



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

Case Reference : CAM/00MC/LSC/2013/0139

Property : Flat 10, Greys Court, Sidmouth Street,
Reading, Berkshire, RG1 4PP

Applicants : Kheok Aun Teh &
Patricia Ann Teh

Respondent : Albion Place Reading Limited
("the Company")

Date of Application : 15th November 2013

Type of Application : To determine the reasonableness and
payability of service charges pursuant
to section 27A of the Landlord and
Tenant Act 1985 ("the 1985 Act")

Tribunal : Judge J. Oxlade
S. Redmond BSc ECON MRICS
A. Kapur

Date and venue of : 11th April 2014

**Re-convene
(in parties absence)** : 6th June 2014

Hearing Reading Tribunal, 30-31 Friar Street

Attendees

Applicants

**Jamie Sutherland, Counsel
Kheok Aun Teh &
Patricia Ann Teh**

Respondents

**Danielle Gilbert, Counsel
Mr. McInness, Director
Mr. Harding, Director
Hailey Walters, Credit Control –
John Mortimer
("JMPM")
Jane Birchmore, Account Manager –
John Mortimer**

DECISION

For the following reasons, the Tribunal finds that:

- (i) the service charges demanded by the Respondent of the Applicants in respect of service charge years ending 31st March 2011, 31st March 2012, and 31st March 2013 are reasonable and payable save in respect of (a) professional fees for variation of the terms of the lease, for the reasons given in paragraph 33 herein, (b) the replacement of doors to Greys Court, for the reasons given in paragraph 65 herein, and (c) insurance and managing agents fees, limited by section 20 of the 1985, for want of failure to comply with consultation requirements, as set out in paragraphs 68 and 70 herein,
- (ii) it is just and equitable to make an order pursuant to section 20C of the 1985 in respect of costs incurred by the Respondent in defending these proceedings,
- (iii) the Respondent shall reimburse to the Applicants the sum of £315 to meet the costs of issuing the application and paying the hearing fee,
- (iv) the Respondent do pay to the Applicants assessed costs of £1,322.40, pursuant to 13(1)(b) of the 2013 Rules, in view of the Respondent's unreasonableness in the manner of defending the proceedings.

REASONS

Background

1. Greys Court is a 1980's development of 43 purpose-built flats, located close to the centre of Reading on an estate which includes 56-65 Albion Terrace ("Albion Terrace"), a listed building converted into 57 flats one of which is 65A London Road ("flat 65A"), a flat contained within Albion Terrace.
2. Greys Court and Albion Terrace share communal gardens, but flat 65A has its own garden, and otherwise does not benefit from the communal estate shared between Greys Court and Albion Terrace, save as to a right of way marked on the lease plan which enables the lessee of flat 65A to get to and from the garden demised to the flat.
3. Subject to necessary variations in the leases of Greys Court and Albion Terrace to accommodate the descriptions of the two buildings the form of leases and attached plans are substantially the same; they are different to the lease of flat 65A.

4. Albion Place Reading Limited (“the Company”) is the freeholder and management company under the leases of Greys Court and Albion Terrace, and freeholder of 65A who appointed John Mortimer Property Management Limited (“JMPM”) to manage the entire estate.
5. The leases of Greys Court and Albion Terrace contain service charge provisions, which require that the expenditure of the company be apportioned to arrive at a reasonably fair calculation of its total expenditure attributable to (i) the dwellings and (ii) the accessway/parking areas/communal area and further that there is a further refinement of that, so that the accounts reflect general expenditure in meeting liabilities under the lease, and common parts expenditure in meeting liabilities under the lease for maintenance of the parking area/accessway/communal area - the latter two being specifically defined in the lease.

Application

6. On 15th November 2013 the lessees of flat 10 Greys Court, Mr Kheok Aun Teh and Mrs Patricia Ann Teh (“the Applicants”), issued an application for determination of the reasonableness and payability of service charges in the years ending 31st March 2011, 31st March 2012, and 31st March 2013, as they were concerned that:
 - (i) costs had been wrongly apportioned as between various service charge funds,
 - (ii) some costs have been too high for the quality of works done or standard of service provided, and,
 - (iii) some costs should be disallowed or limited because of terms of the lease,
 - (iv) some costs should be disallowed or limited because of the failure to comply with statutory requirements (ss 20, 21, 28, of the 1985 Act and ss47 and 48 of the 1987 Act).

Directions

7. In light of the application made at the commencement of the hearing, it is apposite to fully set out the progress of the application from receipt of it by the Tribunal.
8. On 15th November 2013 the Tribunal made directions for the service of the application on all other lessees who may be affected by the proceedings and the filing of evidence. The application named Mr. Colin McInness, a Director of the Respondent, as the recipient for correspondence.
9. In response to receipt of the Directions Order by email dated 24th November 2013, Mr. McInness notified the Tribunal that he took exception to his home address and business email being used in the application, and provided two alternative addresses which could be specified in the application (the registered address for the Company

and for the attention of the Company care of the JMPM) and required an apology from HM Courts and Tribunals Service.

10. On 27th November Mr. McInness was invited by the Tribunal to specify to which one postal address correspondence should be sent, and by fax and post of 29th November elected: c/o Mr. C. Inness/Jane Birchmore of John Mortimer Property Management Limited, Bagshot Road, Bracknell, Berkshire, RG12 9SE (“the elected address”). Further, the following email address should be used: cdmcinnes@hotmail.com.
11. At the Tribunal’s request, on 3rd December 2013 the Applicants re-issued the application in identical terms - save for substituting the elected address and email address. At the same time the First Applicant forwarded to Mr. McInness’s email address a copy of the application. A Directions Order was made on 10th December 2013 in identical terms to that made on 15th November, save that the timetable for compliance was extended. Under cover of letter date 10th December the Tribunal served on both parties the Directions Order at the elected postal addresses – neither was subsequently returned to the Tribunal unserved.
12. On 7th February PDC Legal wrote to the Tribunal to say that they were instructed on behalf of the Respondent, and on 10th February 2014 they were notified of the hearing date by the Tribunal. In correspondence subsequently seen on 10th February, the Applicant served by recorded delivery on PDC copies of the amended application and Directions Order. Despite, this on 19th February 2014 PDC wrote to the Tribunal to say that they were unaware of the application and so by return on 21st February a copy of the application was provided to them; the Tribunal made the point that it had not previously been served on them by the Tribunal as they were not on record, but its had been served on the Respondent’s elected address.
13. On 28th February 2014 the Respondent made an application to the Tribunal to vary directions for the filing of evidence, as time for compliance had passed, which application was refused as no reason was provided for seeking an extension of time. In doing so the Tribunal said that if good reasons existed for seeking an extension of time, it would re-consider any application made to vary the Directions. No such application was made.
14. The Applicants notified the Tribunal that the Respondent failed to cooperate over preparation of the bundle, and on 24th March in the absence of any further application to extend time accompanied by an explanation for the delay, the Tribunal directed that no documents were to be filed save in accordance with Directions.

Hearing and Inspection

15. The application was listed before the Tribunal for hearing on 11th April 2014, at which hearing the Applicant lessees and the Respondent

Company (by their Directors, Mr. McInnis and Mr. Harding) attended and were represented.

Inspection

16. The Tribunal inspected the estate generally, both parties pointing out the locations of Grey's Court, Albion Terrace, flat 65A and the various items which would feature in the dispute, including the wall on London Road, the wall in the visitor's car park, the entrance doors into Grey's Court, and the access route from London Road into the estate which bypassed flat 65A and making use of wooden steps.

Hearing

17. On the morning of the hearing both Counsel filed a skeleton argument, and though the Applicant had complied with the Directions to file and serve a bundle of documents, the Respondent had failed to do so.

Application for late admission of evidence

18. On the morning of the hearing the Respondent applied to file late a bundle of documents, which had been provided to the Applicant prior to the hearing. The chronology (as understood by the Respondent) was set out and principle points relied on were that the Respondent had no knowledge of the application until about 11th February 2014, that the Respondent expeditiously set about trying to establish what the application related to and the Directions made, that the Panel Office refused to issue another copy and which were only received on 19th February. Further, that it then tried to secure an alternative timetable, but being refused, set about taking instructions and compiling evidence; the Applicant then behaved unreasonably by failing to agree their bundle. Ms. Gilbert could not explain why the initial application to seek alternative directions was not renewed with an explanation given for delay. She argued that the Applicant would benefit from the evidence being adduced.
19. In reply Mr. Sutherland set out the chronology (as understood by the Applicants), made the point that the Tribunal had confirmed that on 10th December 2013 it had served all the documents on the Respondent at the address elected for service, and it has failed to explain at all why it failed to comply (in any way at all) with Directions and why (if it did not have them) it waited so long to ask for copies of the documents, provide an explanation for non-compliance and to seek an extension of time if needed. He denied that the Applicant had behaved unreasonably in refusing to agree an alternative bundle, and was simply complying with the Tribunal's directions. There had been an unseemly delay on the Respondent's part which has not been explained. His position was that he would not seek an order barring the Respondent from participating, nor filing a skeleton argument, just an objection to filing a bundle at this late stage. He denied that the Applicant would be

assisted by late production of evidence, and nothing now was needed for the Applicants to prove their case.

20. Mr Teh was able to point to (a) an email of 3rd December 2013 in which he had copied Mr. McInness into an email to the Tribunal advising the Tribunal that he was re-issuing the application with addresses elected by Mr. McInness, and (b) correspondence he had sent by recorded delivery to the Respondent's solicitors PDC and the Respondent on 31st January 2014 (A 694) enclosing a copy of the Directions and Tribunal's letter of 10th December. The Applicants' position was that the Respondent had knowledge of the application and Directions made a long time ago, had simply failed to co-operate, and gone about subsequent events in an odd and unhelpful manner.
21. In closing submissions Ms. Gilbert conceded that the Respondent did receive a copy of the letter dated 31st January and application, but denied receipt of Tribunal Directions.

Decision on application for late admission of Evidence

22. The Tribunal gave a short ex tempore decision on the application for late admission of the Respondent's evidence, refusing to do so pursuant to regulation 8(2)(e) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 .
23. The Tribunal was satisfied that the Respondent had received ample notice of the application, the Directions and hearing date, and been dilatory in responding to the application: Mr. McInnes was aware that re-issue was imminent on 3rd December; on 10th December the Directions were sent to both parties, and not returned un-served; in late January and early February Mr. Teh notified the Respondent's Solicitors of the application and Directions. The Tribunal does not accept that either the early methods of communication failed or that later on the attachments/enclosures were not attached/enclosed. It appears that the Respondent concedes that on 31st January that it was aware of the application and the Tribunal finds that it was also aware of the Directions and then failed to comply with them.
24. Further, the Tribunal does not accept that the Respondent sensibly progressed matters: it made application for a fresh timetable, without providing a good reason for doing in the first place. It then failed - when prompted to do so by the Tribunal - to renew the application accompanied by an explanation for needing an extension of time. Instead it proceeded to progress matters, contrary to the Tribunal's Directions.
25. The Tribunal finds that there is prejudice to the Applicant in non-compliance with Directions and late service of a bundle, not least with the prospect of extending the hearing time. The risk of going into a second day was an obvious consideration; Ms. Gilbert later indicated

that if the hearing proceeded and over ran it could take place only in September when she was next available.

26. The Tribunal found that it would be just to exclude the Respondent's bundle, but admit the Respondent's skeleton argument, and Ms. Gilbert would be able to make submissions on behalf of the Respondent.
27. The hearing proceeded without the need for the Applicant's oral evidence and by both representatives making oral submissions, largely following their skeleton arguments. The Tribunal sat until 5.30pm that day to conclude submissions.
28. There was a dispute between the representatives as to whether material parts of section 21 of the 1985 Act were yet in force, and at the end of the hearing both Counsel were directed to file short skeleton arguments on the point, which they both did.

The Substantive Issues

29. For ease of reference, the issues and respective arguments will be set out in turn with the Tribunal's decision on each issue, grouped logically as follows:
 - (i) some costs have been wrongly attributed to the specific service charge fund ("*Wrong Apportionment between funds*"),
 - (ii) some costs have been too high for the quality of works done or standard of service provided, ("the reasonableness arguments"),
 - (iii) some costs should be disallowed or limited because of terms of the lease, ("terms of the lease"),
 - (iv) some costs should be disallowed or limited because of the failure to comply with statutory requirements (ss 20, 21, 28, 47 and 48 of the 1985 Act) ("statutory arguments").

Wrong Apportionment between funds

Professional costs of varying the terms of the lease of flat 65A - arguments

30. The service charge scheme provided in the lease of flat 65A meant that the then freeholder's (Reading BC) officer would certify costs; after disposal of the lease to the Applicant, this provision was no longer workable, as a result of which the lessee refused to make payment of service charges. Accordingly, an application was made to the LVT pursuant to section 35 of the Landlord and Tenant Act 1987, to vary this term. Legal and professional costs of £2,373.50 were incurred.
31. The Applicants make the point that when an application was made to vary the terms of the lease of flat 65A these were wrongly charged to the communal area service charge in 2010/11, rather than the Albion

Terrace service charge. In submissions, Mr. Sutherland made the point that the accounts do show two alternative figures, £2,373.50 and £4,101 (A/263); the best evidence suggested the lower figure. The Applicants rely on an email sent by Mr. McInness to the JMPM (A/527), making the point that this had been wrongly apportioned.

32. In reply, despite the contents of the email, the Respondent argued that the variation benefits the entire estate as by virtue of the variation, flat 65A contributes to the common areas and so (slightly) reduces the service charge of the remaining flats. The Respondent considers that there is a wide discretion built into the Applicants' lease which permits costs to be apportioned in several different ways, and that this was one of several permissible ways; the fact that the Applicants would prefer apportionment by a different method was not relevant. The evolutionary nature of the estate – which started with the Terrace, on which gardens Greys Court were built, and then the Terrace divided into flats, including flat 65A, was material to consideration of this aspect of the case.

Professional costs of varying flat 65A – Tribunal's decision

33. The issue is not whether or not per se a variation does or may benefit the Applicants or the other lessees; rather it is a question of asking whether the lease makes the Applicants liable to pay service charges in respect of such a cost? The Tribunal does not find that the Respondent has shown that the lease of flat 10 makes such a provision. In the definition section of the lease, the service charge “means one such portion of the general expenditure and such portion of the common parts expenditure as the management company shall consider fair and reasonable”. The reference to “fair and reasonable” is as to *proportion* of common parts expenditure payable - not to what items of expenditure it would cover. The items which can be charged to the service charge accounts are well-defined in the Fourth Schedule under the headings “General Expenditure” and “Common Parts Expenditure”, by reference to the company's obligations contained within the lease. These do not extend to making applications for lease variations. Further, it is not open to the Respondent to seek to rely on the terms of other leases of other premises in the development to which the Applicants are not party.
34. Accordingly, the Tribunal finds that this head of expenditure is not recoverable under the lease for flat 10 Greys Court.

Works to Wall and Railings fronting London Road - arguments

35. The Respondent charged £2,700 to the communal area service charge account in the service charge year 2011/12 for works of repair/restoration to the historic wall and railings fronting London Road, which wall/railings were pointed out to the Tribunal on its inspection.

36. The Applicants position was that the wall and railings were not part of the communal area for which service charge was payable as its repair did not fall within paragraphs 6 or 7 of the Third Schedule, recoverable by 1(2)(b) of the Fourth Schedule. Rather, logically (having been built at the same time and also being listed) it formed part of Albion Terrace, and so should have been charged to the Albion Terrace service charge account. It turned on the construction of the lease: “communal area” was defined in the lease as being the “land edged green on the plan”, and on the plan the green line demarcating the communal area ran along the wall/railings; the Applicants did not consider that this clearly showed that the wall/railings were included. Further, it did not naturally fall within clauses 6 or 7 of the Third Schedule, which by 1(2)(b) of the Fourth Schedule set out the right of the management company to recover common parts expenditure, which referred to maintaining the area “in such a manner as shall be reasonably necessary for the purpose of affording to the residents in the building *suitable facilities for rest and recreation and storage of a dustbin*”. It appeared from the listed building consent that the wall and railings were part of Albion Terrace.
37. The Applicants said that there remained some ambiguity over what was actually charged to the service charge account, either £2,700 (A-525) or £4,680 plus vat (an estimate, A/520); both sums should be discounted from the Applicants service charge account of £27 and £46.80.
38. In reply, the Respondent made the point that the fact of being included on the application for listed consent did not make them part of the building; the wall/railings are physically separate and stand apart from the terrace itself, which is reflected in the lease of flat 16, and which defines the building of Albion Terrace as the building which is edged blue

Works to Wall and Railings fronting London Road – Tribunal’s decision

39. The Tribunal finds that the communal area is defined in the lease of flat 10 by reference to the attached lease plan. The plan marks in green the communal areas, which run along and follow the wall. The shape and contours of the marking clearly indicate that the marking relates to and includes the wall/railings. Clause (7) of Schedule 3 of the lease (set out in paragraph 36 above) does not define what is the communal area; rather it sets the applicable standard or breadth of works which the Company should do. The Tribunal finds that the main purpose of the wall/railings is to provide an attractive and practical definition to the boundary of the estate and to act as a buffer against the traffic and so could be said to offer suitable facilities for rest and recreation. Accordingly, the cost is recoverable from the Applicants under the common parts head of expenditure.

Works to Step/Shed

40. The Applicants raised as an issue costs expended on external wooden steps adjacent to 65A of £950 plus vat added to the communal area service charge account in the service charge year 2011/12. Neither Counsel addressed this point in their skeleton argument or submissions.

Works to Step/Shed – Tribunal’s decision

41. On inspection of the premises the Tribunal was shown the external staircase, and noted that it also provided access to all who wished to enter or leave the estate by means of a pedestrian gate giving access to and from London Road.
42. The lease provides by Schedule 3 (10) that the Management Company shall maintain the accessway, which is defined as paths and roads which is necessary for the lessee to use to access his flat and to enjoy the rights granted to him in the lease. Clause 3 of the First Schedule provides rights of way to the lessee, which includes the right to use the accessway for the purpose of access to the flat and parking space and the communal area. The Tribunal finds that this must be given a wide interpretation to include such access; it cannot be reduced to drawing straight lines which the lessee must walk or drive along, to strictly access his flat, his parking space, and the bin store. Rather, it must be given a reasonably wide interpretation.
43. Accordingly, the Tribunal finds that this is payable by the Applicants as a service charge under the common parts expenditure.

Visitor Car Park Wall – the arguments

44. In November 2011 a brick wall surrounding a visitor car park close to the entrance gates of Greys Court was damaged, and the costs of clearance and repairing totalled £2,485, which was charged to the service charge account in 2012/13. The Applicants have two points: firstly, the works are not recoverable as a service charge from the common area service charge, as it does not fall within the definition of common area; secondly, the Respondent failed to progress an insurance claim which had been immediately notified to the broker, and which appear to arise from a decision of a Director and not the Board. The Applicants relied on an email from a Director of the Board conceding that the sum should be recovered through insurance.
45. The Respondent’s position is that the common area is defined by reference to the leases of Greys Court, Albion Terrace, and flat 65A; that the lease of Greys Court, by Clause (6) the Third Schedule includes an obligation to maintain the parking area. At paragraph 28 of the skeleton argument the Respondent said that an insurance claim was made and the sum recovered, and so there was no issue on this aspect of the claim; in oral submissions the Tribunal was told that if the

Respondent had chosen not to pursue the claim, this was part of management discretion, and so should be regarded as a fair decision.

Visitor Car Park Wall – Tribunal’s decision

46. The Tribunal inspected the wall and notes its position, and finds that it does not fall within the areas edged in green on the map, and so is not part of the “communal area”. Whilst “parking area” is not defined, logically it cannot relate to those parking spaces beyond the entrance gates of Greys Court. So, by a process of deduction the Tribunal finds that the wall is within the “parking area” over which the management company has a responsibility to maintain, by clause 6 of the Third Schedule and so falls within common parts expenditure set out in 1(2)(b) of the Fourth Schedule.
47. Accordingly, in principle the cost is recoverable from the Applicants.
48. However, the Tribunal (and Applicants) are left not knowing what the Respondent’s position is, as the skeleton argument and closing submissions were contradictory. In principle a decision to make an insurance claim or not pursue it is a proper management decision, in respect of which the Tribunal will not interfere where a reasonable decision is explained and advanced. Where a set off argument is advanced, the Tribunal will examine it and make a decision - but materially it was not advanced by the Applicants in this case. The Tribunal is therefore without jurisdiction to act.
49. Accordingly, the only argument left is as to the reasonableness of management fees; however, as this appears to be a Director decision – not a management decision – the managing agents cannot be criticised on this point. Reluctantly, the Tribunal therefore finds that this cost is recoverable.

The Reasonableness Argument

Managing Agents and Accountancy fees - parties’ respective positions

50. The Applicants concede that they are liable to pay service charges which include Managing Agents’ fees (JMPPM) and Accountancy fees (Donald Reid, Chartered Accountants). These have been charged to the service charge account, as follows:
 - (i) in 2010/11 management fees of £11,328 and accountancy fees of £2,532,
 - (ii) in 2011/12 management fees of £11,684 and accountancy fees of £2,540,
 - (iii) in 2012/13 management fees of £11,932 and accountancy fees of £3,491.

51. The Applicants consider that the standard of management and level of accounting applied has not been reasonable, and cite the following examples of poor management:
- (i) the Applicants made written requests for a summary of costs for each service charge year, which in two of the three years were served outside the statutory time limit of 6 months, and which on each occasion was signed by the firm of accountants rather than the individual accountant as required by section 21(6) of the 1985 Act,
 - (ii) service charge accounts, statements and summaries for each service charge year are sent in point 10 character, which make it difficult to read,
 - (iii) the Applicants have asked whether or not there is a contract between the Company and JPM, and been furnished with inconsistent answers; it is not clear if this is a rolling contract and so subject to the long-term qualifying agreement provisions and so the consultation requirements,
 - (iv) there has been a refusal by the Company to review the contract with JPM and which represents unreasonable management,
 - (v) the demands issued in respect of the replacement doors to Greys Court (£250) were initially issued in breach of section 47 and 48 compliance, and which subsequently formed part of a total sum (£533.08) subject to the threat of litigation but without any explanation as to what the balance related, and which litigation was unnecessary and aggressive,
 - (vi) the non-compliance with statutory requirements (consultation in respect of the entrance doors in Greys Court, a 17 month insurance contract) and failure to apportion correctly as referred to above add to the general picture.
52. These points were ventilated at the hearing, and though asked to indicate what deduction should be made to the Applicants service charge liability for managing agents and accountancy fees, Mr. Sutherland's view was that it was a matter for the Tribunal.
53. The Respondent took issue with the individual complaints and the overall impression which the Applicants seek to create, and the following specific submissions were made:
- (i) section 21 is not yet in force, save as to the Secretary of State's power to make Regulations under ss (4) and (5) and in any event section 28 defines "qualified accountant",
 - (ii) [point not met],
 - (iii) JPM is appointed on an annual oral rolling contract, and so the agreement is not a LTQA, and so no consultation was required,
 - (iv) [point not met],
 - (v) the Applicants had misunderstood the obligation as the demand from PDC did not need to be section 47 and 48 compliant,

- (vi) the Respondent did not concede non-compliance, save an error made in respect of a 17 month insurance contract.
54. Both Counsel filed short written submissions, arguing for opposite conclusions as to whether or not sections 21 and 28 of the 1985 Act were in force and attaching printouts (on the Applicants' part) from Westlaw and the case of Di Marco v Morshead and (on the Respondent's part) from Lexis Nexis.

Managing Agents and Accountancy fees - Tribunal's findings

55. It is apparent from an inspection of the site and the leases, that the administration of this estate is not an easy task. Despite this, the estate appears to be reasonably well managed and costs are not high. It is apparent that the Board of Directors take on a lot of management functions and decisions, which reduce the extent of JPM'S involvement (and their fees).
56. The Applicants do have some valid criticisms of the Respondent. For example, a failure to comply with consultation procedures (insurance is conceded, and doors to Greys Court), and section 47 and 48 notices. There was a failure to provide summary statements within a six month period for two of the years, which we find to be a statutory requirement, preferring the arguments of Mr. Sutherland which correctly identify the relevant statutory framework; having said that we are satisfied that they can be signed by a firm of accountants, provided that the person actually signing on behalf of the firm is a "qualified accountant". There are issues over proper apportionment of costs as between funds, as set out above. There are odd aspects of overall management: failing to have in place (and available for inspection) a written contract between the Company and the Managing agents, which could reasonably be anticipated where the annual costs exceeds £10,000 and where there should be absolute clarity over who is responsible for what; a lack of clarity over whether insurance claims were made (and abandoned) in respect of the damage to the visitor's walls; taking an aggressive stance on service charges against the Applicants, without explaining to what some of the costs relate.
57. There appears to us to be a "gap" between what one/some of the Directors or the Board of Directors are doing and the Managing Agents. Some of this lack of joined up management cannot be laid as a criticism of the Agents: for example, though the replacement of the front doors of Grey Court were used as an example of lack of good management, this appears to have been the Board of Directors making the decision - not the managing agents - and so it would be inappropriate to cite this as an example of poor management by the managing agents.
58. Our function is not to attribute blame or make criticism, but to assess reasonableness of costs. In respect of some items dealt with elsewhere in the decision the Tribunal will reduce or extinguish the Applicants

liability to pay specific items, and we have to take care not to “punish” the Respondent twice for the same thing.

59. As the Applicants’ share of the managing agents fees equate to between £112 and £118 per annum, and the accountancy fees between £25 and £34 per annum, the question is whether despite the (on the whole) justified criticisms, the costs are reasonable for the standard provided, and we find they are nevertheless reasonable and payable.

Terms of the Lease

Doors to Grey’s Court – the arguments

60. It was the Applicants’ case that the Respondent had (without section 20 consultation) replaced the front doors of Greys Court at a cost of £372.93 per flat, but which was not necessary because the old ones had not fallen into disrepair, did not fall within the terms of the lease, nor were they an improvement as they gave limited access for movement of furniture through the front doors (unlike internal fire doors – and the old front doors – which could be fully opened on both sides).
61. The Tribunal inspected the doors and at the hearing heard argument about whether or not this was permissible under the terms of the lease. The Applicants’ argument was that the lease provided only for repair¹, and that it was only if something was out of repair that it could be classed as a replacement over an improvement – the latter not being permitted. Whilst the Respondents’ correspondence asserted that the doors were “deteriorating due to age”, there was no evidence that this was so, and the Applicants’ hotly disputed this point and said so at the time, asserting that they were in a reasonable condition and functioning normally.
62. The Respondents’ position was that as the obligation was to “keep” in good repair, the Respondents could take pre-emptive action before an item actually fell into disrepair - though in fact the Respondents’ position was that the doors were not in good condition. The Applicants had filed no evidence to show that the condition of the doors was fine and as the Applicants did not live in the premises they were less likely to know than those who lived on the spot. Though the replacement was a more modern equivalent, this is natural, as you would not replace old style door of a type liable to deteriorate when more modern materials and methods are available.

Doors to Greys Court – the Tribunal’s findings

63. The Applicants have from the outset put in issue the need for replacement of these doors and challenged the rather vague assertion

¹ Clause 1(a) of the Third Schedule referred to the management company being obliged to “keep in good repair” the “roof and main walls and other parts of the building” and “foundations and main structures”.

that the old ones “deteriorate due to age”; this challenge was apparent from email correspondence in response to consultation. Despite this, the Respondent was unable to point to any evidence to show that the old doors were out of repair – for example a surveyor’s report - which would bring the works within the terms of the lease to keep them in repair, as opposed to an improvement, which we find this to be.

64. Accordingly, the costs of the replacement doors of £372.93 (and associated additional planning costs of £22.50 and £85) are not recoverable as a service charge from the Applicants.
65. It appears that the sum of £533.08 pursued by litigation threatened by PDC relates to this sum or at least partially to this sum. It follows from our finding that the litigation must fall away. The Tribunal cannot make a determination as to the reasonableness of those sums appearing as a future service charge item, as they fall outside the service charge year that we are considering. In any event, the Tribunal does not have available to it a clear chronology and all supporting paperwork to determine the point.

Insurance Cover

66. The Applicants were concerned that insurance cover included legal expense cover, which did not fall within the terms of the lease. The Respondent conceded that this had been taken, but was in accordance with the lease.
67. Clause 4 of the Third Schedule of the lease requires the managing agent to take insurance; this is in wide terms which require it to be taken for the buildings “against loss or damage by fire and such other risks (if any) as the Lessor things fit”. The Tribunal is satisfied that this stretches to include legal cover, which falls within the Respondent’s discretion.

Statutory Arguments

Section 20 Consultation Requirements – Insurance

68. The Respondent conceded that an insurance contract of 17 months had been entered into, and so was a QLTA, so that the Applicants liability for that cost would be limited to £100. The Respondents sought at the hearing to apply orally under section 20ZA for dispensation from consultation requirements; however, this requires a written application.

Section 20 Consultation Requirements – Managing Agents fees

69. The Applicants raised as an issue the Managing Agents fees, for want of any clear evidence of the terms of it, and whether it was a rolling contract or annual. The Respondent’s case appears to be that it is oral and a rolling contract, but equally limited to 12 months.

70. The Tribunal had before it no evidence of the terms of the managing agent's contract, how it came about, nor how it is renewed, nor that it is limited to 12 months. In light of the absence of clarity the Tribunal therefore finds that the Applicants liability for service charges in respect of managing agents fees is limited to £100 per annum for each of the three years.

Section 21 and 28

71. The Tribunal has found above, that there was a failure on two occasions to comply with the requirement to provide a summary statement of costs within 6 months of the request being made, though we are satisfied that the signatures did not render them invalid. The statute does not provide that the failure to comply has cost consequences. Whilst this may go to reduction in recoverable managing agents fees, for the reasons given above, and in view of a reduction arising from a failure to comply with section 20, the Tribunal makes no further deduction.

Sections 47 and 48

72. The Applicants points about the failure to comply with these obligations largely fall away, as subsequently there has been compliance. In due course it may go to the question of recovery of the £533.08 which had been pursued by PDC, but this is not currently a matter before the Tribunal.

Consequential Orders

Section 20C

73. The Applicants sought an order pursuant to section 20C of the 1985 Act, which was resisted by the Respondent on the grounds that the application was largely misconceived and so would not be appropriate.
74. In light of the Tribunal's findings the Applicants have been partly successful and partly unsuccessful; in our assessment the Respondents have not been put to more costs on those items on which they have succeeded than those on which they have not been successful, and so a section 20C being in the discretion of the Tribunal is an order that we consider it just and equitable to make.

Reimbursement of Application and Hearing fees

75. The Applicants paid £315 in fees to the Tribunal, and we have a wide jurisdiction in respect of this. Whilst the Applicants have only been partially successful, the Tribunal's assessment of the Applicants' position in respect of a lot of the points is that this has been a quest for a proper answers - which have been slow to be provided, and in some cases, not provided at all.

76. The Tribunal is satisfied that these sums should be paid to the Applicants by the Respondent.

The Applicants' Legal Costs - Arguments

77. At the date of filing the bundle of evidence the Applicants' schedule of legal fees (and disbursements) amounted to £18,122.31 (less £315 in applicant and hearing fees). Subsequent to the hearing the Tribunal was provided with a more up-to-date assessment.
78. At the hearing the Tribunal was told that the legal costs incurred in 2011 and 2012 related to costs incurred in respect of the repairs to the wall in the visitor's car park. The Applicants had made offers to mediate prior to the application being made, to which no response had been made. The Respondent's failure to co-operate and submit a statement of case, documents, and a skeleton in a timely fashion could have reduced costs.
79. The Respondent's position was that the Applicants send multiple questions to the Respondent, and they do their best to answer these questions; these are accompanied by threats that if they are not answered then the Applicants will make an application to the LVT, but this should be a position of last not first) resort. The sums involved are relatively small and the costs disproportionately large. Further, costs should be limited to that incurred in the proceedings, and so at a glance £8,438 incurred in 2011 should not be on a schedule put before this Tribunal. Issues were taken with Counsel's brief fee of £3,600, in view of his call and limited involvement; the costs of making an application of £1,206 should not be included as the Applicants could well do this themselves.

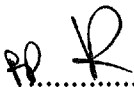
The Applicants' Legal Costs – Tribunal's findings

80. The Regulations² limit recovery of the Applicants costs to where the Respondent has acted "unreasonably in bringing, defending or conducting proceedings".
81. The correspondence is peppered with examples of the Applicants having made reasonable request for information, which are not met with adequate responses. Apposite examples are the failures to pursue an insurance claim in respect of the visitor's car park, pressing ahead with replacement of the doors to Greys Court without proper consideration of the terms of the lease, and whether or not the managing agents are engaged by written or oral contract and the terms of it.
82. Inevitably, this has led to a breakdown in trust and confidence, and resulted in further requests for information. The Tribunal accepts that

² Regulation 13(1)(b) of the Tribunals (First Tier)(Property Chamber) Rules 2013

the Applicants offered mediation as an option, which was not responded to by the Respondents; conceivably it may have avoided the issue of proceedings.

83. However, it is not conduct prior to proceedings which we can consider, and only conduct in defending the proceedings. Nor can we consider the Applicants' costs incurred prior to bringing proceedings.
84. Accordingly, the Tribunal can consider only those costs which were incurred post-issue of proceedings which are £1,812.00, £1,322, and £3,600 ("possible costs"). The Tribunal infers that the bill paid on 12th December 2013 for £602.40 relates to work done before issue.
85. The Applicants are certainly entitled to seek advice and secure legal representation or advice, which they appear to have done on an ad hoc basis, as Solicitors have not gone on record. However, in light of the relatively small sums involved against the scale and the scope of the advice sought and costs incurred, we do not consider that the Applicants can recover all possible costs.
86. The Tribunal finds that the Respondent has behaved unreasonably in defending these proceedings in the way that it has: it has failed to comply with a timetable, and failed to deal sensibly with the claimed practical problems, which we have not accepted as credible. The Respondent has failed to concede items which it should have conceded early in the proceedings, and pursued them at the hearing. The past prevarication continued at the hearing, for example the question of whether or not the insurance claim was pursued or not.
87. However, equally the Applicants pursued points which had no merit – the Applicants wanted to voice their complaints about poor management but in some instances lost sight of the Tribunal's jurisdiction being to determine reasonableness and payability of service charges – as opposed to acting as an Ombudsman.
88. In the circumstances the Tribunal finds that the Applicants should recover approximately 1/3rd of the possible costs, and for ease of calculation directs the Respondent to pay assessed costs of £1,322.40 which meet the invoice paid on 21st March 2014.


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Judge Oxlade
Judge of the First-tier Tribunal Property Chamber

7th August 2014