

9384



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

Case Reference : LON/00/BK/LSC/2013/0425

Property : 2nd Floor, 44 Westbourne Terrace,
London, W2 3UH.

Applicant : Ms Andree Mart ("the Tenant")

Representative : In person

Appearances for Applicant: (1) Ms Andree Mart
(2) Ms A. Peters

Respondent : Kolup Investments Limited.

Representative : City Estates London Limited
(1) Ms S Smith, counsel
(2) Mr A Lewin, managing agent with
City Estates London Limited

Appearances for 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 Thompson, BSc FRICS
(3) Mr Clabburn

Date and venue of Hearing : 22.10.13
10 Alfred Place, London WC1E 7LR

Date of Decision : 22.10.13

DECISION

Decision of the Tribunal

1. The tribunal makes the determinations as set out under the various headings in this Decision.
2. The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge

Introduction

3. This is an application made under section 27A Landlord and Tenant Act 1985 ("the 1985 Act") for determination of the Applicant's liability to pay service charge to the Respondent in respect of 2nd Floor, 44 Westbourne Terrace, London, W2 3UH ("the Property") for service charge years ending 2010, 2011 and 2012.
4. The Applicant is the leasehold owner of the Property, a two-bedroom flat on the second floor of a six-storey Grade II listed building containing six flats built around the 1890's ("the Building"). She is the only long-leaseholder in the Building, the other flats being let by the Respondent on short-term tenancies.
5. The Respondent, Kolup Investments Limited, has the benefit of the freehold reversion of the Property. It instructs City Estates London Limited ("City Estates") to manage the Building and has done so since about 1995. The Applicant's position is that since that date City Estates had not maintained the Building properly leading to the intervention of the local authority who had served statutory notices requiring the Respondent to carry out remedial works in the Building.
6. Numbers appearing in square brackets below refer to pages in the Respondent's bundle unless stated otherwise.
7. The relevant legal provisions are set out in the Appendix to this decision.

The Lease

8. The lease for the Property is dated 08.09.78 and was granted by the Respondent to the Applicant for a term of 100 years from 29.09.76. The pertinent provisions can be summarised as follows:
 - 8.1. The Applicant covenants to pay by way of a service charge a proportion of the "Total Expenditure" incurred by the Respondent in carrying out its obligations contained in Clauses 3(3) and (7) of the lease and any other costs and expenses reasonably and properly incurred in connection with the Building.
 - 8.2. The Respondent's obligations as set out in Clauses 3(3) and (7) include the costs of insuring the Building as well as the repair and maintenance of the Building including its main structure, foundations and roof. This repairing and maintenance covenant extends to the common parts of the Building. The Respondent also covenants to maintain the heating and hot water system servicing the Building, ensuring an adequate supply of hot water

and (between 1st October to 1st May in the following year) sufficient and adequate heat to the radiators in the Property.

8.3. The method of apportionment of the Service Charge is based on the rateable value of the Property compared to the other flats in the Building and was not challenged by the Applicant.

8.4. The service charge year as set out in the lease is the period commencing 29th day of September in each year and ending on the 28th day of September in the following year.

9. For the avoidance of doubt, where below we determine that a sum is payable by the Applicant, we mean that we are satisfied that it is payable under the terms of her lease as summarised in the paragraph above. Where we state that we are satisfied that a sum has been reasonably incurred we are satisfied that the amount sought is reasonable having regard to the provisions of s.19 of the 1985 Act.

Pre-Trial Review

10. A pre-trial review took place on 30.07.13 which the Applicant attended. The Respondent did not attend. The following issues were identified by the Tribunal as requiring determination:

10.1. Whether or not the costs claimed by the Respondent for the service charge years 2009/10, 2010/2011 and 2011/12 are reasonable, in particular in relation to the nature of the works and the patch repairs carried out;

10.2. Whether or not those costs have been properly and timeously demanded for the purposes of s.20B of the 1985 Act.

10.3. Should an order be made under s.20C of the 1985 Act?

11. The directions provided for the parties to exchange schedules relating to the items in dispute as well as statements of case and any witness statements of fact. The Applicant was directed to provide copies of any alternative quotes or other documents on which she intended to rely and to prepare the hearing bundle.

Inspection

12. Neither party requested that the Tribunal inspect the Property and we did not consider this to be necessary.

The Hearing, Decision and Reasons

13. Although the Applicant provided the Tribunal with an un-paginated hearing bundle shortly before the date of the hearing this was not agreed with the Respondent. Nor was it sent to the Respondent in advance of the hearing. Ms Peters, a friend of the Applicant who was assisting her at the hearing, informed us that this was because the Applicant had found the costs prohibitive, having spent over £100 in copying costs for the bundle sent to the Tribunal. She also stated that the Respondent found dealing with this application difficult following an accident in which she sustained a

head injury. Instead of sending the Respondent a hearing bundle the Applicant attempted to send documents to them by fax, some of which the Respondent indicated were illegible.

14. The Respondent prepared its own hearing bundle which was provided to the Tribunal one working day before the hearing date. We are grateful for its assistance in doing so. A copy of this bundle was provided to the Applicant. After an adjournment for the Applicant to consider the contents of the Respondent's bundle and to compare it to her own, the Applicant confirmed that she was content for the hearing to proceed and for the Tribunal to utilise the Respondent's bundle. We informed the Applicant that if there were any documents in her bundle that were not in the Respondent's bundle she should ensure that they were brought to the Tribunal's attention. Ms Smith, for the Respondent, took no point on the lack of service of the Applicant's bundle.
15. We heard oral evidence from Mr A Lewin, managing agent with City Estates on behalf of the Respondent and also from the Applicant.
16. During the course of the hearing the Applicant requested permission to rely on a set of photographs taken over a period of several years and which were not in either bundle. Ms Smith did not object to the Tribunal having sight of these. We considered them but did not make copies.
17. The Respondent also provided us with copies of additional documents on which it sought to rely. The Applicant did not object to it being allowed to do so and we granted permission for these to be introduced as evidence. The documents were:
 - 17.1. Schedules prepared by the Applicant setting out the service charge items in dispute, now including the Respondent's comments
 - 17.2. An email from Giles Peaker, Anthony Gold & Co, solicitors to the Respondent, enclosing service charge demands for periods September 2009 to September 2010, September 2010 to September 2011 and September 2011 to September 2012 and account details.
 - 17.3. An email from Alvin Ormonde, Planning and Project Management Services, to Mr Lewin dated 14.10.13, referring to a payment of £1,000 received on 13.04.10 in relation to advice provided.
18. We also had regard to two documents that were, in part, present in the Applicant's bundle but in respect of which Ms Smith provided the missing pages. These were:
 - 18.1. Letter from Sean Pender, Environmental Health Enforcement Officer, City of Westminster council ("the Council") to City Estates dated 30.01.12
 - 18.2. Schedules to an Improvement Notice dated 27.08.09 served by the Council under Housing Act 2004, ss.11 and 12 in respect of the Building.

Accounting Period

19. As stated above, the lease provides for an accounting period that runs from 29th day of September in each year and ending on the 28th day of September in the following

year. However, the Respondent's practice has been to prepare accounts on the basis of a different accounting period, namely 25th December to 24th December in the following year. The Respondent concedes that this was not in accordance with the terms of the lease but contends that the method had been in use for many years, since at least before 2002, and that the Applicant had previously not demurred from the arrangement.

20. It also argued that the arrangement had led to no loss or prejudice to the Applicant and that the Tribunal should give effect to the purpose of the service charge provisions of the lease, avoiding too literal a construction of its provisions. However, without prejudice to that assertion, it had prepared and served revised accounts based on an accounting period of 29th September to 28th day of September for the years 2009/10, 1010/11 and 2011/12, giving credit for the period 29.09.09 to 24.12.09 already paid by the Applicant.
21. Whilst maintaining her contention that the Respondent had not complied with the terms of the lease, the Applicant agreed that for the purposes of this Application she was willing for the Tribunal to assess whether or not the costs sought were reasonably incurred by reference to the figures set out in the certified accounts for each year [231-246]. We considered this approach to be appropriate given that the accounts in question had been independently certified using invoices and documents provide by the lessor and because they formed the basis of the service charge demands relied on by the Respondent.

S.20B of the 1985 Act

22. In her Statement of Case the Applicant asserted that she "was not given service charges for 2010-2011 until they were requested by the court for this hearing". She appeared to be arguing that as these costs demanded were incurred more than 18 months before the demand for payment was served on her that she was not liable to pay the costs sought by virtue of s.20B of the 1985 Act.
23. This was disputed by the Respondent who maintained that the service charge demands for those two years were served in June 2011 and June 2012 respectively. Copies of the relevant demands appear at [245] and [243] respectively. Also in the bundle are copy letters from City Estates to the accountants, Ian Cobden & Co, enclosing copies of the accounts (presumably after signature by the Respondent) for 2009/10 dated 31.01.11 [40] and for 2010/2011 dated 25.01.12 [94].
24. In evidence, Mr Lewin confirmed that these demands had been served in June 2011 and June 2012 and that City Estates usual practice was for these to be sent out by first class post. He had no reason to believe that this had not happened in the case of the two invoices referred to by the Applicant who, he said, had not raised the matter with him prior to commencement of these proceedings. Nor, he said, had these notices been returned by the Post Office as undelivered. Mr Lewin also confirmed that the Applicant would have been sent copies of the annual certified accounts although these were not necessarily sent at the same time as the service charge demands.

25. The Applicant was asked by Ms Smith if it was possible that she had received the demands but then mislaid them. She disagreed stating that if the demands had been sent then she would have received reminder letters seeking payment.
26. When asked by the Tribunal Mr Lewin acknowledged that he had not sent reminder letters to the Applicant seeking payment of the outstanding sums. This was because past experience, including previous county court proceedings, had led him to believe that the Applicant would not make payment until compelled to as a result of litigation.

Decision and Reasons

27. We accept Mr Lewin's evidence that the service charge demand for the 2009/10 was sent to her by first class post on or around 23.06.11 and that the demand for 2010/11 was sent to her on or around 21.06.12. It seems to us unlikely, having gone to the trouble of securing certified accounts, that the Respondent would not then seek payment of the service charges it considered due.
28. We considered Mr Lewin's evidence to be credible and accept that the demands had been sent to the Applicant. He conceded that he had not sent reminder letters to the Applicant and in our assessment, given the Applicant's evident vulnerability as a result of her accident, there is a significant possibility that she may have received the demands but could not recall doing so.
29. We are therefore satisfied that the service charges for the two years being challenged were properly demanded from her despite the Applicant's contention that they had not been received. There is nothing to indicate that the costs demanded were incurred more than 18 months before demand for payment was made and s.20B of the 1985 Act therefore is not relevant to this Application.

2009/10 service charges

30. The Applicant challenged the following items of expenditure:
 - (a) Electricity £140.76
31. These costs concerned the lighting to the communal areas of the six floors of the Building as well as the lighting in the boiler room and the electricity supply to the boiler itself. The Applicant contended that the bills were always based on estimated readings and that she found the copy invoices [41-49] provided by the Respondent to be confusing.
32. Mr Lewin agreed that the bills had been based on estimated figures but stated that meter readings were obtained when sums demanded were inconsistent with previous bills.

Decision and Reasons

33. We consider these costs to be payable by the Applicant (in her apportioned share) and that the costs have been reasonably incurred. We do not consider it unreasonable for the demands to be based on estimated readings given the relatively

low sums involved and the lack of significant variation in amounts of the quarterly bills.

(b) Cleaning £1,337.18

34. This item related to the costs of Beechwood Property Services Ltd (“Beechwood”) who charged a monthly sum of £95 plus VAT for weekly cleaning of the common parts of the Building [50-60]. The Applicant considered the standard of cleaning to be inadequate. She asserted that the tiling on the ground floor entrance lobby was cleaned thoroughly and that the carpets were not vacuumed properly.
35. This was disputed by Mr Lewin. Whilst he did not inspect the Building himself to see if the cleaning was being carried out appropriately, one of his colleagues did so about every two months and would have noticed if the standard of cleaning was unsatisfactory. Nor, he said, had any of the other residents complained. He believed that the cleaner attended for two hours each Monday but no records of this were kept by the Respondent, either as to attendance by the cleaners or regarding the standard of cleaning. Neither was a full set of invoices provided.

Decision and Reasons

36. We consider the amount charged (which appears to also include replacing any defective light bulbs) to be reasonable for the size of the area to be cleaned and the time engaged. The photographs supplied by the Applicant showed that communal areas to be in quite poor condition and we consider that they are likely to be quite difficult to clean.
37. We were not assisted by the lack of inclusion of the contract with Beechwood in the hearing bundle which would have enabled us to identify the extent of the contractor’s obligations. Nevertheless, the Applicant does not dispute that cleaning takes place each week. Her complaint is that it is not up to an appropriate standard. If that were the case we would have expected other residents to have complained. Mr Lewin informed us that none had done so and the Applicant did not produce any witness statements or other documents to indicate otherwise. We are not satisfied, on the available evidence that these costs have been unreasonably incurred and determine that they are payable by the Applicant in her apportioned share.

(c) Gas £4,935.94

38. The Applicant challenged these costs, which relate to the supply of gas to the communal heating and hot water boiler system, on the same basis as her challenge to the electricity costs, namely that the bills were based on estimated meter readings and did not reflect the actual costs incurred. She also contended that the charges included the cost of heating between the hours of 6 pm to 9 am which was not provided for in the lease and that the house was overcrowded which increased heating costs. In addition, the hot water supply was intermittent and not all of her radiators worked. Furthermore, she asserted that system had not been serviced since 2005 and that gas safety certificates obtained by the Respondent were not

carried out by an independent company but, unlawfully, by an employee of City Estates employee.

Decision and Reasons

39. We consider these costs to be payable by the Applicant (in her apportioned share) and that the costs have been reasonably incurred. The bills were not all based on estimated meter readings. It appears that meter readings were taken on 01.09.09 [72] and 09.03.10 [78]. An examination of the bills shows a significant increase in winter months as would be expected. They also show that a revised gas bill dated 25.02.10 resulted in a substantial credit in charges for the period July 2009 – February 2010 [62]-[65].
40. We accept that the need for this credit may have been due to actual meter readings not being taken frequently enough but the fact that the charges were revised indicates that the Respondent was alert to variations in the gas bills. Mr Lewin indicated as much when he stated that the revised charges arose out of a challenge made by the Respondent. When looked at over a period of a year the charges are, in our view, reasonable for a building of this nature.
41. The Respondent maintained that the installation was serviced once a year when the gas safety check was carried out and disputed the Applicant's assertion that the hot water supply was inefficient. It is unfortunate that no maintenance contract for the boiler appeared in the Respondent's hearing bundle. However, given the lack of expert evidence on this point or evidence from other tenants in the Building we do not consider there is sufficient evidence to conclude that the service provided was inadequate. Nor is there evidence to establish that the apparently defective radiators in the Property are a result of the failure by the Respondent to maintain the heating installation.
42. We were informed that there are two boilers in the basement of the Building and that both are over 30 years old. Given the age of the system it appears likely that it is becoming increasingly inefficient, leading to higher costs than would be incurred with a modern system. However, this does not mean that the costs actually incurred by the Respondent were not reasonably incurred. Replacement or the introduction of individual boilers to the flats carries with it obvious cost consequences for both the Applicant and Respondent and is a matter that would require careful consideration by both parties.
43. We do not consider the other points raised by the Applicant and referred to in paragraph 39 above to be relevant to this Application.

(d) General Maintenance £320

44. The invoices for these items relate to the fitting of a self-closer to the main front door [87] and repair works needed following a water leak [88]. The Applicant made no substantive challenge to the latter invoice but contended that the self-

closer broke two months after it was installed and had not been replaced. She did not raise this with Mr Lewin as she considered him to be unhelpful.

Decision and Reasons

45. We accept the Applicant's evidence, which was not countered by Mr Lewin, regarding the self-closer. There is no evidence to indicate vandalism or abnormal usage and given the fact that the closer broke so soon after installation we consider the costs of this item (£60.00) were not reasonably incurred. We find the costs referred to in the other invoice to be payable by the Applicant (in her apportioned share) to have been reasonably incurred

(e) Insurance £5001.98

46. The Applicant's challenge to the cost of the Buildings Insurance premium [89] was that the cost was high due to a history of previous claims and also because the Respondent had failed to properly maintain the Building. She asserted that claims had been made in relation to other flats in the Building and not in respect to damage to her flat or the common parts. She also pointed out that poor claims history meant that the insurers had applied an excess of £2,500 per claim.
47. Mr Lewin conceded that the claims history for the Building was such there had been problems in finding an insurer willing to insure the Building. This had been verified by a broker used by the Respondent. He also agreed that due to their age the lead pipes used throughout the Building were prone to leak. However, the cost of replacing the pipes was a very significant item of capital expenditure that had to be weighed up against the cost of carrying out patch repairs as and when necessary.

Decision and Reasons

48. We consider the cost of the premium to be payable by the Applicant (in her apportioned share) and that the costs have been reasonably incurred.
49. It appears from the invoices in the bundle relating to general maintenance that water leaks have been an ongoing problem in the Building for several years. Whilst this is likely to have increased the cost of the insurance premium and led to a higher than usual excess, this does not necessarily mean that the cost of the premium was unreasonably incurred.
50. The Applicant asserts that the cost of the premium was high because of historic neglect of the Building. We agree that the documentation relating to local authority enforcement action supplied by the Applicant and referred to above indicates that the Building has been, and still is, in need of significant repair and decorative work. However, even if the Respondent has failed to comply its' repairing obligations under the lease in a timely manner the question we have to consider is whether or not it was reasonable for the Respondent to incur the costs of the insurance premium at the time it was taken out.
51. The Respondent is obliged to insure the Building and, as Mr Lewin pointed out, has a vested interest in keeping the premiums as low as possible because it has to pay 7/8ths of the premium itself (given that the other flats in the Building are let on

short-term tenancies). There is no evidence in the form of alternative insurance quotes or otherwise showing that the cost of the premium was excessive and in the absence of such evidence we determine that the cost was reasonably incurred.

(f) Professional Fees £1000

52. Mr Lewin informed us that this sum relates to a payment on account for advice provided by Alvin Ormonde of Planning and Project Management Services. He referred us to an email sent to him on 14.10.13 from Mr Ormonde [38] in which it is stated that the advice provided concerned *“planning, conservation and listed building consents and general discussions and meetings with Sean Pender EHO Westminster Council and the Planning Department in respect of the above named property”*.
53. Mr Lewin had not been able to locate any invoice for the payment made to Mr Ormonde hence the email confirmation elicited from him. Mr Lewin stated that he believed that the advice probably related to one of the statutory notices served by the council on the Respondent concerning the condition of the Building and that it was obtained as works were being discussed. He could not remember, however, whether or not advice was provided verbally or in writing. Nor could he provide any specific information regarding the advice provided.
54. The Applicant was unaware of Mr Ormonde’s involvement until receipt of the hearing bundle and considered the costs to be unreasonable as there was insufficient explanation as to what they related to.

Decision and Reasons

55. On the available evidence we are not satisfied that this sum is payable by the Applicant by way of service charge or that the cost been reasonably incurred.
56. It is unsatisfactory that no invoice for this payment could be located by Mr Lewin and that there was no explanation offered as to why this was the case. There is no letter of instruction to Mr Ormonde; no evidence of the advice provided and no contemporaneous evidence as the cost being incurred. The rather vague indication in Mr Ormonde’s email is that his advice related to discussions with the Environmental Health Officer of the Council. Mr Ormonde has not provided details of the advice given other than as stated in his email and the Respondent has not produced a witness statement from him.
57. In our view there is insufficient evidence to establish that the cost of this advice was reasonably and properly incurred in connection with the Building or that it was incurred by the Respondent in carrying out its obligations under Clauses 3(3) and (7) of the lease. As such, we do not consider it is recoverable from the Applicant through the service charge provisions of the lease.

(g) Management Fees £1,914.64

58. These costs related to the costs of City Estates for its management of the Building and were calculated on the basis of 12.5% of the service charge. The Applicant considered the amount to be unreasonable given the poor management service

received and because City Estates had neglected the Building, resulting in the council serving improvement notices on the Respondent.

59. No management contact appeared in the bundle and Mr Lewin explained that the original contract from about 20 years ago was lost. When asked what the management service consisted of he stated that it was to ensure that the Respondent complied with its obligations and that their duties included inspecting the Building bi-monthly; preparing service charge demands; dealing with issues relating to the fire alarm, heating, hot water and lighting installations. When asked to explain how the 12.5% fee was calculated he stated that City Estates had applied the percentage used by their predecessors. He believed the fee charged to be reasonable and that other companies he was aware of were charging sums in the region of £350 to £400 per calendar month.

Decision and Reasons

60. We consider that the fees sought would be reasonable if a good management service was being provided. However, the evidence suggests that it is not and we consider that the total fee should be reduced by 50% to £814.74 plus VAT totalling £957.32 (the amount that we consider is reasonably payable for the service provided).
61. The schedules to the Housing Act 2004 Notice apparently served on City Estates on 27.08.09 by Westminster Council specify numerous hazards in Building. These include works to deal with risk of fire from an incomplete fire detection system and excess cold due to lack of draught proofing. Other hazards include broken window sash cords, presence of dampness and poor roof insulation.
62. In evidence before us, Mr Lewin acknowledged that the condition of the Building had deteriorated but asserted that the capital expenditure that would be incurred in improving its condition had to be weighed against the more limited cost of doing patch-work repairs as required. He believed that a chartered surveyor had been instructed to draw up a schedule of disrepair at some time in the past. However, no such schedule appears in the bundle.
63. The Applicant raised issues of historic neglect of the Building in her email to Mr Lewin of 17.09.13 [287]. That issue is not addressed in his letter in response dated 02.10.13 [33]. Nor is there evidence in the documents in the bundle of any kind of planned preventative maintenance programme for the Building that we would expect from a responsible managing agent.
64. Some of the photographs provided by the Applicant at the hearing showed a Building not only in a poor external condition but one with gutters filled with plant growth, threadbare carpets on the stairs and a cluttered communal hallway. The statutory notices and correspondence from the council included in the Applicant's bundle also indicate a Building in a poor condition. In a letter dated 10.05.13 from the council to City Estates it is stated that "*The façade of the building appears to be in a generally poor state of repair with paintwork peeling from the stucco at ground floor level, including the porch. The paintwork to the upper three stories is extremely worn, tired and dirty.....previous investigations (1996) have shown that the paint used on the outside of the building was of a latex finish i.e. non-*

breathable/permeable, which was inappropriate". The writer goes on to describe several problems affecting the interior of the Building.

65. We acknowledge that responsibility for the repair of the Building rests with the Respondent rather than City Estates and we are not suggesting, in this case, that failure to carry out improvements is a matter that is relevant to the question of whether or not City Estates' management fees have been reasonably incurred. However, both parties acknowledge that this is a Building that could benefit from improvement, if not significant repair and in our view, there is a complete lack of evidence of any form of proactive management or maintenance of the Building by City Estates. These are matters that we would expect to be addressed by a managing agent if it were properly performing its management function.
66. We were also concerned with the apparent lack of a maintenance contract for the boiler and the cold water tank . We would expect to be in place for a building of this nature. When asked, Mr Lewin was not able to confirm that such contracts existed.
67. Furthermore, it appeared to us that there was evidence of poor record keeping by the Respondent. There was no evidence any monitoring of Beechwood and the bi-monthly inspections that Mr Lewin stated a colleague carried out at the Property. The original management contract between City Estates and the Freeholder was lost and there was no evidence of servicing of the boiler installation.
68. Nor do we consider it a sign of good management to adopt the position that Mr Lewin stated in evidence, namely to not issue reminder letters to the Applicant to pay service charges due as he felt the only way she would pay was through litigation. Litigation should always be a last resort.
69. It was also disappointing that when asked by us Mr Lewin said he was unfamiliar with the Royal Institute of Chartered Surveyors ("RICS") publication, *Service Charge Residential Management Code – 2nd Edition*. That document contains important guidance to agents involved in managing properties and we consider it would be useful for City Estates and the Respondent to give careful consideration to its contents. The Tribunal, in particular, pointed out to Mr Lewin that this Code recommends that agent's fees be based upon a flat rate as opposed to a percentage of spend.

2010/2011 service charges

70. The Applicant maintained the same challenge as in the 2009/10 service charge year in respect of the costs of electricity (£143.66); cleaning (£1,441.47); gas (£5,105.42) insurance (£5,442.46) and management fees (£2,788.22) [93]. The Respondent did not make any additional material points in respect of these items over and above those referred to for the previous service charge year.

Decision and Reasons -Electricity; cleaning; gas; insurance and management fees

71. For the same reasons as stated above for the 2009/10 service charge year we determine:

71.1. The costs of electricity; cleaning; gas and insurance are payable by the Applicant in her apportioned share and that they have been reasonably incurred.

71.2. The amount that it is reasonable for the Applicant to pay towards management fees should be reduced by 50% to £1,161.76 plus VAT totalling £1394.11.

72. The Applicant also challenged following items:

(a) General Maintenance (£2,128)

73. The invoices for these items are present in the hearing bundle at [137] to [146]. The only substantive challenge raised by the Applicant to these costs concerned the invoice relating to a repair to the communal intercom [147]. She contended that the replacement of a faulty handset to one of the flats should be charged to the individual tenant concerned.

Decision and Reasons

74. We agree with Ms Smith's submission that the installation as a whole included the individual handsets to each flat. We consider that all of the invoices under this item are payable by the Applicant in her apportioned share and that the costs have been reasonably incurred.

(b) Professional Fees (£195)

75. This sum related to an invoice from Westminster Council [149] for the recovery of costs incurred in preparing and serving a notice under s.12 Housing Act 2004. The Applicant contended that she should not have to pay towards the costs of the local council taking enforcement action against the Respondent as a result of its neglect of the Building.

76. Ms Smith argued that this cost was payable by the Applicant as it was a cost or expense that was "reasonably and properly incurred in connection with the Building" for the purposes of the Fifth Schedule of the lease.

Decision and Reasons

77. This is not a cost or expense *incurred by the Respondent* in connection with the Building. It is a demand for payment of costs *incurred by the council* over which the Respondent had no choice as to whether or not the costs were going to be incurred. As such, it is not a cost that can be properly or sensibly charged to the service account.

(c) Dampcourse (£2,976.00)

78. These costs relate to works carried out to the Building in around October 2011 that the Respondent contended were works to the exterior of the Building and which were necessary in order to comply with the local authority statutory notices.
79. The Applicant's case appeared to be that she should not have to contribute towards these costs as they were incurred as a result of the Respondent's neglect of the Building and because she believed that the works were to the interior of the basement flat and not the exterior.

Decision and Reasons

80. A survey report from P.L.F Preservation dated 16.09.11 [140-144] refers to evidence of rising damp present to the walls in the front and rear walls of the basement flat as well as penetrating damp. The recommended course of action was to insert a dampcourse to the walls of the Building. The relevant invoice for this work [139] relates to the injection of the dampcourse and resulting tanking and replastering works.
81. We are satisfied that the works related to the part of the structure of the Building for the purposes of clause 3(7) of the lease, that the costs are payable by the Applicant (in her apportioned share) and that the costs were reasonably incurred. Whilst internal re-plastering work was required to the basement flat this was part of the dampcourse treatment.

Fire Equipment (£502.09)

82. These sums related to the costs of an annual service of the fire alarm system, emergency lights and fire extinguishers [151-152]. Mr Lewin informed us that the extinguishers were subsequently removed on the advice of fire safety experts who warned against their presence in the communal areas as individuals may not be aware how to properly use them.
83. The Applicant believed that no service had taken place as there was no notification placed on the fire extinguishers to confirm this.

Decision and Reasons

84. We accept Mr Lewin's evidence that the contactor concerned was a responsible company who would not bill for a service that was not carried out. The work billed for is referred to in the contractor's invoices at [151-152] and whilst the Applicant may not have been aware that a service had taken place this does not mean that none was carried out. The service of the fire extinguishers was only one of the items billed for and this may not have required a notice to be placed on the extinguishers. Alternatively, it is possible that the Applicant may not have noticed the notice before the fire extinguishers were removed.
85. We determine that the sum is payable by the Applicant in her apportioned share and that it was reasonably incurred.

Boiler repairs (£330)

86. This item related to the costs of heating engineers attending the Building following a boiler breakdown in June 2011[136]. The Applicant's position appeared to be that there is no evidence that this work took place or that it was only required because the boiler had not been properly serviced.

Decision and Reasons

87. We determine that the sum is payable by the Applicant in her apportioned share and that it was reasonably incurred.
88. The relevant invoice refers to the cause of the breakdown being water penetration from the pipe above the boiler. We have no reason to doubt that this work was carried out given the provision of this invoice and we consider the cost was reasonably incurred given the evident need for the Respondent to remedy the boiler breakdown.

2011/2012 service charges

89. The Applicant maintained the same challenge as in the 2009/10 and 2010/11 service charge year in respect of the costs of electricity (£207.59); cleaning (£1,401.89); gas (£4,577.15) insurance (£5,709.31) and management fees (£2,739.31). The Respondent did not make any additional material points in respect of these items over and above those referred to for the previous service charge year.

Decision and Reasons -Electricity; cleaning; gas; insurance and management fees

90. For the same reasons as stated above for the 2009/10 service charge year we determine:
- 90.1. The costs of electricity; cleaning; gas and insurance are payable by the Applicant in her apportioned share and that they have been reasonably incurred.
 - 90.2. The amount that it is reasonable for the Applicant to pay should be reduced by 50% to £1141.38 plus VAT totalling £1369.66
91. The Applicant abandoned her challenges to the service charge items relating to professional fees and fire equipment but challenged the amount sought in respect of general maintenance and surveyors fees.
- (a) General Maintenance (£2,775)
92. The invoices for these items are present in the hearing bundle at [179] to [183]. The only substantive challenge raised by the Applicant to these costs concerned the invoice relating to a external redecorations to French doors to the ground floor flat [181] in the sum of £200. She believed that no French doors were present in that flat.

Decision and Reasons

93. On the available evidence we are satisfied that this work was carried out. We see no reason to doubt that the invoice from the contractor correctly describes the work carried out. This specifies that the works were carried out to the exterior of the doors and, as such, we consider this to relate to works to the structure of the Building for the purposes of Clause 3 (7) of the lease.
94. We determine that the sum is payable by the Applicant in her apportioned share and that it was reasonably incurred.

(b) Surveyors Fees (£195)

95. Mr Lewin was unable to clarify what this sum [185] related to save that he thought it may relate to fees incurred in identification of possible major works. He referred us to the handwritten note on the invoice which reads “*Draw specification to do works*” that he confirmed was his handwriting. However he was not aware of any specification actually being drawn up or what the position was in respect of any planned works.
96. The Applicant considered there was no explanation as to what this sum related to and that she should therefore not have to pay towards it.

Decision and Reasons

97. In the absence of any satisfactory explanation as to what this sum relates to, Mr Lewin suggested that it might relate to proposed major works following on from service of Westminster Council’s statutory notices but he was unable to say that this was definitely the case.
98. There is, however, no evidence of any planned major works or as to what the surveyor did to justify these fees. Ms Smith submitted that Mr Lewin was unaware that this item was in dispute until 16.10.13 and had insufficient time to make enquiries into the invoice. Even if that were the case, this was five days before the hearing and, in our view he had sufficient time to make any necessary enquiries.
99. In our view there is insufficient evidence to establish that this cost was reasonably and properly incurred in connection with the Building or that it was incurred by the Respondent in carrying out its obligations under Clauses 3(3) and (7) of the lease. As such, we do not consider it is recoverable from the Applicant through the service charge provisions of the lease.

Section 20C Application

100. In her application the Applicant sought an order under section 20C of the Landlord & Tenant Act 1985 Act that none of the costs of the Respondent incurred in connection with these proceedings should be regarded as relevant costs in

determining the amount of service charge payable by the Applicant. She argued that she was forced into coming to the tribunal by virtue of the Respondent's poor management of the Building

101. Ms Smith submitted that no order should be made as: (a) some matters were only raised by the Applicant late in the day; (b) she had dropped several items of challenge during the course of the hearing and had not pursued one of her main challenges namely that the Respondent was adopting a service charge accounting year contrary to the terms of the lease; and (c) she had failed to comply with the Tribunal's directions in that the schedules she was supposed to serve by 03.09.13 were not received until 16.10.13 and then were not completely legible [A12-23].
102. The Applicant acknowledged and apologised for her non-compliance with directions, explaining that she had been unable to get assistance to help her with the application. This, she said was necessary as she suffered from post-concussion syndrome.

Decision and Reasons

103. It was clear to us from our observations of the Applicant during the hearing that she was somebody who was likely to require assistance in dealing with this application. She presented to us as someone who had difficulty in concentrating and focusing on the matter in hand. In that respect, she was greatly assisted by the presence of her friend, Ms Peters.
104. It also seemed clear to us that both parties were not communicating effectively with each other. The Applicant conceded that she had stopped informing Mr Lewin of issues relating to the Property and Building as she found him unhelpful. In evidence, Mr Lewin stated that he had also stopped chasing the Applicant for service charges payable as the only way she would pay was through litigation. This lack of communication appears to us to be a likely contributory factor in the Applicant issuing this Application, with both parties looking to this tribunal to resolve their differences.
105. Both parties must share some responsibility for this unfortunate situation but, in our view, it was incumbent on Mr Lewin, as a professional managing agent, to seek to ensure effective communication so as to avoid the need for an application of this nature. As stated above, litigation should be a last resort.
106. We accept that there appears to have been no prior notification by the Applicant that she intended to bring this Application and that she had not complied with directions. However, we also note that only the Applicant attended the Pre-Trial review. If the Respondent had attended this would, in all likelihood assisted the Tribunal in narrowing the issues in dispute at an early stage and may have shortened what was a lengthy hearing before the Tribunal.
107. We do not find Ms Smith's submissions to be persuasive. Whilst it is correct that some issues were dropped during the course of the hearing this was primarily due to the Applicant being satisfied that it was appropriate to do so based on the evidence she had heard. Some issues were raised quite late in the day but this is not unusual

where a litigant in person is concerned. The Respondent had the benefit of experienced counsel and, in our view, had sufficient time and resources to meet this challenge. As stated above, the Applicant maintained her challenge in respect of the accounting year but, was willing for the Tribunal to reach its determination based on the year end specified in the annual accounts. In doing so she facilitated an effective hearing and assisted the Tribunal.

108. On balance, having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Amran Vance, LLB

Date: 18.11.13

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.