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

Case Reference : LON/00AT/LSC/2013/0362

Property : 65 Holland Gardens, Brentford,
Middlesex, TW8 0BF

Applicant : Dr Maren Heidemann (“the tenant”)

Representative : N/A

Appearances for Applicant: Applicant in person

Respondent : Holding & Management (Solitaire)
Limited (“the landlord”)

Representative : Pembertons Property Management

Appearances for Respondent:

- (1) Ms Misbah Khan, Legal Consultant,
Pembertons Property Management
- (2) Mr Sean Doherty, LVT Accountant
employed by OM Property
Management Limited
- (3) Ms Lorraine Walsh, Property
Manager, Pembertons
- (4) Mr Irwin Alvisse, Regional Property
Manager with Pembertons
Residential Limited
- (5) Mr Charles Bettinson, Head of
Insurance for Estates & Management
Limited, agents for the Respondent

Type of Application : For the determination of the reasonableness of and the liability to pay a service charge

Tribunal Members : (1) Mr A. Vance, LLB (Chair)
(2) Mr P. Roberts DipArch RIBA
(3) Mrs L. West

Date and venue of Hearings : 14.11.13 and 04.12.13 (reconvened hearing)
10 Alfred Place, London WC1E 7LR

Date of Decision : 04.12.13

DECISION

Decision of the Tribunal

1. The tribunal makes the determinations as set out under the various headings in this Decision.
2. The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

3. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by her in respect of 65 Holland Gardens, Brentford, Middlesex, TW8 0BF ("the Property") for the service charge years 2007 to 2012 inclusive.
4. The relevant legal provisions are set out in the Appendix to this decision.
5. Numbers appearing in bold and in square brackets below refer to pages in the Respondent's hearing bundle unless stated otherwise. The Applicant provided her own voluminous hearing bundles which contained much of the material in the Respondent's bundle. As the Respondent's bundle was paginated and in a logical sequence we utilise their bundle for the purposes of this decision. Where pages in the Respondent's bundle are referred to these will be identified in round brackets and in bold.

Background

6. The Applicant is the former leasehold owner of the Property, a three bedroom maisonette in a purpose built block of flats ("the Block") located on an estate comprising two blocks and approximately 172 flats ("the Estate"). Flats on the Estate were first let in 2002 and the Applicant acquired her leasehold interest in the Property on 05.10.07. She sold it on 18.07.12.
7. The Respondent has the benefit of the freehold reversion of the Property. Pembertons Property Management ("Pembertons") were the Respondent's managing agents at all material times but were replaced by Crabtree Property Management, LLP ("Crabtree") in October 2013. The relevant long lease for the Property is dated 27.09.02 and was entered into by the Respondent and the Applicant's predecessor in title, Arthur Chirkinian, for a term of 999 years from 01.01.02. A copy of the lease appears at the end of the second volume of the Applicant's bundle. The lease requires the landlord to provide services and for the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

8. An oral pre-trial review took place on 27.06.13 which the Applicant attended. The Respondent did not attend and was not represented. Directions were issued on the same day.
9. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

The Hearing

10. There was insufficient time available at the initial hearing on 14.11.13 to hear evidence and submissions on all the issues in dispute and a reconvened hearing took place on 04.12.13.
11. The Applicant represented herself at both hearings. The Respondent was represented by Ms Khan.
12. During the course of the hearing the parties handed in further documents. The tribunal took time to consider these new documents and considered it equitable to allow the parties to rely on the documents despite their late submission. The documents were added to the bundles and comprised copies of the following:
 - 12.1. Email from Scott Tomsett at Team (Energy Auditing Agency Ltd) ("Team Energy") to Mr Doherty dated 25.09.13 **[219A-219B]**.
 - 12.2. Letter from the Applicant to the Tribunal dated 08.11.13 enclosing details of the buildings insurance premium paid by the current managing agents, Crabtree, as well as information and copy certificates of insurance for the years ending 27.06.13 and 27.06.14 (inserted into the Applicant's bundle at **(708A-719)**).
13. At the start of the hearing the parties identified the relevant issues for determination as being the payability and reasonableness of the following service charge costs:
 - 13.1. Individual and communal water charges for the service charge years 2007/8 to 2011/12;
 - 13.2. Buildings insurance for the years 2009/10 to 2011/12 inclusive.
 - 13.3. Communal electricity charges for the years 2008/9 to 2011/2012 inclusive.
 - 13.4. Repairs for the years 2009/10 and 2010/11
14. However, during the course of the hearing the tribunal determined, on the Respondent's invitation, that it lacked jurisdiction to determine the challenge to the individual water costs. In addition, having heard the Respondent's explanation as to how communal water costs had been calculated and the amount of costs involved the

Applicant did not pursue her challenge to the communal water costs. Finally, the Applicant did not maintain her challenge to the 2010/11 repair costs.

15. Having heard evidence and submissions from the Applicant and considered all of the documents provided, the tribunal has made determinations on the various issues as set out below.

Individual Water costs – jurisdiction

16. In her application the Applicant challenged the water charges attributed to her individual Property for the years ending 2007 to 2012.
17. The arrangements for the supply of water to the Estate and flats is a somewhat unusual one. A main water meter is located on Holland Road which records the usage of the whole Estate. Thames Water use readings from this meter when calculating the charges payable by the Respondent. Whilst there are also individual check meters for each flat, the flat owners do not receive individual bills from Thames Water. Instead, the Respondent's practice has been to apportion the total water costs charged for the Estate to the individual lessees both in respect of the communal costs for the Estate and in respect of their individual usage.
18. This has led to difficulties which Mr Doherty stated in evidence stemmed from a variation in the frequency of the Thames Water readings and the readings of the check meters for the individual flats. According to Mr Doherty a reconciliation exercise in 2011 resulted in an adjustment credit of £193.06 being applied to the Applicant's account [471]. It appears that the actual sum attributed for her total individual usage between 05.10.07 to 31.03.11 was £355.96 [494] and that when the period up to the end of the 2012 service charge year is taken into account the amount rises to £536.58 [231].
19. It was Ms Khan's position that the tribunal lacked jurisdiction to determine whether or not these costs were payable or reasonable.

Decision and Reasons

20. After hearing oral representations from both parties, the tribunal concluded that Ms Khan was correct. This was because the costs were not service charge items for the purposes of section 18 of the 1985 Act.
21. The tribunal's jurisdiction to determine the payability and reasonableness of a service charge derives from Section 27A of the 1985 Act. However, for the purposes of that section the definition of what constitutes a service charge is set out in section 18, namely that it is an amount payable by a tenant of a dwelling as part of or in addition to rent which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management and the whole or part of which varies or may vary according to the relevant costs.

22. The following lease provisions are relevant:

- 22.1. Under clause 3.2 the Applicant covenants to contribute towards a Service Charge and Estate Charge for each Maintenance Year ending on the 31st day of March in each year.
 - 22.2. The Estate Charge relates to the wider Estate costs.
 - 22.3. The amount payable in respect of Service Charge is calculated by reference to the Annual Maintenance Provision which is itself calculated in accordance with the provisions of the Fourth Schedule Part II.
 - 22.4. The Fourth Schedule Part II provides that the Annual Maintenance Provision shall consist of a sum comprising (amongst other matters) expenditure likely to be incurred by the Respondent in meeting the purposes set out in Part 1 of the Fifth Schedule.
 - 22.5. The purposes for which the Service Charge is to be applied as referred to in Part I of the Fifth Schedule include those costs and expenses incurred by the Applicant in maintaining a supply of water to the Block.
 - 22.6. The purposes for which the Estate Charge is to be applied are set out in Part II of the Fifth Schedule and include the costs incurred by the Respondent in maintaining a supply of water to the Estate.
23. Therefore whilst Part I of the Fifth Schedule of the lease allows the Respondent to recover *Block* water costs from the Applicant through the service charge (although Ms Khan informed us that there are none) and Part II of that Schedule provides for the recovery of communal *Estate* water costs, there is no provision within the lease for the Respondent to recover, by way of service charge, costs attributable to usage by the individual flat owners.
24. It was Ms Khan's submission that the individual water costs fell outside the service charge and were sums chargeable directly to the tenants. She relied on the lessee covenants at clause 3.2 and the Third Schedule para. 3 of the lease relating to payment of water rates attributable to individual flats. She maintained that the charge was a direct charge to the flat.
25. The tribunal concludes that these costs were not recoverable through the service charge and that they were not payable for services, repairs, maintenance, improvements or insurance provided by or on behalf of the Landlord or in connection with the Landlord's costs of management. As such, we conclude that we lack jurisdiction to determine the Applicant's challenge.

Communal water charges for the years 2007 to 2012

26. Mr Doherty confirmed that no communal estate water charges were sought from lessees via the service charge until the service charge year ending 2010 [470].

2007/8

27. An examination of the accounts shows that no estate water charges were sought through the service charge for the year ending 2008 [3].

2008/9

28. Ms Khan confirmed that in the service charge year ending 2009 the sum of £1,889.25 was erroneously included in the accounts as relating to Estate water charges [15]. These, she said, related to costs incurred by the gym servicing the Estate and should have been identified under a different head of expenditure [259]. She confirmed that no communal water charges were sought from the Applicant for this service charge year.

2009/10

29. For the service charge year ending 2010 the sum of £10,336 was charged to the service charge accounts for communal water and sewerage supply [42]. This amount included sums due for past service charge years but which had not been charged to the service charge account. Mr Doherty stated in evidence that the sum was calculated on a 'guesstimate' that 10% of the previous charges related to the communal element.
30. Ms Khan, on behalf of the Respondent, conceded that a credit of £6,397.31 needed to be made to this sum because of the impact of the provisions of s.20B of the 1985 Act. An explanation of how this was calculated is at page [489]. She explained that it was concluded, following a reconciliation exercise carried out in 2011 and an analysis of invoices for the year ending 2010 that the sum of £3,938.55 was properly chargeable to this service charge year. The credit adjustment of £6,397.31 was required because that sum was not recoverable from lessees as it related to charges incurred over 18 months before they were demanded. As such, s.20B of the 1985 Act applied and the lessees were not liable for that sum.

2010/11 and 2011/12

31. The service charge accounts for this year show that £2,883 was charged for communal water costs [51] followed by £1,843 for the year ending 2012 [57].
32. Mr Doherty confirmed that the Applicant's account had been adjusted to take into account the credit referred to above and that her total liability for communal water for the service charge years ending 2008 to 2012 was £98.55 [231].
33. Given this explanation and the reduced amount sought, the Applicant did not maintain her challenge to this item further, and the tribunal is not required to determine if the sum of £98.55 was reasonably incurred or payable by the Applicant.

Buildings insurance

34. The annual service charge accounts show the following sums were charged in respect of buildings insurance:

Year Ending 2009	£32,356.34	[33]
Year Ending 2010	£32,709.00	[42]
Year Ending 2011	£42,347.00	[51]
Year Ending 2012	£45,460.00	[57].

35. Breakdowns as to how these sums were calculated and copies of the relevant certificates of insurance are at pages **[289 – 295]**.

The Respondent's Position

36. Mr Bettinson provided witness evidence on behalf of the Respondent **[402]**. He confirmed that insurance cover for the buildings on the Estate was originally provided by insurers NIG who were owned by Royal Bank of Scotland ("RBS"). Prior to the 2009 policy renewal deadline and because of concerns over the financial situation of RBS it was decided to carry out an insurance remarketing exercise.
37. The outcome of that exercise was that cover was arranged with AXA from 28.06.09 but subject to a risk survey of the buildings on the Estate. NIG had not requested a survey for any of the years that they provided cover.
38. When the AXA risk survey took place in October 2009 it was identified that polystyrene insulation formed part of the cladding to the external fabric of the buildings. This was of concern to AXA because of the increased fire risk and it gave notice that it was cancelling insurance cover **[409]**.
39. An alternative insurer was needed but, according to Mr Bettinson, it was very difficult to identify one that was willing to provide cover given the construction of the building, the AXA cancellation and the claims history for the Building.
40. Zurich were the only insurer willing to offer cover and a policy was taken out with them for the period after the AXA cancellation took effect, namely 13.11.09 to 28.06.10 **[411]**. Unfortunately, this was at a greatly increased premium of £25,006.32 for the period covered (compared to the sum of £24,757.20 originally charged by AXA for the whole of the period 28.06.09 to 28.06.10).
41. On renewal on 28.06.11 the Zurich premium increased to £46,120.43 for the year **[295]**. According to Mr Bettinson this was as a result of annual indexation and because of the significant claims history exhibited to his witness statement at **[413]**.
42. At the next renewal on 28.06.12 the premium increased to £50,746 as a result of an independent revaluation of the Building that increased the reinstatement cost value to £40,530,000 including VAT **[415-420]** from £27,280,608 **[295]**.
43. Mr Bettinson's evidence was that at each renewal the policy terms were reviewed by the Respondent with the assistance of the appointed broker in order to obtain the most competitive quote. The results of a 2012 remarketing exercise are set out in a letter dated 17.09.13 from Lockton Companies LLP exhibited to his witness statement **[422]**. This refers to a number of insurers declining to provide terms based on the poor claims history and the construction of the building.

The Applicant's Position

44. The Applicant's position was that the increased policy costs since 2009 were excessive and that they included an excessively high component for terrorism cover. She queried both the need for terrorism cover to be included at all and the associated costs.
45. She relied upon an email dated 06.09.13 from St Giles Group to the current managing agents, Crabtree in which it is stated that Aviva would provide insurance cover for the Block for 2013/14 in the sum of £56,644.37 (later corrected to £59,644.37) which included a premium of £12,410.45 for terrorism cover [709]. As Zurich's certificate of insurance for the period 28.06.13 to 27.06.14 was in the sum of £66,833.13 [714] she considered this to amount to evidence that the premiums paid in previous years to Zurich were excessive.
46. She also queried the amount of commission paid to brokers and suggested that this was an incentive to the Respondent to keep premiums high.

Decision

47. The tribunal determines that the amount payable in respect of buildings insurance is the Applicant's apportioned share of the following sums as reflected in the service charge accounts:

Year Ending 2009	£32,356.34	[33]
Year Ending 2010	£32,709.00	[42]
Year Ending 2011	£42,347.00	[51]
Year Ending 2012	£45,460.00	[57].

Reasons

48. There was unquestionably a very significant increase in insurance premiums following the change from NIG in 2009. The last NIG premium was £27,737.68 for the period 28.06.08 to 28.06.09. Following the cancellation of the AXA policy and their replacement by Zurich the cost of the premium for 2009 roughly doubled. Nevertheless, despite the large increase and in the unusual circumstances of this application, we are satisfied that the increased premiums were reasonably incurred.
49. Firstly, we do not consider the Respondent acted inappropriately in carrying out an insurance remarketing exercise in 2009. It is prudent for a freeholder to do so periodically and given the concerns over Royal Bank of Scotland in 2008 and 2009 the decision to do so cannot be criticised by this tribunal. We consider that the AXA premium of £24,757.20 to be reasonable in amount given that it was less than the previous NIG premium.
50. Secondly, we accept Mr Bettinson's evidence that the problem identified with the construction of the building following the AXA survey was such that it would have

been difficult to secure alternative cover without a significantly increased premium. The reasons for AXA's cancellation are clearly set out in an email dated 18.10.09 [409]. This refers specifically to the findings of the survey report and states that if AXA had been aware of the construction prior to providing cover it would have declined to provide terms on any basis.

51. The problems with securing alternative cover were confirmed by the Respondent's insurance brokers, Oval Insurance Broking Limited ("Oval") by letter dated 01.12.09 [411]. Given the stance taken by AXA following the survey report we accept the information stated in that letter (and Mr Bettinson's evidence) that no other insurer other than Zurich agreed to offer terms.
52. We also accept that the revaluation in 2012 increased the cost of the insurance premiums but this is not a matter that we consider renders the increased sums to have been unreasonably incurred. It is sensible for a freeholder to carry out periodic revaluations of a building and if this leads to an increased property reinstatement value then an increased insurance premium is in most cases unavoidable.
53. Whilst it seems clear that the Aviva quote obtained by Crabtree was less than the Zurich quote for 2013/14 the email appears to contain a typographical error. Further details of the Aviva quote were provided by the Respondent in a document from St Giles to Crabtree dated 02.07.13 [546] in which it is stated that the premium quoted was £59,644.37 as opposed to the £56,644.37 quoted in the email of 06.09.13. The difference between the Aviva quota and the Zurich quote for the same period therefore appears to be £7,188.76.
54. The tribunal sees little merit in seeking to extrapolate this differential to the years in dispute in this application when determining whether or not the Zurich premiums were excessively high. The fact that the Zurich quote for 2013/14 was higher than the Aviva quote does not necessarily mean that this would have been the case for earlier years. Both quotes for 2013/14 are significantly above the Zurich premium for 2011/12 of £45,460.00, the last year this tribunal is concerned with. There may be many reasons, including annual indexation as to why the costs of premiums would increase over time. It appears to the tribunal, weighing up the available evidence, that whilst the premiums paid to Zurich for the years in dispute were towards the higher end of what can be considered reasonable they were not so high as to have been unreasonably incurred.
55. We consider a similar position arises in respect of the cost of terrorism cover. The cost of this cover amounts to approximately 30% of the premiums for the years in issue. However, whilst, once again, we consider this to be at the high end of what can be considered reasonable (we note that 22% of the premium quoted by St Giles related to the cost of terrorism cover) we do not consider the cost to be so high as to have been unreasonably incurred.
56. We are also of the view that securing such cover is not unreasonable. The provisions of the lease allow the Respondent to insure against "...such other risks as the Company shall see fit" (paragraph 8.1 of the 5th Schedule). As Mr Bettinson states in his witness statement the RICS Service Charge Residential Management Code of Practice (2009) recommends at paragraph 15.2 that serious consideration be given

to taking out such cover. Given the unpredictable nature of terrorism attacks and where terrorists might reside we consider these costs to have been reasonably incurred.

57. As for the brokers commission Mr Bettinson confirmed that all commission paid was included in the insurance premiums. A breakdown of the premiums paid was exhibited to his witness statement [407]. Two persons received commission for claims handling. E & M received commission averaging 9.6% between 28.06.09 and 28.06.12 whilst the brokers, Oval received commission averaging 7.7% for the same period.
58. The tribunal does not consider the commission paid, which, averages out to about 18 – 20% of the relevant premiums, to be excessive for the services provided and as described in the letter sent by Oval to the Applicant (718). The sums paid compare favourably to the quote from St Giles (709) which incorporated a 35% commission in the building element and 10% in the terrorism section.
59. We do not accept the Applicant's assertion that payment of commission is an incentive to the Respondent to pay higher rates for insurance cover. There is no evidence to support such an assertion and there is merit in Mr Bettinson's response, in cross-examination, that it is in the Respondent's interest to keep the premium as low as possible to avoid challenges such as this application.

Communal electricity charges

60. The Applicant's challenge was that the sums sought for the electricity supply to communal areas to her Block and to the Estate were excessive for two reasons:
 - (a) Non-domestic VAT and Climate Change Levy ("CCL") rates had been incorrectly applied to the bills for the years ending 2008/9 to 2011/2012 inclusive.
 - (b) Inappropriate electricity tariffs applied during this part or all of this period.

(a) VAT and CCL

61. The Applicant believed that following a change in supplier from Eon to Opus in 2009, VAT had been charged at the non-domestic rate as well as a CCL levy, both of which should not have been charged for a residential supply.
62. Mr Doherty confirmed that this was correct [471] and that the mistake occurred from receipt of the Opus bill dated 14.07.09 [108] onwards. However, the mistakes were corrected through two reconciliation exercises. The first reconciliation exercise took place in 2010 and the second in 2012. The required adjustments were then reflected in the service charge end of year accounts. Details of the 2012 reconciliation exercise are exhibited to Mr Doherty's witness statement [496-498].

(b) Tariff

63. The Applicant asserts that for an unspecified period of time an inappropriate day/night tariff was used for the communal electricity supply. It appears from an examination of the electricity invoices in the Respondent's hearing bundle that this occurred on two occasions, firstly between April 2011 to August 2011 (which was then corrected by subsequent bills covering the same period) and also between January 2012 to April 2012.
64. Ms Walsh's evidence was that because of a mistake made by Pembertons, the electricity contract with Opus was allowed to lapse on 26.03.12 without an alternative contract being agreed with the result that the supply was moved on to a non-domestic day/night tariff. However, this does not explain why bills in January 2012 refer to day/night rates [215].
65. Mr Doherty's evidence was that the rates that had been applied were, in any event, reasonable despite the fact that for a short period a day/night tariff had applied. He referred us to a breakdown of the unit rates charges exhibited to his witness statement [501-508] and an email from Team Energy to him dated 25.09.13 [219A]. He had instructed Team Energy, an energy consultancy, to comment on the unit rates and they had concluded that the majority of the unit charges were very much below the UK average and that when the bills contain what looks like a day and night rate the average of those two figures also falls below the UK average. We were assured by Mr Doherty that this averaging process took into account actual likely usage between night and day and that it was not just an average of the two sums.
66. The Applicant also queried why the Respondent had not been able to secure a supply with Southern Electricity following her suggestion in January 2012 [534] that they offered a better contract rate. The explanation provided by Ms Walsh was that she passed this information on to Team Energy who advised her that the existing contract with Opus had a 90-day notice period for termination and that this had been missed as the contract ended on 26.03.12 [542].
67. Finally, she also queried why some of the Electricity bills showed a KVA rate charge. Mr Doherty explained that this was a supply capacity rate applied to ensure that the level of supply was available when required.

Decision

68. The tribunal determines that the amount payable in respect of communal electricity costs is the Applicant's apportioned share of the following sums as reflected in the service charge accounts:

Year Ending 2009	£31,978.77	Block costs [33]	and	£18,672.34	Estate costs [15]
Year Ending 2010	£38,220.00	Block costs [42]	and	£16,170.00	Estate costs [42].
Year Ending 2011	£29,565.00	Block costs [51]	and	£13,727	Estate costs [51].

Year Ending 2012 £71,078.00 for both Block costs and Estate costs [57].

Reasons - VAT and CCL

2008/9

69. For the service charge year 2008/9 we are satisfied with Mr Doherty's explanation that no adjustments were required to the service charge accounts as VAT had been charged at the rate of 5% throughout that year and with no CCL imposed. This is clear from by an examination of the relevant electricity bills [88-103].

2010/11

70. For the service charge years 2010/11 we are satisfied that the reconciliation exercise referred to by Mr Doherty led to appropriate credit adjustments as reflected in the annual accounts.
71. There are three meters servicing the Estate. For 2010/11 the adjusted figure for the first meter (showing VAT at 5% and with no CCL levy) is £22,598.47 [496]; for the second meter, £14,175.33 [497] and for the third £18,131.92 [498]. Those three figures total £54,905.72. That figure is accurately reproduced in the end of year service charge accounts [51].

2011/12

72. We are similarly satisfied that the reconciliation exercise referred to by Mr Doherty led to appropriate credit adjustments as reflected in the annual accounts for this service charge year.
73. The three relevant meter readings are £27,641.18 [496], £13,029.39 [497] and £30,406.96 [498]. The total sum, £71,077.53 is again accurately reflected in the annual service charge accounts [57].

2009/10

74. Mr Doherty's evidence was that adjustments were also made for this year to correct the erroneous application of non-domestic VAT and a CCL levy but that this was done as part of the earlier 2010 reconciliation exercise. He indicated that the figures stated for this year at pages [496-498] were by way of a cross-check of the earlier reconciliation and that this was why the total of the three figures stated on those pages did not match the figure stated in the annual accounts for the year 2009/10. If one adds up the total of those figures for the three meters they total £42,456.90. However, the total electricity cost for the Estate reflected in the service charge accounts is £68,354 [42].
75. Mr Doherty indicated that the tribunal should not have regard to the figures stated on pages [496-498] for this year as it was the earlier reconciliation exercise in 2010 that was the relevant reconciliation. He also drew our attention to the fact that in the service charge accounts various credits are shown for previous years electricity costs totalling £9,165. [51]. He suggested that this credit may have been for adjustments made in respect of the previous year following the 2010 reconciliation exercise.

76. We do not find Mr Doherty's evidence entirely satisfactory as we do not have an explanation as to how the 2010 reconciliation exercise was carried out nor how the outcome was reflected in the service charge accounts. The difference between the sum of £68,354 and £42,456.90 is a considerable one and we have considered whether or not it is open to the tribunal to determine that some or all of that difference was unreasonably incurred.
77. We have concluded that it is inappropriate to do so for the following reasons:
- 77.1. We found Mr Doherty to be a credible and knowledgeable witness whose evidence as contained in his witness statement was corroborated by the documentary evidence in the hearing bundle. An example was the fact that the outcome of the 2012 reconciliation exercise as exhibited to his witness statement was accurately reflected in the accounts for 2010/11 and 2012/13. We accepted his evidence that there had been an earlier reconciliation exercise in respect of these electricity costs which was then reflected in the 2009/10 and 2010/11 accounts.
- 77.2. Whilst it is unfortunate that neither Mr Doherty nor Ms Khan were able to provide full details of the 2010 reconciliation exercise we do not regard this as justification for the tribunal to determine that some or all of these costs had been unreasonably incurred.
- 77.3. Ms Khan submitted that what the Respondent considered was in issue in this application, as far as electricity costs were concerned, was why an inappropriate VAT rate and CCL had been applied together with issues concerning the tariff. She suggested that the Applicant had not challenged the actual costs for the relevant service charge years and that there may be several reasons why there was a difference between the figures shown in the 2010 and 2012 reconciliations such as a missing invoice or invoices when the 2012 reconciliation was carried out. If the tribunal was going to consider whether or not some of the costs were unreasonably incurred it was her view that the tribunal should allow the parties to make written submissions on this point before reaching its decision.
- 77.4. We do not agree with Ms Khan that the Applicant had not challenged the reasonableness of the actual electricity costs incurred. The application notice refers to specified costs being excessive. However, we consider that the manner in which the Applicant has presented her case has left the Respondent at a disadvantage in responding to this challenge. Whilst, in her application notice, the Applicant raised the issue of the incorrect VAT rate and CCL levy what she has not done is state how much of the total sum demanded she considers has been unreasonably incurred. The Respondent provided her with copy electricity invoices for the service charge years in dispute under cover of a letter dated 12.08.13. However, her statement of case/witness statement dated 10.09.13 does not provide any meaningful analysis of those bills. It was open to the Applicant to review those bills, recalculate the correct VAT rate, remove the CCL levy and provide the tribunal with an analysis of what sum she considered had been unreasonably

incurred. If she had done so the Respondent could have made necessary enquires of its accountants and been prepared to address these issue before the tribunal.

- 77.5. We considered whether or not to allow additional time for the parties to make written submissions on this point but decided that it was disproportionate to do so having regard to the value of the amount in dispute, the tribunal's resources and the fact that the hearing in this matter had already been adjourned on a previous occasion.
- 77.6. Weighing up the evidence we accept that a reconciliation exercise was carried out in 2010 to remove the incorrect VAT rate and CCL which then led to the adjustments shown in the service charge accounts for 2009/10 and 2010/11. We do not consider, on the evidence available, that there is sufficient evidence before us to conclude that the communal electricity costs for 2009/10 were unreasonably incurred.

Reasons - Tariff

78. It is very unfortunate and a sign of poor management that the electricity contract was allowed to expire without the managing agents securing an alternative supply with the result that the supply was switched to a non-domestic tariff. Moreover, there is no explanation as to why a day/night rate seems to have been applied in January 2012 prior to the Opus contract coming to an end.
79. Nevertheless, in light of the Team Energy conclusion that, for the short period that the supply moved to a non-domestic tariff, the rates applied were still below the national average, we are satisfied that the costs were reasonably incurred. We are also satisfied that the application of a KVA rate charge is appropriate given Mr Doherty's explanation as to the purpose of such a charge.

Repairs

80. The Applicant confirmed that she was now only challenging the costs of invoices for the service charge year ending 2010 and not 2010/11.
81. She queried a total of nine invoices that were only specifically identified during the course of the hearing [**301, 303, 306, 307, 311, 312, 313, 316 and 317**]. Out of these invoices, four she said related to issues relating to missing/dislodged membranes to window openings which should have been covered by a NHBC guarantee. The remainder related to work carried out to individual flats that she believed should have been paid for by the leaseholder in question and not charged to the service charge. Alternatively, the cost of the work should have been covered under the block insurance policy.
82. Ms Walsh, in evidence [**511**], confirmed that there was an issue with defective windows to the flats on the Estate that they had raised with the developer and NHBC. However, NHBC rejected the claim on the basis that each repair would not

meet their minimum claim value of £847 [545]. As a result of this rejection when works to flat windows were required the Respondent treated the costs as being chargeable to the service charge account as the problem was an Estate-wide issue not limited to the windows to individual flats.

83. Mr Alvisse stated that matters such as sudden escape of water to an individual flat were covered under the block insurance policy but if the amount of the repair cost was at or below the excess amount of £250 the cost was charged to the service charge account.
84. Ms Khan submitted that the Respondent had prepared for the hearing on the basis that in the directions issued following the PTR it was stated that the Applicant was not making a challenge to specific invoices and that if specific challenges had been identified at an earlier stage this could have been addressed in evidence. None of the Respondent's witnesses present at the hearing were able comment on the specific invoices.
85. Ms Khan did her best to do so and suggested that as invoices [301, 306, 307, 316 and 317] were for £250 or less they would have fallen within the insurance policy excess and therefore the costs could not be claimed under that policy. Invoice [303] she pointed out related to a defective window and was chargeable for the reason stated by Ms Walsh. Invoice [311] for £280 related to a broken pipe, which may have served more than one flat, and the amount was close to the excess. Invoice [312] related to a leak emanating from behind plasterboard and therefore affecting the structure of the building. As such, she anticipated it was properly chargeable to the service charge account. The final invoice challenged, [313] referred to more than one flat but Ms Khan was unable to clarify why this work was not the subject of a buildings insurance claim or why it was properly chargeable to the service charge account.

Decision

86. The tribunal determines that the amount payable in respect of repair costs for the year ending 2010 is the Applicant's apportioned share of the sum of £7,283 Block costs and £7,321 Estate costs as reflected in the service charge accounts [42].

Reasons

87. We conclude, from our reading of the pre-trial review directions as a whole, that the Applicant was still maintaining a challenge to individual invoices. The difficulty is that she did not identify challenges to individual invoices until the date of the reconvened hearing of this application. This is the Applicant's application and it was incumbent on her to properly set out her challenge for these sums. She had received copies of the relevant invoices from the Respondent under cover of its letter of 12.08.13. In its statement of case dated 09.08.13 [26] the Respondent specifically

requested that the Applicant highlight any particular invoices that were in dispute following which the Respondent would respond.

88. The Applicant did not so do. Her statement of case is dated 10.09.13 but makes no mention of a challenge to individual invoices. The Respondent is entitled to know what case it has to answer. It was unable to properly respond due to the fact that the specific challenges were not raised until the final hearing of this matter. Moreover, the Applicant's challenges to the invoices are general, uncorroborated by evidence and amount to putting the Respondent to proof that these costs were properly incurred. Given the very late stage at which the specific challenges were raised we are not satisfied, on the available evidence, that the costs being challenged were unreasonably incurred.

Application under s.20C

89. The Applicant has applied for an order under section 20C of the 1985 Act that the Respondent may not pass any of its costs incurred in connection with these proceedings before the tribunal through the service charge.
90. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is not just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act.
91. Whilst we consider there is evidence of poor management by the Respondent's managing agents (as shown by the need to have complicated reconciliation exercises for both water and electricity costs) we consider that the Respondent had engaged with the Applicant to seek to address her queries (see, for example the letter sent by Oval to the Applicant (718)). We are not persuaded that the issue of this application was necessary to resolve the matters in dispute even though it may have triggered the need for an adjustment in the 2009/10 communal water costs due to the impact of the provisions of s.20B of the 1985 Act.
92. In addition, the general and wide-ranging way in which the Applicant particularised her claim has not assisted the Respondent in responding to her application nor this tribunal who are tasked with determining the application. Specific challenges could and should have been identified following the provision of the invoices provided by the Respondent on 12.08.13

Name: Amran Vance, LLB

Date: 08.01.14

Annex - Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 - Meaning of "service charge" and "relevant costs"

- (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 – Limitation of service charges: reasonableness

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the 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 – Liability to pay service charges: jurisdiction

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the Tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

[.....]

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.