10810

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LSC/2014/0617** **LON/00AW/LSC/2014/83 and** **LON/00AW/LSC/2014/0799**
Property	:	**Flats 2, 3 and 4, 44 Oakley Street, London SW3 5HA**
Applicant	:	**Lakeside Developments Limited**
Representative	:	**Mr Benjamin Mire BSc FRICS, Trust Property Management Limited (Managing Agents)**
Respondent	:	**Ms Anita Macauley (Flat 2)** **Mr Edmund Cleary (Flat 3)** **Ms Daphne Robertson (Flat 4)**
Representative	:	**Mr Cleary in person**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charges and administration charges**
Tribunal Members	:	**Mr Jeremy Donegan (Tribunal Judge)** **Mr Ian Thompson FRICS (Professional Member)** **Mrs Lucy West (Lay Member)**
Date and venue of Hearing	:	**07 July 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**14 September 2014**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the following sums are payable for the disputed insurance premiums:

2007/08	£3,552.62
2008/09	£3,003.74
2009/10	£2,887.51
2010/11	£3,072.03
2011/12	£3,036.34

(2) The tribunal determines that the following sums are payable for the disputed surveyors' fees:

2007/08	£3,818.75
2010/11	£0
2011/12	£1,132.98

(3) The tribunal determines that no sums are payable for the disputed door entry rental charges:

(4) The tribunal determines that the sum of £343.10 is payable for the disputed health and safety charges in 2007/08.

(5) The tribunal determines that the sum of £450.00 is payable for the disputed cleaning charges in 2007/08.

(6) The tribunal determines that the sum of £93.07 is payable for the disputed electricity charges in 2007/08.

(7) The tribunal determines that the sum of £136.20 is payable the disputed electrical maintenance charge in 2011/12.

(8) The tribunal has no jurisdiction to deal with the claim for an additional service charge credit arising from the works to the front entrance steps in 2011/12.

(9) The tribunal determines that the following sums are payable for the disputed management charges (Flat 2 only):

2007/08	£1,338.64
2008/09	£1,338.64
2009/10	£1,338.65
2010/11	£1,373.90
2011/12	£1,373.90

(10) The tribunal determines that no sum is payable in respect of the disputed accountancy charges in 2011/12.

(11) The tribunal determines that no sum is payable in respect of the disputed arrears fees for Flats 3 and 4.

(12) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") so that none of the Applicant's costs of the tribunal proceedings may be passed to the Respondents through any service charge.

(13) The application for reimbursement of the tribunal fees paid by the Applicant is refused.

(14) Since the tribunal has no jurisdiction over ground rent, statutory interest or county court costs, all three sets of proceedings should now be referred back to the County Court for a determination of these issues and Mr Cleary's counterclaim.

The application

1. The tribunal has before it three sets of proceedings transferred from the County Court. They all concern flats at 44 Oakley Street, London SW3 5HA ("the Building"). The Applicant is the freeholder of the Building and the Respondents are the leaseholders of three of the flats at the Building.

2. In each case the Applicant seeks a determination under section 27A of the 1985 Act and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), as to the amount of various service charges and administration charges payable by the Respondents for the service charge years 2007/08 to 2011/12, inclusive.

3. The Respondents also seek an order for limitation of the Applicant's costs under section 20C of the 1985 Act.

4. An oral case management hearing took place on 06 March 2014 when directions were given. The directions identified that the service charges in dispute are those for the years ended September 2007 to September 2012, inclusive and the amounts in issue are:

Flat 2	£1,570.67 (this figure includes ground rent in respect of which the tribunal has no jurisdiction)
Flat 3	£4,134.53
Flat 4	£2,015.28

5. The directions provided that the Respondents should nominate a lead representative by 21 March 2014. On 19 March 2014, Mr Cleary wrote to Mr Anup Parmar of the managing agents, Trust Property Management Limited ("Trust"), advising that he would be the lead representative.

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

The hearing

7. The Applicant was represented by Mr Benjamin Mire, the managing director of Trust. Mr Mire is a Chartered Surveyor and is also involved in the running of Benjamin Mire Chartered Surveyors ("BMCS").

8. Mr Cleary appeared at the hearing in person. There was no attendance by Ms Macauley or Ms Robertson.

9. The tribunal were supplied with a hearing bundle that had been prepared by the Applicant. This contained copies of the documents from the County Court proceedings, the directions, the parties' statements of case and Scott schedules, the leases, a deed of variation for Flat 2, short statements from Mr Nigel Amos of Lorica Insurance Brokers ("Lorica") and Mr Parmar and various other relevant documents. The tribunal were also supplied with a helpful document headed "*Summary of Arguments*" by Mr Cleary.

10. At the start of the hearing, Mr Mire explained that he was standing in for Mr Parmar who was unwell. He advised that he only had an opportunity to read the bundle on his journey to the hearing and apologised for his lack of familiarity with the case.

The background

11. The Building is a converted house, which has been divided into six flats.

12. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

13. The Respondents each hold a long lease of their respective flats, which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

The leases

14. Copies of all three leases were in the hearing bundle. In its statement of case the Applicant advised that the only variance was that the lease of Flat 2 had been varied on 31 August 1984. The Applicant referred to various covenants in the lease of Flat 3, which was granted by Kensington Houselets Limited ("the Lessors") to Thomas Edward Brodie Howarth ("the Lessee") on 20 October 1964 for a term of 99 years from 29 September 1964.

15. Clause 1 of the leases obliges the Lessee to pay a ground rent of £90 per annum, by equal quarterly payments on the usual quarter days and *"..by way of additional rent a yearly sum equal to one-sixth of the sum which the Lessors shall from time to time expend by way of premium for keeping the said Building insured in pursuance of Clause 3(iv) hereof such further rent to be paid together with the next payment of rent becoming due following the disbursement of the same by the Lessors"*.

16. The Lessee's covenants are to be found at clause 2 of the lease and include:

    (1) That the Lessee will pay to the Lessors the said rents hereinbefore reserved during the said term upon the days and times and in the manner in which the same are hereinbefore reserved and made payable clear of all deductions

    (2) That the Lessee will pay to the Lessors a sum equal to Twenty per cent of the sum which the Lessors shall from time to time expend in cleaning the front steps front door and communal parts of the said Building and repairing decorating and furnishing the entrance hall passages landings and stairs thereof and in removing rubbish from the demised premises such payment to be made quarterly on the quarter days fixed for payment of rent

(3) *That the Lessee will pay to the Lessors a sum equal to Twenty percent of the sum which the Lessors shall from time to time expend in lighting the entrance hall and staircase of the said Building and in supplying a "Door Porter" system for the use of the Lessee and the other tenants of the said Building*

(4) *That the Lessee will pay to the Lessors on demand one sixth of the cost incurred by the Lessors in observing and performing the repairing covenant on their part contained in Clause 3(v) hereof so far as such covenant extends to the outside of the Building except where such cost is incurred in respect of making good or reinstating damage or destruction arising from any of the risks in respect of which the Lessors are bound to maintain insurance under Clause 3(iv) hereof or arising from any risks in respect of which the Lessors have actually maintained insurance*

17. In simple terms the leaseholders pay 20% (1/5th) of internal expenditure and the costs associated with the door entry system and 1/6th of external expenditure and insurance. Presumably this is because the leaseholder of the basement flat (Flat 1) is not required to contribute to works to the internal common-ways or door entry system. For this reason the service charge certificates distinguish between "*Internal Communal Charges*" and "*External Communal Charges and Insurance*".

18. The Lessors' covenants are to be found at clause 3 of the leases and include obligations:

(ii) *To keep the front steps front door and the communal parts of the said Building clean and properly lighted and the entrance hall passages landings and stairs properly furnished*

(iii) *To make suitable arrangements for the removal of rubbish from the demised premises and to supply and maintain a "Door Porter" system in the said Building for the use of the Lessee*

(iv) *To keep the said Building insured against loss or damage by fire and other risks covered by a comprehensive insurance policy with an insurance company of repute in the joint names of all persons having any interest in the Building to the full replacement value thereof and to produce to the Lessee on demand the policy together with the receipt for the last premium and in the event of damage or destruction by fire or other perils or contingencies covered by the said policy forthwith to rebuild restore and reinstate the same (including the demised premises) to their former condition and fit for habitation and use in accordance with the byelaws and the requirements of any planning authority*

(v) *At all times during the said term well and substantially to repair decorate maintain cleanse and amend in every respect and keep repaired decorated maintained cleansed and amended in every respect the said Building except such parts thereof as are demised by these presents PROVIDED NEVERTHELESS that the Lessor's liability under this clause shall include the main structural parts of the said Building including the roof foundations main walls and external parts thereof*

19. The leases do not include any express obligation on the part of the Lessee to pay contributions for management fees. However this is dealt with in the Deed of Variation for Flat 2, which inserted the following additional clauses in the lease for this flat:

2(25)that the Lessee will pay to the Lessor a reasonable deemed management fee charged by the Lessor in performing the covenants under Clause 3 hereof

3(vi) that the Lessor will at the written request of the Lessee take all necessary steps to enforce at the cost of the Lessee the covenants similar to those contained in this Lease entered into by the Lessees similar to those contained in this Lease entered into by the Lessees of the other flats comprised within the building PROVIDED THAT the Lessee shall indemnify the Lessor against all costs and expenses incurred by the Lessor arising out of this clause

20. The Deed of Variation only applies to Flat 2. The leases of Flats 3 and 4 have not been varied in the same way. It follows that the lessee of Flat 2 is under an express obligation to contribute to management fees but the lessees of Flats 3 and 4 are not.

The issues

21. The directions identified the relevant issues for determination as follows:

(i) The payability and reasonableness of the insurance premiums;

(ii) The payability and reasonableness of health and safety costs;

(iii) The reasonableness of the door entry system costs;

(iv) The payability and reasonableness of accountancy fees;

(v) The payability and reasonableness of various administration fees;

(vi) The payability and reasonableness of management fees;

(vii) Whether sums in respect of cleaning and electricity are caught by section 20B of the 1985 Act;

(viii) How the cost of repairs to the front steps in 2013 should be apportioned;

(ix) Whether the cleaning contract is a Qualifying Long Term Agreement ("QLTA"), requiring consultation under section 20 of the 1985 Act;

(x) Whether an order under section 20C of the 1985 Act should be made; and

(xi) Whether an order for reimbursement of application/hearing fees should be made.

22. Within the County Court Proceedings, Mr Cleary issued a counterclaim for non-payment of certain costs. These relate to the withdrawal of a right of first refusal notice served by the Applicant under section 5 of the Landlord and Tenant Act 1987. It will be for the County Court to determine this issue and the Applicant's claims (for all 3 flats) for ground rent and statutory interest.

23. Mr Cleary contends that the Applicant has misallocated service charge payments that he has made and that the sum being claimed for his flat is incorrect. At the start of the hearing, the tribunal explained that its role was to determine the disputed service and administration charges and it would be for the parties to work out what sums were due from each flat, if any, once the tribunal's decision is issued.

24. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Buildings Insurance - £3,552.62 (2007/08), £3,003.74 (2008/09), £2,887.51 (2009/10), £3,072.03 (2010/11) and £3,036.34 (2011/12)

25. Clause 3(iv) of the leases obliges the Applicant to insure the Building *"..in the joint names of all persons having any interest in the Building..".* The Building was insured in the Applicant's sole name up until 2010/11. Since 2011/12 the Building has been insured in the joint names of the Applicant and the various leaseholders.

26. The Respondents contend that they have been prejudiced by the Applicant's failure to insure the Buildings in joint names in the past in that:

(i) they have not had a direct contractual relationship with the insurance brokers, meaning that they have not had the benefit of the various obligations that would be owed to them, by the brokers, under the law of agency;

(ii) they have not had access to certain additional information regarding the insurance policies, including any commission element on the premiums;

(iii) they have not had access to the insurance claims history and policy details, which could form the basis for obtaining alternative quotes;

(iv) the Applicant has been able to insure the Building on a block policy, which might be disadvantageous to the leaseholders;

(v) they have each lost the benefit of having 5 other leaseholders empowered to scrutinise the policies; and

(vi) they have not had the benefit of FCA protection and investigative powers, as they are not direct "customers" of the insurers; and

(vii) they have not had direct access to the insurers to ascertain the validity of the cover and whether this has been invalidated by dilapidations/disrepair at the Building.

27. The Respondents suggest that the Applicant's failure to insure the Building in joint names means that the insurance premiums were not reasonably incurred and the amount of the premiums were not reasonable. They also suggest that there should be a reduction in the insurance premiums to take account of any commission received by the Applicant for placing the insurance.

28. The Respondents have not obtained any alternative insurance quotes or sought advice from an insurance broker regarding the level of the premiums. At the hearing, Mr Cleary explained that he was not in a position to seek alternative quotes, as he did not have access to the claims history.

29. Mr Cleary proposes a reduction in the insurance premiums of 40% for each of the years in question and a further 10% for the years 2007/08, 2008/09 and 2009/10, upon the basis that the freeholder had failed to promptly supply insurance information for these years. Mr Cleary

requested summaries of the insurance cover on 23 December 2008 and 09 April 2009. The Applicant failed to provide this information within the 21-day period specified at paragraph 4 of the schedule to the 1985 Act.

30. The figure of 40% represented Mr Cleary's estimate of the commission element on the premiums (30%) and a penalty of 10% for the Applicant's failure to insure the Building in joint names. Mr Cleary referred the tribunal to articles from Times Online, the Estates Gazette and the Independent, regarding insurance commissions. The former referred to commission charges of "*..up to 30 per cent..*".

31. The Applicant's case is that the Respondents have not been prejudiced by the failure to insure the Buildings in joint names. No insurance claims have been rejected and there was no change in the premium when the policy was transferred into joint names. Further it points out that the tribunal has no jurisdiction to deal with an allegation of breach of statutory duty, arising from any delay in supplying insurance information.

32. In its statement of case the Applicant referred to a decision of the Leasehold Valuation Tribunal ("the LVT"), dated 15 December 2007, under reference LON/00AW/LSC/2007/0236. Those proceedings concerned service charges for the Building for the year ended September 2006, including the insurance premium. Each of the Respondents was a party in the earlier proceedings, where the same point was taken regarding the failure to insure the Building in joint names. In that case the LVT allowed the insurance premium in full, the Applicant's solicitor having assured the LVT that leaseholders who have notified the Applicant of their ownership are noted on the policy document. The Applicant contends that the Respondents are seeking to reopen an issue, which has previously been decided by the LVT.

33. The Applicant relies on a signed statement and letter from Mr Amos of Lorica, both dated 29 October 2013. The letter explained that Lorica have dealt with the Applicant's insurance matters since 01 December 2009. It also explained that the Applicant's portfolio is insured on a block policy and that the policy wording contains an automatic interest clause, which includes all leaseholders' interests. The penultimate paragraph of the letter reads: "*The commission we earn from the policy is representative of the service provided to clients and the insurers AXA. These serves include administering documentation, providing a claims team to assist provide advice throughout a claim and we provide numerous reports and accounting data relating to the large portfolio we manage*".

34. During the hearing, Mr Mire informed the tribunal that Lorica received the entire commission on placing the insurance. This was corroborated by a letter from Ms Louise Black of Lorica, dated 18 March 2014, which

stated that *"..no payments are made to either the freeholder or Managing Agents from the commission we earn in respect of the insurance for this property"*. That letter goes onto say that the commission is 20%.

The tribunal's decision

35. The tribunal allows the insurance premiums in full.

Reasons for the tribunal's decision

36. The Respondents' case is that the insurance premiums should be reduced due to the historic failure to insure the Building in joint names and to take account of the insurance commission and the Applicant's delay in providing insurance information. There was no suggestion that the premiums are irrecoverable, as the Building was not insured in accordance with the leases. Further there was no evidence that the level of the premiums was unreasonable.

37. The tribunal concluded that the Respondents had suffered no actual prejudice arising from the Building being insured in the Applicant's sole name in previous years. This is not a case where insurance claims or complaints to the FCA have been rejected. Further there has been no impact on the level of the premium. Whilst it might be the case that the Respondents were not entitled to seek information from the insurers or brokers direct, they could certainly have sought that information from the Applicant and its managing agents.

38. The Respondents have not established any losses arising from the failure to insure the Building in accordance with the lease or arising from any delay in the provision of information. Further they have not established that the premiums were too high. Mr Cleary suggested that he could not obtain alternative quotes without obtaining the claims history but there is no evidence that he sought such quotes. Alternatively he could have sought advice from an independent insurance broker, as to the level of the premiums. There was no evidence before the tribunal to suggest that premiums were unreasonable.

39. In relation to the commission, the tribunal accepts the evidence from Mr Amos and Ms Black of Lorica. The 20% commission is not shared with the Applicant or its managing agents and is reasonable remuneration for the services provided by Lorica.

40. The Applicant is correct in saying that the tribunal has no jurisdiction to deal with any breach of statutory duty, arising from the late provision of insurance information. Any such breach of duty amounts to a summary offence pursuant to paragraph 6 of the schedule to the 1985

Act and is a matter for the Magistrates Court. Further any delay on the part Applicant, or its agents, in providing insurance information does not affect the reasonableness of the insurance premiums. The tribunal rejects the deductions proposed by Mr Cleary, which are arbitrary and are not supported by independent evidence.

41. In coming to its decision the tribunal did not take account of the LVT decision in the earlier proceedings, as that related to an earlier service charge year and the tribunal is not bound by previous decisions of the LVT or First-tier Tribunal.

Surveyor's fees - £4,406.25 (2007/08), £411.25 (2010/11) and £1,132.98 (2011/12)

42. The surveyors' fees relate to proposed major works, both internal and external, at the Building. The Respondent contends that the surveyor's fees were not reasonably incurred, the amount of the fees is not reasonable, there has been a breach of the "*18-month rule*" to be found in section 20B of the 1985 Act and that one of the invoices has not been paid.

43. At the hearing, Mr Mire explained that Trust had taken over the management of the Building from Basicland Registrars (BLR") in late 2006. Following the takeover, Trust discovered that BLR had started the process of arranging major works to the Building. Trust then instructed BMCS to prepare a specification of works. BMCS raised an invoice for £500 plus VAT (total £587.50) on 21 June 2007. The narrative on that invoice reads:

44 Oakley Street, London SW3 5HA

To: Take instructions from your managing agents to inspect the above site and prepare a specification of works for the exterior repairs and redecoration

To: Provide details of items to be included with the Notice of Intention

To: Visit property on two occasions firstly to prepare specification and secondly to meet contractor on site regarding roof leaks

Fee due - £500 + VAT

44. Trust subsequently served notice of intention to carry out work on the leaseholders, in accordance with section 20 of the 1985 Act, on 14 March 2007. This description of the proposed works was limited to "*The external redecoration and repair of the property*". BMCS then produced a specification and schedule of works dated June 2007, part

of which was sent to Trust on 21 June 2007. A further invoice for £3,250 plus VAT (total £3,818.75) was raised on 24 June 2008 and the narrative on that invoice reads:

To taking your further instructions in respect of the above property to prepare a specification and schedule of works and forwarding copies of the same to your managing agents.

To our fee in this matter based on the anticipated lowest tender figure of £60,000

Fee Due 12.5% of £60,000 = £7,500

Stage 1 Fee Now Due 50% being £3,750 + VAT

Less invoice 09874 £500 + VAT

45. A further specification and schedule of works was produced by BMCS in June 2010 and a statement of estimates was served on the leaseholders on 19 October 2011. It appears that some of the leaseholders complained to Trust that they had not received the original notice of intention and a further notice was then served on leaseholders on 21 November 2011. This was more detailed than that served in March 2007 and identified 9 areas of work to be undertaken. These works have not yet commenced and a further statement of estimates was served on the leaseholders on 11 March 2013. This gave details of 3 tenders ranging from £55,810 to £85,000 (plus professional and administration fees and VAT).

46. A further invoice for £350 plus VAT (total £411.25) was raised by BMCS on 15 October 2010. The narrative on the copy invoice in the bundle was partially obscured but it appears that the fees relate to updating the specification in June 2010.

47. The final invoice in dispute was issued by BMCS on 24 October 2011 and was for £944.15 plus VAT (total £1,132.98). The narrative reads:

To taking your further instructions to obtain tenders based on the specification and schedule of works previously provided to you and forwarding a tender analysis report to you for your due consideration

Our fee in this matter based on the lowest tender figure of £55,810 (£45,375 Externals and £10,435 internals)

Fee Due 12.5% being £6,976.25 (£5,671.88 Externals and £1,304.38 internals)

Stage 2 Fee Now Due 60% being £4,185.75 (£3,403.13 externals and £782.63 Internals)

Less: Stage 1 Fee as per invoice no. 10493 being £3,250 + VAT (£2,708.33 externals and £541.67 internals)

Plus Disbursements: photocopying 4 specifications being £8.40 (replaces invoice 42735)

The total sum invoiced was £1,132.98 including VAT, of which £294.20 relates to proposed internal works and £838.78 relates to proposed external works.

48. The invoices from BMCS do not specify when payment was due but do give their bank details and explain that payment can be made directly to their bank.

49. Mr Mire was unable to account for the Applicant's delay in undertaking the works. He believes that this might be due to the wording of the leases, which do not provide for payment of advance service charges. This means that the Applicant will have to fund the works and then recoup the costs from the leaseholders. Mr Mire stated that the Applicant will press on with the works once the tribunal's decision is issued.

50. The Respondents dispute the surveyor's fees upon the following grounds:

(i) They contend that they have derived no value from the specification and schedule of works prepared by BMCS given the passage of time since these documents were prepared and the fact that the works have not been undertaken;

(ii) There was a gap of 4 ½ years between service of the original notice of intention in March 2007 and the statement of estimates in October 2011, suggesting that the original plan to undertake the works had been abandoned.

(iii) A similar issue was raised in the earlier proceedings where the LVT disallowed surveyor's fees for preparing a specification of works, upon the basis that the works had not been undertaken. The LVT questioned the utility of the specification that was over 2 years old and concluded that the leaseholders had obtained no value for money from the work undertaken by the surveyor. Mr Cleary described the LVT decision as a "*warning*" and suggested that the leaseholders had obtained no value for money from the work undertaken by BMCS since 2007.

(iv) On 15 September 2008 the Applicant wrote to Mr Cleary indicating that the works would start shortly. On 29 October 2008 Mr Gavin Putney of Trust wrote to Mr Cleary stating "*I will start the Section 20 notices for these repairs soon*". Almost six years have elapsed and the works have not commenced.

(v) The first two invoices from BMCS were not disclosed until July 2011, by which time it was clear that the works process had stalled and the leaseholders were aware of the LVT decision.

(vi) The BMCS invoice dated 21 June 2007 was not paid until 10 February 2010, which was more than 18 months after the invoice was issued. The Respondents contend that this is irrecoverable under section 20B of the 1985 Act.

(vii) The BMCS invoice dated 24 June 2008 has not been paid, as acknowledged by the Applicant in their Scott schedule. The Respondents contend that the fees covered by this invoice have not been "*incurred*" for the purposes of clause 2(iv) of the leases, as the invoice is outstanding. Further they suggest that the Applicant might never pay the invoice, upon the basis that the original specification and schedule are redundant and the Applicant has been trying to sell the freehold.

(viii) The section 20 consultation has been mishandled. The original notice of intention did not invite leaseholders to nominate a contractor and the works appear to have been abandoned, given the passage of time since the process started.

(ix) Mr Cleary wrote to the Applicant on 22 November 2011 pointing out certain flaws in the June 2010 specification and schedule. Further this document is now redundant due to the passage of time and the fact that some of the works detailed have been undertaken by the leaseholders.

(x) There is a potential conflict of interests in that Mr Mire is a signatory for the Applicant, Trust and BMCS. This means that it has been difficult for the Respondents to obtain impartial information upon whether the surveyors fees "*..arose apparently imprudently..*". They suggest that the relevant test is whether the Applicant would have incurred these fees if paying them itself.

(xi) The Respondents reject the Applicant's suggestion that they have benefitted financially by the works being delayed. They also point out that the delay gives rise to a potential claim for dilapidations and additional repair costs. However there were no counterclaims for disrepair within the County Court proceedings and they did not seek to quantify their alleged losses arising from the delay.

(xii) The Respondents have not served separate section 20 notices in relation to the surveyors' fees. Accordingly the fees should be capped at £250 per flat.

51. At the hearing, Mr Cleary suggested that the surveyors' fees should be disallowed in full. Alternatively the fees should be reduced to take account of the arguments advanced in relation to section 20B and section 20.

52. The Applicant points out that the Respondents have not produced any independent evidence to suggest that the surveyors' fees are unreasonable. It contends that the sums charged are reasonable and should be allowed in full. Following service of the second notice of intention, Mr Cleary nominated an alternative consultant to supervise the works. The consultant's proposed fee was higher than that proposed by BMCS, which demonstrates that the fees charged by BMCS were reasonable.

53. In relation to the section 20B argument, the first two invoices from BMCS were included in the service charge certificate for the year ended September 2008 that was issued to the leaseholders on 13 August 2009. They were then credited and recharged in the certificate for the year ended September 2009 that was issued to the leaseholders on 22 February 2010.

54. The second invoice from BMCS, dated 24 June 2008, was raised approximately 14 months before the certificates. The Applicant's case is that the second invoice is within time, as the relevant costs were incurred less than 18 months before the date of the demands (section 20B(1)) or were notified to the leaseholders within the 18-month period (section 20B(2)).

55. The first invoice is more problematic. This was raised on 21 June 2007, approximately 26 months before the 2007/08 certificate was issued. The Applicant's alternative argument is that the surveyor's fees were not incurred for the purposes of section 20B until the invoice was paid on 10 February 2010, shortly before the 2009 certificate was issued. It relies on the Upper Tribunal's decision in ***OM Property Management Limited v Burr [2012] UKUT 2 (LC).***

56. In relation to the section 20 argument, the Applicant points out that it could not establish the extent of its repairing liability under the leases until the surveyor had inspected the Building and given advice. It follows that the Applicant did not know the anticipated cost of the works or the amount of the surveyor's fees for preparing the specification and schedule of works, when it first instructed the surveyor.

57. The Applicant also argues that it is standard practice for surveyor's fees to form part of the cost of major works when serving section 20 notices and that the statement of estimates included professional fees. It contends that there is no need to serve separate section 20 notices just for surveyors' fees.

58. Mr Mire suggested that the tribunal should ask itself whether it was reasonable for the Applicant to commission the surveyor in each case and whether the surveyors' fees were reasonable. If the answer to both questions is yes then the fees should be allowed in full, notwithstanding the criticisms made by the Respondents.

The tribunal's decision

59. The tribunal disallows the sum of £500 plus VAT claimed in the first invoice dated 21 June 2007 and the sum of £411.25 claimed in the third invoice dated 15 October 2010. It follows that the following sums are payable for the disputed surveyors' fees:

2007/08	£3,818.75
2010/11	£0
2011/12	£1,132.98

Reasons for the tribunal's decision

60. The tribunal's starting point was to look at when the surveyor's fees were "*incurred*", which is the wording used in both clause 2(4) of the leases and section 20B of the 1985 Act. In ***OM Management Limited*** the Upper Tribunal did not feel it was necessary or desirable to try and determine whether costs are incurred when an invoice or certificate is served or when payment is made. In relation to section 20B it concluded that costs are incurred "*..on the presentation of an invoice or on payment; but whether a particular cost is incurred on the presentation of an invoice or on payment may depend upon the facts of the particular case*" (paragraph 23). It went on to suggest that where there was a justified dispute over the amount of an invoice then costs might not be incurred until the dispute was settled and the bill was paid.

61. In this case the first BMCS invoice was raised on 21 June 2007 but was not paid until 10 February 2010. There is no suggestion that there was any dispute over the amount of the invoice and the tribunal is satisfied that the surveyor's fees were incurred when the invoice was raised, not when it was paid. It follows that the costs in question should have been demanded from the leaseholders by 20 December 2008. However the demands were not made until the 2007/08 service charge certificate

was issued on 13 August 2009. Therefore the Applicant was out of time in demanding the surveyor's fees and the amount of the invoice (£587.50) cannot be recovered from the leaseholders. No notice was served under section 20B(2) within the 18-month period. Further the fact that the surveyors' fees were credited and recharged in the 2008/09 service charge certificate does not alter the position. The amount of the first invoice was not demanded from the leaseholders within 18 months of the date when the invoice was raised and the contractual liability was incurred.

62. The fees claimed in the second invoice have not been paid. The reason given for this is that the leaseholders are disputing the charges. There was no suggestion that the Applicant has disputed the amount of the surveyors' fees. Working upon the basis that the Applicant is contractually liable to pay the fees in full, the tribunal is satisfied that the fees were incurred when the invoice was raised. This was the date on which the liability was incurred and the tribunal rejects the Respondents' argument that the costs will not be incurred until the fees are paid. It follows that the tribunal also rejects that Respondents' argument that they do not have to contribute towards the second invoice because it has not been paid.

63. The amount of the second invoice was included in the 2007/08 service charge certificate issued on 13 August 2009. This was within 18 months of the date the invoice was raised (24 June 2008) and was in time. The tribunal considered whether the credit and recharge of the surveyors' fees in the 2008/09 accounts altered the position and concluded that it made no difference. There was no need for the credit and recharge as the fees were correctly included in the 2007/08 certificate, having been incurred in June 2008. The leaseholders were liable to contribute to these fees when they received this certificate, notwithstanding the subsequent adjustment in the 2008/09 certificate. Given that the fees claimed in the second invoice were demanded in time, there was no need for the tribunal to go on and consider whether the Applicant had given notice under section 20B(2).

64. The tribunal then looked at whether section 20 of the 1985 Act applies to the surveyors' fees. This section could only possibly apply to the fees charged in 2007/08. The fees charged in 2010/11 and 2011/12 are below the statutory cap of £250 per flat (£1,500 for the Building as a whole).

65. The amount of the first invoice has already been disallowed so the tribunal were only concerned with the fees claimed in the second invoice. Section 20 only applies to "*qualifying works*", which are defined in section 20ZA(2) as "*works on a building or any other premises*". The fees claimed in the second invoice do not fall within this definition, as they relate to the preparation of a specification and

schedule of works. It follows that the statutory cap does not apply to the second invoice.

66. Having reached decisions set out above the tribunal then looked at whether the surveyors' fees claimed in the second, third and fourth invoices were reasonably incurred. The tribunal initially followed the approach suggested by Mr Mire, looking firstly at whether it was reasonable for the Applicant to commission the surveyor and then looked at whether the amount of the fees was reasonable. It then took an overview on whether the leaseholders had obtained value for money from the services undertaken by BMCS, taking into account the various criticisms made by the Respondents.

67. There is no dispute that major works are required at the Building. It follows that it was reasonable for the Applicant to originally instruct BMCS to prepare the specification and schedule of works in 2007 and the fees claimed in the second invoice were reasonably incurred.

68. In relation to the third invoice, the original notice of intention was served in March 2007 and the leaseholders could reasonably have expected the works to take place later that year or in 2008. Mr Mire was unable to give a satisfactory explanation for the Applicant's delay in undertaking the works. Had the works been undertaken in 2007 or 2008 then there would have been no need for BMCS to reinspect the Building and update the specification and schedule in June 2010. Upon this basis the tribunal concluded that the fees claimed in the third invoice were not reasonably incurred. The services provided by BMCS in 2010 largely duplicated the services they provided in 2007. Their fees would have been avoided had the Applicant undertaken the works within a reasonable period of obtaining the original specification and schedule.

69. Although the works have not yet been undertaken, it was reasonable for the Applicant to instruct BMCS to obtain tenders and prepare a tender analysis report in 2011. This step was necessary to comply with the section 20 consultation and to ensure that the cost of the proposed works was competitive. It is reasonable for the Respondents to pay for this, notwithstanding the delays on the Applicant's part. It follows that the fees claimed in the fourth invoice were also reasonably incurred. The tenders and tender analysis report will need to be updated before the works commence, given the passage of time. However the leaseholders will still derive benefit from the work undertaken by BMCS in 2011, provided that they are not charged for the updating.

70. The Respondents did not produce any independent evidence to challenge the amount of the surveyors' fees. Their arguments focussed on liability rather than the amount of the fees. Using its own knowledge and experience the tribunal is satisfied that the amount of the surveyors' fees was reasonable.

71. The tribunal is satisfied that the leaseholders have obtained value for money from the services charged in the second and fourth invoices. The tribunal accepts Mr Mire's evidence that the Applicant plans to undertake the works shortly after the tribunal issues its decision. The specification and schedule, as updated, will form the basis of the works. The scope of the works may need to be reduced to take account of repairs undertaken by the leaseholders. As Mr Mire pointed out at the hearing, this should reduce the additional fees to be charged by BMCS for supervising the works. Their total charges are based on 12.5% of the costs of the works. It follows that if the scope and cost of the works is reduced then the balancing fee due to BMCS will also come down.

72. The tribunal's decision is made upon the basis that the Applicant will not seek to recover additional surveyors' fees from the leaseholders, arising from any further updating of the specification and schedule or fresh tendering exercise.

73. The tribunal allows the surveyors' fees claimed in the second, third and fourth invoices in full.

Door entry system rental - £202.12 (2007/08), £209.40 (2008/09), £212.51 (2009/10), £220.67 (2010/11) and £230.11 (2011/12).

74. At the hearing, Mr Cleary explained that an electronic door entry system had been in place for approximately 25 years, which he described as "*fairly decrepit*". He stated that the lights and Perspex on the entrance panel had been damaged and visitors speaking into this panel can barely be heard on the handsets in the flats. There is no regular servicing of the system and the Respondents believe that the system should be replaced.

75. The charges in question are the annual rental payments for the system. Mr Cleary queried the charges in early 2006 and Basicland wrote to him on 23 March 2006, explaining that maintenance was part of the rental agreement for the system. Mr Cleary requested a copy of the agreement in a letter to the Applicant dated 12 May 2007 but did not receive this until after the inception of these proceedings.

76. On 07 February 2012, Mr Cleary wrote to the Applicant suggesting that they should arrange the renewal of the entrance panel, if this was covered by the rental agreement (at no cost).

77. The original rental agreement for the system was between Cheshire Communications Limited ("the Owner") and the then freeholder, Marblebrook Limited ("the Subscriber") and was dated 23 November 1988. The annual rental was £77.16 plus VAT and the initial term was 14 years from 01 January 1989. The agreement was subsequently assigned to the Applicant and continued after the expiry of the initial

term. It is determinable on either party giving six months written notice to expire on a rent dated.

78. The agreement provides that the Owner shall maintain the system and may increase or decrease the rent *"..at intervals of not less than 12 months by an amount proportionate to the increase or decrease in the Index of Hourly Wages for all Workers..."*. This accounts for the increase in the rent since the agreement commenced.

79. The Respondents contend that the rental charges should be disallowed in full, upon the basis that the system is defective and their complaints about the system have not been satisfactorily resolved.

80. Mr Mire suggested that the rental charges are reasonable for the service provided by the Owner. In its Scott schedule the Applicant suggested that no annual maintenance of the system was required, as it is *"self-maintaining"*. Maintenance is only undertaken when defects are reported to the Owner. On being questioned by the tribunal, Mr Mire accepted that modern rental agreements are less onerous and tend to be for a much shorter period.

The tribunal's decision

81. The rental charges for the door entry system are disallowed in full.

Reasons for the tribunal's decision

82. Clearly there have been problems with the system, as evidenced by the correspondence referred to by Mr Cleary. This is no surprise, given that the system is 25 years old. The agreement requires the Owner to maintain the system and the Applicant should have enforced this obligation. Mr Cleary's complaints have not been resolved and the level of the rental charges was unreasonable, given the poor service provided. It follows that the charges were not reasonably incurred.

83. The tribunal considered whether lower rental charges should be substituted for the figures claimed but concluded that this was inappropriate. The leaseholders have obtained little or no value from the rental agreement in recent years. The original term of the agreement expired back on 31 January 2003. It should have been terminated long ago and replaced with a modern, less onerous agreement.

Health and safety risk assessment - £343.10 (2007/08)

84. This fee relates to an assessment undertaken by 4Site Consulting Limited ("4Site") in 2008. They undertook a site visit on 07 May 2008

and produced a report to Trust on 24 September 2008. The Respondents case is that the leaseholders should not have to pay for the full cost of this assessment, as they did not receive a copy of the report until July 2011. They are willing to agree a figure of £171.55, being 50% of the cost of the report.

85. The Applicant contends that the report was produced for its benefit rather than the leaseholders, so that he might know the regulatory requirements for the Building. Further there is no requirement for it to voluntarily disclose the report, which is extremely technical, to the leaseholders. Rather copies of the report are available if requested by the leaseholders.

86. Mr Mire advised the tribunal that some of the recommendations in the report had been implemented and that the leaseholders had therefore derived value from the report.

The tribunal's decision

87. The cost of the assessment and report is allowed in full.

Reasons for the tribunal's decision

88. A copy of the report is in the bundle. This is a thorough document, running to 15 pages. 4Site's fee of £292 plus VAT is entirely reasonable given the work involved. The Respondents' only argument is that the report was disclosed late. However this does not justify a reduction in the fee or mean that the fee was unreasonably incurred. Further the tribunal accepts that there was no obligation on the Applicant to volunteer the report.

Cleaning charges - £750 (2007/08)

89. The Respondents have two arguments in relation to the cleaning of the common-ways at the Building. Firstly they suggest that the previous cleaning contract was a QLTA, in which case their contributions to the cleaning charges should be capped at £100 per flat (total £500) as there was no consultation with the leaseholders before the parties entered into the contract. Secondly the Respondents contend that part of the costs demanded in the 2007/08 service charge certificate is out of time under section 20B of the 1985 Act.

90. The cleaning at the Building was previously undertaken by M&E Cleaning Services ("MECS"), who raised invoices every month. The Respondents contend that the contract was a QLTA, as MECS cleaned the common-ways for a period in excess of one year. They also point out four of the MECS invoices were raised more than 18 months before the 2007/08 certificate was issued on 13 August 2009, namely:

Invoice Date	Amount
16/10/07	£75
21/11/07	£75
11/12/07	£75
22/01/08	£75
Total	**£300**

91. At the hearing, Mr Mire explained that MECS were cleaning the Building before Trust took over the management. There was no written contact with MECS. The Applicant rejects the suggestion that the contract with MECS is a QLTA, as there was no fixed term and could be terminated at any time.

92. In relation to the section 20B point, the Applicant's case is that all four invoices were paid on 01 August 2008. This was less than 18 months before the 2007/08 certificate was issued. Once again the Applicant contends that the costs were incurred when the invoices were paid, rather than when the invoices were raised. Mr Mire did not know the reason for the delay in payment of the invoices. There was no suggestion that the invoices were disputed. Further each invoice was stamped by Trust, showing that they had been authorised for payment. The invoices stated that they were due within 7 days of receipt.

The tribunal's decision

93. The sum of £450 is allowed for the cleaning charges.

Reasons for the tribunal's decision

94. The tribunal accepts Mr Mire's evidence that Trust inherited the cleaners and there was no written cleaning contract. The agreement was not a QLTA for the reasons advanced by the Applicant. However the tribunal disagrees with the Applicant, as to the date when the cleaning costs were incurred. These costs were clearly agreed by Trust, as evidenced by the authorisation stamps on the invoices. The Applicant was contractually obliged to pay the invoices within 7 days of receipt and the liability was incurred when the invoices were raised. The four invoices referred to in paragraph 88 were all raised more than 18 months before the 2007/08 certificate was issued. It follows that the Applicant was out of time in demanding payment of these costs and the amount claimed in each invoice cannot be recovered from the

leaseholders. The total sum disallowed is £300, which reduces the recoverable charges to £450.

Electricity charges - £220.19 (2007/08)

95. The Respondents contend that some of the electricity charges for 2007/08 are also caught by section 20B. The electricity in the common-ways is supplied by British Gas and one of their invoices, dated 18 December 2007, was raised more than 18-months before the end of year certificate was issued on 13 August 2009. The amount of the invoice was £127.12, including VAT. The Respondents suggest that this is irrecoverable.

96. The invoice in question was paid on 23 December 2008. Again Mr Mire did not know the reason for the delay in payment. The Applicant's case is that the costs were incurred when the invoice was paid, not when it was raised. There was no suggestion that the amount of the invoice was disputed and the invoice was stamped by Trust, showing that it had been authorised.

The tribunal's decision

97. The sum of £93.07 is allowed for electricity charges.

Reasons for the tribunal's decision

98. The electricity charges and contractual liability were incurred when the invoice was raised. The amount of the charges was clearly agreed by Trust, as evidenced by the authorisation stamp on the invoice. The invoice was raised more than 18 months before the 2007/08 and the Applicant was also out of time when it demanded this cost. It follows that the sum of £127.12 is disallowed and the recoverable charges are limited to the balance of £93.07.

Repairs to front entrance steps - £740 credit (2011/12)

99. In the previous proceedings the LVT determined that a sum of £250 was payable by the leaseholders for repairs to entrance steps to the Building. The actual cost of the repairs was £740, meaning that a sum of £490 was disallowed and should be credited to the leaseholders. The Applicant has incorrectly credited the full sum of £740 in the 2011/12 service charge certificate. Unsurprisingly, the Respondents have not challenged the amount of this credit. However they suggest that an additional sum of £87.28 each should be credited to the leaseholders of Flats 2, 3, 4, 5 and 6 at the Building.

100. The background to this issue is that occupier of Flat 6 organised repairs to the entrance steps that were undertaken in April 2012. The total cost of this work (£2,618.49) was split between the leaseholders of the five upper flats, who each contributed £523.70. The Respondent's case is that had the works been undertaken by the Applicant, in accordance with the leases, then each leaseholder would have been contractually obliged to pay 1/6th of the cost of this work (£436.42 per flat). The Respondents contend that they should each receive a credit of £87.28 being the amount of their notional overpayments.

101. At the hearing the tribunal explained that it had no jurisdiction to determine this issue. The cost of the repairs to the steps is not a service charge for the purposes of section 18 of the 1985 Act, as it was not incurred *"..by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable"* (section 18(20)). It follows that the tribunal cannot determine liability for the cost of the works under section 27A. Further there was no counterclaim before the tribunal, relating to the steps issue. Rather the only counterclaim is that pursued by Mr Cleary, relating to costs arising from the withdrawal of the right of first refusal notice, which is a matter for the County Court.

Electrical maintenance charge - £136.20 (2011/12)

102. This item relates to the lighting in the internal common-ways at the Building. Mr Cleary advised the tribunal that the push button for the lighting sticks, so that the lights stay on for too long. This is a long standing problem and there had been previous, unsuccessful attempts to remedy it. Mr Cleary suggested that the problem persists.

103. The work was undertaken by DB Electrical (London) Limited ("DBEL") at a total cost of £114 plus VAT (total £136.20). Of this sum, £80 relates to labour, £31 for materials and £3 for parking. DBEL's invoice is dated 04 October 2011 and the narrative reads:

Attended site and investigated problems with lights in the common area, we replaced 3 x low energy BC lamps and 1 x push switch. We would strongly recommend a periodic inspection of this installation be carried out due to the condition of some of the accessories. All was left working satisfactorily

104. The Respondents contend that DBEL's charge should be disallowed in full. The Applicant's case is that these costs were reasonably incurred. DBEL only made one charge for investigating and rectifying the problem. The amount of their invoice is reasonable and Trust has not been notified of any ongoing problem with the lighting. Further the Respondents have not produced any independent evidence to challenge the level of the charge.

The tribunal's decision

105. The electrical maintenance charge is allowed in full.

Reasons for the tribunal's decision

106. Clearly there has been a problem with the lighting. Accordingly it was reasonable for Trust to instruct DBEL to investigate and rectify the problem. The amount of the invoice is modest and is entirely reasonable for the work undertaken. DBEL's charges were reasonably incurred, notwithstanding any ongoing problem with the lighting.

Management fees - £1,338.64 (2007/08), £1,338.64 (2008/09), £1,338.65 (2009/10), £1,373.90 (2010/11) and £1,373.90 (2011/12)

107. This item relates solely to Flat 2. Management fees have been demanded from leaseholder of this flat, Ms Macauley, but not from the other two Respondents. This is because the lease of Flat 2 has been varied to include an express obligation to contribute to management fees. Ms Macauley has been asked to pay 1/6th of these fees.

108. In her Scott schedule, Ms Ms Macauley stated that the management fees were "*Not reasonable (sic) incurred/not reasonable in amount. The freeholder his agent has generally neglected the property over this period*". There was no evidence from Ms Macauley, expanding upon these grounds and Mr Cleary had nothing to add at the hearing.

109. The Applicant's case is that the fees are reasonable for a property based in Chelsea and having regard to management fees allowed in other tribunal cases. At the hearing, Mr Mire advised that Trust's normal range for management fees was between £250 and £1,000 plus VAT per flat. The fees charged at the Building equate to approximately £190 plus VAT per flat. The Applicant contends that the management fees should be allowed in full and points out that Ms Macauley had produced no independent evidence to suggest that the level of Trust's fees are unreasonable.

The tribunal's decision

110. The management fees are allowed in full.

Reasons for the tribunal's decision

111. It was clear to the tribunal that that there have been some failings on the part of the Applicant and/or Trust. Most notably there has been a considerable delay in undertaking the major works and the 2007/08 service charge certificate was issued very late. However Trust have

provided a number of services, which justify the fees charged. They have arranged insurance and cleaning, paid invoices (albeit some have been paid late), issued service charge accounts and demands, obtained the specifications and schedules of work from BMCS and instructed various other contractors.

112. Based on its own knowledge and experience of management fees charged in the London area, acquired from hearing other similar cases, the tribunal is satisfied that a fee of £190 plus VAT, per flat, is reasonable. In fact this is well below the fees charged by many other managing agents. Further there was no evidence from Ms Macauley to justify any reduction in Trust's fees.

Accountancy fees - £576.20 (2011/12)

113. The Respondent's case is that there is no provision in the leases enabling the Applicant to charge accountancy fees to the leaseholders. They also make the point that such fees have not been charged in previous years.

114. The Applicant accepts that there is no express term in the lease dealing with accountancy fees. However it relies upon sections 21(1) and (3) of the 1985 Act, which requires it to provide an annual statement of account and a certificate of a qualified accountant. The Applicant's case is that the accountant's fees were necessarily incurred in fulfilling these statutory obligations. It is unable to produce the certificate, as it is not a qualified accountant as defined in section 28 of the 1985 Act. The Applicant also points out that the provisions of this Act could not have been envisaged when the original leases were granted in 1964.

The tribunal's decision

115. The accountancy fees are disallowed in full.

Reasons for the tribunal's decision

116. There is no express term in the lease enabling the Applicant to charge accountancy fees to the leaseholder. The question then is whether some implied term exists. The tribunal accepts that the provisions of the 1985 Act could not have been in the contemplation of the parties when the original leases were granted. This only strengthens the Respondents' argument that they should not have to pay accountancy fees, as an obligation to pay such fees was not in the minds in their original parties.

117. The tribunal do not consider it necessary to imply a term to pay accountancy fees to give business efficacy to the leases. They are perfectly workable without such a term. Whilst there is a statutory

obligation to obtain a certificate from a qualified accountant, this does not mean that leaseholders have to pay for the certificate in every case. Rather the cost of the certificate can be borne by the freeholder, as is the case here.

Arrears fees (Flats 3 and 4) - various

118. In her defence to the County Court proceedings, Ms Robertson (Flat 4) referred to *"..4 sums ranging between £64.40 and £67.20, which are apparently charges levied once a year specifically because of late payment of service charge or ground rent."*. Included in the hearing bundle was a statement for Flat 3, dated 07 December 2012, showing five separate arrears fees that has been charged to Mr Cleary and which ranged from £58.75 to £67.20. The fees for both flats were charged by Trust.

119. Ms Robertson and Mr Cleary's case is that there is no provision in their leases obliging them to pay arrears fees. The Applicant suggests that the fees are payable as variable administration charges pursuant to part 1 of schedule 11 to the 2002 Act. It acknowledges that there is no provision to charge management fees to the leaseholders in the leases of Flats 3 and 4 but suggests that the contractual arrangement between the parties envisages all parties complying with their respective obligations. The Applicant contends that fees incurred in chasing debts are chargeable by the managing agents on top of their normal management fee.

120. At paragraph 9 of her defence, Ms Robertson points out that where administration charges are payable by a leaseholder then schedule 11 to the 2002 Act imposes restrictions on the amount that may be levied but *"The schedule does not create a right to charge where none exists in the lease"*. Ms Robertson and Mr Cleary contend that the arrears fees should be disallowed in full, as there is no contractual obligation for them to pay these fees.

The tribunal's decision

121. The arrears fees are disallowed in full.

Reasons for the tribunal's decision

122. The tribunal accepts the arguments put forward at paragraph 9 of Ms Robertson's defence. There is no term in the leases enabling the Applicant to charge arrears fees to Ms Robertson and Mr Cleary. Schedule 11 to the 2002 Act only applies where there is a contractual obligation to pay administration charges. No such obligation exists in the leases of Flats 3 and 4.

Application under s.20C and refund of fees

123. At the end of the hearing, Mr Mire made an application for a refund of the fee paid by the Applicant in respect of the hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal does not order the Respondents to refund the fee paid by the Applicant.

124. At the hearing Mr Cleary applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. The Respondents have been partially successful, as a number of the disputed service charges have been disallowed, as have all of the administration charges. Although the Applicant succeeded on the insurance premiums, it was partially responsible for this dispute as it failed to insure the Building in joint names in the past. Further the dispute over surveyors' fees largely stemmed from the Applicant's delay in undertaking the major works. Taking into account the outcome of the proceedings and the conduct of the parties, the Respondents were entirely justified in contesting the case and it would be unreasonable for them face a bill for the Applicant's costs.

125. It is also worth spelling out that there is no express provision in the leases for Flats 2, 3 and 4 (or in the Deed of Variation for Flat 2) enabling the Applicant to charge its legal costs to the Respondents, via the service charges for the Building.

The next steps

126. The tribunal has no jurisdiction over ground rent, statutory interest or county court costs and fees. All three sets of proceedings should now be returned to the County Court to determine these issues and Mr Cleary's counterclaim. The tribunal suggests that the Respondents seek independent professional advice if they have any outstanding concerns regarding the condition of the Building or the outstanding major works.

Name: J P Donegan **Date:** 14 September 2014

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[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

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

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
   and the amount payable shall be limited accordingly.

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

Section 20

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

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

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

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

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

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

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

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

Section 20B

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

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

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).