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

Case Reference: CHI/18UC/LSC/2016/0030
Property: 95 Wellington Road, Exeter EX2 9DY

Applicant: Exeter City Council
Representative: Mr M Hopton
Respondents: Mr K Jenkins (deceased) and Mrs C Jenkins

Representative: Mrs F Canning
Type of Application: Section 27A of the Landlord and Tenant Act 1985
(Liability to pay service charges)
Landlord's application for the determination of reasonableness of service charges for the year 2013/14.

Tribunal Members: Judge A Cresswell (Chairman)
Mr E Harrison FRICS

Date and venue of Hearing: 3 November 2016 at Exeter
Date of Decision: 9 November 2016

DECISION

The Application

1. This case arises out of the landlord's application for the determination of liability to pay service charges for the year 2013/14. That was the sole application made to the Tribunal. Some matters previously of concern to Mrs Jenkins, who is sometimes referred to later as "the Respondent", were resolved during the hearing and so do not form part of this Decision. Sadly, Mr Jenkins passed away after these proceedings were commenced.

Inspection and Description of Property

2. The Tribunal inspected the property on 3 November 2016 at 1000. Present at that time were Mrs Jenkins, Mrs Canning and Mr Hopton.
3. The property in question consists of a four-storey detached building with a pitched roof clad with metal sheeting with three-storey stairwells with flat roofs. It was built in the 1960s with facing brick cavity walls and original windows and external doors have been replaced with double-glazed upvc units. There are 16 maisonettes, each with 3 bedrooms. Eight maisonettes have access to the front and rear at ground floor level and 8 have access at second floor level. The lower properties have small gardens front and rear and a store shed in the rear garden. The upper properties have separate store sheds. There are small communal areas, a bin store and clothes drying area.

Summary Decision

4. This case arises out of the landlord's application for the determination of liability to pay service charges for the year 2013/14. Under Sections 19 and 27A of the Landlord and Tenant Act 1985 (as amended) service charges are payable only if they are reasonably incurred. The Tribunal has determined that the landlord has not demonstrated that a number of the charges in question are payable by the Respondents.
5. Costs of internal cleaning and lighting and the door lock mechanism and *contribution to future maintenance fund* are not payable under the lease. The charge for external cleaning is not payable as it has not been shown to have been carried out.
6. A payment is due from the Respondents for external lighting in the sum of £4.76.
7. The Applicant needs to address how it maintains a Reserve Fund.
8. By agreement and subject to the above paragraph, the overall charge for the major works due from the Respondents is reduced from £1347.77 to £1315.03.

Directions

9. Directions were issued on 19 April 2016.
10. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
11. Unfortunately, the Applicant failed to provide a number of relevant documents, including invoices, and the relevant Service Charge demand in advance of the hearing.
12. This determination is made in the light of the documentation submitted in response to the directions and the evidence submitted and submissions made at the hearing. Evidence was given to the hearing by Mr Hopton (Lettings and Leasehold Lead at Exeter City Council), Ms D Jamieson (Lettings and Leasehold Officer), Mr P Townsend (Surveyor) and Mrs Jenkins. Submissions were made also by Mrs Canning. At the end of the hearing, the parties told the Tribunal that they had had an opportunity to say all that they wished and had nothing further to add.

The Law

13. The relevant law is set out in sections 18, 19 and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002.
14. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord’s costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 “the 1985 Act”). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.
15. In reaching its Determination, the Tribunal also takes into account the RICS Service Charge Residential Management Code (“the Code”) approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993. The Code contains a number of provisions relating to variable service charges and their collection. It gives advice and directions to all landlords and their managing agents of residential leasehold property as to their duties.
16. In particular Part 6 of the Second Edition deals with service charges as follows.
Service Charges
6.1 Subject to the terms of the lease, once a year you should make available on request to tenants a statement of service charge payments that they have individually made
6.2 Demands for money should be clear and be easily understood by tenants.
17. “If the landlord is seeking a declaration that a service charge is payable he must show not only that the cost was incurred but also that it was reasonably incurred to provide services or works of a reasonable standard, and if the tenant seeks a declaration to the opposite effect, he must show that either the cost or the standard was unreasonable. In discharging that burden the observations of Wood J in the **Yorkbrook** case (**Yorkbrook Investments Ltd v Batten** (1986) 19 HLR 25) make clear the necessity for the LVT to ensure that the parties know the case which each has to meet and for the evidential burden to require the tenant to provide a prima facie case of unreasonable cost or standard.”: **Schilling v Canary Riverside Development PTE Limited** LRX/26/2005 at paragraph 15.
18. “Once a tenant establishes a prima facie case by identifying the item of expenditure complained of and the general nature (but not the evidence) of the case it will be for the landlord to establish the reasonableness of the charge. There is no presumption for or against the reasonableness of the standard or of the costs as regards service charges and the decision will be made on all the evidence made available: **London Borough of Havering v Macdonald** [2012] UKUT 154 (LC) Walden-Smith J at paragraph 28.
19. Where a party does bear the burden of proof:
“It is common for advocates to resort to [the burden of proof] when the factual case is finely balanced; but it is increasingly rare in modern litigation for the burden of proof to be critical. Much more commonly the task of the tribunal of fact begins and ends with its evaluation of as much of the evidence, whatever its source, as helps to answer the material questions of law... It is only rarely that the

tribunal will need to resort to the adversarial notion of the burden of proof in order to decide whether an argument has been made out...: the burden of proof is a last, not a first, resort." (Sedley LJ in **Daejan Investments Ltd v Benson** [2011] EWCA Civ 38 at paragraph 86).

Ownership

20. The Applicant is the owner of the freehold. The Respondents were the owners of the leasehold.

The Lease

21. The Respondents held 95 Wellington Road, Exeter under the terms of a lease dated 28 March 1988, which was made between the Applicant as lessor and the Respondents as lessees.
22. The construction of a lease is a matter of law and imposes no evidential burden on either party: **((1) Redrow Regeneration (Barking) Ltd (2) Barking Central Management Company (No2) Ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
23. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:
Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* at pp 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.

16. For present purposes, I think it is important to emphasise seven factors:

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very

unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114, where the court concluded that “any ... approach” other than that which was adopted “would defeat the parties’ clear objectives”, but the conclusion was based on what the parties “had in mind when they entered into” the contract (see paras 17 and 22).

23. Seventhly, reference was made in argument to service charge clauses being construed “restrictively”. I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant’s contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not “bring within the general words of a service charge clause anything which does not clearly belong there”. (120. I agree, if by this it is meant that the court should lean towards an interpretation which limits such clauses to their intended purpose of securing fair distribution between the lessees of the reasonable cost of shared services.)
24. Lord Neuberger’s final point above is a reference to the doctrine of “*contra proferentem*”, which had been understood to require an ambiguity in a clause in a lease to be resolved against a landlord as “*proferor*”.
25. Clause 3 of the lease provides that the Respondents are
- (l) to pay to the Council in each year the items of expense listed in the Fifth Schedule (calculated as provided in the Fourth Schedule) and such payment to be made at the times and in the manner specified in the said Fourth Schedule.

The Second Schedule

(Easements rights and privileges included in the Lease)

1. Full right and liberty for the Lessee and all persons authorised by the Lessee (in common with all other persons entitled to the like right) at all times by day or by night
 - (a) to go pass and repass on foot only over and along so much of the Common Access Ways passages landings and staircases in the building as is necessary to obtain access to the flat and the outbuilding (if any)
 - (b) to go and pass along roadways and footpaths outside the building which are not adopted as public maintainable highway as are necessary to obtain access to the flat (such roadways and footpaths being coloured yellow on the second Plan)

The Fourth Schedule

1. (a) The recoverable cost of carrying out the obligations of the Council for each year shall (subject to sub-paragraphs (b) and (c) of the paragraph) be the actual cost to the Council of carrying out such obligations as certified by the Council’s Treasurer.

The Fifth Schedule

3. The cost of decorating the exterior of the building and all staircases accessways entrances and other parts of the building which the Lessee is entitled to use under the provisions of the Lease
 4. The cost of lighting and cleaning the common parts of the building specified in paragraph 3
26. The lease envisages, in accordance with Clause 3 (m), the payment by the tenants each year by four equal quarterly payments an initial service charge. Each year, the

Council sends an estimate of costs and the four quarterly payments are then credited against the service charge demand made by the Council in accordance with Clause 3 (l).

27. Paragraph 3 of the Fourth Schedule sets out what is required should the four quarterly interim payments result in an under or overpayment of the final service charge demand. In respect of an overpayment, "*(being the unexpended surplus) shall be accumulated by the Council to be applied towards the recoverable cost in future years*".

Contribution Formula

The Respondent

28. The Respondent was concerned that the lease provided no contribution formula.

The Applicant

29. The Applicant indicated that all costs were divided by sixteen to reflect the fact that there are 16 3-bedroom maisonettes all of the same size.

The Tribunal

30. In **Windermere Marina Village Limited v Wild & Barton** [2014] UKUT 0163 (LC), it was held by the Upper Tribunal that it is a matter for the First Tier Tribunal itself to determine a "fair proportion" for payment by an individual tenant of a Service Charge. It is not simply to review the fairness or reasonableness of the landlord's approach.
31. The Tribunal finds it clear from a reading of the lease that there are different proportions applicable dependent upon the nature of the charge. The lease at Clause 3 (m) uses the words "*the appropriate service charge in respect of the items referred to in the Fifth Schedule ...*"
32. The Tribunal was asked to consider the meaning of Paragraph 3 of the Fifth Schedule and has concluded that there are here two different proportions.
33. Whether the words "*which the Lessee is entitled to use under the provisions of the Lease*" apply solely to "*all staircases accessways entrances and other parts of the building*" or also to "*The cost of decorating the exterior of the building*" it is clear that the Respondents were entitled to enjoyment of the exterior of the building. Unlike the common parts, the exterior of the building provides the building and all occupiers with a wind- and waterproof environment.
34. More likely, however, is that the requirement within the Paragraph of enjoyment relates solely to the latter elements referred to above, i.e. "*all staircases accessways entrances and other parts of the building*".
35. Whichever way the Tribunal was to resolve this question, apportionment in respect of exterior decoration would result in a one-sixteenth share per flat. A very strict reading of the lease could lead to the ridiculous conclusion that the Respondents could be liable for the totality of the building's external decorating costs, which was clearly not the intention of the parties.
36. The lease, however, is clear in that liability for costs associated with *all staircases accessways entrances and other parts of the building* is limited to those *which the Lessee is entitled to use under the provisions of the Lease*. The Second Schedule details easements rights and privileges included in the lease. Paragraph 1 describes rights of access and, as can be seen in paragraph 21 above, provides access only as is necessary to obtain access to the flat (in this case). It follows that the Applicant cannot require the Respondents to make payment towards costs decoration, lighting or cleaning of common parts which they are not entitled to use.

Common Parts

The Respondent

37. The Respondent contended that a number of costs included within the service charge demand for 2013/14 were not payable. The elements concerned are communal cleaning, door entry system and communal light.
38. In relation to communal cleaning, the evidence of the Respondent, by reference to her lease, was that she was entitled only to use two very small areas of the external parts of the property under the terms of her lease, being the pathway from the public highway to her front door, shared with Flat 93, and the bin area at the end of the building. (This was a view shared by the Tribunal as the original lease produced at the hearing clearly delineated these two areas in yellow and showed that the pavement external to the shared pathway was part of the public highway.)

The Applicant

39. The Applicant appeared to be unsure as to the extent of the common areas until able to study the plan attached to the original lease. After some discussion, the Applicant accepted that no charge could be demanded of the Respondents in respect of communal costs relating to the interior of the building.
40. Ms Jamieson told the Tribunal that a cleaning contract required cleaning of all communal areas every 2 weeks and a thorough cleaning of the bin area once per year. Sadly, as with so much relevant documentation, the Tribunal was unable to examine any written evidence supportive of this. Mr Townsend told the Tribunal that the Respondents' flat benefited from external lighting from the floor above.

The Tribunal

41. The Tribunal notes that difficulties have arisen here, in part, due to a lease which could have been better drafted. The Tribunal is aware that "common parts" does not have a strict legal definition; usually 'common parts' are treated as being all those parts of a property and any associated land which the lessee or occupier has a right to use in common with others. At the most basic level, this may include only the main entrance to a property and any steps leading up to that entrance, and the hallway and any staircase that could be used to gain access to the leased premises.
42. All, however, depends upon the wording of the individual lease. Here, the Respondents' lease gives them no right to enjoy common parts other than the bin area and the pathway shared with No 93 as the lease provides access only as is necessary to obtain access to the flat (in this case).
43. The Respondents' assertion does make sense, the Tribunal believes, because it would not be a very attractive clause to a prospective tenant to expect that tenant to contribute to what could be considerable costs relating to works for which other flats took benefit and he/she took no benefit whatsoever, and is an entirely reasonable way of interpreting the lease.
44. The Tribunal finds that the assertion by the Respondents as to the meaning of the terms of the lease is "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.*"
45. The Tribunal agreed with the Applicant's concession that no costs could be charged to the Respondents in respect of internal communal cleaning, internal lighting and the door entry system. It was clear that the Respondents were not entitled to use any of those parts under the terms of their lease.
46. The Tribunal further accepts the clear evidence of Mrs Jenkins that the pathway to her flat shared with No 93 has never ever been cleaned since she took occupation in the 1960s, there being no actual evidence to the contrary.

47. So far as the bin area is concerned, whilst the clear evidence of Mrs Jenkins was that she made no use of this area, bin collection processes having changed over the years such that she keeps her own bins in her own rear garden, the Respondents remain liable for their share of any cleaning of that discrete common area. There being no evidence before the Tribunal that this discrete area was actually cleaned during the year in question, the Tribunal finds that there is no liability for a contribution to the payment claimed for such external cleaning. Even had the Tribunal found otherwise in relation to the bin area, any payment would have been a minimal sum.
48. The Tribunal accepts that the Respondents would enjoy the external lighting. There being no evidence available to perform a scientific calculation (no evidence of meter readings, numbers of bulbs illuminated internally and externally, timings, etc.) the Tribunal has done the best it can and finds that a sum of £4.76 is payable for communal external lighting for the year in question.
49. Clearly, going forward, the Council will need to identify the appropriate proportion which the Respondent should be required to pay towards cleaning of external common parts enjoyed by her and external common lighting.
50. Without deciding the point, it appears likely that all leaseholders would be liable for a share of the external lighting costs; the proportion of external cleaning would depend upon what proportion of the external area was enjoyed by the individual leaseholder; and internal cleaning, lighting and maintenance would be shared proportionately by those leaseholders with a right under their leases to use those parts. This would clearly be subject to assessing whether all leases were common in their terms.

Reserve Monies

The Respondent

51. The Respondent queried the practice of the Applicant in maintaining a Reserve Fund and, more particularly, asked why sums collected in earlier years had not been applied to the costs of the major works entailing the external decoration of the building.

The Applicant

52. The Applicant argued that it was entitled to maintain a Reserve Fund and had done so, but that the monies collected were being held towards internal decoration.

The Tribunal

53. The Tribunal finds that the Applicant is able to collect and hold sums for a Reserve Fund, but that the Applicant has not approached its responsibilities in a correct manner, as the Tribunal now explains.
54. A Reserve Fund is recognised as being for the benefit of both landlord and tenants.
55. In reaching its current Determination, the Tribunal also takes into account the Third Edition of the RICS Service Charge Residential Management Code ("the Code") approved by the Secretary for State under section 87 of the Leasehold Reform Housing and Urban Development Act 1993 and effective from 1 June 2016. Of particular note to the issues here are the following extracts from the Code:

7.5 Reserve funds (sinking funds)

The lease often provides for the landlord to make provision for future expenditure by way of a 'reserve fund', or 'sinking fund'. You should have regard to the specific provisions within the lease that may, for example, provide for a general reserve fund(s) for the replacement of specific components or equipment.

The intention of a reserve fund is to spread the costs of 'use and occupation' as

evenly as possible throughout the life of the lease to prevent penalising leaseholders who happen to be in occupation at a particular moment when major expenditure occurs. Reserve funds can benefit both the landlord and leaseholder alike by ensuring monies are available when required for major works, cyclical works or replacing expensive plant.

It is, therefore, considered good practice to hold reserve funds where the leases permit. If the lease says the landlord 'must' set up a fund, then this must be done. Neglecting to have a fund when the lease requires one could be deemed to be a breach of the terms of the lease. No attempt to collect funds for a reserve fund should be made when the lease does not permit it.

Where there is no provision in the lease for reserve funds, there is no entitlement to create or hold one, and any money collected for such a purpose can be demanded back by the leaseholders. In these circumstances, or where the current provisions are likely to prove inadequate, you should make leaseholders aware and encourage them to make their own long-term saving provisions towards the estimated expenditure. You should also consider recommending to your client that consideration be given to discussing with leaseholders the benefits of a variation to the leases to allow for a reserve fund to be set up.

You should also recommend your clients to have a costed, long-term maintenance plan that reflects stock condition information and projected income streams. This should be made available to all leaseholders on request and any potential purchasers upon resale.

The level of contributions for simple schemes should be assessed with reference to the age and condition of the building and likely future cost estimates. On more complicated developments, the assessment should reference a comprehensive stock condition survey and a life-cycle costing exercise, both undertaken by appropriate professionals.

The usual method of working out how much money is to go into the fund each year, assuming the lease/tenancy agreement does not make any other provision, is to take the expected cost of future works, including an allowance for VAT and fees, and divide it by the number of years which may be expected to pass before it is incurred. The level of contributions should be reviewed annually, as part of the budget process, and the underlying survey information should be reviewed at appropriate intervals. This will vary for each scheme depending on complexity, age, condition and the relative size of funds held.

If after the termination of any lease there are no longer any contributing leaseholders, any trust fund shall be dissolved and any assets comprised in the fund immediately before dissolution shall, if the payee is the landlord, be retained by them for their own use and benefit, and in any other case, be transferred to the landlord by the payee. Again this is subject to any express terms of the lease relating to distribution, either before or at the termination of the lease.

56. The Applicant has not approached the requirements for a Reserve Fund in an approved or constructive manner. There was no evidence available to the Tribunal to show that any particular items of future expenditure had been identified as of major significance, had been costed and a calculation been made of the sums

required proportionately from the tenants to meet those future costs. Nor was there any evidence to show that the tenants had been involved by the Applicant in such an exercise. Nor was there evidence available to the Tribunal to show the sums accumulated from the contributions of the Respondents.

57. The Applicant appeared to have operated a system of accounting which suited its own purposes rather than one which met the requirements of the lease. The Tribunal noted a number of errors. First of all, there is no entitlement under the terms of the lease to demand a specific payment towards a Reserve Fund, which the Applicant has ignored when demanding a "*contribution to future maintenance fund*". Secondly, the monies collected from these Respondents is being held for a project, the cost of which does not fall to them for the reasons detailed above, the cost relating to internal decorations. Further, the service charge statement of account does not show the total of monies collected under this heading. Ms Jamieson told the Tribunal that this fund held some £210 to the Respondents' credit, but no form of accounts showing this was available to the Tribunal; this was worrying, given that these funds should be held on trust.
58. What the Applicant is entitled to do is to maintain a Reserve Fund, but this is a fund built from any unexpended surplus as detailed in Paragraph 3 of the Fourth Schedule as detailed above. That fund should be held in trust and should be accounted for to the Respondents each year and should be available for crediting against recoverable costs. The Tribunal finds that it was wholly appropriate for the Respondents to query why the sums collected were not applied to the major costs expenditure and were retained for a purpose in relation to which the Respondents were not liable to make payment.
59. The Tribunal finds that the *contribution to future maintenance fund* in the sum of £30.15, given what is detailed above, is not a sum payable by the Respondents under the terms of the lease.
60. Whilst the application before the Tribunal relates solely to the year 2013/14 and solely to these Respondents, the Applicant will clearly need to account to the Respondents for sums collected under this head and in future years to show the total held of any reserve monies and the intended purpose.

The Major Works: Welfare, Scaffolding & Cast Iron The Tribunal

61. The Tribunal notes the agreement of the parties that the hire of a Portaloo and temporary site accommodation associated with major works for a period of 4 weeks is a reasonable charge and so finds. Accordingly, adopting the original estimate of £993.96, rather than the sum demanded of £1517.76, the overall charge for the major works due from the Respondents is reduced from £1347.77 to £1315.03.
62. There was no reason for the Tribunal not to accept Mr Townsend's clear evidence that scaffolding is supplied to the Applicant at a fixed fee regardless of any time element. Accordingly, the only concern of the Respondents relating to the excessive time apparently taken for the completion of the works, the Tribunal cannot find that the cost of the scaffolding was other than reasonable.
63. The Respondents believed that the cost of the major works should be reduced by an element attributable to the scrap value of the cast iron guttering and downpipes removed from the building and replaced with plastic fittings. Mr Townsend explained that it was part of the contractual terms for the contractor to remove scrap items. Closer examination of this issue, however, revealed that there was no such term and that it appeared to be more a matter of custom and practice. Mr Townsend accepted that the contractor may have achieved a benefit which should

rather have been applied to the paying tenants. However, it was simply not possible for the Tribunal to apply any value to this scrap metal, there being imponderables as to the cost of its removal and its actual value and no evidence whatsoever as to the value at the time of any weighed in scrap cast iron. This was yet one further example of how the Tribunal was hampered by the failure of the Applicant to provide relevant documentation. It is not necessary for the Tribunal to detail all of the instances where further documentation would have been required, but those detailed within the Decision are certainly not isolated examples and were the source of some frustration.

64. Whilst the Tribunal had no reason to doubt the veracity of anything it heard in evidence from the witnesses, the value of relevant documentation is high in a case such as this.

A Cresswell (Judge)

APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.