

11894



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

Case Reference : CHI/21UD/LSC/2015/0045

Property : First Floor Flat & Top Flat
28 Magdalen Road, St Leonards on Sea, East
Sussex. TN37 6EG

Applicant : Mr Barry Markham (the Landlord)

Representative : Mr Simon Sinnatt

First Respondent : Mr I D Bailey (Third Floor Flat Tenant)

Second Respondent: Mr S Lilley (First Floor Flat Tenant)

First Respondent`s
Representative : Ms Katie Gray

Type of Applications: Application for determination as to reasonableness
of service charges pursuant to Section 27A
Landlord and Tenant Act 1985

Tribunal Members : Judge P.J. Barber
Mr N Robinson FRICS Valuer Member

Date and venue of Hearings : 11th January Council Chamber, Bexhill Town
2016 Hall, London Road, Bexhill on
Sea TN39 3JX

2nd June 2016 Magistrates Court & Tribunal
Centre, 6 Market Avenue,
Chichester, West Sussex.
PO19 1YE

Date of Decision: 16th June 2016

DECISION

Decision

The Tribunal determines in accordance with the provisions of Sections 19 and 27A Landlord and Tenant Act 1985 ("the 1985 Act") that:

- (1) That service charges in a sum of £5480.00 in respect of property repairs are recoverable for the service charge year 2014, resulting in a liability for each of the five lessees of £1096.00, for that element of the service charges.
- (2) In regard to the service charge year 2015, the conduct of the Section 20 procedure was sufficiently flawed such as to render it invalid, and consequently no determination may be made concerning reasonableness of the tender estimate and provisional sums arising from it.

Reasons

INTRODUCTION

1. The application in this matter was made pursuant to Sections 27A of the 1985 Act for determination of the reasonable service charges payable by the First Respondent and Second Respondent to the Applicant in respect of the service charge years 2014 & 2015. Directions were issued in the matter, following a telephone case management hearing, on 24th July 2015.
2. The claim relates to service charges in respect of 28 Magdalen Road, St Leonards on Sea, East Sussex, TN37 6EP ("the Property"). The Applicant is the freehold owner of the Property; the First Respondent is the lessee of the Third Floor flat pursuant to a lease dated 28th January 1992 ("the Third Floor Lease") for a term of 99 years from 25th December 1992. The Second Respondent is the lessee of the First Floor Flat pursuant to a lease dated 11th September 1985 ("the First Floor Lease") for a term of 99 years from 11th September 1985.
3. The Property has been managed throughout the period under dispute by HAS Property Management limited ("HAS"), a business owned by the Applicant's late wife Mrs Eileen Bowen, who died in 2013. The Applicant seeks a determination as to the reasonableness of service charges in respect of the Property in 2014, and in respect of major works to the Property in 2015.

INSPECTION

4. The Tribunal carried out an inspection of the Property immediately before the hearing, initially only in the presence of the First Respondent and counsel, and the Second Respondent, having allowed some time for the Applicant to arrive. The Property comprises a 5 storey mid terraced building with cream painted rendered elevations under a slate roof with a portico to the main front entrance door and ornamental iron work balustrading to decorative balconies at first and second floor levels. There were general signs of deterioration and a need to repair to the elevations, with weed growth in the pvc guttering and to cracks in the portico amongst other defects. Originally constructed as a single house in or about the mid Victorian period, it has subsequently been converted into five flats.

The communal entrance and staircase walls were woodchip papered and cream emulsion painted, but in a fairly shabby condition with damaged areas, some blown plaster and damp staining noted. It was noted that the Basement flat has its own separate entrance door and does not require shared use of the communal entrance door, hallway staircases and landings serving the upper four flats. Mr Markham and his counsel arrived at this point and asked that part of the ground floor flat be briefly inspected, where it was noted that the rear external wall to the bedroom was visibly marked and stained. The Tribunal then viewed the Property from the rear, via a narrow pedestrian access path which did not connect directly to the rear of the Property, but nevertheless facilitated visual inspection of the rear elevations. These elevations appeared generally to be in a poor condition. It was clear from the inspection that works to the exterior and common parts are necessary and that, given the size and age of the Property, these will be reasonably substantial in cost.

THE LAW

5. Section 19(1) of the 1985 Act provides that :

“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 provision 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.”*

Sub-Sections 27A (1), (2) and (3) of the 1985 Act provide that:

“(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 cost, 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.

“Service Charges” are defined in Section 18 of the 1985 Act as follows

(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, 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

18(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.

Paragraph 6 to Part 2 Schedule 4 of The Service Charges (Consultation Requirements)(England) Regulations 2003 No. 1987 provides:

6(1) Subject to sub-paragraph (2) where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants’ association (if any):

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

(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his responses to them

.....

HEARING & REPRESENTATIONS

6. Counsel respectively for the Applicant and the First Respondent, requested the Tribunal to accept at the hearing, and consider skeleton arguments and separate bundles in regard to authorities and case law. Mr Sinnatt had only been instructed via Gaby Hardwicke solicitors for the Applicant, late in the week prior to the hearing, and Ms Gray was similarly relatively recently instructed. Ms Gray for the First Respondent, had also produced a re-ordered bundle containing no new material, but nevertheless presenting the material in Mr Markham’s bundle in better order; she also invited the Tribunal to make a costs order against the Applicant in regard to the work in so producing the re-ordered bundle. A short adjournment took place from 12.10pm to 12.30pm during which the Tribunal members read both skeleton arguments. When the hearing resumed, Mr Sinnatt submitted that the matter might best be considered in the following order and broad headings:

(1) The correct service charge accounting dates

- (2) Construction issues in regard to the leases
- (3) Reasonableness of the 2014 Service Charges
- (4) 2015 anticipated major works expenditure

Ms Gray and Mr Lilley submitted no objections and accordingly the Tribunal proceeded to receive submissions on that basis, variously from counsel and also separately from Mr Lilley who was unrepresented.

The correct service charge accounting dates:

7. Mr Sinnatt accepted that there was a date missing from Paragraph 5, 7th Schedule of the Third Floor Lease, now vested in the First Respondent, but submitted that it is open to the Tribunal in such circumstances of ambiguity, to look at extrinsic evidence. Mr Sinnatt referred to Paragraph 7, 7th Schedule, and said it was a provision requiring every lease granted in respect of the Property to be in similar form, and that since both the Third Floor Lease and the First Floor Lease have similar accountancy clauses, the date, being 11th September as appearing in the First Floor Lease, ought also to be deemed applicable in the Third Floor Lease. Mr Markham however, said that the dates in each of the corresponding Counterpart Leases in his possession, was actually 31st December, although he was unable to produce them to the Tribunal. Mr Sinnatt added that in circumstances where the Applicant has for 12 years produced accounts, calculated on a calendar year basis, the Respondents, who he said had accepted such accounting period throughout that time, were now estopped from disputing the correctness of same. Ms Gray submitted that compliance by the landlord with the provisions at Paragraphs 5 and 6 of the 7th Schedule, are a condition precedent to payment of service charges. Mr Sinnatt disagreed and submitted that paragraphs 5 & 6 are free standing or elective provisions, by which the lessees may call upon the landlord to provide certified annual accounts, and that paragraph 19 in the 6th Schedule is an obligation to pay, unqualified by references to the certified annual accounts.
8. Ms Gray submitted that paragraph 6 of the 7th Schedule was a requirement for the accountant to certify the proportion actually payable by the lessee and that prior compliance with the provisions of paragraphs 5 & 6 is a pre-condition to any liability to pay arising under paragraph 19 in the 6th Schedule.

Construction issues in regard to the leases

9. The issue of the correct apportionment of service charges as between the five flats, was also raised. Paragraph 19 of the 6th Schedule provides "*In equal proportion floor by floor with the lessees or owners of the other flats or apartments comprised in the building pay to the lessor a fair and reasonable share of the costs charges and expenses incurred by the lessor in carrying out the obligations under the seventh schedule.*" Mr Sinnatt submitted in this regard that a dual approach was reasonable and rational; he suggested that this meant that all five lessees should contribute 20% each towards the structural maintenance of the whole building, whilst the basement flat should not be included in the maintenance costs for the communal areas not shared by it, leaving the upper four lessees to bear 25% of those costs. Ms Gray referred to her skeleton argument and submitted that paragraph 19 of the 6th Schedule contained no free standing obligation to pay service charges, adding that it would only do so if the words "on demand" were inserted after the word "pay". Ms Gray submitted that a date may not simply be implied into paragraph 5 of 7th Schedule of the Third Floor Lease;

she also questioned the disparity of appropriate dates suggested by Mr Sinnatt and Mr Markham. Mr Sinnatt insisted that paragraph 19 of the 6th Schedule is nevertheless the material obligation on the lessee to pay service charges and that paragraphs 5 & 6 in the 7th Schedule are not a condition precedent to payment, but are the “checks and balances” mechanism, designed to protect the lessees. Reference was made to the decision in *Arnold v Britton [2015] UKSC 36*; Ms Gray submitted that no reasonable person would accept a lease provision which required payment at will and that primacy should be given to the clear and natural words in the leases. Reference was also made to the obligation at paragraph 20 of the 6th Schedule which provided for keeping properly cleaned, in good order and adequately lighted such part as shall be agreed – thus providing for the possible lighting of the areas adjoining each flat, by each respective lessee, but seemingly only by agreement.

10. Following the lunch adjournment, the Tribunal invited Mr Lilley to make any submissions; Mr Lilley said that as a non-lawyer, he was not so greatly concerned about technical provisions in the leases relating to recovery, as he was in regard to common sense apportionment of the costs arising for maintenance of the Property. In this regard, Mr Lilley considered that the variable proportions for service charges operated by the Applicant regarding the basement flat, seemed preferable.

Reasonableness of the 2014 service charges

11. The sub-headings or categories of expenditure were as follows:

Communal Areas (as charged by the Applicant only to the upper four flats)

	£
Electricity	(147.41)
Cleaning	840.00
Repairs	1030.00

Other Expenditure (as charged by the Applicant to all five flats)

	£
Insurance	379.37
Property Repairs	5860.00
Bank Charges	63.77
Accountancy	144.00
Management fees	2500.00

Mr Sinnatt referred to the dispute by the Respondents as to recoverability in regard to electricity, cleaning and bank charges, and referred to the decision in *Wembley National Stadium Ltd v Wembley (London) Ltd and others [2007] 2 EGLR 115*; he submitted that if the Tribunal accepts liability for example, for lessees to pay via the service charge, towards costs of painting, then there was no reason why the landlord may not also charge for organising the painting, given what he referred to as the very broad wording in paragraph 19 of the 6th Schedule. Submissions were made in regard to the various categories of expenditure:

Electricity

Mr Sinnatt accepted that electricity was a moot point, but submitted that common sense had to prevail and that if electricity was not paid for in the communal areas, then how was the landlord expected to provide lighting? Mr Sinnatt added that for 12 years, the landlord has been assuming the obligation and that as a result the tenants were now estopped from denying such arrangement; he said that if the landlord is not obliged to pay such costs, then the Tenant ought to do so, pursuant to the obligation under paragraph 20 of the 6th Schedule. Ms Gray said that the figure for 2014 was a credit of £147.41 and was not therefore disputed.

Cleaning

Ms Gray indicated that the amounts claimed were not accepted. Mr Sinnatt said that the landlord as owner of three of the five leases in the building, had no motive for incurring costs higher than necessary. Ms Gray referred to Tab 10 Page 25 of her Bundle No.2 and said that the invoice for £840.00 in this regard, is undated. Mr Markham said that the contract is for a cleaning visit once a month when vacuuming, clearing of former sub-tenants` abandoned post items and reporting of small repairs was dealt with; he said it equated to £70.00 per visit, but he did not know how long was spent on each visit. Ms Gray said that the invoice had only been produced late in the proceedings and Mr Bailey said the standard of cleaning was "OK", but added that he had never actually seen cleaners there, although he visits 2 or 3 times each month. Mr Markham pointed to the evidence given in the bundle, complaining on an occasion in 2014 of excrement and blood on the walls and added that it was therefore obvious that the communal areas were being cleaned. Ms Gray countered to the effect that in her view, the managing agents ought to be dealing with removal of post, bearing in mind the high level of their charges, and it was suggested that the cleaning costs ought to be reduced by 50%. Mr Markham said there was no formal contract with the cleaners, but that no evidence had been produced as to any complaint regarding a general lack of cleaning.

Mr Lilley said he did not doubt that cleaning had been done, but in his view £70.00 per visit was too much, bearing in mind the small size of the communal areas and in comparison to other buildings with which he was acquainted, adding that a specification ought to be in place to make it clear what was supposed to be done. Mr Lilley added he would be surprised at any charges for this work above £400-£500. Mr Sinnatt submitted that cleaning costs for premises being sub-let were likely to be higher and made the point that Mr Markham is having to bear part of these costs himself.

Repairs (Communal area only)

Ms Gray indicated that these are not disputed.

Insurance

Ms Gray referred to Tab 10, Page 9 at her Bundle which was an invoice for £202.96, whilst the amount being claimed was £379.39. Mr Markham explained the discrepancy by what he referred to as "bulk" insurance arrangements for all his properties and suggested the matter was explained by a simple error; he added that no commission was received by him as a result of the insuring arrangements. Ms Gray said this highlighted a more general grievance – that

wrong amounts and odd sums proliferated and she said the fact remained there was no evidence in the bundle to show that the amount claimed had been paid.

Repairs (Whole property)

Ms Gray indicated that her comments in relation to repairs related to all repairs including those for the communal areas, not accessible by the basement tenant, and also the whole building. Ms Gray accepted that the sum of £4880.00 for the works as referred to at Tab 8 Page 2 in her bundle was agreed on the basis that dispensation had apparently been obtained in respect of same. In regard to the balance of £980.00, Mr Markham said there were 3 supporting invoices and that the certifying accountant would have seen them all, but he accepted that other than the invoices for £280.00 (Tab 3 Page 29) and £320.00 (Tab 3, Page 30), the remaining invoice for £380.00 was not produced in the bundle.

Bank Charges

Mr Sinnatt submitted that the amounts are tiny and it would create absurdity for the Applicant landlord to be expected to hold the moneys in a private bank account. Ms Gray submitted that whilst reasonableness was not disputed, bank charges were simply not expressly recoverable under the leases; she added that it did not follow necessarily that bank charges were recoverable as an ancillary to operating a bank account which account she said, would not automatically have to be a fee bearing one. Mr Lilley submitted that a bank account could be arranged on a trust basis without necessarily giving rise to bank charges.

Accountancy

Mr Sinnatt said that as a result of paragraph 5 in the 7th Schedule the landlord had to provide an annual account and it would be absurd for the related accountant's charges not to be recoverable. Ms Gray said that recoverability was not in dispute but there was simply no invoice provided; Mr Markham accepted that he had not produced such invoice.

Management fees

Mr Sinnatt submitted that the charges raised by HAS in a sum of £400.00 & VAT per flat per year, being on an all-inclusive basis, were perfectly reasonable and that the alternatives were subject to exclusions and wholly inadequate. Ms Gray submitted that management fees are clearly not recoverable under the leases; she referred to paragraph 37 in her skeleton argument and to the decision in *Embassy Court Residents' Association v Lipman [1984] 2 EGLR 60*; she said that whilst in the Embassy Court case there had been no express provision in the lease to allow recovery of management fees, power had been implied but that was only so, in cases involving non-individuals. Ms Gray submitted that where the landlord is an individual, then the lease must include an express provision to allow for recovery. Ms Gray further submitted that a charge of £500.00 per flat was not reasonable and referred to 3 alternative quotes which her client and Mr Lilley had variously obtained in amounts respectively of £150.00, £175.00 and £180.00, in each case plus VAT. Ms Gray said that whilst Mr Markham claimed those other quotes were not fully inclusive and therefore not truly comparable, he had not produced any comparative quotes of his own to demonstrate reasonableness of the HAS fees; she also referred to Mr Markham's family connections with the deceased former proprietor of HAS.

Mr Lilley said he was more concerned with reasonableness than the niceties of legal recoverability; he said it was irrelevant that the amounts had been certified by Mr Markham's accountant and that in reality there was a close connection between Mr Markham and HAS, the company owned by his now deceased wife.

Mr Sinnatt said that Ms Gray had not given the full picture; he referred to Paragraphs 5-006 & 5-007 in *Tanfield* (Third Edition) on "*Service Charges and Management*", adding that they made reference to the decision in *Lloyds Bank Plc v Bowker Orford* [1992] 2 EGLR 44, which he said, was more recent than the *Embassy Court* decision and that lease wording in the *Lloyds Bank* case, similar to this case, had been held to justify recovery of management costs for organising and supervising the provision of works. Mr Sinnatt added that the *Wembley* case was further supportive in this regard. Mr Sinnatt said that whilst general administrative costs might not be recoverable, the costs for organising works, would be so. Mr Lilley said he considered that in view of the family connection with HAS, the reality was that the charges would end up being higher. Ms Gray submitted that the management fees in this case do involve some administrative tasks, for example arranging insurance, and that no evidence had been provided to demonstrate which part of the £500.00 charges related to administrative tasks, and which to actual supervision of work.

2015 anticipated major works expenditure

12. At a reconvened hearing held on 2nd June 2016, at the Magistrates & Tribunals Centre in Chichester, Mr Sinnatt raised objection at the outset, to a request made by Ms Gray for leave to make further submissions in regard to issues related to the 2014 service charges, on the basis that both sides had made their submissions in that regard at the previous hearing on 11th January 2016 and that there had been ample opportunity for her to make any application in the ensuing 5 month period, and that it would be contrary to the interests of justice for new evidence to be introduced and admitted today. After hearing also from Ms Gray in the matter, the Tribunal determined that it would not allow the introduction of such new evidence on the basis that the 2014 service charges had been fully dealt with at the previous hearing.
13. Mr Sinnatt proceeded to make submissions in regard to the major works which had been contemplated in 2015; he said that the Section 20 consultation procedure had been fully and properly complied with, and that neither Respondent had made any observations at the time when the initial notices of intention to carry out major works, had been served. Mr Sinnatt further submitted that the Service Charges (Consultation Requirements)(England) Regulations 2004 ("the Consultation Regulations") are paramount and he said, there is little case law regarding how extensive any description of the works must be included in such notices; similarly he said that the reasons to be stated in such notices for carrying out the works, need only be general ones, particularly taking into account the fact he said that the Respondents are experienced property professionals. Mr Sinnatt said the detail would ordinarily follow in the later stage notices, as part of the overall consultation process. Mr Sinnatt said that the Consultation Regulations do not prohibit an award of a contract to an associated company of the landlord and also that landlords are not obliged to accept the lowest bid, but they should merely take into account any tenant observations. Mr Sinnatt added that Mr Markham owns the leases of 3 of the 5 flats in the Property, and that accordingly he himself would bear the greater part of the

overall costs and would therefore have no motive for trying to inflate the cost of the works. Mr Sinnatt said that as regards the “replacement” contract award notice issued by Mr Markham in November 2015, it may be seen as a deemed amendment.

14. Ms Gray took issue in regard to whether or not the initial notice complied with the Consultation Regulations; she said that in regard to the description and reasons, the tenants had to be made aware of the extent of works intended, that the notice was too general and should have been more specific. Ms Gray added that whilst the Respondents may be professional investors, that was not a relevant statutory consideration; she also referred to the “replacement” contract award notice issued on 27th November 2015 and referred to Paragraph 6 to Schedule 4 of the Consultation Regulations; she said that the notice had not provided responses to tenants’ observations. Mr Sinnatt countered by saying that there had been 3 observations made by the tenants which had in any event been separately addressed; one was a request for surveyor’s details, the second was seeking clarification as to responsibility for the window frames in the leases, and the third sought clarification of previous roof works carried out. In regard to a point raised by Ms Gray as to why Mr Markham had not used the more detailed description of works from the specification, Mr Sinnatt said that no legal authority had been produced evidencing such requirement and that given the relatively small size of the Property, the description given was sufficient.
15. Mr Lilley made a number of submissions; he said that the purpose of the initial notice was to give an idea of the scope of the intended works, to enable tenants to make budgetary provision; he referred to his 20 years’ experience as a property investor and said that he had been shocked at the extent and cost of the works envisaged. Mr Lilley said that the amount provided for by way of provisional sums was very high in relation to the actual tender amounts and that scaffolding, for example, should not have been shown as a provisional sum. Mr Lilley added that many of the provisional sum items might better have been shown as contingency sums. Mr Lilley said he was also concerned about HAS and the lowest bidder both being businesses owned by Mr Markham; he said he did not allege any fraud but that Section 20 was designed to encourage transparency and avoid what he referred to as incestuous arrangements. Mr Lilley further submitted that the HAS schedule of works was flawed and not precise enough; he said he had obtained his own specification for works from other surveyors and then approached contractors who proposed total costs in the region of £40,000 & VAT. Mr Lilley further submitted that a breakdown of the costs should have been included in the estimates to allow more effective scrutiny and verification of the various elements. Mr Lilley said that provisional sums of £45,500, in addition to and compared to a lowest tender of £38,000, were highly disproportionate. Mr Sinnatt said that a number of firms had in fact been willing to bid on the basis of provisional sums for the items as listed. Mr Markham added that he had, subsequent to the consultation notices, contacted a surveyor who had advised that some of the provisional sums might indeed have been tendered; he added that he would ensure that the successful tenderer will arrange to tender the provisional sum elements. Mr Lilley said that this would invalidate the consultation process since, he said, the opportunity to so tender the provisional sums had not been given to all the original bidders for the work. Mr Sinnatt insisted that each bidder had tendered on a level playing field basis and that Mr

Markham was simply being practical and looking for a way to resolve matters. Mr Sinnatt added that the real question for the Tribunal was as to whether too much had been allowed for by way of provisional sums. Ms Gray said that Mr Lilley had been able to obtain separate quotes which were considerably more competitive than those obtained by Mr Markham and referred to the fact that the leases only allow recovery of costs incurred, not costs on an interim or "on account" basis; she added that no detail had been given in any event about what provisional sums will actually be incurred and that it would not be possible for the Tribunal to determine reasonableness in respect of the same, owing to such uncertainty. Mr Sinnatt said that the estimate from 1066 Maintenance, is clear as to the costs, other than for provisional sums and that it would be open to the Tribunal if need be, to determine those costs, but excluding the provisional sums which he said were effectively capped amounts.

16. Mr Sinnatt submitted that there had been no challenge to actual provisional sum elements rather, to the provisional sums per se; he said these challenges could have been raised by the tenants in response to the Section 20 notices but they had not done so. Mr Sinnatt added that the quote obtained by Mr Lilley had been on the basis of a different specification and was therefore not like for like.
17. In closing, Mr Lilley said he had had no opportunity to look at the tenders and that he was concerned at the linkage between Mr Markham and the contractors. Ms Gray had little to add, but said that the consultation process had been invalidated by the purported change of contract award to 1066 Maintenance, and that whilst it had been a level playing field until then, the fact that 1066 were now having to obtain quotes for provisional sums, resulted in the procedure becoming invalidated. Mr Sinnatt said that the consultation had been properly undertaken and that all estimates had been obtained on a level playing field basis and that neither Respondent had raised objections or suggested an alternative contractor. Mr Sinnatt said that Mr Lilley's alternative quote had not been sought on the same specification used by Mr Markham and was therefore not on a like for like basis. Mr Sinnatt added that the law is what it is, and so long as other quotes are obtained, a landlord may select a company which he owns; he said the purpose of the legislation is to avoid capricious selection of a single quote but that in this instance, 1066 Maintenance had been the lowest bidder and that 3/5th of the cost would in any event be borne by Mr Markham.

CONSIDERATION

18. The Tribunal have taken into account all the oral evidence and those case papers to which we have been specifically referred and the submissions of the parties.

Service Charge Accounting Period

19. The Tribunal considers that the absence of a specific date in paragraph 5, 7th Schedule of the Third Floor Lease, does not render the clause void for uncertainty. Such clause includes firstly, an obligation on the lessor to keep proper books of account and secondly to take an account "in every year", of the amounts incurred and sums recovered. Such provision in the Third Floor Lease simply operates, in the absence of an inserted specific date, to require an account to be taken some time during the year in question. The Tribunal concurs with the view of Mr Sinnatt that paragraph 6, 7th Schedule in the leases, is an elective provision, requiring the annual account to be audited "*if required by the Lessee*". Accordingly the Tribunal considers that paragraph 5, 7th schedule to the Third

Floor Lease is sufficiently widely drafted, so as to enable the landlord to set the actual date on which the account is taken.

Construction Issues in the Lease

20. The Tribunal considers paragraph 19, 6th Schedule of the leases to be a sufficiently clear and free standing obligation upon the lessees to pay their share of costs incurred and that compliance by the lessor with paragraphs 5 & 6 7th Schedule is not a pre-condition to such payment. Paragraph 5, 7th schedule is an obligation on the lessor to keep an annual account of costs incurred and recovered and the requirement for an accountant to certify such costs in paragraph 6, is only triggered, if required by the lessee. In this way, paragraph 19, 6th Schedule provides in effect for a rolling obligation on lessees to pay immediately costs as incurred by the landlord; paragraph 6, 7th Schedule is the balancing provision in the leases, entitling lessees to call for an accountant's certified annual account as to costs incurred and the proportionate amount due.

2014 Service Charges

21. In regard to the sub-headings or elements claimed:

Electricity

The Tribunal notes paragraph 20, 6th Schedule to the leases, "*The Lessee shall keep such part of the halls, stairs landing and passages as shall be agreed as being the responsibility of the Lessee properly cleaned and in good order and adequately lighted*"; however in the absence of agreement, there is no obligation on the lessor to carry out such obligations. This raises an issue that if the lessees do not carry out cleaning and lighting of the communal areas, then who should do so? The Tribunal noted during the inspection, that there is a fire alarm system presumably dependent upon an independent power supply, and no doubt installed by the landlord. The Tribunal has some sympathy with the landlord, who may need to consider seeking a variation to the leases in this regard and in other respects in which they are deficient or unclear by modern standards. Nevertheless the leases do not include any provision for charging electricity and so it follows that charges for same may not be included in service charges. The Tribunal accordingly determines that electricity charges are not recoverable.

Cleaning

The Tribunal noted that the Fifth Schedule in the lease, of which a copy was provided in the bundle, provides as to the costs, expenses and outgoings in respect of which the lessee is to contribute, but it makes no reference to cleaning costs. Accordingly, the Tribunal considers the position in regard to cleaning to be as for electricity and in the absence of express provision for charging in the leases, the amounts claimed are disallowed.

Repairs (Communal)

The Respondents had indicated that the item of £1030.00 was not disputed and accordingly the Tribunal has no jurisdiction in that regard.

Insurance

No invoice was produced and accordingly the Tribunal disallows this element.

Property Repairs

The total amount claimed for Property Repairs was £5860.00; part of that amount, namely £4880.00 was not disputed and similarly a further invoice for £320.00. In regard to two further invoices, respectively for £280.00 and £380.00, no substantive objections as to reasonableness were voiced by the Respondents; however no invoice had been presented in respect of the sum of £380.00 as claimed and which Mr Markham conceded. In these circumstances the Tribunal allows the claim for £5480.00 (being £5860.00 less £380.00).

Bank Charges

The Tribunal is not convinced that bank charges are necessarily ancillary or chargeable as part of the service charge by implication. In the absence of express provision in the leases, these charges are not allowed.

Accountancy

No invoice was produced and accordingly this item is disallowed.

Management Fees

No evidence as to express provision in the leases for recovery of management fees was produced. The *Lloyds Bank Plc* case, as referred to by Mr Sinnatt, upheld fees for organising and supervising particular works, but not general management fees. Mr Markham had said in evidence that the HAS management fees were comprehensive, but no evidence was provided to demonstrate how such fees should be attributed or split as between organising and supervising works on the one hand, and general administrative tasks on the other hand. Accordingly there is no evidence provided as to how the management fees claimed could or should be split. The Tribunal notes the lower quotes obtained by the tenants and considers £500.00 per flat in any event to be excessive. In the absence of any clear evidence as to any appropriate apportionment and given the excessive amount claimed, the Tribunal disallows these charges.

22. The Tribunal notes that the leases contain a number of provisions which appear unclear by modern standards. Clearly the Property does nevertheless need to be properly managed and in such circumstances the Applicant may wish to consider seeking variations so as to facilitate the ongoing proper future management and running of the Property.
23. In regard to the application by Ms Gray for a costs order in respect of the costs of re-ordering the Applicant's bundle, no direction requiring this had been made and in any event the new bundles were only handed to the Tribunal members on the day of the hearing. Whilst the Tribunal concurs that the original bundle was not well prepared, it nevertheless declines to make any order for costs in this regard.

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24. In regard to the Section 20 consultation process, the Tribunal considers that the notice of intention is a broad brush warning, not necessarily requiring specific details by way either of description of the intended works or full reasons for doing them. It had been apparent at the inspection that the Property is in a poor state and various defects were visually apparent. The Tribunal does however consider provisional sums of £45,500 in relation to a tendered sum of £38,000, to be disproportionate; it further takes the view that the £45,500 in respect of

provisional sums does not represent a capped or maximum amount as had been suggested by Mr Sinnatt. Mr Markham had been the driver in regard to the process and had carried out the Section 20 consultation, and then made the application for determination of reasonableness, but had then, on his own account, sought subsequent input and advice from a surveyor who by Mr Markham's own admission, had suggested that some of the provisional sums could have been tendered.

25. The Tribunal does not consider it would be possible to determine reasonableness of the £38,000 estimate in isolation from the provisional sums, since the former is dependent on the latter, including for example the need for scaffolding to carry out the tendered work. The Tribunal further considers the Property to be not unduly complex with only a small number of tenants, and such that the provisional sums envisaged are of an unsatisfactorily high amount in relation to the tender sum. The Tribunal considers that the Applicant's own evidence regarding his having instructed a surveyor part way through the process, coupled with the equivocal position regarding whether or not the large provisional sums should have been tendered and the lack of clarity and contradiction resulting from the issue of a replacement notice of award of contract and the uncertainty regarding how the provisional sums might now be tendered, and whether that could result in a level playing field being maintained, are collectively such that the Section 20 procedure has been flawed and made unclear and uncertain.
26. We made our decisions accordingly.

Judge P J Barber

Appeals :

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.