9824

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	LON/00/AR/LSC/2013/0688 LON/00/AR/LSC/2013/0753
Property	:	224A, 226 & 226A North Street, Romford, Essex, RM1 4QD
Applicants	:	(1) Mrs Eleanore David (2) Ms Michelle Lilley (3) Ms Silvija Dobson ("the Tenants")
Representative	:	In person
Appearances for Applicants:		(1) Mrs Eleanore David (2) Ms Michelle Lilley (3) Ms Silvija Dobson
Respondent	:	C H Chesterfield Limited ("the Landlord")
Representative	:	TWM Solicitors
Appearances for Respondent:		(1) Mr James Fieldsend, counsel (2) Mr David Tamsitt, managing

agent

Type of Application	:	For the determination of the reasonableness of and the liability to pay service charge
Tribunal Members	:	(1) Judge A Vance (2) Mr F Coffey, FRICS
Date and venue of Hearing	:	24.02.14 10 Alfred Place, London WC1E 7LR
Date of Decision	:	02.04.14

DECISION

Decision of the Tribunal

1. The tribunal makes the determinations as set out under the various headings in this Decision

2. The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the Applicants through any service charge.

Introduction

3. The Applicants apply under section 27A Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of the their liability to pay service charge to the Respondent in respect of 224A, 226 and 226A North Road, Romford, Essex, RM1 4QD ("the Properties"). Mrs David is the tenant of flat 224A; Ms Dobson is the tenant of flat 226; and Ms Lilley is the tenant of flat 226A. Each tenant's flat is located in a modern purpose-built maisonette. Mrs David's flat is located on the first floor as is Ms Lilley's flat. Ms Dobson's flat is located on the ground floor.

4. The Respondent is the Applicants' landlord. It employs HML Hawksworth to manage the Properties.

5. Numbers appearing in square brackets below refer to the hearing bundle for Flat 224A unless stated otherwise.

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

The Leases

7. The lease for flat 224A is dated 20.12.76 and was granted by the Respondent to Alfred and Ida Reed for a term of 99 years from 25.12.72 **[A1]**.

8. The lease for flat 226 is dated 13.05.74 and was granted by Respondent to William and Margery Rainford for a term of 99 years from 25.12.72 **[226–A41]**.

9. The original lease for flat 226A was dated 13.11.74 and was granted by Respondent to Walter and Joan Hearty for a term of 99 years from 25.12.72 **[226–A1]**. This lease was the subject of a Deed of Surrender and Lease dated 19.01.99 made between the Respondent and Mrs Y. C. Gotz ("the Deed of Surrender and Lease") **[226–A20]**.

10. The leases for flats 224A and flat 226 are in identical terms as was the original lease for flat 226A. However, the Deed of Surrender and Lease whilst providing for the new lease for flat 226A to be on the same terms as the original lease varied some of the original terms.

11. The relevant provisions of the lease can be summarised as follows:

    11.1. The Tenant covenants to pay by way of service charge a 1/2 proportion of the expenditure incurred by the Landlord in carrying out its obligations under clause 5(5) of each lease together with any other costs and expenses

reasonably and properly incurred in connection with each building including the cost of employing managing agents.

11.2. The Landlord's obligations as set out in clause 5(5) include maintaining and keeping in good and substantial repair and condition the main structure of each building and also includes insuring each building and the employment of a firm of managing agents to manage each building. Also included, at clause 5(5)(q) is the setting aside of such sums of money as the Landlord shall reasonably require to meet anticipated future costs of replacing, maintaining or renewing those items covered by the Landlord's covenants.

11.3. Each lease provides for the Tenant to make a payment on account of service charge by two equal payments due on the 24th June and the 25th December in each year.

11.4. The service charge year is the period 1st January to the 31st December in each year.

12. For the avoidance of doubt, where below the tribunal determines that a sum is payable by the Applicants, it means that the tribunal is satisfied that it is payable under the terms of the Applicants' leases as summarised above.

Case Management Conference/Mediation

13. An oral case management conference took place on 24.10.13 at which all three Tenants were present as well as Mr Fieldsend, Mr Tamsitt and Ms G Byfield of HML Hawksworth Limited ("HML Hawksworth"). At the start of that hearing only one application was before the tribunal, that of Mrs David. All parties agreed to mediate and a mediation hearing took place on 10.02.14. That mediation was unsuccessful.

14. Directions were issued by the tribunal on the same day as the case management conference which included provision for an anticipated application by Ms Lilley and Ms Dobson to be joined with Mrs David's application and for the pre-trial review directions to apply equally to both applications.

Inspection

15. Although the pre-trial review directions referred to an inspection of the flats being necessary, the tribunal did not consider this was necessary in order for it to make a determination of the particular issues in dispute and no inspection took place.

The Hearing

16. During the course of the hearing the representatives for the Respondent provided the tribunal with copies of the following additional documents at the tribunal's request. These were added to the tribunal's hearing bundles:

16.1. A copy of the management agreement between the Respondent and HML Hawksworth dated 18.09.08 **[72-84]**.

16.2. Debit Notes from Mulberry Insurance Services ("Mulberry") relating to the insurance premium for both 224/224A and 226/226A North Street for the period 29.09.13 to 28.09.14**[85-86] [226-E4A]**.

16.3. Insurance policy wording in respect of terrorism cover **[87-89]**

16.4. A list of documents sent by HML Hawksworth to the Respondent's accountants for the year ending 31.12.2013 **[90]**.

16.5. Copy email dated 21.02.14 from the Respondent's accountants to Mr Tamsitt, containing an explanation for the insurance expenditure charge for all three flats **[91-92]**.

17. Mrs David supplied the tribunal with copies of the following:

17.1. Email dated 20.01.14 with alternative insurance quotes **[94-96]**.

17.2. NIG Residential Landlords Insurance policy booklet **[97-137]**.

18. Neither party objected to the other being allowed to rely on any of the additional documents provided. The tribunal allowed each party sufficient time to consider them and considered it just and equitable for them to be relied upon as evidence despite their late provision.

19. The tribunal granted the Applicants permission to amend their applications so as to include the 2014 interim service charge. It considered there was no prejudice to the Respondent in doing so given that it was on notice of this request and given that the heads of expenditure and sums in question were very similar to the 2013 interim service charge. No copy of the 2014 interim demand for flats 226 and 226/A was in the hearing bundle but all parties confirmed that it was the same as that for flat 224A **[C25]**.

20. The tribunal was therefore required to determine whether or not the service charges demanded by the Respondent were payable by the Applicants (and whether the same had been reasonably incurred) for the years 2011; 2012; 2013 (interim charge); and 2014 (interim charge).

21. The tribunal had the benefit of a witness statement from Mr Tamsitt **[59]** who also gave oral evidence at the hearing.

Insurance

22. There is a difference between the cost of insurance as shown in the Respondent's service charge accounts and the actual premiums incurred as shown in invoices from the Respondent's insurance brokers, Mulberry. The explanation for this variance, provided by Respondent's accountants, Wilder & Coe **[91]**, relates partly to the fact that the service charge accounting year runs from 1st January to the 31st December in each year whereas the insurance period runs from 29th September to 28th September in each year. As such, each premium had to be apportioned between two service charge years.

23. In addition, for the 2012 accounting year the Respondent decided to move to a cash accounting system so that the entire premium due for the period September 2012 to September 2013 was treated as having been incurred within the 2012 service charge year. As apportioned insurance expenditure for the period January 2012 to September 2012 was also treated by the accountants as being incurred in the 2012

service charge year this meant that the treatment of insurance expenditure for 2012 was considerably higher than in previous service charge years.

24. For 2012 the accountants treated the following expenditure as falling within the year ending 2012:

£498.84 (the apportioned premium for September 2011/12 for the period January to September 2012)

£681.05 (the full amount of the premium covering the period September 2012/13)

£106.00 (the full amount of the premium for terrorism cover for the period September 2012/13)

£1,280.89

25. By way of contrast the sum falling within the 2011 service charge year was £648.89. The Applicants were, understandably, unclear as to why they had received demands for such a high sum for the 2012 service charge year when compared to the 2011 figure, especially as the budgeted amounts for 2013 and 2014 did not show any 'credit' being given for the change to a cash accounting system in 2012.

26. At the start of the second day of the hearing Mr Fieldsend informed the tribunal that the Respondent had not realised that the move to a cash accounting system in 2012 would lead to the distortion set out above. He indicated that the Respondent was therefore content for the tribunal to proceed on the basis of the previous accounting system and that it would make appropriate adjustments to the Applicants' service charge accounts following this tribunal's determination.

27. As there was no dispute over the Applicants' liability to pay towards the costs of insurance, the tribunal informed the parties that it considered that the appropriate way for it to proceed was to consider whether or not the premiums that were paid in each year were costs that were reasonably incurred and whether the budgeted amounts for 2013 and 2014 were reasonable. All parties agreed with this approach.

28. The costs of the premiums was as follow

Property	2011	2012	2013
224/224A	£665.13 **[D4]**	£787.05 **[E8/9]**	£614.80 **[85/6]**
226/226A	£665.13 **[226 –C24]**	£787.05 **[226–D10/11]**	£614.80 **[226 –E4A/B]**

The Applicants' Case

29. The Applicants' position was that the cost of insurance was excessive. They relied on three quotes obtained by Mrs David that ranged from £341.47 to £415.17 **[95]**.

30. These were not the first quotes obtained by Mrs David. Previous quotes **[F1]** had obtained following a telephone call to an insurance broker. Mrs David then received an email from Mullberry dated 13.01.14 **[57]** in which it was stated that the quotes she had obtained did not appear to include cover for certain items covered under the Respondent's policy. It is also stated in that email that insurance cover was required by the Respondent's mortgage brokers, Barclays Bank plc, and that at renewal the premiums are market tested.

31. After receiving that email Mrs David contacted the broker once again and provided them with a copy of the Mulberry policy schedule and the email itself. The later quotes at **[95]** were then provided by the broker. Mrs David contended that these were like for like comparables. She had copied and pasted details of the quotes and what was covered under the policies into the Scott Schedules relied upon by the Applicants (in red ink) **[1-38; 226-1-37]**.

32. Reference was also made to Ms Lilley's father (who owns several properties in the area including 228/228A North Street, being able to secure insurance at a much cheaper rate. The tribunal was informed that a renewal schedule with Direct Line in the sum of £643.40 for the period 11.10.12 to 04.11.13 **[F16]** covered six properties. A renewal schedule for 23.10.13 to 01.11.14 in the sum of £1,009.33 appears to cover nine properties **[F15]**.

33. The Applicants also contended that there was no need for the landlord to insure for terrorism as this was not a risk in the Romford area. Further, the cost of this additional cover was too high in any event. The premiums paid by the Respondent in 2012 and 2013 set out in the table above included the sum of £106 for terrorism for each year. By way of contrast, one of the quotes that Mrs David had obtained, from NIG, totalled £415.17 and included terrorism cover as referred to in the policy booklet **[97]**.

The Respondent's Case

34. Mr Fieldsend submitted that the quotes obtained by Mrs David were not like for like quotes. All three had a £250 standard excess with a £1,000 excess for subsidence **[1]** whereas the Respondent's policy has a £100 excess save for subsidence cover. This, he said, was referred to in a summary of cover sent to Mrs David under cover of an email dated 25.06.12 [**H9**] He also submitted that there was no evidence that the apparent provision for loss of accommodation was the same as loss of rent which Mulberry had confirmed was covered under the Respondent's policy.

35. As for the Direct Line information, this did not include details of what was actually covered under the policy and was not a proper comparable.

Decision and Reasons

36. The tribunal recognises the efforts made by Mrs David to obtain proper comparable quotes but, on the available evidence, does not consider the quotes she secured to be on a like for like basis with the policy taken out by the Respondent. The tribunal accepts her evidence that she provided her brokers with the Mulberry policy schedule and the email from Mulberry at **[57]**. However, there is no documentation

before the tribunal from her brokers to show what they did with that documentation and what they did to try to secure like for like quotes.

37. The only relevant documentation from the broker is the email dated 20.01.14 **[94]** which just consists of four quotes. The tribunal does not have the benefit of documentary evidence as to the relevant policy schedules other than the material that Mrs David cut and pasted from the details she accessed online (by clicking on the quotes and then pasting them into the Scott Schedule). In the tribunal's view this is not sufficient to satisfy it that the quotes are like for like. The tribunal would have liked to have seen documentary evidence detailing the cover provided by these policies and, ideally, an assessment from Mrs David's broker that the Respondent's full policy had been taken into consideration and that it considered that these were like for like comparables.

38. Mrs David did supply a copy of a NIG policy booklet on the second day of the hearing but appears to be a standard policy document and is not in any way tailored to the specific quote obtained by Mrs David. As Mr Fieldsend pointed out, page 7 of the NIG policy booklet appears to exclude terrorism cover for residential properties. As Mrs David's evidence was that this policy booklet related to a quote that she obtained from the brokers asking for like for like cover with the Mulberry quote (including as to terrorism cover) this indicates it may not be truly comparable.

39. Due to these uncertainties in documentation the tribunal is not satisfied that the quotes obtained by Mrs David can be relied upon as being safe comparables. The same is true of the information obtained from Ms Lilley's father which is much less clear in terms of what was covered under the terms of the relevant policies.

40. The tribunal also agrees with Mr Fieldsend that if, which was not contested by the Applicants, the amount of the policy excesses were different from the Respondent's policy excess that these were significant differences that would contribute towards a lower price in the quotes obtained by Mrs David.

41. As for terrorism cover, the Applicants did not dispute that such cover could be obtained by the Respondent under the provisions of their leases, only that it was unreasonable, for it to do so. The tribunal disagrees and considers it to be prudent for the Respondent to effect such cover even if the same were not required by its mortgage broker (as was indicated by Mulberry) **[57]**. Terrorists may live and seek to manufacture explosives or carry out terrorist activities anywhere in the UK. Whilst perhaps a low risk that this would happen in Romford, it is not unreasonable to seek to cover such risk.

42. The tribunal considers that the amounts of the insurance premiums paid by the Respondent for 2011, 2012 and 2013 are at the high end of what is reasonable but not so high as to have been unreasonably incurred.

43. It therefore determines that the Applicants are liable to pay ½ each of the following sums expended by the Respondent £665.13 (2011); £787.05 (2012) and £614.80 (2013). The sum that appears on the interim demand for 2013 **[C14]** amounts to £787. However, given that we now have the actual cost for that year and as Mr Fieldsend confirmed that the Respondent will carry out an adjustment exercise

following receipt of this decision (to rectify the distortion in the 2012 figures) the tribunal considers it appropriate to limit the sum that is reasonable for the Applicants to pay for the 2013 interim demand to the actual expenditure incurred.

44. As for 2014, the Respondent has budgeted for £645 in its interim demand **[C25]**. The tribunal considers this to be reasonable in amount and payable by the Applicants in their ½ apportioned share.

Managing Agent's Fees

45. The amounts in dispute, as reflected in the service charge accounts and interim demands are:

Property	2011	2012	2013	2014
224/224A	£661.44 **[C5]**	£694.48 **[C11]**	£715 **[C14]**	£735 **[C25]**
226/226A	£661.44 **[226 –C17]**	£694.48 **[226 –D5]**	£715 **[226–E4]**	£735 **[C25]**

The Applicants' Case

46. The Applicants' considered the level of fees to be excessive for the service provided. They highlighted that each property is a self-contained flat without common parts to manage. Referring to the management agreement provided at the start of the hearing **[72]** Mrs David argued that the properties are not inspected every two months as required by clause 1.2 of the agreement **[80]** and that as far as they are aware no inspection has ever taken place since HML Hawksworth took over the management function in 2009.

47. All parties agreed that there have been no repairs or works carried out at the properties since 2009 except that a drain required clearing at 226/226A in February 2011 **[66]** in respect of which it was asserted that the cost had been authorised by Mr Tamsitt without checking with Ms Lilley or Dobson that the time spent by the contractor on site was as recorded in the invoice.

48. Mrs David also pointed out that the agents leave securing insurance to brokers and the preparation of annual service charge accounts to accountants rather than performing those functions themselves. All in all, the service provided was minor and could not justify the fees sought.

49. The Applicants had sought to obtain evidence of management charges for other properties in the area **[B1-24]**. This comprised photographs of three properties rented by people known to Ms Lilley and with details of the amounts paid for management services.

50. They also contended that the agreement entered into between the Respondent and HML Hawksworth to manage the flats amounted to a long-term qualifying

agreement ("QLTA") under the 1985 Act on the basis that it was an agreement for over 12 months (as it rolled over at the end of the initial 12 month term). This meant that statutory consultation was necessary before it was entered into. As no such consultation had taken place, the amount allowable for management fees should be reduced.

The Respondent's Case

51. The Respondent considered the level of fees to be reasonable for the professional service it was contended was provided. In evidence, Mr Tamsitt indicated these were detailed in the extract from their brochure at **[58]**. He prepares the annual budget and ensures that the accountants are sent the documentation needed to finalise the end of year service charge accounts. He and his colleagues liaise with the Respondent and deal with queries from the Applicants as required. He informed the tribunal that he visits the Properties two to three times a year but only carries out an external inspection of the front of the Properties and does not knock on the door or inform the Applicants in advance that he was intending to visit. As he lives in the London/Essex area he travels from home to carry out these inspections.

52. Mr Tamsitt's office at HML Hawksworth is in the City of London and he conceded that using a local agent may possibly be cheaper but that their fee was set having regard to the Respondent's portfolio of properties. He indicated that HML Hawksworth's usual management fee was in the region of £200 - £350 per year but that they would not normally manage a two-property building.

53. Mr Fieldsend disputed that the agreement with HML Hawksworth was a QLTA as it did not entail a commitment for more than 12 months. He considered the wording of the agreement to be similar in nature to that in ***Paddington Walk Management Ltd v Peabody Trust*** [2010] L&TR 6 and relied on that decision.

54. After the short adjournment on the first day of the hearing the tribunal informed the parties that it had formed the preliminary view that the managing agents fees were in a higher sum than the tribunal considered to be reasonable. As this view was based primarily on the application of the tribunal's own knowledge and expertise it considered it appropriate to inform the parties of its reasoning and to allow them time to consider these reasons and to make further representations and adduce further evidence on this point on the second day of the hearing if they wished to do so. The tribunal gave two reasons:

54.1. The tribunal considered that if a local agent had been used the fees would be considerably lower. As HML Hawksworth were based in the City of London it was likely to have considerably higher overheads when compared to a local firm.

54.2. The sums demanded were considered to be excessive given the type and nature of the Properties and the limited management required. These were maisonettes with no common parts; with just four tenants and which were not part of a larger estate.

55. Mr Fieldsend asked the tribunal members to provide details of their experience with a view to identifying whether this was relevant experience. Mr Coffey explained that

he is a chartered surveyor and has been so for 40 years. He is a fellow of the Royal Institute of Chartered Surveyors and has around twenty years' experience sitting as a member of this tribunal. During that time he hah probably dealt with hundreds of cases that involved service charge challenges, almost all of which would involve questions over the level of a managing agent's fees. When asked, he confirmed that he had experience of what management fees for a firm based in the Romford area were likely to be but that there was, in his view, nothing special about the Romford area. In his view the maximum amount that was reasonable in respect of these Properties was £580 plus VAT for each building.

56. Mr Vance indicated that he had been appointed to the tribunal about two and a half years ago during which time he had dealt with a considerable number of service charge challenges that included challenges to the level of managing agent's fees. Prior to that he had been a solicitor in East London specialising in housing cases. He grew up in the Essex area, had former clients in the Romford area, and knew the locality well. He also had a good knowledge of rental values in the area. He acknowledged that he did not have an expert knowledge of the level of management fees specific to the Romford area but would defer to Mr Coffey that respect.

57. Mr Fieldsend submitted that for the tribunal's experience to be relevant it needed to have comparable experience of what a local firm of agents in the area would charge. Further, what the tribunal considered to be an appropriate fee did not mean that the fee actually charged was unreasonably incurred. In his submission the charges were within a range that should be considered reasonable. He pointed out that the fee in 2011 was below the maximum sum indicated by Mr Coffey.

Decision and Reasons

58. A QLTA is defined by s.20ZA(2) of the 1985 Act as *"an agreement entered into, by or on behalf of a landlord or superior landlord for a term of more than twelve months"*.

59. If an agreement is a QLTA then s.20 of the 1985 Act operates to limit the relevant contributions of tenants to £100 each per year unless the consultation requirements set out in the Service Charges (Consultation) Regulations 2003 ("the 2003 Regulations") are complied with or a tribunal grants dispensation from those regulations. These regulations provide important statutory safeguards to tenants who are entitled to make observations on the proposed entry into a QLTA

60. The Tribunal considers that the agreement with HML Hawksworth is not a QLTA. Clause 7.1 specifies that the agreement has a fixed term of one year ending on 29.09.08. Clause 8.1 provides for either party to terminate the agreement *"with effect from the expiry of the Term"*. Whilst the agreement provides for the possibility of the fixed term being automatically followed by a further term (if the agreement is not terminated) it cannot be said that this is an agreement with a term of more than 12 months. We accept Mr Fieldsend's submission that the nature of the agreement is similar to that in the *Paddington* case. We concur with and follow the reasoning of Her Honour Judge Marshall QC in that case in that the question of whether an agreement is a QLTA cannot depend simply on the fact that an agreement *could* continue beyond the initial fixed term. This agreement can

therefore be distinguished from that in considered in ***Poynders Court v GLS Property Management*** [2012] UKUT 339 (LC) where the intention of the agreement was construed as being one for the provision of services for a period of more than 12 months.

61. As to the level of fees demanded, in the tribunal's expert judgment these are excessively high for the service provided and have, therefore, been unreasonably incurred. We accept Mr Fieldsend's submission that the exercise of such judgment requires that the tribunal possess relevant expert knowledge. In our view, that requirement is clearly met given the background and experience of the tribunal members. We do not accept that it requires a detailed knowledge of managing agent's fees in the Romford area. Both tribunal members have substantial experience of assessing managing agent's fees through their work on this tribunal which in Mr Coffey's case is very extensive. The tribunal deals with applications throughout Greater London and the outskirts of London. That broad experience is sufficient to amount to relevant experience. In the event that we are wrong on that point Mr Coffey, in any event, indicated that he did have experience of managing agent's fees in the Romford area.

62. The tribunal recognises that the Properties would cost more per unit to manage than a larger block. Nevertheless it considers the fees to be excessive for the reasons set out above, namely that substantial savings would have resulted if a local firm had been used but, more significantly, the level of management required for these Properties cannot justify the fees sought. The evidence indicates that the management services provided to these four tenants are limited. No repairs at all have been carried out during the four years in issue and there has been only one call out for maintenance issues namely to clear a blocked drain. The service charge accounts are prepared by external accountants and not the managing agents. The amount of documentation that would need to be provided to the accountants is limited given the small number of relevant transactions. Insurance cover is affected by brokers. There are no common parts and therefore no charges for matters such communal cleaning or gardening.

63. The tribunal accepts that the managing agents have had the burden of responding to a considerable number of communications from the Applicants concerning the service charges demanded from them. The evidence does not, in the tribunal's judgment, indicate that those responses have been anything other than professional and we do not consider there is evidence to justify a conclusion that the service provided was inadequate. Rather, the fees are too high for the service actually provided.

64. The tribunal determines that the amount that it is reasonable for the Applicants to pay is their ½ apportioned share of the following (such sums being exclusive of VAT):

Property	2011	2012	2013	2014
224/224A	£500	£520	£541	£563

226/226A	£500	£520	£541	£563

Accountants Fees

65. The amounts in dispute, as reflected in the service charge accounts and interim demands are:

Property	2011	2012	2013	2014
224/224A	£420 **[C5]**	£420 **[C11]**	£432 **[C14]**	£432 **[C25]**
226/226A	£420 **[226-C17]**	£420 **[226-D5]**	£432 **[226-E4]**	£432 **[C25]**

The Applicants' Case

66. The Applicants queried whether or not these were required on an annual basis and considered the sums sought to be unreasonably high given the size and nature of the Properties and the amount of work the accountants would have had to do in order to finalise accounts.

The Respondent's Case

67. The Respondent's position was that paragraph 1(1) of the 5th Schedule of the Applicants' leases provided for the Respondent to recover *"the cost of any Accountant or Surveyor employed to determine the Total Expenditure and the amount payable by the Tenant"* through the service charge. It considered it prudent to use an external firm and contended that the sums were reasonable given that the evidence from the firm was that their minimum fee was £350 plus VAT **[40]**, the sum that was charged to the Applicants for 2011 and 2012.

Decision and Reasons

68. Under the provisions of the 5th schedule to the Applicants' leases the Respondent is obliged to send to the Applicants a certificate confirming the amount of the service charge expenditure incurred during the annual accounting period together with details of sums paid on account by the each Applicant and any excess or deficiency between those sums and the final accounts figure. The tribunal agrees with the Respondent that the lease entitles it to instruct external accountants to do so each year and to recover the costs of doing so from the Applicants.

69. However, the tribunal considers the sums incurred and budgeted for to be excessive and therefore unreasonably incurred. The tribunal had regard to the information stated in an en email from the accountants dated 09.01.14 to Mr Tamsitt setting out

details of the work undertaken **[40]** and the relevant letter of engagement **[41]**. Nevertheless, on the available evidence, the time required in order to prepare the accounts does not justify a fee in the sum sought.

70. The heads of expenditure in the accounts for each year are minimal. By way of example, for the year ending 2011 the only heads were insurance; management fees; bank charges; accountancy and sundry. The vouchers that the accountants would need to consider are clearly likely to be very few in number. Mr Tamsitt's evidence was that for the 2013 service charge year a total of only eight vouchers were sent to the accountants along with 8-10 bank statements; 12 bank reconciliation reports and the other information set out in his schedule **[90]**.

71. Furthermore, the accountants have been engaged to prepare service charge accounts for both buildings comprising the Properties. The costs sought in respect of insurance; management fees and accountancy are identical for each tenant. The only divergence is in respect of repairs, bank fees and sundry items. There is, therefore, a high degree of overlap in the heads of expenditure for the two properties.

72. Given that overlap and the small amount of documentation to be considered by the accountants (as evidenced by Mr Tamsitt's schedule **[90]**) the tribunal does not consider the sums incurred for accountants fees (which totalled £840 for both Properties in 2011 and 2012) to have been reasonably incurred.

73. The tribunal determines that the amount that it is reasonable for the Applicants to pay is their ½ apportioned share of the following (such sums being exclusive of VAT):

Property	2011	2012	2013	2014
224/224A	£250	£250	£260	£260
226/226A	£250	£250	£260	£260

74. *General Repairs*

The Applicants' Case

75. The Applicants contended that the on account costs demanded for the 2013 and 2014 interim charge for general repairs (£450 for each of the Properties in each year) were excessive given that no repairs at all had been carried out since HML Hawksworth took over the management function in 2009.

The Respondent's Case

76. The Respondent's position was that it was prudent to budget for the costs of unexpected works and that it had done so in previous service charge years **[C1]**. If no costs were in fact incurred the tenants would get the benefit of this when the end of year accounts were finalised.

Decision and Reasons

77. The tribunal accepts that it is prudent to demand a sum for potential expenditure. However, no such expenditure had actually been incurred in the previous two service charge years (save that the drain clearance for 226/226A appeared under this head of expenditure). In addition, Mr Tamsitt's evidence was that he was not aware of the need for any current repairs and that none were anticipated.

78. In these circumstances the tribunal considers that the sum demanded is excessive and determines that the sum that it is reasonable for the Applicants to pay is their ½ apportioned share of £350 per property for each of the two years in question.

General Reserve

The Applicants' Case

79. The Respondent has demanded the sum of £1,000 per property in both the 2013 and 2014 interim charge in respect of a general reserve. The Applicants accepted that the Respondent was entitled to demand a sum in respect of a general reserve but their position was that the sums demanded were unreasonable given the existence of a general repairs budget.

The Respondent's Case

80. Mr Tamsitt explained that the first time a general reserve was sought from the Applicants was in respect of the year ending 2013. The Respondent considered this to be good practice so as to avoid the Applicants having to pay an unexpected and potentially large sum for major works. He indicated that no major works were planned but a condition report was to be sought from a surveyor. As no repairs had been carried out for five years it is possible that sum may be required.

Decision and Reasons

81. The tribunal accepts that it is sensible planning to budget for a general reserve given the fact that no repairs have been carried out to the Properties since 2009. The sums paid by the Applicants are ring-fenced and held on account until such time that works are required.

82. In light of the tribunal's view that the sum that it is reasonable for the Applicants to pay in respect of general repairs should be limited to £350 per property, it considers the sums demanded by the Respondent for this item to be reasonable.

Bank Charges and Sundries

83. The amounts in dispute in respect of bank charges relate to the service charge accounts for the year ending 2011 and were £40.20 for 224/224A **[C25]** and £6.30 for 226/226A **[226-C17]**.

84. The amounts in dispute relating to sundries are, for 224/224A, shown as £2.25 in the 2011 accounts **[C5]**; a credit of £24.18 in the 2012 accounts **[C11]**and £20 for the interim service charge demands for 2013 and 2014 **[C25]**. In respect of 226/226A the amounts are shown as £2.25 in the 2011 accounts **[C5]**; £7.58 in the

2012 accounts **[D5]** and £20 for the 2013 and 2014 interim service charge account **[C25]**.

The Applicants' Case

85. The Applicants disputed that they were liable to pay these costs as any charges incurred should be absorbed within the managing agents' fee.

The Respondent's Case

86. The Respondent's position was that the bank charges were nominal charges levied by its bankers for the operation of the separate trust accounts in which service charge funds were held.

87. It also acknowledged that an error occurred in 2011 whereby the bank account was allowed to go overdrawn for a few days resulting in total fees of £32.55 being incurred. This sum, it says, was refunded in 2012.

88. As to sundries, these related to the costs of a courier who was used to send documents relating to several properties to the accountants and also the costs of sending documents by recorded delivery, which they consider fall to be recovered outside their management fee **[C6-8; 226-C31/D17-19]**.

89. Mr Fieldsend submitted that these sums were recoverable under the terms of the Applicants' leases as they related to the costs "reasonably and properly incurred in connection with the Building". He further submitted that it was not proportionate to carry out a forensic exercise as to how these costs were incurred given the small sums involved. He also submitted that as to the costs of the courier would probably have been cheaper than sending documents by post in any event.

Decision and Reasons

90. The individual bank charges that appear to make up this charge are described in bank statements as relating to commission charges (some examples are at **[E2 – E4; 226-21 to 25; 30;36;41]**). Although details of standard charges levied by Barclays bank (the Respondent's bankers) were included in the hearing bundle **[53]** none of these are described as commission charges

91. In light of the lack of explanation as to why these sums are described in the bank statements as "commission charges" the tribunal is not satisfied that the Applicants are liable to pay these sums. Alternatively, the whole amount has not been reasonably incurred given the unsatisfactory explanation as to what they relate to and they are therefore not payable by the Applicants. If these were sums payable for the running of the account we would expect them to be described as such or an explanation provided as to why they are described as commission charges in the bank statements.

92. The amounts in dispute related to the service charge accounts for the year ending 2011 and were £40.20 for 224/224A **[C25]** and £6.30 for 226/226A **[226-C17]**.

93. As to sundries, the tribunal is not satisfied that the Applicants are liable to pay these sums. The tribunal sees no proper basis on which the Respondent can distinguish between the costs of standard postage (which it accepts are absorbed within the

management fee) and the costs of recorded delivery and courier charges (which it does not). The tribunal agrees with Mr Fieldsend that the costs of sending documentation relating to multiple properties to the accountants in one courier delivery is likely to be cheaper than sending the documents by post. This begs the question as to why a more expensive method of delivery should be absorbed within the management fee but not a cheaper one.

94. The tribunal determines that the Applicants are not liable to pay any of the sums sought for bank charges or sundries for any of the years in question. Alternatively, these amounts have not been reasonably incurred. The tribunal accepts, however, that there may be some costs that may properly be incurred by the managing agents under the heading of sundries that would not fall to be absorbed within the management fee and considers that the sum of £20 is reasonable in amount. That sum is therefore payable by the Applicants in their ½ apportioned shares in respect of the 2013 and 2014 interim service charge.

Section 20C Application

95. In their applications the Applicants seek an order under section 20C of the Landlord & Tenant Act 1985 Act that none of the costs of the Respondent incurred in connection with these proceedings should be regarded as relevant costs in determining the amount of service charge payable by the Applicants. They argued that since 2011 it had been increasingly difficult to obtain a suitable response to their enquiries from Mr Tamsitt. He had not, to their knowledge, visited to properties or offered to visit them. They had tried to resolve these issues by making a formal complaint and by an offer of alternative dispute resolution **[H1]**. They had also, unsuccessfully, sought assistance from the Ombudsman **[I1]**. They had willingly engaged in the tribunal's mediation service but the mediation had been unsuccessful.

96. Mr Fieldsend submitted that the managing agent's responses as shown in section **[H]** of the bundle are not indicative of an uncooperative approach and that this was not an issue that had been put to Mr Tamsitt when he was giving evidence. He contended that the Applicants had pursued challenges without having proper comparable evidence and that they had unreasonably challenged very small sums such as the courier charges. Given this level of challenge it was, he said, inevitable that this matter would end up in the tribunal and that no order should be made.

Decision and Reasons

97. Given the degree to which the Applicants have succeeded in this application the tribunal considers it just and equitable to make an order under s.20C so that the Respondent may not pass *any* of its costs incurred in connection with the proceedings before the tribunal to the Applicants through the service charge.

98. The tribunal does not consider that there was adequate evidence to conclude that the Respondent or the managing agent had behaved unreasonably prior to or in connection with these proceedings. Its decision is based on the considerable success that the Applicants have had in their Applications. The tribunal also considers that the Applicants took reasonable steps to avoid such proceedings through their use of the managing agent's complaints procedure, the ombudsman and the tribunal's mediation scheme.

Name: Amran Vance **Date: 02.04.14**

Annex

Appendix of relevant legislation

Landlord and Tenant Act 1985

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

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

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

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

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

.

(3) For this purpose -

(a) "costs" includes overheads, and

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

Section 19 – Limitation of service charges: reasonableness

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

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

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

and the amount payable shall be limited accordingly.

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

Section 27A – Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal 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.

[.....]

Service Charges (Consultation Requirements) (England) Regulations 2003.

SCHEDULE 1

CONSULTATION REQUIREMENTS FOR QUALIFYING LONG TERM AGREEMENTS OTHER THAN THOSE FOR WHICH PUBLIC NOTICE IS REQUIRED

Regulation 5(1)

Notice of intention

1

(1) The landlord shall give notice in writing of his intention to enter into the agreement--

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall--

(a) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected;

(b) state the landlord's reasons for considering it necessary to enter into the agreement;

(c) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works;

(d) invite the making, in writing, of observations in relation to the proposed agreement; and

(e) specify--

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate in respect of the relevant matters.

Inspection of description of relevant matters

2

(1) Where a notice under paragraph 1 specifies a place and hours for inspection--

(a) the place and hours so specified must be reasonable; and

(b) a description of the relevant matters must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed agreement

3

Where, within the relevant period, observations are made in relation to the proposed agreement by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates

4

(1) Where, within the relevant period, a single nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a single nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate--

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate--

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

Preparation of landlord's proposals

5

(1) The landlord shall prepare, in accordance with the following provisions of this paragraph, at least two proposals in respect of the relevant matters.

(2) At least one of the proposals must propose that goods or services are provided, or works are carried out (as the case may be), by a person wholly unconnected with the landlord.

(3) Where an estimate has been obtained from a nominated person, the landlord must prepare a proposal based on that estimate.

(4) Each proposal shall contain a statement of the relevant matters.

(5) Each proposal shall contain a statement, as regards each party to the proposed agreement other than the landlord--

(a) of the party's name and address; and

(b) of any connection (apart from the proposed agreement) between the party and the landlord.

(6) For the purposes of sub-paragraphs (2) and (5)(b), it shall be assumed that there is a connection between a party (as the case may be) and the landlord--

(a) where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(7) Where, as regards each tenant's unit of occupation and the relevant matters, it is reasonably practicable for the landlord to estimate the relevant contribution attributable to the relevant matters to which the proposed agreement relates, each proposal shall contain a statement of that estimated contribution.

(8) Where--

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (7); and

(b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement,

each proposal shall contain a statement of that estimated expenditure.

(9) Where--

(a) it is not reasonably practicable for the landlord to make the estimate mentioned in sub-paragraph (7) or (8)(b); and

(b) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters,

each proposal shall contain a statement of that cost or rate.

(10) Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by him of premises to which the agreement relates, each proposal shall contain a statement--

(a) that the person whose appointment is proposed--

(i) is or, as the case may be, is not, a member of a professional body or trade association; and

(ii) subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and

(b) if the person is a member of a professional body trade association, of the name of the body or association.

(11) Each proposal shall contain a statement as to the provisions (if any) for variation of any amount specified in, or to be determined under, the proposed agreement.

(12) Each proposal shall contain a statement of the intended duration of the proposed agreement.

(13) Where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, each proposal shall contain a statement summarising the observations and setting out the landlord's response to them.

Notification of landlord's proposals

6

(1) The landlord shall give notice in writing of proposals prepared under paragraph 5--

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall--

(a) be accompanied by a copy of each proposal or specify the place and hours at which the proposals may be inspected;

(b) invite the making, in writing, of observations in relation to the proposals; and

(c) specify--

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) Paragraph 2 shall apply to proposals made available for inspection under this paragraph as it applies to a description of the relevant matters made available for inspection under that paragraph.

Duty to have regard to observations in relation to proposals

7

Where, within the relevant period, observations are made in relation to the landlord's proposals by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Duty on entering into agreement

8

(1) Subject to sub-paragraph (2), where the landlord enters into an agreement relating to relevant matters, he shall, within 21 days of entering into the agreement, by notice in writing to each tenant and the recognised tenants' association (if any)--

(a) state his reasons for making that agreement or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he has received observations to which (in accordance with paragraph 7) he is required to have regard, summarise the observations and respond to them or specify the place and hours at which that summary and response may be inspected.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the agreement is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement, summary and response made available for inspection under this paragraph as it applies to a description of the relevant matters made available for inspection under that paragraph.