat.

15. The Applicants did not pursue this issue further at the hearing. The Respondent said that it accepted that, as a result of the Landlord and Tenant Covenants Act 1995, a leaseholder was not liable to pay charges that were payable by the assignor, before the leaseholder took an assignment of the lease from that person, on purchase. However, Mr Davidoff submitted that in such a case the right of re-entry in the lease would permit the Landlord to take forfeiture proceedings against the current assignee because the right of re-entry in respect of the former leaseholder's breach of covenant ran with the lease. Thus indirectly the assignee would in practice be obliged to discharge the debt of the assignor in order to avoid costly forfeiture proceedings. He suggested that if on purchase of a flat a proper apportionment had not been agreed between the respective solicitors in order to protect the purchaser, a leaseholder could seek redress from their solicitor.

Issue 4: whether some leaseholders are obliged to pay sums in respect of service charges already paid in advance on completion of their flats.

16. The Applicants state that a number of leaseholders have been in dispute with ABC as to whether they were properly credited with apportioned service charge payments made in advance on purchase of their properties. There was also a dispute between at least one leaseholder and ABC as to whether the service charge demand received after purchase included an element of double charging, given the advance payment already made. The Respondent says that when ABC took over management of the property, after the landlord purchased it at auction, the solicitors provided a spreadsheet, which showed the relevant credits and arrears for each leaseholder. Mr Davidoff says that ABC entered those credits and arrears into their software package and all credits were correctly applied to the relevant accounts. He acknowledged that some of these figures had been disputed but as far as he was aware those disputes had been resolved. He denied any element of double charging.

The Scott Schedule

17. The Applicants challenged the payability and reasonableness of a number of the service charge items for each of the years in question.

1	2	3	4	5	6

	2015-16 (budget)	2015-16 (actual)	2015-16 (Applicants)	2016-17 (budget)	2016-17 (Applicants)
Insurance	4,000	3,249	0	4,200	0
Audit & Acc'y	750	600		750	600
Garden	1,700	938	700 or less	1,700	700
Cleaning	800	-	250	800	250
Intercom	2,016	472	0	2,016	0
Reserve fund	2,500	2,500	0	2,500	0
Set up fee	600	600	0	-	-
Management	3,780	2,468	2,700 or less	3,780	2,700 or less
Repairs	3,500	2,354	0	3,500	0

The Items are as follows:

Buildings Insurance

18. The Applicants state that they have repeatedly requested a copy of the Property's insurance policy, certificate of insurance and proof of payment. They say that they have never been provided with complete information and this has made it impossible for them to obtain alternative quotations. They state that the Respondent is in breach of the terms of the Lease, which obliges the Landlord to provide this information on request. Such details as have been provided with regard to insurance cover, indicate that 36 months loss of rental income is included in the cover (totalling £95,00 per annum) whereas the actual income receivable (being the sum total of the ground rents payable per annum) is only £4,200. The Applicants placed in evidence a quotation from a different insurer for a premium of £2,598.75.

19. The Respondent refuted the suggestion that it had not provided the insurance details when requested. They stated that the building is insured as part of a block policy, which therefore affords very competitive premiums, which are undoubtedly reasonable. The Respondent submitted that the alternative quotation relied upon by the Applicants was not a like for like quotation. They drew attention to the fact that a person who is assisting the Applicants (Miss Francesca Elu) requested the quote but is not a leaseholder of any of the flats. They also stated that the answers to the risk questions that accompanied the application for a quotation were not completely accurate and that this would have affected the quotation.

Audit and Accountancy

20. The Applicants considered that the rise in audit and accountancy fee from the actual cost in 2015-16 of £600 to a sum of £750 in the following year was unreasonable.

21. The Respondent said that it was not unreasonable to have a budget figure of £750 for 2016-17 (as was the case in 2015-16) because the final figure will depend on the number of transactions during the course of the year, which will be unknown at the time of preparation of the budget. Furthermore, any surplus would be refunded to the leaseholders, as was the case in the previous year. The Respondent says that the sum of £600 was a typical charge by their accountant when preparing the accounts.

Garden Furniture

22. The Applicants stated that the "garden furniture" consists of three wooden picnic tables and 3 pot plants, which were originally hired by the Landlord from a garden centre. The Landlord purchased the tables outright in August 2015 and £1000 was split and credited to each leaseholder's account in the 2015-2016 billing period. The full £1700 invoice for the garden furniture then reappeared on the 2016-2017 budget breakdown statement. The Applicants state that the Respondent had failed to answer queries about this raised by the leaseholders. Furthermore, the Applicants considered that £700 per annum for the hire and upkeep of the pots and plants cannot be deemed a reasonable charge. The Applicants stated that the three pot plants disappeared altogether in January 2017 without any notice or reason given by ABC. The Applicants submit that no maintenance has been needed on the remaining tables and therefore this charge should be adjusted accordingly.

23. The Respondent explained that when it bought the property there were contracts in place for the contract hire and maintenance of three picnic tables and pot plants. Shortly thereafter ABC considered that it would be more cost-effective to buy the tables at a reasonable price. Indeed the £1000 that had been allocated in the budget for rental of the tables has been credited pro rata to each leaseholder. The Respondent said that it was not unreasonable for the figure of £1000 to reappear in the 2016-2017 budget and be reallocated to another service charge item such as maintenance. In any event at the end of the year any unspent surplus would be refunded. The Respondent denied that it had not responded to queries raised by the leaseholders and said that leaseholders were informed that the sums would be reflected in the balancing charge at the end of the year.

24. With regard to the potted plants, the Respondent said that the contract have been placed by the original freeholder developer and was in place when the leaseholders first bought their flats. However, following complaints by leaseholders the Respondent had, in January 2017, given notice to the company to terminate the hire and maintenance of the

plants. Any unspent surplus will be refunded once the accounts have been certified at the end of the year 2016-17. The Respondent contends that the costs of hire and maintenance whilst the contract was in place were in fact fair and reasonable.

Cleaning

25. The Applicants state that the charge for cleaning in the year 2014- 2015, when the previous freeholder owned the property, was less than £430 for the year. This then doubled under the Respondent's ownership to £800 for each of the disputed years. The Applicants state that cleaning has been intermittent throughout this period, during which time the Respondent withheld cleaning services, or threatened to do so, until service charges were paid. The Applicants also state that there was a significant delay in appointing a cleaner at the development when the Respondent's managing agent took over in August 2015. A regular cleaning rota was not put into place until after the end of the March 2015 to March 2016 payment period, despite the leaseholders having been charged for this period of non-cleaning in advance.

26. In response the Respondent contends that the cleaning costs are reasonable and they believe that they have acted properly when halting cleaning services because of lack of funds in the account due to non-payment of service charges. They believe that it would be wrong to allow the contractor to carry out work without the funds available to pay them. No cleaning charge was made at the end of the 2015-16 year.

Intercom rental

27. The Applicants state that it is their understanding that the intercom system was purchased on 31 December 2014 and therefore there was no need to budget for its rental.

28. The Respondent states that it is incorrect to suggest that the intercom was purchased at the end of December 2014. The intercom system is owned and maintained by NACD and was installed before the Respondent purchased the building. The Respondent contended that the costs are fair and reasonable.

Reserve fund

29. The Applicants state that there is no provision in the Lease for a reserve fund and therefore all such payments should be credited and/or refunded to the leaseholders. The Respondent contends that running a reserve fund is considered good practice and that the Lease permits such a fund. It points to paragraph (h) in the definition of Services in the Lease, which refers to "any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building."

30. The Respondent states that at present there are in fact no funds in the Reserve Fund as any funds billed and received from the leaseholders have been spent on day to day service costs. Should the Tribunal rule that a reserve fund is not permitted, the Respondent would refund any unspent surplus in that fund at the end of the financial year

Set up fee

31. The Applicants state that this fee was a charge made to leaseholders for the Respondent's managing agent entering the units on their database when they took over management of the Property. The Applicants contend that such action should be covered by the management fee and not charged for in addition.

32. The Respondent states that the Applicants' expectation is unrealistic. It submits that the setup and handover at the beginning and end of a Block Manager's instruction is not part and parcel of the usual day-to-day management of the building. This is therefore additional work that should be billed for separately. The fees were agreed with the client and are therefore correctly payable.

Management fee

33. The Applicants argue that a unit charge of £252 p.a. is excessive, given the norms in the local area. They considered a charge of £180 to be a reasonable charge were the management functions to be properly carried out. However, the Applicants consider that very little management is performed in relation to the Property. They instance failure of the agents to pursue non-paying leaseholders, failure to deal with missed bin collections and failure to provide information to leaseholders, for example as to insurance of the building, when requested. The Applicants also consider that ABC's response to complaints is often inadequate.

34. The Respondent submits that the charge of £252 p.a. is reasonable taking into account the size and nature of the Property and its location. It also says that the defaulting leaseholders have been sued and the outcome is awaited. The Respondent also denies that the block manager failed to report the matter of missed bin collections to Bristol City Council.

Repairs and Maintenance

35. The Applicants submit that many maintenance items already appear under other budget heads. They consider that where there is already £1,000 allocated to a contingency budget item as well as, what they describe as, a spurious £2,500 reserve, an additional £1,500 allocation

to repairs and maintenance seems excessive, especially when there is so little management activity at the building.

36. The Applicants state that there has been repeated non-commencement of promised works, most notably improved security for the residents, to be provided between the shared hallway and the commercial units at 329 Two Mile Hill, which has an emergency exit in the rear corridor of the building. This was first proposed in September 2015 but has still not been carried out. There has been continued use of the cycle store at the rear of the building by the commercial tenants as well as use and soiling of the rear corridor itself, for which the managing agent continues to charge cleaning on the residential units only. Proper increased security measures have still not been put in place despite a break-in and bike theft at the end of September 2015. Furthermore, repeated problems with the intercom system are still unresolved.

37. The Respondent contends that the Applicants fail to distinguish between a contingency and a reserve. It also states that any surplus funds would be reimbursed to the leaseholders after the end of the service charge year. It submits that the sums budgeted are prudent and not excessive. The Respondent refuted any suggestion that the intercom was not working correctly. The Respondent says that if they receive a report that the system is not working they send it to NACD who have a maintenance contract on the system. They in turn would attend immediately because they own and maintain the system.

Discussion and determinations

38. This is an unfortunate case. The Property is a relatively small development of 13 flats and two commercial units that should not create insuperable management difficulties. Sadly, that has not been the case. There is a history of on going disputes between the Applicants and Respondent about services and charges for the same, since the latter acquired the Property in May 2015 and appointed ABC Estates as its Managing Agent in August 2015. Those disputes have not admitted of an amicable resolution and this is what has led to the present Tribunal proceedings. Fiona Baker (leaseholder of flat 6) made the Application on behalf of herself and the other 11 flat owners. (Flats 2 and 8 are owned by the same leaseholders, Adrian and Susan Woodward). The Applicant leaseholders have undoubtedly found the process a stressful experience. The bundle produced by the parties (consistently mainly materials from the Respondent) amount to almost 1400 pages, many of then duplicates. The night before the hearing the Applicants learned that their representative would not be available. In her absence, Ms Caroline Burrows, leaseholder of Flat 1, ably presented the case for the Applicants. Mr Richard Davidoff of ABC Estates, the Managing agents (whose actions are attributable to the Landlord after their appointment in August 2015) presented the Respondent Landlord's case. References to the Respondent Landlord and the management of the property are in reality references to the agents.

Section 47 Landlord and Tenant Act 1987

39. The first issue is whether the Landlord has complied with section 47 of the Landlord and Tenant Act 1987, which provides that "(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—
(a) the name and address of the landlord,....." The Applicants say that this has not been satisfied because the address given by the Landlord was that of its accountants. The Respondent says that it has complied because the address of the accountants is the registered address of the Landlord Company. The Respondent also says that if it has not complied it will do so and the service charges (but not any penalty incurred in the meantime in respect of non-payment) will then become payable.

40. It is settled law that the effect of non-compliance with section 47 is suspensory only and that on compliance any service charges due will become payable from that point (*Tedla v Cameret Court Residents Association Ltd* [2015] UKUT 221 (LC); *Cannon v 38 Lambs Conduit LLP* [2016] UKUT 371 (LC)). In *Cannon* the Upper Tribunal explained that

"The purpose of section 47 is two-fold, as explained by the Tribunal in *Beitov Properties Ltd v Elliston Bentley Martin* [2012] UKUT 133 (LC) at [9]: to enable the tenant to be sure of the landlord's identity by providing an address at which he can be found, and to provide the tenant with an address at or through which he can communicate with him. It is for this reason that the Tribunal held in *Beitov Properties* that it is the address of the landlord, and not the address of the landlord's agent, that must be provided."

In *Beitov Properties* the President of the Upper Tribunal stated, that

"The address of the landlord for the purpose of section 47 thus seems to me to be the place where the landlord is to be found. In the case of an individual this would be his place of residence or the place from which he carries on business. In the case of a company it would be the company's registered office or the place from which it carries on business. If there is more than one place of residence or place from which business is carried on, then, depending on the facts, it may be that any one of such addresses will do. I do not think that it is useful to say any more than this."

41. In the present case the registered address of the Landlord Company is c/o Leigh Philip and Partners, 2nd Floor Devonshire House, 1 Devonshire Street, London W1W 5DS. What was not clear was whether or not the Landlord carried on any business at that address. The use of "c/o" suggests not, although no other trading address has been provided. Mr Davidoff says that correspondence sent to the Landlord at that address is dealt with in the usual way. However, that is beside

the point because provision of an address for that purpose is dealt with by section 48. Nevertheless, *Beitov* holds that the use of the registered address is sufficient compliance with section 47 in the case of a company Landlord. It is tolerably, if not absolutely, clear, that this is the case even if the address is also the address of another person or entity, in this case the Accountants The Tribunal therefore finds that the Respondent Landlord has complied with section 47.

The supplemental service charge demand

42. The second issue is whether the Respondent was entitled under the Lease to issue a demand for a supplemental service charge in the sum of £300, which was to cover the shortfall occasioned by the non-payment of service charge by the tenants of the business premises. As Mr Davidoff acknowledged, the Lease in the present case is unusually drafted, although the Tribunal considers his description of the Lease as "beautifully" drafted to be less than helpful. The present Lease simply provides that the Landlord's obligations are

    4.1 Subject to the Tenant paying the service charge, to provide the Services

    4.2 To serve on the Tenant a notice giving full particulars of the Service Costs and stating the Service Charge payable by the Tenant and the date on which it is payable as soon as reasonably practical after incurring, making a decision to incur, or accepting an estimate relating to, any of the Service Costs.

    In turn Service Costs are defined in the Lease as

    "the total of

    (a) All of the costs reasonably and properly incurred or reasonably and properly estimated by the Landlord to be incurred of:

        (i) providing the Services; and
        (ii) complying with all laws relating to the Retained Parts;

    (b) the reasonably and properly incurred costs fees and disbursements of any managing agent or other person retained by the Landlord to act on the Landlord's behalf in connection with the Building or the provision of the Services; and

    (c) all rates, taxes, impositions and outgoings payable in respect of the Common Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Building)."

43. The Tribunal finds that the first obligation on the Landlord is to give notice of the Service Costs. These can be costs, which have been incurred by the Landlord in providing the services (that is to say past costs) and/or costs, which the Landlord has estimated to be incurred (that is to say future costs).

44. For the purpose of these requirements, the Landlord has in practice adopted a service charge year of 25 March to 24 March. It provides leaseholders with a "Proposed Service Charge Budget" of estimated costs at the beginning of that period and then makes service charge demands twice yearly for the periods 25 March to 28 September and 29 September to 24 March. The Budget splits the costs into two schedules. Schedule 1 – External and Building and Schedule 2 Flat Only Costs.

45. The Lease provides that the amount payable by the Tenant is a fair and reasonable proportion determined by the Landlord of the Service Costs. In practice the Landlord has adopted an apportionment based on floor area. The percentage payable for the Schedule 2 costs is higher than that for the schedule 1 costs because the latter includes the commercial units.

46. The dispute in the present case specifically turns on whether it was legitimate for the Landlord to raise a "supplemental service charge demand" of £300 to cover the insurance premium which had become payable. The Landlord said that it was legitimate because the funds held by the Landlord were insufficient to pay the insurance premium because a commercial tenant had failed to make payments demanded of it. The Landlord points to the Tenant's obligation in clause 2 of Schedule 4 to the Lease "To pay to the Landlord the Service Charge demanded by the Landlord under paragraph 4 of Schedule 6 by the date specified in the Landlord's notice." The Landlord says that paragraph 4 of Schedule 6 enables it to make a demand because it had decided to incur the costs of insuring the building.

47. The Tribunal does not agree with the Landlord's interpretation of the Lease for the following reasons. Paragraph 4.2 is ambiguously drafted. It obliges the landlord to serve on the tenant a notice which (a) gives full particulars of *the* Service Costs and (b) states *the* Service Charge payable by the Tenant and the date on which it is payable (emphasis supplied). That notice must be served as soon as reasonably practical after the Landlord incurs, makes a decision to incur, or accepts an estimate relating to, any of the Service Costs. However, Service Costs is defined as *the total* of the costs referred to in the definition thereof. The reference to *any of* the Service Costs therefore does not make sense. On Mr Davidoff's reading of the Lease the Landlord can give notice of its budget estimate and demand a service charge in respect of those estimated costs and then at any time thereafter make a charge for an individual cost despite that cost having already been demanded. This cannot be right.

48. Mr Davidoff also says that the Landlord is only obliged to provide a service if the service charge has been paid and he points to paragraph 4.1. However, that paragraph refers to "the Tenant" paying the Service charge. It does not say subject to the commercial tenants paying their charges. Furthermore, even had it been a case of default by a residential leaseholder, it has been held by the Court of Appeal that where a lease contains such a clause as that in 4.1 the obligation to provide services and the obligation to pay the service charge are independent obligations. If a tenant does not pay the service charge the landlord has remedies against that tenant. It is not absolved from its covenant to provide the services (*25 Yorkbrook Investments Limited v Batten* (1986) 18 H.L.R. 25).

49. Finally, the insurance cost is demanded as part of the service charge. This is not in accordance with the terms of the Lease, which does not list insurance as a Service in the Lease (although it is within the definition of "service charge" for the purposes of the regime in section 18 et. seq. of the Landlord and Tenant Act 1985). Insurance is dealt with separately in paragraph 3.1 of Schedule 4 to the Lease, which obliges the tenant to pay to the Landlord "the Insurance Rent demanded by the Landlord under paragraph 2 of schedule 6 by the date specified in the Landlord's notice". Paragraph 2 of Schedule 6 to the Lease is a covenant by the Landlord "to effect and maintain Insurance of the Building against loss or damage caused by any of the Insured Risks with reputable insurers, on fair and reasonable terms, that represent value for money.... Paragraph 2.2 obliges the Landlord to serve on the Tenant a notice giving full particulars of the gross cost of the insurance premium payable in respect of the Building (after any discount or commission but including IPT). Such notice shall state (a) the dates by which the gross premium is payable to the Landlord's insurers and (b) the Insurance Rent payable by the Tenant, how it has been calculated and the dates on which it is payable.

50. It follows that the supplemental demand was not lawful, and therefore not payable, and it is no defence to say that it was refunded or credited thereafter. It amounted to a demand for a loan to the Landlord from the tenants. In so far as it was requested to cover the insurance premium it can be seen that it was not demanded in accordance with the terms of the Lease. Indeed as noted above an amount in respect of insurance had already been demanded by way of service charge.

Demands for service charge arrears incurred by a leaseholder's predecessor in title

51. The third issue is whether the Landlord can demand, from a current leaseholder, payment of unpaid charges that were incurred by a predecessor in title of the current leaseholder. No evidence was adduced as to any such demand made of an individual leaseholder. Indeed Mr Davidoff conceded that a lease purchaser would not be liable

for the arrears of his or her predecessor, by virtue of the Landlord and Tenant Covenants Act 1995. However, in his statement of case Mr Davidoff suggested that if such a scenario had occurred it would be prudent for a current leaseholder to settle arrears of his or her predecessor to avoid costly forfeiture proceedings the cost of which could be recovered from the current leaseholder under the terms of the Lease. Mr Davidoff based his assertion on the contention that, even if a leaseholder cannot be sued for arrears incurred by a predecessor leaseholder, the right of re-entry (i.e. right to forfeit the lease) will still be exercisable against the current leaseholder as a result of the breach by a predecessor.

52. It is not part of the function of the Tribunal to express a view on the accuracy of this observation, although it notes that the assertion seems calculated to alarm leaseholders. Should the Landlord take such action, it would be for the leaseholder against whom action is taken to take advice in relation to such proceedings.

Double charging of service charge payments

53. The fourth issue is whether a leaseholder having paid an apportioned service charge on purchase of the lease can then be charged again for services covered by that payment. The short answer is no. If a leaseholder has paid the service charge for the coming service charge year and during that year the lease is sold, the purchaser will pay the seller the appropriate apportionment of the service charge for the remainder of that year. The leaseholder is not then obliged to make a further payment in respect of those charges. It is clear that a number of leaseholders have been in dispute with ABC as to whether their accounts have been properly credited to reflect service charges paid to the seller on completion of their purchase. The Landlord has sought to deal with these queries although not without protracted correspondence before the matter was resolved. The Tribunal cannot resolve these individual disputes, which are a matter for the Landlord and respective tenants.

The Scott schedule.

Buildings Insurance

54. The leaseholders have challenged the payability and reasonableness of the Insurance Charge. The history of the Building Insurance is as follows. On 29 April 2014 the Building was insured by the then Landlord, Ingenious Properties Limited, from 1 May 2014 to 1 May 2015. The current Landlord insured the property temporarily until 28 May 2015. From 29 May 2015 to 28 May 2016, the Building was insured by Floorweald Limited with AXA Insurance UK Ltd., through Ashley Page as brokers. The premium was £3,951.01 and was invoiced to the landlord by Ashley Page on 2 June 2015. ABC paid £800 on 30 October 2015 and the balance of £3,151.01 on 30 March 2016. The Landlord insured the

building again from 29 May until 9 July 2016 and then, from 10 July 2016 to 09 July 2017, with AXA Insurance UK plc through Ashley Page as brokers. The brokers invoiced the Landlord on 30 June 2016 for the premium of £3,651.85. As noted by the Applicants the details provided by the landlord with regard to insurance cover, indicate that 36 months loss of rental income is included in the cover (totalling £95,000 per annum) whereas the actual income receivable (being the sum total of the ground rents payable per annum) is only £4,200.

55. However, the issue for determination by the Tribunal is whether the insurance premiums were reasonably incurred and if so were reasonable in amount and whether the Insurance rent was properly demanded. It was clearly reasonable to incur insurance costs. The question is whether the costs that were incurred were reasonably incurred. Mr Davidoff says that the premium must be reasonable because it is obtained through a block insurance policy. With respect, that conclusion does not necessarily follow. Nevertheless, the landlord's broker did obtain, from reputable insurers, more expensive quotations. By contrast the Applicants have, through a representative, produced an alternative quotation, which would provide the same level of cover on similar terms for a lower premium of £2,598.75. Mr Davidoff says that the quotation is flawed because (a) it was obtained by a person advising the Applicants, who is not herself a leaseholder (b) the insurer was told that there were no on going disputes with tenants, which is incorrect and (c) that there had been no claims during the last three years, which was also incorrect. He said that these matters would affect the quotation.

56. The Tribunal accepts that those factors might affect the premium. However, the Tribunal agrees with the Applicants that the loss of rental income cover of £95,000 a year is clearly excessive given that the ground rental income does not exceed £4,500 per annum. Even if, which it does not, rental income were to cover service charge income, the sum would be excessive. Furthermore, the Applicant's quotation used the same sum. Nevertheless, a single quotation from another insurer does not by itself indicate that the premium paid by the Respondent Landlord was necessarily unreasonably incurred. There is a range of premiums quoted by insurers and it is common knowledge that insurers will often quote lower premiums for new business. In the absence of further evidence the Tribunal is not satisfied that a single quotation is sufficient in this case to displace the prima facie presumption that the insurance placed by the landlord was unreasonably incurred, save that the loss of rental income cover is excessive and should be reviewed. The third issue is whether the insurance rent was properly demanded in accordance with the lease.

57. It is tolerably clear, as explained above, that the Insurance rent has not been demanded in accordance with the terms of paragraph 2 of Schedule 6 of the lease. The Applicants state that they have repeatedly requested details of the insurance but have been denied until 19 January 2017, following an email request by Caroline Burrows for a copy of the insurance policy and schedule. Even then it would appear that the policy was not provided until 16 March 2017. Mr Davidoff denies that the

information has been withheld. However, the only evidence of information being provided is that referred to above, which supports the Applicant's case. An email to Miss Burrows from ABC Estates, dated 19 January 2017, stated that the insurance premium for 2016-17 had been paid in two instalments with a further instalment to be paid imminently "dependent upon lessees paying the supplemental demand." That instalment was paid the following day.

Audit and Accountancy

58. The Tribunal does not find the audit fee of £600 to be unreasonable or unreasonably incurred. The Applicants argued that the budget figure for the year 2016-17 should have been £600. However, the Tribunal finds that the budget sum was not so excessive as to be unreasonable, given that it was an estimate and may prove to be reduced in the light of the actual figures. The Tribunal would stress that it does not accept that budget sums are always reasonable because an adjustment will be made at the end of the year. The sums still have to be reasonable in all the circumstances.

Garden Furniture

59. The Budget for garden furniture was £1,700 for each of the years 25 March 2015 - 24 March 2016 and 25 March 2015 - 24 March 2016. The 'furniture' comprised 3 wooden tables and 3 potted plants. The Tribunal accepts that the Respondent bought the property in August 2015 with contracts of hire in place for the 'furniture'. The hire charge for the tables and plants was £141.60 p.c.m, including VAT. Shortly thereafter, on 31 August 2015, the landlord bought the tables outright for £180.00, including VAT, and the leaseholders were credited pro-rata in September 2015 with £1,000 stated to have been attributable to the tables in the budget for 2015-2016. The hire contract for the plants remained in place at £41.00 p.c.m including VAT. The question therefore is whether the plant hire contract costs in 2015-16 were reasonably incurred. The Tribunal has not seen the plants (they were removed in January 2017, see below) but nor has it seen any evidence that the sums were unreasonably incurred.

60. However, by 25 March 2016 the tables had been sold and yet the sum of £1,700 still appeared in the coming year's budget. The Respondent says that it would have been allocated to some other service charge head. However, this is simply not good management practice. A sum specified in respect of one head cannot be allocated to another and to that extent the sum attributable to tables is not payable. That leaves the plant hire contract, which was terminated by ABC in January 2017 after comments by leaseholders. The issue therefore is whether, as in the case of the previous year, these sums were reasonably incurred. As in the case of the previous year the tribunal has not seen seen any evidence that the sums were unreasonably incurred.

Cleaning

61. It was clear, from the submissions made by the parties, that cleaning has been intermittent and of questionable quality. Photographic evidence and the Tribunal's inspection revealed that the common areas are often in a poor state of cleanliness. The Respondent candidly admitted that they have withheld cleaning services on the ground that they have insufficient service charge funds. As explained above this is not lawful. The obligations to provide services and to make payments for those services are independent of each other. Although a sum of £800 was included for cleaning in the budget for 2015-2016 no charge for cleaning was in fact made when the income and expenditure account was prepared at the end of the year, when a surplus on the account was credited to leaseholders. However, it was not reasonable to demand such sums by way of advance payments at a time when no cleaning contract was in place. A similar sum was included in the budget for 2016-2017. It would appear that cleaning did not commence until May 2016 when an initial clean took place at a cost of £127.50. Invoices for cleaning were then received in June 2016 (£112.50), July 2016 (£90), August 2016 (£112.50), October 2016 (£135.00), November 2016 (£135.00), December 2016 (£112.50) and January 2017 (£90). The total sums for cleaning are £915.00.

62. The Tribunal has no evidence that these sums were unreasonably incurred. It would appear however that cleaning is not of a high standard and needs to be carefully monitored.

Intercom rental

63. The budget for each of the years 2015-16 and 2016-17 includes sums of £1,500 for intercom rental and £516.00 for intercom phone line rental. The service charge expenditure statement for 2015-16 does not contain any sum in respect of the former but does include £472 telephone charges. The Respondent says that when it bought the building it was not given outstanding invoices from BT and only knew about any problem when the line was cut off. However, it is no defence for the Landlord to say that it did not have any information about the intercom system. It became responsible for such on acquisition and the cost of failing to obtain adequate information about services from the seller should not be visited on the leaseholders. The only evidence provided by the Respondent for these charges is by way of BT invoices dated 19 October 2015 and 17 November 2015. The former is for £118.08 but includes a late payment charge of £30.00. The latter is for £32.05. The tribunal finds therefore that the only sums recoverable in respect of BT charges for 2015-2016 are £113.13.

64. With regard to the service charge year 2016-2017, the evidence provided in respect of phone line rental payments showed payment of invoices dated 5 June 2016, 16 June 2016, 18 September 2016 and 15 December

2016 totalling £575.38. However the invoice of 5 June 2016 included a reconnection charge of £120 plus VAT. The Tribunal disallows this charge because it only arose by reason of non-payment of bills by the managing agents. Thus the sum allowed is £431.38.

65. A sum of £144 charged by Express Property Services on 9 June 2016 for affording access to the BT engineer is also disallowed because the Tribunal is satisfied that the agents had ample opportunity to gain access for the engineer without incurring this cost.

66. With regard to the intercom rental charges for 2016-2017, there is a contract in place with NACD for an annual sum of £1,467.52. However, the bundle of documents provided to the Tribunal also includes an invoice of £308.10 for an investigation visit by an engineer. It transpired that there was no fault with the NACD equipment but the problem arose from non-payment of the BT bill resulting in the line being cut off. The Tribunal therefore disallows this sum as a service charge.

Reserve fund

67. A "reserve fund" is a fund created for the purposes of spreading certain costs across the life of the lease to prevent penalizing leaseholders who happen to be in occupation when items of major expenditure are incurred.

68. The Applicants state that there is no provision in the Lease for a reserve fund, and therefore all such payments should be credited and/or refunded to the leaseholders. The Respondent contends that running a reserve fund is considered good practice and that the Lease permits such a fund. It points to paragraph (h) in the definition of Services in the Lease, which refers to "any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building."

69. Mr Davidoff may well be right to state that running a reserve fund is good practice. However, it is not sufficient justification by itself for setting up a reserve fund, which requires express or implied authority for such in the Lease. The Tribunal can find no provision in the present Lease for such a fund. Mr Davidoff relies on the sweeping up clause in paragraph (h) of the definition of Service in the Lease (see above). However, it seems clear to the Tribunal that a reserve fund is not a "service or amenity" and therefore any sums attributed to a reserve fund for the service charge years 2015-16 and 2016-17 are disallowed and therefore not payable.

Set up fee

70. The Respondent says that when a managing agent takes over management of a building the process of handover and setting up a new account is not considered part of the normal management functions covered by the annual management charge and therefore it is acceptable practice to charge a separate fee.

71. The Tribunal disagrees. The Tribunal includes members who are experienced in property management and to their knowledge this is not normal practice. It is expected that setting up a new account is part of the normal management function. The fee is therefore disallowed and not payable.

Management fee

72. The Respondent says that ABC's unit fee of £252 p.a. is at the lower range of their scale, which varies from £200 plus VAT to £450 plus VAT per unit, depending on the size and nature of the building and the leases. The Respondents also state that they provide a good service and instance actions that they have taken. The Applicants say that these charges are too high, that they obtain poor value for the sums charged, and provided examples of allegedly poor service. In January 2017 the Applicants, through an adviser, sought alternative quotes for a management contract from local agents on the same terms as the existing contract with ABC. The results were: (1) Twelvetrees Accommodation Agency - £1,260 per annum; (2) Attwoods - £1,440 per annum; (3) DNA £2,925; (4) Blenheims £3,408 per annum.

73. The Tribunal considers that the explanation for the Attwoods quote is most likely that because Attwoods were the previous agents they can be expected to provide a low bid to secure the contract again. It can be seen that the quotes obtained varied widely but they are indicative of the fact that ABC's fee is relatively high. This is also the view of the Tribunal, which contains two expert valuer members. As to performance it is true that the management company usually takes action to deal with matters raised but their response has too often been protracted and calculated to obfuscate and mystify rather than resolve problems. Correspondence between the parties over matters such as security, door entry, cleaning, rubbish removal, provision of documentation on request, resolution of individual account queries have all been dealt with by a number of members of staff at ABC, often with no satisfactory outcome. In view of the range and type and quality of services at the Property the Tribunal determines that a fee of £2,500 p.a. would be a reasonable management charge and the charge is limited accordingly.

Repairs and Maintenance

74. The budgeted amount for repairs and maintenance in 2015-16 was £3,500. The actual sums charged were £2,354. The same sum of £3,500 was included in the budget for 2016-17. The Tribunal has no compelling

evidence that the sums expended in 2015-16 were unreasonably incurred, although it is concerned at the number of visits necessary to deal with lighting matters and problems with the remote access system, which seem to be on-going. In the circumstances the budgeted sum of £3,500 for 2016-17, although on the high side, would not seem to be unreasonable but will need to be kept under review for the future in the light of actual costs when known.

75. In this connection, the inclusion in the budgets for both years of a sum of £500 under the head of "contingency" is unexplained and therefore disallowed.

The section 20C application

The Applicants' case

76. The Applicants submit that they brought the section 27A proceedings for the following reasons. First, because the supplemental service charge demand requested payment within 30 days of 30 November 2016 and it was therefore important to issue proceedings, the Applicants not having been able to resolve the issue by agreement. Second, because they required a ruling as to whether it was lawful for the Respondent Landlord to make a supplemental service charge demand in order to make good a shortfall in funds caused by non-payment of service charge by other (commercial) leaseholders. Third, attempts by the Applicants to resolve the dispute without recourse to the Tribunal had not been reciprocated by the Respondent. Instead the managing agents had throughout provided information piecemeal in a way that served only to obfuscate the matter. Past experience of leaseholders was that email and phone queries had not been properly dealt with and access to transparent accountancy had failed. The Applicants considered that mediation would therefore not be effective. The Respondent had also ruled out mediation in person, as opposed to telephone mediation.

The Respondent's case

77. The Respondent submits that the supplemental charge was reasonably made because the commercial tenants were in default and the Landlord did not thereby have funds to insure the building in the interest of the Leaseholders. It says that when the commercial tenants settled their obligations the Landlord remitted the payments of the two leaseholders who had paid and cancelled the demand made of the others.

78. The Respondent also submits that it was unreasonable of the Applicants not to have entered into telephone mediation, the outcome of which cannot be predicted in advance. The Respondent says that they suggested telephone mediation to save costs.

79. The Respondent says that complaints about how queries had been dealt with were general and not particularized. It says that they have performed their duties according to law and in the interest of

leaseholders. The Respondent says that the managing agents have always been transparent in their management of the building. The final accounts have been available to leaseholders once they have been prepared and certified by qualified accountants.

80. The Respondent stated that the Applicants' adviser, Miss Francesca Elu, has been in dispute with the Respondent at another property. They allege that she has instigated the present Application. The Respondent asked that if the Tribunal considers that the Respondent is entitled to some or all of its costs the Tribunal consider whether to make a costs order against the Applicants and Miss Elu jointly and severally.

81. In conclusion the Respondent considers that a Tribunal application in respect of a necessary refundable charge of £300 was excessive and not a good use of the Tribunal's resources.

Consideration

82. The Applicant leaseholders seek an order preventing the Respondent Landlord from recovering its costs incurred in connection with these Tribunal proceedings by way of a future service charge demand. The Landlord opposes that request. Section 20C confers a wide discretion to make such order on the application as the Tribunal considers just and equitable in the circumstances.

83. Section 20C has been considered by the courts and the Upper Tribunal on a number of occasions. In *Iperion Investments Corporation v Broadwalk House Residents Limited* (1996) 71 P & CR 34 Peter Gibson LJ considered that the purpose of section 20C was to prevent recovery of the landlord's costs of proceedings by way of a service charge demand

    "...... where the tenant has been successful in litigation against the landlord and yet the costs of the proceedings are within the service charge recoverable from the tenant."

    In *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 (Judge Rich QC) stated:

    "28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise. "

    In *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 Judge Rich QC placed emphasis on the significance of the outcome of the proceedings saying that

    "in service charge cases, the "outcome" cannot be measured merely by whether the applicant has succeeded in obtaining a reduction. That would be to make an Order "follow the event". Weight should be given rather to the degree of success, that is the proportionality between the

complaints and the determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of service charges on the one hand and the costs of the dispute on the other hand".

84. The first issue in the present case is where the balance of the outcome lies. On the issue of whether section 47 of the 1987 Act had been satisfied the Respondent succeeded. However, despite citation of the *Beitov* decision by the Applicants, of which Mr Davidoff, somewhat to the Tribunal's surprise, claimed to be ignorant, it was reasonable of the Applicants to query whether that decision applied where the Landlord's registered address was that of its Accountant.

85. The second issue was that of the supplemental service charge demand. For the reasons set out in paragraphs... above that issue was decided in favour of the Applicants.

86. No concrete evidence was offered with regard to the third and fourth issues and therefore it was not necessary for the Tribunal to rule on these matters. However, there was clearly an acrimonious dispute between ....and the Respondent over her own account and whether she had been overcharged but in the circumstances this was not a matter for resolution by the Tribunal. It is true however that the Respondent had provided copies of relevant correspondence in order to meet this allegation.

87. The Applicants also challenged a number of charges contained in the budgets for 2015-16 and 2016-17. The Tribunal found in their favour wholly or partly with regard to (1) Insurance, which had not been charged in accordance with the terms of the lease (2) Cleaning, which had been charged for in the budget for 2015-16 but deliberately not provided, meaning that the sum paid was only refunded at the end of the year. (3) Garden furniture (wrongly included in the 2016-17 budget) (4) Intercom rental (5) Reserve fund (collected without authority in the lease) (6) Set up fee (disallowed) (7) Management fee (reduced) (8) Contingency (sum disallowed).

88. The Tribunal finds accordingly that it was far from disproportionate for the Applicants to have commenced the present proceedings and that the supplemental demand was not the only issue raised by them. As explained above the Respondent has not always managed the property in accordance with the terms of the lease.

89. It is quite true that the Respondent has, despite the unusual drafting of this lease, sought to charge for services according to a budget and produced accounts at the end of the year with appropriate refund where applicable. Some of the budgeted items are uncontroversial but many are

not. The Landlord admitted that they had bought the property with minimal information as to services. See for example the debacle over the telephone and intercom rental charges

90. The Tribunal accepts that it was not unreasonable of the Applicants to have rejected telephone mediation, which would not have been appropriate in this case because of the number of disputed matters and the documentation involved.

91. As explained above lack of funds is not an excuse for withholding of services or double charging (not in accordance with the terms of the lease) for insurance.

92. There is no evidence that a third party cajoled the Applicants into bringing the proceedings. Indeed it was clearly a stressful experience for them.

93. The Tribunal is satisfied that the balance of the outcome lies substantially with the Applicants and therefore makes the order requested under section 20C.

94. Even had the Tribunal not made the order requested it cannot see any provision in the lease whereby the Landlord would be able to charge its costs incurred in connection with Tribunal proceedings under section 27A of the 1985 Act to the leaseholders.

The Rule 13 costs application

The Applicants' Case

95. The Applicants allege that the Respondent conducted the proceedings unreasonably. They instanced the provision of over 1200 pages of documents, which some Applicants had to take off work to deal with. This led to a printing bill of £314.52 incurred at Bristol Law Clinic.

96. The unrepresented Applicants stated that Mr Davidoff made inappropriate and unprofessional remarks and abusive threats during the hearing, not making his comments through the judge. This caused them unnecessary stress. The Applicants also referred to the Respondent sending documents by email rather than by post.

97. The Applicants also asked the Tribunal to order that the Respondent reimburse their application and hearing fees.

The Respondent's case

98. The Respondent says that they did not behave unprofessionally or

abusively. They say that the printing costs could have been significantly reduced had the Applicants printed their own or used Rymans whose costs are lower. They also say that the Applicants, who are intelligent people, could have been legally represented. Although they did not have the services of Lisa Attwood they did have the support of Miss Francesca Elu who is well versed in these matters. The Respondent says that the Applicants should know that there are Tribunal fees to be borne. They deny that use of email is unreasonable.

99. Mr Davidoff also made submissions on behalf of ABC Estates. However, many of his comments either reiterated or expanded on submissions made at the hearing or provided further information, which was post-hearing and not of relevance to the costs applications. Nevertheless in summary, he argues that costs should not be ordered, nor a section 20C Order made, because he believes that the Respondent (and its agent have behaved professionally and responsibly and would succeed on the substantive matters in dispute before the Tribunal.

Consideration and decision

100. The Tribunal has power to award costs under Rule 13(1)(b) of the 2013 Rules only if a person has acted unreasonably in bringing, defending or conducting proceedings. If that threshold is crossed the Tribunal then has discretion as to whether to make an order and if so what order to make. In addition to these powers in relation to costs, the Tribunal may also make an order under rule 13(2) for the reimbursement of fees. That power is unrestricted, other than by the overriding objective.

101. In *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 90. The Upper Tribunal stated

" [24] Unreasonable conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?" (per Martin Rodger QC, Deputy President).

102. The Applicants state that the unreasonable behaviour complained of was (a) the Managing Agents sending over 1200 pages of documents many of which were not referred to at the hearing (b) that Mr Davidoff caused the Applicants undue stress by making inappropriate and unprofessional remarks and abusive threats during the hearing; not making his comments through the judge. (c) that the agents frequently sent documents by email rather than by post.

103. In turn the Respondent says that the Applicants could have chosen to be legally represented. However, the Tribunal finds that the criticism directed at the unrepresented status of the Applicants is misplaced. In

Willow Court the Upper Tribunal stated

> "25 It is not possible to prejudge certain types of behaviour as reasonable or unreasonable out of context......... For a professional advocate to be unprepared may be unreasonable (or worse) but for a lay person to be unfamiliar with the substantive law or with tribunal procedure, to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case, to lack skill in presentation, or to perform poorly in the tribunal room, should not be treated as unreasonable."

104. It is expensive for leaseholders to engage professional representation and in fact the Applicants in the present case performed very well. By contrast Mr Davidoff undoubtedly overstepped the mark on occasions. Some of his observations, as detailed in the Applicants' submission, were inappropriate and calculated to raise the temperature of the proceedings. He did address the parties directly at times and his tone was on occasions calculated to inflame matters. However, the Tribunal believes that this conduct did not pass the threshold of being vexatious and harassing rather than seeking a resolution of the case. It is also the case that the Respondent produced a large number of documents, some unnecessarily repetitious, but the Tribunal accepts that this was in order to ensure that any evidence that might prove to be relevant was before the Tribunal. The use of email on occasions cannot be said to amount to vexatious conduct. For these reasons the Tribunal considers that the Applicants have not made out the case for Rule 13 costs.

105. The suggestion in the Respondent's costs submission that the Tribunal consider awarding costs against the Applicants and/or Miss Elu is rejected. No such formal application has been made and there are no grounds for such an order.

106. For the same reasons as given in respect of the section 20C application the Tribunal orders that the Respondent reimburse the Applicants' Tribunal fees. It is correct that such fees are an inevitable cost of the tribunal process but it is also the case that the Tribunal has power to award that these fees be reimbursed by another party if it considers it appropriate to do so and the Tribunal so orders on this occasion.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written

application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Martin Davey
Chairman of the Tribunal
26 July 2017

Annex: The Law

Landlord and Tenant Act 1985

Section 18(1) defines a "service charge" as:

"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."

Section 19(1), provides that:

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

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly".

"Relevant costs" are defined for these purposes by **section 18(2)** of the 1985 Act as "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.

Section 20C(1) provides in so far as relevant 'that a tenant may make an application for an order that all or any of the costs incurred by the landlord in connection with proceedings before a court or tribunal.........are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application."

Section 20C(3) provides that "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."

Landlord and Tenant Act 1987

47.— Landlord's name and address to be contained in demands for rent etc.

(1) Where any written demand is given to a tenant of premises to which this Part applies, the demand must contain the following information, namely—

(a) the name and address of the landlord, and

(b) if that address is not in England and Wales, an address in England and Wales at which notices (including notices in proceedings) may be served on the landlord by the tenant.

(2) Where—

(a) a tenant of any such premises is given such a demand, but

(b) it does not contain any information required to be contained in it by virtue of subsection (1),

then (subject to subsection (3)) any part of the amount demanded which consists of a service charge [or an administration charge] ("the relevant amount") shall be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant.

(3) The relevant amount shall not be so treated in relation to any time when, by virtue of an order of any court [or tribunal] , there is in force an appointment of a receiver or manager whose functions include the receiving of service charges [or (as the case may be) administration charges] from the tenant.

(4) In this section "demand" means a demand for rent or other sums payable to the landlord under the terms of the tenancy.

The Tribunal Procedure (First-tier Tribunal (Property Chamber) Rules 2013

13.— Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgement Debts Order) 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.