10409

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00LC/LSC/2014/0033
Property	:	1-43 South Shore, Ocean Drive, Gillingham, Kent ME7 1FY
Applicant	:	South Shore Residents Association
Representative	:	Miss Gemma Quinnell, Chairperson of the Residents Association
Respondent	:	Hyde Housing
Representative	:	Miss Katerina Birkeland, Lead Senior Compliance Officer for Hyde Housing
Type of Application	:	For the determination of the reasonableness of and the liability to pay a service charge
Tribunal Member(s)	:	Judge Tildesley OBE Judge Lederman Mr C Harbridge FRICS
Date and Venue of Hearing	:	5 September 2014 at Bridgewood Manor Hotel, Walderslade Woods, Chatham ME5 9AX
Date of Decision	:	13 October 2014

DECISION

Decisions of the Tribunal

1. The Tribunal determines that the sum of **£13,113.76** is payable by the Applicant in respect of the service charge for 2012/13

2. The 2012/13 service charge demands were made in accordance with the sub-lease and complied with its terms. The provisions of section 20B of the 1985 did not apply to the 2012/13 service charge because the estimated service charge payable in advance exceeded the actual expenditure.

3. The Respondent's decision to apportion the service charge on the basis of the number of leasehold flats in the property was rational and consistent with the ordinary meaning of a fair and reasonable proportion. The Tribunal, therefore, determines each lessee's contribution to the 2012/13 service charge was £304.97 (£13,113.76/43).

4. The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 so that none of the Respondent's costs of the Tribunal proceedings may be passed to the Applicant through any service charge.

5. The Tribunal determines that the Respondent shall pay the Applicant £630 (£440 application fee and £190 hearing fee) within 28 days of this Decision, in respect of the reimbursement of the Tribunal fees paid by the Applicant.

The Application

6. The Applicant seeks a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the Applicant in respect of the service charge year 2012/13.

7. The Applicant also sought an order under section 20C of the 1985 Act preventing the Respondent from recovering the costs incurred in the Tribunal proceedings through the service charge.

8. The relevant legal provisions are set out in the Appendix to this decision.

The Hearing

9. The Applicant was represented by Miss Gemma Quinnell at the hearing and the Respondent was represented by Miss Katerina Birkeland.

10. Mainstay, the managing agent for the head landlord, was named as an interested party to these proceedings. Mainstay did not attend the hearing and made no representations to the Tribunal. Mainstay had sent the Applicant a bundle of documents which according to the

Applicant did not relate to the property in question except for one document, the Service Charge Estimate for the year ending 31 March 2013. This document was exhibited at 1C in the Applicant's bundle.

11. The Applicant had originally applied to the Tribunal to determine the service charges for 2012/13, 2013/14 and 2014/15. At the case management hearing on 30 April 2014 the parties agreed to the Tribunal restricting its determination to the service charges for the year 2012/13.

12. At the outset of the hearing the Tribunal sought the views of the parties on whether they still wished to restrict the hearing to the 2012/13 service charge. The Tribunal pointed out that the parties' bundles of documents contained scant information on the management charges of Mainstay. The parties expressed their understanding of the Tribunal's dilemma but expressed a clear wish for the Tribunal to limit its determination to the 2012/13 service charge on the evidence that it had before it. The Tribunal agreed to proceed on that basis.

13. The Tribunal heard evidence from the parties' representatives. The Tribunal admitted in evidence the Applicant's statement of case and its response, and the Respondent's statement of case. The parties did not apply to admit in evidence the bundle of documents sent to the Applicant by Mainstay.

14. The Tribunal inspected the property before the hearing in the presence of the parties.

The Background

15. South Shore was a modern block of flats situated to the north of Gillingham and to the east of Chatham, being part of a large residential development scheme known as the Victory Pier Estate on regenerated land close to, and overlooking the River Medway to the north.

16. South Shore was one of seven similar blocks of accommodation, and was contiguous with Prospect Place, a care-home managed by Housing 21, which shared the car park described below. The scheme continued to be built-out by the developer.

17. South Shore was a five storey building comprising 43 one and two bed-roomed flats. The accommodation within was accessed via a front ground floor lobby, hallways, staircases and landings. There was a lift serving all floors. The building also accommodated communal stores, plant rooms, and a communal recreation room on the first floor. There was a rear ground floor access to a shared surface car park, with 39 spaces allocated to the leaseholders of South Shore who had paid an additional premium for use of car parking spaces.

18. Construction was conventional being of clad frame design beneath flat roofs. Windows were double glazed and held in uPVC frames; external

doors were formed in wood with glazed panels. The communal electric supply was augmented by a small array of photo-voltaic panels mounted on one of the flat roofs.

19. Berkeley Homes (Eastern Division) was the developer of the Victory Pier Estate. Berkeley Homes (the head landlord) had granted a lease dated 15 March 2012 of South Shore for a term of 125 years from 1 January 2008 to the Respondent in return for a premium. Under the terms of the head lease the Respondent is required to pay the head landlord a proportion of the maintenance expenses which is defined in schedule 12.

20. The Respondent had in turn granted sub-leases on a shared ownership basis to the 43 leaseholders of South Shore. The bundles included a specimen sub-lease which was the one relating to 32 South Shore held by Miss Quinnell. The specimen sub-lease was dated 11 April 2012 for a term of 125 years (less 65 days) from and including 1 January 2008.

21. Under the sub-lease the Respondent covenanted to provide services which were set out in clause 5 of the sub-lease. Under clause 7.1 of the sub-lease the leaseholders of South Shore were required to pay the service charge and the estate charge by equal payments in advance at the same time and in the same manner in which the specified rent was payable. Clause 7.4 defined the relevant expenditure to be included in the service charge which included, amongst other matters, all expenditure reasonably incurred by the Respondent in connection with the repair, management, maintenance, and provision of services for the building and all payments made under the head lease for services including the estate charge. Schedule 9 of the sub-lease defined service charge as the specified proportion of the service provision. Under the particulars specified proportion was defined as a fair and reasonable proportion to be determined by the landlord from time to time.

22. The leaseholders have subsequently set up a Right to Manage company which would take over the management of the property from 12 October 2014.

The issues

23. The following issues of dispute were identified:

- The payability and reasonableness of service charges for 2012/13
- Whether the service charge for 2012/13 has been demanded in accordance with section 20B of the 1985 Act
- The method of apportionment of the service charge
- Whether an order under section 20C should be made.
- Whether an order for reimbursement of fees should be made.

Service charge for 2012/13

24. The service charge for 2012/13 was the one exhibited at 1A of the Applicant's bundle.

25. The Respondent in its statement of case agreed not to make charges for specific items of expenditure for 2012/13 which had been in dispute. Thus the Respondent had agreed as a goodwill gesture not to charge residents for cleaning. The Respondent had also decided to remove the charges for the play area, which in turn had a "knock on" effect on its management charges. The Respondent pointed out that it had imposed in 2012/13 no charges for communal water and the door entry system. Similarly the Respondent was not seeking to recover expenditure in 2012/13 on electrical maintenance, grounds maintenance and lift maintenance.

26. The charge of £676.80 for electricity was made up of two bills from Southern Electric of £658.28 for ground floor riser, and £18.52 for the plant room. Both bills were based on actual readings of the electricity meter, and were for the period from 11 April 2012 to 5 July 2012.

27. The Applicant disputed the accuracy of the charge for electricity. The Applicant believed that the photo-voltaic (PV) panels had not been switched on in 2012/13 which meant that the residents had been deprived of the benefit of the electricity generated by the panels, and the consequential reduction in the communal electricity charge for 2012/13. In support of its proposition the Applicant relied upon recent meter readings of the PV panels, which suggested that the panels had not been operating for the full period from when the building was open for occupation. Further the Applicant referred to the estimated figure for communal electricity for 2014/15 service charge which was about half that for 2012/13. Finally the Applicant pointed out that the Respondent had delayed payment of the two bills by three months, which had denied the residents the benefit of a prompt payment discount.

28. The Respondent was unable to offer an explanation for the late payment of the two bills. The Respondent said the PV panels were used to capture solar power and direct this into the communal electricity supply. The PV panels did not store electricity. The Respondent disputed whether the residents would derive a significant financial benefit from the PV panels because they functioned in the daytime when the energy usage in the property was low. The Respondent argued that the 2014/15 estimated charge was not relevant to the determination of the 2012/13 charges.

29. The Tribunal is satisfied that the Respondent had incurred the charge for electricity, which was correct for the amount of electricity used. The Tribunal noted the Applicant's concerns about the delayed payment and the use of the PV panels. The Tribunal, however, is not persuaded

that those concerns justified a reduction in the charge. The Tribunal, therefore, finds that the charge for electricity was £676.80.

30. The charge of £1,367.49 for fire safety comprised four invoices from Fire Alarm Investigations Limited exhibited at 6A to 6D in the Applicant's bundle. They were for £375 fire alarm servicing (16.11.2012); £338.10 dry riser service (13.2.2013); £375 fire alarm servicing (22.3.2013), and £378.39 unspecified work (7.12.2012).

31. The Applicant commented on the absence of detail on the invoices which made it difficult to identify the works carried out. The Applicant asserted that it was fully aware of the requirement for the building to comply with fire safety regulations. The Applicant, however, pointed out that it had engaged with the local authority over fire safety which had revealed deficiencies in the fire precaution measures and in consequence questioned the standard of the fire safety works carried out by the Respondent.

32. The Respondent relied on the description of the works as stated in the invoices. The Respondent contended that the works were necessary in order to meet the differing building regulations relating to fire safety.

33. The Tribunal noted that the total value of the four invoices exceeded the actual charge for fire safety. The Tribunal considered the invoices 6A – 6C had sufficient information to identify the works carried out, which were for the servicing of fire alarms and the dry riser. The Applicant did not challenge the reasonableness of the charges for these services. The Tribunal applying its own general knowledge and expertise decided that such services and their frequency were not unusual for the size of the property, and that the charges were within a range to be expected. The Tribunal, however, had no confidence that the expenditure incurred in invoice 6D was authorised by the lease because of the vague and inadequate description of the works undertaken given in that invoice. The Tribunal determines that the charges for invoices 6A – 6C totalling £1,088.10 were payable by the Applicant. The Tribunal disallowed the charge for invoice 6D.

34. The charges for responsive maintenance comprised three invoices from MHS Commercial totalling £270 exhibited at 5A – 5C in the Applicant's bundle. The charges represented the call out fee (£75 plus £15 VAT) for MHS Commercial for three jobs: fault with door entry (25.5.2012), carpentry (22.6.2012) and fit notice board (4.9.2012).

35. The Applicant disputed the charges because of the Respondent's failure to provide a satisfactory explanation for the nature of the works undertaken. Further the Applicant maintained that if there were defects they should have been covered by the NHBC warranty.

36. The Respondent had contacted the contractor for further information but was advised that none was available because that aspect of its business had folded. The Respondent pointed out that it had a

responsibility to maintain the building, and as far as the Respondent was concerned the works were reasonable and necessary.

37. The Tribunal during its inspection had identified the notice board which was the subject of invoice 6C. There was discussion at the hearing about whether the carpentry (invoice 6B) related to the wooden blocks which were installed in place of the disability push pads. The Tribunal decided the carpentry did not refer to the wooden blocks because of the Applicant's evidence of the wooden blocks being installed in 2013.

38. On balance, the Tribunal considers that a building of this size would have experienced minor problems in its first year which would not have been covered by the NHBC warranty. The Tribunal finds three call outs and a call out charge of £75 plus £15 VAT were reasonably incurred and determines that the Applicant was liable to pay £270 for responsive maintenance.

39. The charge for building insurance was £2,397.72 which was disputed by the Applicant because it had not been provided with a copy of the policy for 2012/13 and the charge was more expensive than the estimated charge for 2014/15.

40. At the hearing the Respondent explained that it took out a block policy in respect of its property portfolio, and supplied a copy of its summary of cover with Aspen Insurance UK Limited for the period 1 April 2012 to 31 March 2013. The Respondent said the charge for the block policy was apportioned between its properties in accordance with the square area of each property against the total square area for the property portfolio. The Respondent did not, however, provide evidence of how it arrived at the actual charge for insurance of the property. The Respondent stated that in 2013 it negotiated a new insurance policy which resulted in reduced premiums for leasehold tenants from 2013.

41. The Tribunal is disappointed that the Respondent did not provide documentary evidence of the charge for the insurance policy, and the breakdown of that charge between the properties on its property portfolio. The Tribunal, however, notes that the actual cost for insurance in 2012/13 as recorded in the service charge statement (exhibited at 1A of the Applicant's bundle) was some £2,100 less than the estimated cost, which suggested that the Respondent had arrived at the charge using evidence of actual expenditure. On balance, the Tribunal is satisfied the Respondent incurred the expenditure of £2,397.72 for the insurance, and that the amount claimed was not excessive for the type and size of the building.

42. The expenditure head of "Management Company Costs" related to the Respondent's proportion of the maintenance expenses said to have been incurred by Mainstay, the managing agent, for the head landlord under the head lease (see paragraph 3 of schedule 13 of the head lease).

43. Under the head lease the maintenance expenses payable by the Respondent were categorised under various headings: the Estate Charge (schedule 6 of the head lease) ; Parking Spaces and Motorcycle Parking Spaces Charge (schedule 10), Insurance charge (paragraph 1.6 of schedule 12), and Maintenance Expenses – All Sectors (schedule 11).

44. The Estate Charge related to the expenses incurred by the head landlord under the Head Lease in maintaining the common parts of the estate, known as Victory Pier. The Parking Charge concerned the head landlord's costs in maintaining the car park for South Shore. The Insurance Charge related to a range of risks associated with the performance of the head landlord's obligations under the head lease for which the landlord had taken out insurance cover. Finally the Maintenance Expenses – All Sectors included those expenses connected with overall management and administration of the estate and maintained property.

45. Under clauses 7.1, 7.4 and 7.4(a) of the sub lease the Applicant covenanted to pay in any one accounting year the Respondent's proportion of maintenance expenses payable to the head landlord under the head lease.

46. In 2012/13 the amount payable by the Applicant for "Management Company Costs" was £11,393.77.

47. The Applicant contested the quantum of the management company costs because the Respondent's representative at the case management hearing had said she thought the costs were too high.

48. The Respondent had supplied the Applicant with a purported breakdown of the management company costs for 2012/13 (exhibited at 4B of the Applicant's bundle) but later the Respondent told the Applicant to ignore the breakdown because it had been included in error and did not relate to the residential units. By the time of the hearing the Respondent had provided the Applicant with no information on the make up of the management company costs in the sum of £11,393.77.

49. The Respondent's explanation for its failure to provide the necessary information on management company costs was that it was expecting the head landlord's managing agent, Mainstay, to respond to the Applicant's concerns.

50. The Tribunal directed Mainstay to be named as an interested party to the proceedings. Mainstay chose not to make any representations to the Tribunal and did not attend the hearing. Mainstay supplied the Applicant with a bundle of documents which was not sent to the Respondent and the Tribunal. According to the Applicant, the bundle did not contain documents relevant to the application except for a spreadsheet entitled "*Service Charge Estimate for the year ending 31 March 2013: Victory Pier Gillingham*".

51. The spreadsheet set out the contributions of the various residential and commercial units on Victory Pier to the estimated maintenance expenses of the head landlord under the head lease. The Respondent's estimated contribution was £10,344.60 estate charge (based on a 17.8744 percentage contribution) and £2,550.68 parking charge (based on 18.3090 percentage contribution), which made an estimated total of £12,895.28 for the year ending 31 March 2013.

52. At the hearing the Applicant maintained its dispute with the management company costs on the ground that the Respondent had given no explanation for them.

53. The Applicant pointed out that South Shore did not have the same benefits as the other residential blocks on the estate, which included security patrol, caretaker, WiFi lounge, gym and visitor parking. The Applicant stated that visitors to South Shore had been excluded from parking on the estate unless they parked in a two hour or four hour bay. Further the Applicant said for the first two years South Shore did not have the benefit of a road gritting service, which was available to the other blocks on the estate.

54. The Respondent had no answer to the Applicant's concerns. The Respondent stated the costs had been checked and were accurate. The Respondent, however, adduced no evidence of what checks had been carried out.

55. The Tribunal considers the Respondent's stance on the management company costs incurred by Mainstay was unsatisfactory. In the Tribunal's view, the Respondent as the Applicant's immediate landlord had an obligation to justify the charge demanded from the Applicant, and could not abdicate its responsibility by putting the onus upon Mainstay. Also the Tribunal had directed the Respondent to provide a statement of case accompanied by all supporting documentation. The Respondent did not request an adjournment to adduce evidence of the management company costs, and agreed to proceed on the basis of the evidence currently before the Tribunal.

56. The Tribunal is, therefore, required to do its best on the evidence before it. The Tribunal is satisfied on the evidence of the spreadsheet and its inspection that during 2012/13 Mainstay on behalf of the head landlord had incurred expenditure which was recoverable under the terms of the head lease from the Respondent, and properly included as management company costs in the Applicant's service charge for 2012/13.

57. The question for the Tribunal is the amount of management company costs that should be determined. The Tribunal considers the Applicant's evidence of works and services not being to the required standard had some merit. The Applicant referred to problems with the parking area, in particular the absence of gritting and the poorly

maintained light fittings in the under-croft area of the car park. The Tribunal also noted that a car park barrier had not been installed despite reference to a barrier in schedule 10 to the head lease.

58. The Applicant implied that it was paying for benefits through the service charge which the Applicant did not enjoy with the other residential blocks on the estate. These benefits included security patrol, caretaker, WiFi lounge, gym and visitor parking. The Tribunal's examination of the head lease suggests the Applicant should not be charged for some of the benefits because they did not fall within the provisions of schedule 6 which defined the estate charge. The Tribunal, however, notes that schedule 6 included the inspecting, insuring and maintaining designated visitor's parking spaces for which the Applicant had no allocation. The Service Charge Estimate exhibited at 1C of the Applicant's bundle showed the Applicant's contribution to the estate charge was based on the proportion of its square area to the total square area of the blocks and apartments on the estate. The Tribunal is, therefore, satisfied on the evidence before it that the Applicant's contention about contributing to visitor's parking on other blocks on the Estate had some force.

59. The Tribunal's analysis of the available evidence on management company costs gives credence to the Applicant's submission on the excessive nature of the costs, which was also supported by the comments of the Respondent's representative at the case management hearing. Having regard to its own general knowledge and expertise, the Tribunal observes that teething problems with the correct allocation of service charge was a common occurrence in the first years of operation, particularly with large estates with diverse property users. The Tribunal, therefore, finds that the charge for management company costs in 2012/13 was too high. In the absence of an accurate breakdown of the costs from the Respondent, the Tribunal doing the best it can on the evidence available decides that a 25 per cent deduction from the sum claimed was justified. The Tribunal determines the sum of £8,545.33 for management company costs for 2012/13.

60. The Respondent charged a fee for the administration involved with the recovery of the management company costs from the Applicant. The fee was calculated at five per cent of the costs incurred by Mainstay in any one accounting year. In 2012/13 the fee was five per cent of £11,393.77 which worked out at £ 569.69.

61. The Tribunal finds that the Respondent adduced no plausible evidence which substantiated the five per cent charge. At the hearing the Respondent made bald assertions about the correctness of the charge and the checks carried out. The Respondent, however, was unable to explain the breakdown of the management company costs nor give details of the actual checks performed on the accounts with Mainstay. The Respondent had been in possession of the year end accounts of Mainstay from May 2014 (see exhibit 6E of the Applicant's bundle) but for some unknown reason had failed to share this information with

either the Applicant or the Tribunal. Given the above circumstances, the Tribunal decides that the Respondent's administration of the management company costs fell below the required standard, and determines that the charge for 2012/13 should be reduced to nil.

62. The Respondent charged an additional fee for its own management of the property. The fee was calculated at 15 per cent of the charges under Scheme costs for all Residents except utility charges and the charge for responsive maintenance. In 2012/13 the relevant charges taken into account were fire safety (£1,367.49), play inspection (£162) and responsive maintenance (£270) which totalled £1,799.49 and produced a management charge of £269.92. At the hearing the Respondent agreed to remove the charge for the play area inspection which had the effect of reducing its management charge to £245.62.

63. The Applicant argued the Respondent had not managed the property to the required standard. The Applicant pointed out that its dispute with the Respondent about the service charge had been ongoing for two years during which time no substantive progress had been made.

64. The Respondent stated that its management fee of £6.28 per unit per annum covered all complaint investigation, management of service charges, block management, Tribunal attendance, response to court applications, staff attendance at meetings and general day to day management of the block. The Respondent asserted the fee charged for 2012/13 fell significantly short of the actual costs incurred in managing the property, and did not include the time of its salaried employees engaged with resolving the various disputes at the property.

65. The Tribunal acknowledges the Respondent's charitable status and that it was not seeking to make a profit from its management fees. On the face of it, the charge of £6.28 per unit per annum was low but that was primarily because of the low value of the services supplied in 2012/13. The Tribunal considers from its own general experience the rate of 15 per cent was the norm for the calculation of fees for non-profit making bodies involved in property management. The Tribunal, therefore, considers the reasonableness of the management fees from the perspective of the percentage rate rather than from the actual costs per unit.

66. In the Tribunal's view, the prolonged nature of this dispute, the Respondent's tardiness in dealing with the Applicant's queries on the service charge and its inability to justify the sums claimed as service charges by the head landlord demonstrated that the Respondent's management of the property was not to the required standard. The Tribunal, therefore, holds that the percentage rate for the management fee should be reduced to 10 per cent which produces a fee of £135.81 for 2012/13.

67. Having regard to the above findings, the Tribunal determines a service charge of **£13,113.76** for 2012/13, the basis for which is summarised in

the table below. The Tribunal emphasises that its findings in respect of the 2012/13 service charge is derived solely from the evidence before it, and sets no precedent for subsequent service charge years.

Expenditure Head	Actual Cost (£)	Individual Charge (£)	Determination (£)
Cleaning	0.00	0.00	0.00
Electricity	676.80	15.74	676.80
Water	0.00	0.00	0.00
Door entry	0.00	0.00	0.00
Electrical Maintenance	0.00	0.00	0.00
Fire Safety	1,367.49	31.80	1,088.10
Grounds Maintenance	0.00	0.00	0.00
Lift maintenance	0.00	0.00	0.00
Play area	162.00	3.77	0.00
TV aerial costs	0.00	0.00	0.00
Responsive Maintenance	270	6.28	270.00
Buildings Insurance	2,397.72	55.76	2,397.72
Management Company Costs	11,393.77	264.97	8545.33
Management fee on Mainstay Services	569.69	13.25	0.00
Management fees on Hyde Services	269.92	6.28	135.81
Total	**17,107.39**	**397.85**	**13,113.76**

Service Charge demand in accordance with Section 20B of the Landlord and Tenant Act 1985

68. The Applicant argued that the service charge for 2012/13 had not been demanded in accordance with section 20B of the 1985 Act. The Applicant referred to the Notice dated 17 September *(no year)* from the Respondent which advised the Applicant of the costs incurred in respect of the services provided to the property over 2012/13 (exhibited at 1B of the Applicant's bundle). The Applicant said the Notice did not comply with section 20B because it did not state which items incurred an additional charge of more than £250 above the original estimate.

69. The Respondent disagreed with the Applicant's submission. The Respondent asserted that the Notice clearly stated the amount of costs incurred in 2012/13, and that it was sent on 17 September 2013. The Respondent cited in support of its proposition the High Court decision

in *The Mayor and Burgesses of the London Borough of Brent v Shulem B Association Limited* [2011] EWHC 1663 (Ch) which held that a notification under section 20B(2) of the 1985 Act must state an actual figure for the costs incurred, even if that figure was just an estimate and required later adjustment.

70. The Applicant challenged the Respondent's interpretation of the *Shulem B Association Limited* decision. The Applicant pointed out that the actual costs for services in the 2012/13 period had still not been confirmed, and, therefore, the costs had not been calculated which meant that the requirement specified in *Shulem B Association Limited* had not been met.

71. The Tribunal's starting point for determining the lawfulness of the demand is the lease. Clause 7 of the lease sets out the *Service Charge Provisions.* Under clause 7.1 the Applicant is required to pay the service charge by equal amounts in advance at the same time and in the same manner in which the specified rent is payable under the lease. Clause 2 sets out the requirements for paying the rent which is by equal monthly payments in advance on the first day of each month, the first payment to be made on the date of the lease. Clause 7.3 provides the method for calculating the amount of service charge payable in advance. Under clause 7.3 the amount shall consist of a sum comprising the expenditure estimated by the Authorised Person as likely to be incurred in the account year by the Respondent for the matters specified in clause 7.4 together with an appropriate amount as a reserve. Clause 7.4 recites the various items of expenditure which are recoverable by the Respondent under the terms of the lease. Clause 7.5 requires the Respondent to determine and certify the amount by which the estimate referred to in clause 7.3 shall have exceeded or fallen short of the actual expenditure in the account year, and shall supply the Applicant with a copy of the certificate.

72. Section 20B of the 1985 Act imposes a time limitation on the Respondent's ability to recover service charges. Under section 20B(1) a tenant is not liable to pay costs taken into account in determining a service charge if they were incurred more than 18 months before a demand for payment of the service charge is served on the tenant. Section 20B(2) enables a landlord who is unable to serve a demand within the 18 months period to stop the clock running by serving a notice in writing before the expiry of the 18 months limitation period. The notice must specify those costs that had been incurred and that they would be recovered as service charge under the terms of the lease.

73. The provisions of section 20B do not displace the parties' contractual obligations under the lease regarding the arrangements for service charge demands. Instead they supplement the arrangements by adding a time limit for the service of demands.

74. Section 20B has no application where (a) payments on account are made to the landlord in respect of service charges and (b) the actual

expenditure of the landlord does not exceed the payments on account and (c) no request by the lessor for any further payment by the tenant needs to be or is fact made (see *Gilje v Charlegrove Securities* [2004] HLR1.).

75. Turning to the facts of this case, the Respondent was required under the terms of the lease to provide the Applicant with a service charge estimate at the beginning of the account year 2012/13, and as soon as practicable after the end of the account year 2012/13 a certificate of actual expenditure specifying the variance with the estimated amount.

76. Although the Tribunal was not provided with a full suite of the demands issued by the Respondent for 2012/13, the Tribunal is satisfied that the lessees received a service charge estimate for 2012/13 when they occupied the property. In this respect the Tribunal relied on an e-mail dated 22 August 2014 from Alex Costello to Gemma Quinnell which referred to the setting of a service charge estimate at £859.20 for 2012/13 which was also in accordance with the service charge accounts exhibited at 1A and 2A of the Applicant's bundle.

77. Following the end of the account year 2012/13, on 17 September 2013 the Respondent sent the Applicant a Notice under section 20B of the 1985 Act. The Notice stated the amount of costs which had been incurred in 2012/13 and that the Applicant would be required to contribute towards those costs under the terms of the lease through the payment of a service charge. The Notice also advised that the Respondent would write to the Applicant again as soon as the Applicant's specific contribution had been calculated.

78. The Respondent then sent the Applicant a Service Charge Statement for 2012/13 which gave details of the estimated and actual costs for the year in question together with the size of the variance between the actual and estimated costs. The statement was signed by Stuart Hamill, Finance Business Partner, and gave the amount due for refund. It would also appear the Respondent sent an accompanying letter with the statement including a booklet *Your Service Charges Explained* which contained a summary of tenant's rights and obligations (see exhibit 2a of the Applicant's bundle). Although the statement was not dated, the inclusion of the statement in the Applicant's bundle indicated that it had been sent after the end of the account year for 2012/13 and before the 23 June 2014 which was the date of the bundle. The Tribunal is satisfied that the statement amounted to a certificate as required by clause 7.5 of the lease.

79. The key feature of the 2012/13 service charge accounts was that the estimated service charge payable in advance exceeded the actual expenditure which meant that the 2012/13 service charge was not caught by the requirements of section 20B of the 1985 Act. If this had not been the case, the Tribunal would have found the Notice sent 17 September 2013 constituted a valid notice under section 20B(2) of the

1985 Act and was served by the Respondent within the requisite 18 month period.

80. The Tribunal observes the Applicant in its statement of case conflated two separate statutory restrictions affecting the recovery of expenditure through the service charge. The Applicant objected to the Notice sent 17 September 2013 because it did not state which items incurred an additional charge of more than £250 above the original estimate. The Tribunal believes the reference to £250 related to the threshold for determining whether the Respondent should have consulted on qualifying works (see section 20 of the 1985 Act). The £250 threshold had nothing to do with the requirements of section 20B. Further the provisions of section 20 regarding consultation did not apply to the 2012/13 service because none of the charges related to qualifying works.

81. The Tribunal, therefore, decides:

- The Respondent's demands in respect of the 2012/13 service charge were made in accordance with the sub-lease and complied with its terms.

- The provisions of section 20B of the 1985 did not apply to the 2012/13 service charge because the estimated service charge payable in advance exceeded the actual expenditure.

- If the provisions of section 20B of the 1985 had applied, the Notice sent by the Respondent on 17 September 2013 constituted a valid notice under section 20B(2) of the 1985 Act and was served by the Respondent within the requisite 18 month period.

The Method of Apportionment

82. The Respondent apportioned the 2012/13 service charge costs equally between the lessees of the 43 flats in the property. The Applicant disputed the method of apportionment, arguing that when the lessees occupied the property, the lessees of two bed-room flats paid more in service charges than the lessees of one bed-room flats. The Applicant also pointed out that Mainstay for the head landlord apportioned the estate and parking charges in accordance with the square areas of the residential blocks and commercial units on the Estate.

83. The Respondent stated that it apportioned the service charge between the lessees in accordance with the terms of the lease, which was a fair and reasonable proportion to be determined by the landlord from time to time (see the definition of *specified proportion* in the particulars of the lease). The Respondent considered that apportioning the costs by the number of properties was a fair and reasonable method of charging for services.

84. The Respondent disagreed with the Applicant's assertion about two bedroom flats paying more in service charge than one bedroom flats when the flats were occupied. The Respondent said the difference in the amount of service charges paid in the specimen flats given by the Applicant was due to the lessees of those flats occupying them at different times during the year. The Respondent accepted that Mainstay for the head landlord apportioned the estate and parking charges in accordance with square area. The Respondent, however, pointed out that Mainstay was governed by the terms of the head lease, whereas the Respondent had to abide with the terms of the sub lease.

85. The Tribunal's starting point is again the terms of the sub-lease. Under clause 7.1 the lessee covenants with the landlord to pay the service charge and the estate charge during the term of the sub-lease. Under schedule 9 to the sub-lease service charge is defined as the specified proportion of the service provision. The particulars to the sub lease define specified proportion as a fair and reasonable proportion to be determined by the landlord from time to time. Incidentally there is no definition of estate charge which would appear to be redundant because the charges levied by the head landlord against the Respondent are recoverable from the Applicant through the service charge (see clause 7.4(a) of the sub-lease).

86. The question for the Tribunal is whether the Respondent's decision to apportion the service charge by the number of flats in the property was compliant with the terms of the sub-lease. Before answering the question a distinction needs to be drawn between the Tribunal's determination on the level of the service charge, from its decision on the apportionment of that charge between the lessees. In respect of the former the Tribunal is entitled under the provisions of the 1985 Act to decide whether those charges have been reasonably incurred. In contrast, the question of reasonableness is irrelevant to a determination on apportionment which has to be decided on what the lease states. Thus to take an extreme example if the lease stated that the service charge was to be apportioned on the basis of the lessees of one bedroom flats paying 50 per cent more than the lessees of two bedroom flats, the parties to the lease would be bound by the terms of the lease despite the obvious unfairness.

87. In this application the operative part of the sub-lease for apportionment is the definition of specified proportion, which means a fair and reasonable proportion to be determined by the landlord from time to time. The Tribunal considers the ordinary and natural meaning of specified proportion is that it is at the Respondent's discretion to determine what constitutes a fair and reasonable proportion. The Tribunal has no power to interfere with the Respondent's discretion unless it can be demonstrated that the exercise of the discretion was perverse in that its decision completely disregarded the criteria of fair and reasonable. The Applicant offered no alternative construction of specified proportion.

88. The Tribunal holds the Respondent's decision to apportion the service charge on the basis of the number of leasehold flats in the property was rational and consistent with the ordinary meaning of a fair and reasonable proportion. The Tribunal, therefore, determines each lessee's contribution to the 2012/13 service charge was £304.97 (£13,113.76/43).

89. The Tribunal makes one rider to its determination on the apportionment of the service charge. The Tribunal notes that the wording of the lease with the use of the phrase *"from time to time"* requires the Respondent to review its decision on apportionment. It would appear that the 43 lessees contributed equally to the parking charge imposed by Mainstay for the head landlord even though only 39 lessees have allocated parking spaces. If that is the case, the Respondent may wish to consider in future years to restrict recovery of the parking charge to the 39 lessees. The reasonableness of sums incurred or charges for future service charge years should be considered separately. This decision does not affect other service charge years.

Application under S20C and refund of fees

90. The Applicant applied for a refund of fees that it had paid in respect of the application/hearing and for an order under section 20C of the 1985 Act. The Applicant explained that it had made numerous attempts to resolve its dispute with the Respondent but had been passed from person to person. The Applicant had agreed to mediation but the Respondent had failed to attend the mediation session. In those circumstances the Applicant considered the only option open to it was to bring proceedings before the Tribunal. The Respondent made no challenge to the Applicant's depiction of the background to the dispute.

91. Under rule 13(2) of the 2013 Procedure Rules the Tribunal has unfettered discretion to order a party to reimburse the fees of the other party. In view of the Applicant's explanation of the history of the dispute, the Tribunal considers there is ample justification to require the Respondent to reimburse the Applicant with its fees, which are in the sum of £630 (£440 application fee and £190 hearing fee) and are to be paid within 28 days from the date of this decision.

92. Different considerations apply to an order under section 20C in that the Tribunal can only make such an order if it is just and equitable to do so. The Applicant has been partially successful with its application. It has achieved a reduction in the amount of the service charge for 2012/13 but failed in its attempt to persuade the Tribunal on the section 20B issue and the method of apportionment. The Applicant's partial success would under normal circumstances favour a section 20C order on terms, such as putting a monetary limit on its liability to pay the costs through the service charge. In this case, however, a full

section 20C order is merited, because of the Respondent's failure to engage with the Applicant in its attempts to resolve the dispute without resort to the Tribunal. The Tribunal considers that most of the issues that have been decided were capable of resolution without a hearing had the Respondent provided additional information or explanation or engaged with attempts to resolve the Applicant's concerns. Thus the Tribunal decides that it is just and equitable 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.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

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

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

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

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

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to 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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.