10900

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CZ/LSC/2013/0154**
Property	:	**Apartments 329, 363, 365 & 576 Titanic Mill, Lowestwood Lane, Huddersfield HD7 5UN**
Applicant	:	**Apt 329 – Ms N. Johnson-Perry & Mr D. Perry** **Apt 363 – Mr & Mrs B. Rutter** **Apt 365 – Mr & Mrs Dilks** **Apt 576 – Mr & Mrs Pugh**
Applicants Representative	:	**Zermansky and Partners Solicitors** **Representing Apt 363,365 & 576**
Respondent	:	**Titanic Mill Management Company Limited**
Respondents representative	:	**Ms. F Devine by written representations** **Representing Titanic Mill Management Company Limited (in Liquidation)**
Type of Application	:	**Landlord & Tenant Act 1985 – Sections 19 & 27A(1) & 20C and for dispensation S20ZA and to set aside pursuant to Rule 51 Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	:	**Ms A Ramshaw. Judge M J Simpson**
Date	:	**28th May 2015.**

DECISION

This determination should be read in conjunction with the Interim Determination dated 17th November 2014 and the further Directions of 19th January 2015. Together the 2 Determinations constitute the Final Determination in respect of the various applications before the First Tier Tribunal. This determination was completed at decision meetings convened on 29th April 2015 and 19th May 2015.

Application under Rule 51.

Included in the submissions and evidence filed by the Liquidator, under cover of her letter of 16th December 2014, was an application signed by Dr Oates to set aside that part of the interim decision of the Tribunal dated 17th November 2014 relating to the disputed item 1 , the balancing charge for 2012.
The contention is that, accepting the Tribunals ruling regarding the unenforceability of balancing charges until audited accounts are produced, there are, in fact, audited accounts for 2012. The précis on page 18 of the Reasons correctly (for the time being unless and until audited accounts are produced) determines that the balancing charge for 2011 is not payable, but the existence of audited accounts for 2012 means that the statement that 2012 is not payable is incorrect and should be set aside.
The audited accounts for 2012 appear at Page 27 of the original hearing bundle.

Dr Oates avers that there was a procedural irregularity, in that the issue of the actual existence or not of audited accounts was not addressed at the hearing, as the Tribunals decisions on the meaning of 'Audit' had not been determined.

The Applicants make no substantive representations save to say that Dr Oates has no standing to make the application.

Determination.

The application somewhat stretches the scope of Rule 51, which relates principally to absences of documents or parties. The substance of the Tribunals decision was, however, quite clear:-

"The failure to comply is not fatal to the service charge demand. Payments on account are required regardless of certification. It does however mean that the payment of any balancing additional amount due as a result of such certification, when the accounts are prepared after (as is bound to be the case) the year end, is not likely to be enforceable in accordance with Clause 6 of the Seventh Schedule."

The unenforceability can be rectified by the provision of audited accounts. We do not resile from our substantive decision re 'audit', but we were in error in applying that decision to 2012, for which audited accounts were available. To that extent Item 1(re 2012) of the précis on page 18 of the interim Determination should be set aside.

We accept that the liquidation deprives Dr. Oates of standing, but the Liquidator has made it clear that she authorised him to speak for her. The application was an enclosure in a letter from her. He was not on a frolic of his own. We find it in the interests of justice to allow the application.

That merely removes the procedural bar to claiming a balancing charge. It does not endorse the reasonableness or payablity of the balancing charge, the amount of which will be determined by any Tribunal determination as to the reasonableness and or payabilty of items of service charge in the year in question.

Dispensation application,

The Liquidator, by an application dated 15th December 2014, makes an application to retrospectively dispense with the consultation requirements in respect of the agreement with TMESL , arising from the Tribunals interim determination that such an agreement was a LTQA to which the consultation requirements of Section 20ZA and the Service Charges (Consultation Requirements) (England) Regulations 2003 apply. [The "Regulations"]

The issue had been adjourned, and Directions given, so as to allow the Respondent time to formulate the application and evidence in support, and to afford the Applicants an opportunity to reply.

The agreement for supply was entered into following the insolvency of MES in late 2010. Whilst the bulk of the supply (both as to volume and cost) is to either the Spa or the individual residents' apartments (and consequently not within our jurisdiction), the consultation requirement do apply to the agreement for supply, primarily of electricity, to the common parts, which we inspected.

The liquidator's case is that there has been no prejudice to the leaseholders because, in the absence of an alternative supplier, the outcome of the consultation would have been no different. She correctly identifies the leading case of *Daejan Investments Ltd v Benson* [2013] UKSC 14.

She identifies that the purpose of the consultation requirements is to ensure that the Tenants are protected from paying more than would be appropriate. Merely being deprived of consultation is not of itself prejudice unless causative of prejudice.

She seeks to support the contention of absence of prejudice by relying upon extracts from the reports of BMA Building Services Consulting Engineers and Lindley Consulting.

What is not included in her application is any evidence as to the nature and scope of the negotiations which are said to have taken place between Mr Daure, the MCs managing agent, and TMESL. There is no evidence as to what steps have or could be taken to obtain alternative supplies. Reliance is placed on average costs postulated in consultant reports, but no first hand documented evidence as to actual cost. There is no detailed evidence as to how the 'unique set up for supply of electricity' came about or whether it could be changed or modified.

The Applicants' representations are set out under cover of Zermansky's letter of 24 February 2015. They point out the paucity of disclosure by or through or with the assistance of Dr. Oates. They question the independence and reliability of the consultants reports adduced by the Respondent, in support of the application for dispensation, highlighting in particular that the Lindley report is incomplete and contains errors and discrepancies. They refer to and rely upon the calculations contained in Dr Dilks' statement appended to the Scott Schedule.

Determination.

We firstly remind ourselves of the very clear Dicta of the Supreme Court in *Daejan Investments Ltd v Benson* [2013] UKSC 14. That was a case involving Qualifying Works, but the same principles apply to LTQA

At paragraph 42 of Lord Neuberger's leading Judgement the object of the legislation in ensuring that tenants do not pay more than they should is emphasised and the connection with Section 19 is established. (and repeated at paragraph 52)

The Tribunal should focus on the extent to which the tenants are prejudiced by the failure to consult. It is not the seriousness of the landlord's breach that is in issue.

The exercise of the Tribunal's discretion is not binary. Dispensation might be reasonably granted on terms.

Whilst reminding ourselves that, although, in this case there has been a wholesale failure to consult, we should not seek to punish the landlord. We should concentrate on prejudice to the tenants. We did afford a significant adjournment to the MC after the first hearing, to enable evidence to be adduced that may be relevant to the issue of dispensation. We afforded a further adjournment to facilitate the formulation of the application to Dispense by the liquidator. The onus is on the tenants to identify prejudice, but the legal burden to sustain the application remains with the Landlord. The quality of the evidence adduced by the MC/ Liquidator is unimpressive.

Dr. Oate's oral evidence was that despite any failure to consult, the negotiations between MC and TMESL were arms length in the sense that they were carried out by Mr Daure, the MC's managing agent, without interference from the Board of MC. We were not told with which human representative of TMESL the negotiations took place. There is documentary evidence in a letter written on 27th April 2011 to Dr. Dilks by Dr. Oates after TMESL had taken over the debacle arising from TES liquidation, that he was the sole director and shareholder. [Exhibit AR3 page 41]. It is very difficult to visualise the actual circumstances of the 'arms length' negotiations, whether by Mr Daure or Scanlons. It is the case that subsequently other persons became directors of TMESL. (Wilkinson, Harrison and Burton – the Directors of the Spa and the Freeholder)

The MC may not have anticipated that the Tribunal would determine that the agreement for supply was a LTQA, but there is no doubt that it must have been aware of the tenants anxiety to be consulted, be involved and play a part in resolving the supply problems. In Dr, Oate's letter, on TMESL notepaper, of 27th April 2011 he acknowledges that it is intended that TMESL would be tenant owned in due course. There is however cogent evidence that the tenants have been excluded from any, even informal, involvement.

We recite the above only because it is the background to the prejudice articulated by the tenants.

We regard the commerciality of the agreement between MC and TMESL as a sham. Both are connected parties with at least one common Director.
The MC seeks to present the agent, to whom it pays several thousand of pounds per year, as independent for the purposes of these negotiations. Mr Daure is MCs agent taking instructions from Dr. Oates who appears to be the sole Director of MC and is a Director of TMESL and was at one time its sole director and shareholder. The more recent Directorships are representatives of every entity, except the tenants, who have a financial interest in Titanic Mill. There is said to be absolutely no documentation to evidence the agreement re such an important matter. We do not find that to be credible. TMESL , and its predecessor, was intended to be not for profit tenant owned. There is evidence of substantial payment to Directors and associated companies, which appear to run contrary to this concept, even allowing for reasonable remuneration.
We have not had the benefit and assistance of any of the documentation that might reasonably have been expected to be provided by MC in support of establishing the absence of prejudice, or at the very least giving us the material to help in the exercise of our discretion, despite adjournment for that specific purpose.

What then is the prejudice, if any?

We accept that one of the reasons we determined that the agreement with TMESL was a LTQA was that it was treated by MC as the sole and only available supplier. The liquidator says, therefore, that consultation would have been otiose. The outcome would have been the same.

In our view the only reason that consultation would have been otiose is the well demonstrated unwillingness of MC to have due regard to any representations from the tenants.

The tenants have been prejudiced by being ignorant of the relevant matters about which they should have been informed. [Schedule I. paragraph 1. (2) of the Regulations] They were deprived of the opportunity of making observations as to the rate of charge. They were deprived of the opportunity, that compliance with the consultation process would have afforded, to make observations as to whether in fact, an alternative supplier could be found. They were deprived of the opportunity of suggesting that the TMESL contention that it has exclusive ownership of the infrastructure could be challenged. They could have made observations as to the connection between MC and TMESL. They could have made observations about codes of practice such as RICS and OFGEM.

If the MC had had proper regard to those observations the outcome would in our view have been very different. Despite being afforded every opportunity to do so, neither the MC nor the Liquidator has provided evidence to contradict the adverse inference that we draw from the absence of that evidence.

The prejudice is substantial. How do we quantify it?

We are, with great respect, considerably assisted by the guidance of Lord Neuberger. There is a clear connection between these provisions and Section 19. The amount of the prejudice is the extent to which consultation is likely to have avoided the levying of unreasonable charges.

On one sense the Tribunal may follow 2 routes to the same destination. It could grant full dispensation but still consider the extent to which the charges are not reasonably incurred, or it could grant dispensation on the basis that the charges are limited to only those that have been reasonably incurred. We accept that in some cases the failure to consult may not be causative of any prejudice, but the charges still fall to be considered under Section 19. In this case, however, the prejudice is very closely linked to the extent to which consultation would have abrogated unreasonable charges.

In that regard we much prefer the evidence of Dr. Dilks. His analysis is based on the evidence adduced by the Respondent MC. He uses the facts set out by the MC, with which it presumably cannot logically take issue (and has not done so in reply to Dr. Dilks' analysis). The Lindley Consultancy report is incomplete (beginning at Chapter 11) and contains manifest errors re VAT. Neither that report, nor the earlier Consultant's report, are as persuasively analytical as Dr. Dilks. [Attachment 2 to his witness statement filed with Scott Schedule]

We accept that a charge limited to £100 p.a. per flat is unrealistic. Electricity and water (and gas if supplied to common parts, but we saw none on our inspection) has to be paid for at reasonable but not excessive rates.

The best evidence that we have of those charges is as set out in Dr. Dilks' evidence. We therefore grant dispensation to MC and the liquidator to that extent, but only to that extent. We formulate the precise figures in our consideration of the Scott Schedule items.

Dr. Dilk's calculation makes some assumptions as to the Spa contribution. We find them to be reasonable assumptions. We have no evidence to contradict them. We were refused the opportunity to inspect that part of the complex occupied by the Spa at the time of our inspection visit. We were told by Dr. Oates, on site, that the board of the Spa were not prepared to allow it. We have not been able to gather information by observation, so as to form our own assessment, or to contradict Dr. Dilks assumptions. We were also told that, when we adjourned the first hearing, details of the square footage of the Spa, the residential areas and the area under development could and would be provided. They have not been provided. We do not therefore have even any basic raw data upon which to make an assessment.

We therefore grant dispensation to the extent of (before Spa contribution) £23,415 for 2011; £25,760 for 2012; £25,990 for 2013.

Those matters deferred from 24th July.

These are matters about which we heard some evidence at the hearing when all parties were fully represented. The issues were deferred to allow MC to obtain further evidence to support what we had been told on behalf of the MC by Dr. Oates. Our expectations in that regard were set out in our Order and Directions. That was a record of what we were told would be available and could be readily accessed by Dr. Oates. None of our expectations or Directions required the production of anything that we were told was not available. We attempted to be proportionate. The absence of much of that documentation, despite the MC being given every opportunity to produce it, undermines the evidential basis of the Respondent's case.

Reserves.

Despite documentary evidence in Scanlon's accounts of the existence of reserves in 2010 of £19,268 no such sum has been carried forward. It appears that if that sum had not disappeared, it would have been available to contribute to the 2011 accounts or be held in reserve and still be available until spent and accounted for.
The MC said at the first hearing that it was a mistake by Scanlon's. No evidence has been produced. Scanlon's were a well reputed firm of managing agents, which could reasonably be expected to have produced reliable accounts. They were the agents of the MC. The amount is very precise; not a mere round sum provisional figure.
On the same basis we determine that that figure is the out turn figure of reserves in hand from the previous years. We do not regard the round sum £17000 shown in earlier service charge budgets as a cumulative sum.

We conclude, in the absence of evidence that the fund is still available or an explanation as to how it was spent, that there has been an overcharge on the 2011 service charge account of an equivalent amount, namely £19268.37. [Appendix 5 Applicants Statement of case. 14th April 2014]

Spa actual contribution to service charges.

This issue follows on from page 14 of the Interim determination.

No further evidence has been supplied, despite our being told it could be obtained, to support the contention that the spa has either paid any more to the MC than £4670 when it should have paid £25,712 or that it discharged liabilities of the MC and was therefore entitled to contra account.
Dr. Dilks' analysis set out at appendix 5 of his evidence and supplemented by the analysis produced at the first hearing called for an answer and none has been forthcoming.
On the basis of the evidence before us we conclude and determine that there has been an under collection by MC or its managing agent of £21,042. We do not have jurisdiction to make a determination about the commercial premises of the Spa. We can say that, to the extent that any service charge demanded of the Applicants includes an amount making up the shortfall that has not been collected from the Spa, then it is not a reasonable in amount and is not payable.

The collection of any shortfall from the commercial tenants such as the Spa is a matter for the liquidator. She will not be inhibited by Section 20.

In any event, in terms of the competence of the MC or its agent, there is an issue as to payabilty even if, as we do not find to be the case, the Spa had made a payment to compromise the liquidators claim for previous years insurance. By the time that amount found its way into the demands made of the residential tenants it is highly likely that that the demands would fall foul of Section 20 (18 months time limit in certain circumstances)

Ventilation.

The ventilation system is defective. The evidence suggests that it has been so from almost the outset of the sales programme of residential units.
The applicants say that it is a development defect. It should be the responsibility of the Freeholder. It should not be a service charge item but should be rectified at the cost of the developer/ Freeholder.

The respondent cites its responsibilities under the lease to maintain and repair the Reserved Property (of which the ventilation system forms part). It avers that it has properly pursued reimbursement of some of the costs and has made a NHBC claim.

Whilst it is correct that, broadly speaking, the same personnel have been involved in the various companies, the fact is that, firstly, the developer is no longer a party to this development and, secondly, in any event the sins (if that is what they are) of the developer cannot justly be visited upon the MC. We have no evidence to suggest that the, albeit significant, sums spent on this intractable issue by the MC are unreasonably incurred.
The passage of time since completion of the applicants' apartments may well make it very difficult to pursue the developer, but that is not a good reason to make the MC responsible.

Sundry Items.

The applicants make a general point that there is no specific provision in the Lease for these items. In our view they are, so far as we find them to be reasonably incurred,items of good estate management and covered by Clause 2(a) of the Seventh Schedule to the Lease.

(i) External signs.

Our inspection of the development and perusal of the invoice does not lead us to conclude that this is an unreasonable expenditure. [£258]

(ii) Sign boards. Walling of Fire exit. Post boxes

Despite the Applicants' misgivings as to the true motive of the personnel of the Management Company, having regard to their close links with the Spa and the development company – the freeholder, there is a Report from Bellis, which has now been disclosed, which justifies the walling of the Fire exit. We do not feel able to go behind that report.
The removal of the Mail boxes is part of that process, as is the consequent repositioning of the sign boards next to the mail boxes. The costs are not unreasonably incurred. [£3337]

(iii) Noise meters

The control of noise by a non resident Management Company is often problematical. This is a mixed tenure development involving residents, buy- to- let landlords, the Spa and the Spa 'hotel' visitors – all with likely different attitudes to noise disturbance. There may be an issue as to for whose benefit the meters were installed, but on balance we do not find the expenditure to be unreasonable. [£765.98]

(iv) Gates and fences.

Good fences make good neighbours. This is not bad estate management. The applicants may well have misgivings as to motive, and whether the Spa, with which the management Company Directors are closely associated, benefits most. The expenditure is not unreasonable. [£3210]

(v) Skip area ground works.

The relocation from an area that was to be designated as car parking should have been carried out by the developer. The development is continuing and a developer is still on site. The cost should not be a service charge item. If the MC felt the need to move the skip it should have been recharged to the developer, There is no evidence of any effort to do so. The cost is unreasonably incurred. [Disallow £557.50]

(vi) Car park permits.

Parking is a major source of friction. A system is required, especially in a mixed development of this type. The implementation of a parking permit system is reasonable and the cost is reasonably incurred. The cost to the residential tenants should however be limited to those permits purchased for their use and not those for the Spa or its visitors or employees. £600 is therefore reasonably incurred re permits and the cost of signage is reasonably incurred [total £1891]

(vii) *Panic Bar and Code locks.*

This was for the sole benefit of the Spa. [Disallow £400]

(viii) *Restaurant fencing*

This was for the sole benefit of the Spa. [Disallow £750]

Scott Schedule items

We considered all the partie's representations; the Applicants' solicitors' letter of 12 September with Scott Schedule, witness statement and attachments; the Respondent's solicitors' letter of 17th September; the liquidator's letter and enclosures of 16 December; Zermansky's reply of 15th January 2015 and liquidators response of 20th January.

We were once again inhibited by the lack of disclosure by the MC in line with our, much earlier, expressed expectations.

The "Amount Charged" calculation set out in paragraph 3 of Alan Dilks' statement of 12 September 2014, is as reliable as we can be on the evidence available.
The unaudited accounts for 2006 -2010 produced under cover of the dip insolvency letter of 16th December 2014 do not significantly contradict those figures (so far as a comparison can be made at all). They are very difficult to understand in terms of collating them to the Service Charge accounts. The absence of a Balance Sheet makes it impossible, for example, to trace the extent to which surpluses have been used or retained.

The Accounts relate to the financial position of the Management Company as a limited Company and do not readily correlate with the service charge expenditure, service charge accounts, service charge demands or Service charge out turn for the years in question.
To the extent that the evidence of the unaudited company accounts contradicts the analysis at paragraph 3 (which is taken from information supplied as evidence submitted by the Respondent MC), we prefer paragraph 3

We noted Shoosmiths' criticism of the extensive format of the Schedule. We limited ourselves to an assessment of reasonableness and addressed only those items which were challenged. We accept some of the criticisms of the format of the Scott Schedule, but it would have been disproportionate to have done as Shoosmiths requested and ordered a full resubmission. The Schedule should not, for example, have included those items that were un-challenged. The parties and ourselves have coped with the defects without detriment or prejudice and much of Shoosmiths criticisms have been addressed by subsequent Directions, which afforded the Respondents (in effect the liquidator) a proper opportunity to respond.

The Schedule incorporates (in the "Corrected amount" column) some of the determinations that we had made in our interim decision, such as our disallowance of MC management fees for 2013 or Recharge of management time for 2012.

Some items in the "Corrected amount" column require more or less adjustment in the light of our determinations in this Final (as opposed to Interim) Decision.

We approach the question of the Spa contribution on the basis that we have regard to the Spa as a distinct entity, not, for service charge purposes, including however many apartments the Spa may from time to time occupy. Those apartments attract service charges in the same way as any other apartment and the apportionment of service charges between apartments is not affected by whether they are owned by the Spa or a third party. We would have been considerably assisted by the provision of the information that we requested, and ordered, as to square footage occupied by the Spa and other entities in the development, but that was not forthcoming.

We also have difficulty with the earlier years because of the absence of documentation, but we take the view that, unsatisfactory as the formant of the identical year on year demands are, the actual annual amounts are not overall likely to be unreasonable.

We dealt with the issue of 'reserves' on the basis that it is of little consequence whether or not the inclusion of reserves in the service charge accounts upon which demands have been formulated and payments made, is authorised by the Leases. The fact is that such items have been included in 2007-10. Payments have been made by the Applicants on that basis. The monies have either been used for authorised expenditure or retained. The best evidence we have is that the culmination of that process is that, in 2010, service charge demands were levied and paid so as to provide for reserve funds and a surplus to transfer to reserves of £19.268.37. We just do not have the historic evidence to arrive at any other conclusion.

The items on the Scott Schedule to which we make no reference are items that are reasonably incurred in the sums shown in the "Amount Charged" column.

Applying the above to the disputed items in the Scott Schedule our determinations are as follows:-

2007 & 2008 & 2009

The insurance is payable and not unreasonable in amount, subject to a 20% deduction to take account of Spa and developer occupation [allow £13000]

No Spa contribution to Door entry. The Spa apartments will pay the appropriate contribution. [Allow £1500]

Ground maintenance: A 20% Spa contribution is reasonable. [Allow £1200].

Sundries/Repairs: Reasonable subject to 20% Spa contribution.[Allow £3200]

Communal area electricity: 10% Spa is reasonable [allow £4050]

Reserve Fund: Allow as claimed, but see re Reserves for 2010 below, and above. [allow £17,000]

Management: 10% Spa is reasonable [Allow £12150]

Accountancy: We see no distinction between this item and management. 10% Spa contribution. [Allow £1755]

2010.

Accounting: 10% Spa contribution [Allow £1125]

Buildings insurance is payable subject to 20% Spa contribution [Allow £16,000]

Electricity: reasonable subject to 10% Spa and developers' contribution, for such as external lighting. [Allow £3023.10]

Gardening: Reasonable subject to 20% Spa contribution [Allow £1200]

General Maintenance: Reasonable subject to 20% Spa contribution. [Allow£2800]

Management Fees: reasonable (as we previously determined) subject to 10% Spa contribution. [Allow £12,150]

Reserve fund: We have dealt with this as a discrete issue, above. All the reserves for which provision is made were reasonably included on the management charge. In 2010 they totalled £16000. By 1 July 2011 Scanlans produced a statement indicating that 3 of those reserve funds and £6268.37 were still in existence. A total of £19,268.37. We do not know what has happened to the External Decoration Reserve, but the best we can do is rely on the Respondent's managing agents' accounts. All 4 reserves are reasonably included in the 2010 accounts but there should be a consequential carry forward to 2011 of the £19263.37.

2011.

Electricity: Reasonable (as per our S20ZA dispensation) subject to 20% Spa and developers' contribution. [Allow £21,073.50].

Management Fees: Reasonable subject to 10% Spa contribution. [Allow £19,980]

General Maintenance: Reasonable subject to 20% Spa contribution. [Allow £39,907.20]

Gardening: Likewise [Allow £7,659.20]

Buildings Insurance: Payable and reasonable subject to 20% Spa and Freeholders /developers contribution [Allow £19,665.60}

Accountancy: Reasonable as we previously determined, subject to 10% Spa contribution. [Allow £587.60]

There is also due a deduction from the total of the amounts reasonably incurred for 2011, of £19,263.37 for the "Scanlon Reserves" carried forward.

2012

Utilities: Reasonable (as per our S20ZA dispensation) subject to 10% Spa/freeholders/developers contribution [Allow £23,184]

Ground maintenance: Reasonable subject to 50% (conceded in MC 2012 Budget) contribution from Spa. [Allow £6,186].

Building Insurance: Reasonable as per our previous determination, subject to 30% (conceded in MC 2012 Budget). [Allow £27,355.62]

Managing Agents Fees: The 'Corrected Amount' is based on Dr. Dilks' calculation of Fees per flat of £204 (although arithmetically we calculate 139 apartments X £204 to be £28,356). The amount charged is that sum plus some additional charges for Village Estates. We previously determined that a reasonable market rate per apartment (regardless of the existence of the Spa) would be £250 p.a. We therefore allow that amount, without any further reduction re Spa contribution. [Allow amount charged £34,750]

Reimbursement of Management time: Rightly shown as zero in accordance with our Interim Determination.

General Repairs and Maintenance: The Corrected Amount assumed a disallowance of £11,003.48. We had not, at the time the Scott Schedule was produced, made a Determination about these matters. We have done so above under "*Sundry Items*" and allowed, as reasonably incurred, £3106.98. The disallowance should therefore be reduced to £7896.50 leaving a Corrected Amount of £55,352.50, which, subject to a Spa contribution (concede in MC 2012 budget) of 20% leaves £44,280 payable. [Allow £44,280]

Consultancy Fees: Having made the Interim Determination that the costs of addressing the ventilation issues are recoverable as service charges, it follows that the Mellor consultancy fee is allowable. [Allow amount charged £3,762]

Travel: We are unable to identify the nature of this dispute. [Allow amount charged £1,295]

2013

General Cleaning: We see no basis for a £170 contribution from the Spa. [Allow £18,210].

Electricity: Reasonable as allowed in S20ZA application subject to 10% Spa etc. contribution. [Allow £23,391]

Ground Maintenance: Reasonable, subject to 66% (conceded in MC 2013 Budget) contribution by Spa etc. [Allow £4243]

Building Insurance: Reasonable subject to 30% (conceded in MC 2013 budget) contribution from Spa etc. [Allow £31,797.50]

Managing agent: Reasonable at £250 per apartment per annum regardless of the existence of the Spa. [Allow £34,750]

Management Fees: Rightly shown as zero in accordance with our Interim Determination.

General Repairs: Reasonable subject (as conceded in MC 2013 budget) to 20% contribution from Spa [Allow£40,075.20]

Lift: Reasonable, subject to 25% (conceded in MC 2013 budget) contribution from the Spa as a discrete entity [Allow£13,078.50]

Telephone: Reasonable. We cannot identify any concession re Spa contribution. [Allow £1,220].

The table below sets bout the financial consequences of our determination in respect of those items on the Scott Schedule that were challenged and have been the subject of our Determinations. The remainder of the Scott Schedule items are additionally payable as being not challenged.

	2007	2008	2009	2010	2011
Buildings Insurance (80%)	£13,000.00	£13,000.00	£13,000.00	£16,000.00	£19,665.60
Communal Electricity (90%)	£4,050.00	£4,050.00	£4,050.00	£3,023.10	£21,073.50
Door entry maintenance (100%)	£1,500.00	£1,500.00	£1,500.00	£1,500.00	
Management (90%)	£12,150.00	£12,150.00	£12,150.00	£12,150.00	£19,980.00
Accountancy (90%)	£1,755.00	£1,755.00	£1,755.00	£1,125.00	£588.60
Garden grounds maintenance (80%)	£1,200.00	£1,200.00	£1,200.00	£1,200.00	£7,659.20
General maintenance (80%)	£3,200.00	£3,200.00	£3,200.00	£2,800.00	£39,907.20
Travel					
Reserve	£17,000.00	£17,000.00	£17,000.00	£16,000.00	-£19,268.37
Totals	**£53,855.00**	**£53,855.00**	**£53,855.00**	**£53,798.10**	**£89,605.73**

	2012	2013
Buildings Insurance (70%)	£27,355.62	£31,797.50
Communal Electricity (90%)	£23,184.00	£23,391.00
Door entry maintenance (100%)		
Managing agents fees	£34,750.00	£34,750.00
Accountancy (90%)		
Garden grounds maintenance (66%)	£6,186.00	£4,243.00
General maintenance (80%)	£44,280.00	£40,075.20
Travel	£1,295.00	
Lift (75%)		£13,078.50
Telephone		£1,220.00
Consultancy	£3,762.00	
Cleaning		£18,210.00
	£140,812.62	**£166,765.20**

Our Interim Determination of 17th November 2014 is varied as a result of this Final Determination in two regards only. Firstly the balancing charge for 2012 is payable in principle in view of our granting the Rule 51 application. The amount overall for 2012 is as set out above. The issue of balancing charge is mechanistic only, and not quantative.
Secondly our Interim Decision re the TMESL contact is superseded by our finding on the issue of dispensation.

Our Interim Determination that Items 4 & 10 (additional management fees), item 7 (legal fees) and Item 13 (Commercial loss insurance) are not payable or reasonably incurred are unchanged by this final Determination.

Cost re 17th November adjourned hearing.

The hearing on 17th November 2104 was adjourned at the request of the liquidator. The costs were reserved and made the subject of further Directions on 19th January.

The reason given by the liquidator for her request was that, although she had no funds to finance her involvement in this litigation, she needed time to collate documentation to assist the Tribunal and that Dr. Oates was willing to do so.

The applicants filed and served their submissions on costs under cover of Zermansky's email of 5 February 2015
The liquidator filed and served her reply under cover of her letter of 16th February 2015.

The applicants correctly refer to the Procedure Rules regarding jurisdiction re costs. The liquidator does not demur as to the Rules but explains that she did not have the funds to deal with disclosure of documentation and that , with the need to put an insolvent company into liquidation , with all the work that that involved for Dr. Oates, he had not acted unreasonably.

The applicants rehearse the chronology and emphasis that the date for compliance with the Tribunal's Directions of 25th July 2014, (which were made by consent, and upon the Tribunal being assured that the documentation was available And accessible), was 17th October; well before the liquidation. Likewise the response to the Scott Schedule was not completed.
The liquidator responds that the Tribunal proceedings were not straight forward, and she needed to appraise herself as to what information could readily be made available at minimal cost. She provided what Dr. Oates was willing and able to supply by 16th December.

Determination.

Whilst, for the reasons given on the day, we acceded to the liquidators request for an adjournment, we are satisfied that her inability to proceed was due to the pre-liquidation failures of the MC to comply with directions to which it had readily agreed in July.

The absence of that documentation and response to the Scott Schedule meant that the Tribunal could neither proceed to a final decision nor adjourn for written representations, as was the indicated preference of the liquidator, without a further hearing. The primary objective of the hearing on 17th November was frustrated by the failure of MC to produce documentation, which was later produced by the liquidator.

In the event, then Tribunal proceeded to produce an interim decision which could and should have been more extensive if there had been compliance with Directions. The Directions which were given on 19th January could, for the most part have been considered on 17th November and a final determination issued with considerably more expedition.

We therefore conclude that the MC acted unreasonably prior to the liquidation and that that was causative of the adjournment, which incurred unnecessary costs for the applicants. The MC is ordered to pay the applicants' costs of and occasioned by the adjournment to be assessed on the standard basis if not agreed.

Section 20C application.

The applicants have succeeded in most of the areas about which they required a determination. Many of the issues could and would have been more readily resolved, at considerably less expense, if the MC had preserved reliable documentation and accounts, behaved with a greater degree of transparency and complied with the terms of the leases.

To the extent that the leases may allow the MC to include its costs of these proceeding as relevant cost in any future service charge claim, we find that would be unjust and inequitable to permit it to do so. We therefore order that all of the costs incurred in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of service charges payable by the applicants.