12529

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

| | | |
|---|---|---|
| **Case Reference** | : | CHI/00HP/LSC/2017/0053 |
| **Property** | : | Flat 12, Falcon Heights, 6A Birds Hill Road, Poole, Dorset, BH15 2FG |
| **Applicant** | : | Arnis Blumentals and Keiko Shimizu |
| **Representative** | : | Not represented |
| **Respondents** | : | Falcon Heights Estates (Poole) Limited |
| **Representative** | : | Mr Jack Dillon Counsel |
| **Type of Application** | : | Liability to pay and reasonableness of service charges |
| **Tribunal Members** | : | Judge N Jutton and Mr M Donaldson FRICS |
| **Date and Venue of Hearing** | : | 30 October 2017<br>Best Western Plus The Connaught Hotel, 30 West Hill Road, Westcliffe, Bournemouth, Dorset, BH2 5PH |
| **Date of Decision** | : | 21 November 2017 |

---

DECISION

---

1 **Introduction**

2 The Applicants Arnis Blumentals and Keiko Shimizu are the lessees of Flat 12, Falcon Heights, 6A Birds Hill Road, Poole, Dorset, BH15 2FG (the Flat).

3 The Applicants hold the Flat under the terms of a lease dated 18 January 2008 which is for a term of 125 years from 1 January 2007 (the Lease).

4 The Applicants seek a determination from the Tribunal of the following matters:

i. As to whether certain items of service charges for the years ending 31 December 2011, 2012, 2013, 2014, 2015 and 2016 are payable and if so, are reasonable.

ii. Whether all or any of the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Applicants.

5 Directions were made by the Tribunal on 16 June 2017. They provided for the filing and serving of Statements of Case and for the preparation of a Hearing Bundle.

6 **Documents**

7 The documents before the Tribunal were:

a. A bundle prepared by the Applicants running to some 196 pages which included the Applicants' Application, a copy of the Applicants' Lease, the Applicants' Statement of Case, Service Charge Accounts for the years ending 31 December 2011, 2012, 2013, 2014, 2015 and 2016, and various invoices and copy correspondence. References to page numbers in this Decision which are annotated with the letters 'AB' are references to page numbers in that bundle.

b. A bundle of documents produced by the Respondent running to some 250 pages which included the Witness Statement of James Steventon a Director of the Respondent company, the Respondent's Statement of Case, HM Land Registry Official Copy of Register of Title Entries for the freehold title of the property, HM Land Registry Official Copy Entries of the Applicants' leasehold title, a copy of the Applicants' Lease, service charge accounts, and various invoices in relation to work carried out at the property. References to page numbers in this decision which are annotated with the letters 'RB' are references to page numbers in that bundle.

c. Skeleton Argument prepared by Counsel for the Respondent.

d. A copy of Decision of the Lands Tribunal (as it then was) in the matter of **Schilling & Schilling v Canary Riverside Development PTD Limited & Others** (2005) LRX/26/31/47 2005.

e. Further written submissions from the Applicants in respect of the Section 20C application.

## 8 The Inspection

9 The Tribunal inspected the property on the morning of 30 October 2017. Present were Mr Blumentals, Mr Joe Mellory-Pratt from the Respondent's Managing Agents Rebbeck Bros, and Mr James Steventon of the Respondent company.

10 The property is understood to have been built in 2007. It comprises 3 separate residential blocks which were described throughout the hearing as Blocks A, B and C. It is understood that it was built in a style to mirror as far as reasonably possible, the residential houses that had occupied the site previously. The blocks are brick partly rendered elevations under a pitched tiled roof. The property has the benefit of an underground car park which the Tribunal inspected. The Tribunal was shown the garage door and garage door motor, evidence of water ingress along the junction of the ceiling and the wall of the garage, and the store room. The Tribunal was also shown 5 external air vents that serve the garage, a gate and fixings, and steps leading down to Churchfield Road, various external emergency light fittings and the internal courtyard area.

## 11 The Law

12 The statutory provisions relevant to service charge applications are to be found in sections 18, 19, 20C and 27A of the Landlord and Tenant Act 1985 (the 1985 Act). They provide as follows:

### The 1985 Act

*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.*

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 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.*

(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*

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.*

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 leasehold valuation tribunal, or the First-Tier 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 –.....*

*(ba) in the case of proceedings before the First-Tier Tribunal, to the Tribunal.*

*(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.*

## 13 The Lease

14 A copy of the Lease appears at pages 24-57.

15 By clause 3 of the Lease, the lessee covenants to pay the service charge. The expression 'Service Charge' is defined at clause 1.5 to mean *"the proportion of Annual Expenditure (as defined by clause 3.9 hereof) specified in the Particulars"*.

The proportion is defined in the Particulars as the '*Service Charge percentage*' and is 6.66% of the expenditure incurred by the lessor in carrying out its obligations pursuant to clause 5.1.

16 The expression 'Annual Expenditure' is defined at clause 3.9 as follows:

*"The expression 'Annual Expenditure' shall mean all costs expenses and outgoings whatever incurred by the Lessor in or incidental to providing all or any of the Services and any VAT payable on such items but excluding any expenditure in respect of any part of the Development for which the Lessee or any other Lessee or the owner or occupier of any other lettable unit within the Development shall be wholly responsible but including an appropriate proportion of any sums incurred in relation to a larger area but properly apportionable to the Development and including such proper provision for services to be rendered in any subsequent financial year as the lessor shall deem appropriate".*

17 The expression 'Services' is defined at clause 1.6 to be the matters referred to in clause 5. Clause 5 provides:

*"The Lessor HEREBY COVENANTS with the Lessee (subject to payment of the Service Charge by the Lessee as follows:-*

*(a) to maintain, repair and mend, alter, re-build, renew and reinstate the Retained Parts (other than the Lift).*

*(b) to treat wash down paint and decorate in a proper and workmanlike manner the exterior of all buildings on the Development as often as the Lessor shall in its discretion consider to be reasonably necessary.*

*(c) (i) to maintain treat wash down paint decorate light and where required re-carpet all such internal parts of the buildings on the Development as often as the Lessor in its discretion considers to be reasonably necessary.*

*(ii) to maintain repair and where necessary re-surface the forecourts and parking areas of the Development.*

*(iii) to maintain the door entry system and fire alarm systems to the buildings on the Development.*

*(d) to maintain repair and renew all boundary walls hedges and fences belonging to the Development.*

*(e) to maintain repair cleanse and renew all Pipes which are not used solely by one unit on the Development.*

*(f) to maintain clean and light the Retained Parts to such standard as the Lessor may from time to time consider appropriate.*

*(g) to provide and maintain (at the Lessor's absolute discretion) lighting to such parts of the Retained Parts as the Lessor shall from time to time deem expedient and in the Lessor's absolute discretion.*

*(h) to provide and maintain and where necessary replace any shrubs plants or trees (if any) on the Retained Parts and keep the same planted and free from weeds.*

*(i) to supply provide purchase hire maintain renew replace service and keep in good order all fixtures and fittings appliances materials equipment and other things which the Lessor shall deem desirable or necessary for the maintenance appearance upkeep or cleanliness of the Property or any part of it.*

*(j) any other services relating to the Development or part of it provided by the Lessor from time to time during the Term and not expressly mentioned which may at any time during the Term be reasonably calculated to be for the benefit of the Lessee and other Lessees of the Development or be reasonably necessary for the maintenance upkeep and cleanliness of the Development or in keeping with the principles of good property management.*

*(k) to make any payment required by way of contribution (if any) to the cost of repair maintenance or otherwise in respect of any facility access way or other thing where used or owned in common with others similarly entitled.*

*(l) to employ at the discretion of the Lessor a surveyor accountant or other individual firm or company in connection with the surveying or accounting functions or the management of the Development and (in the entire discretion of the Lessor) to appoint managing agents in connection with the management of the Development collection of service charge and performance of the services and any other duties in or about the Development or any part of it including the general management administration security maintenance protection and cleanliness of the Development and in the event that the Lessor does not appoint a managing agent it shall be entitled to charge a reasonable management fee.*

*(m) to pay council or any replacement Tax and water and sewerage rates and gas and electricity in respect of all Retained Parts.*

*(n) in the event that the water and sewerage charges relating to the Property and any other flats in the Development are not separately and directly charged to the respective Lessees of all flats forming part of the Development to pay such charges attributable to the Development.*

*(o) in the Lessor's entire discretion to employ staff and pay wages and other benefits and to provide tools for any such staff.*

*(p) to take out such policy or policies of insurance against such risks relating to the Development or anything thereon or the management thereof and in such sum as the Lessor shall in its discretion from time to time decide.*

*5.2 To maintain the lift".*

18 Clause 5.3 of the Lease has a provision for the Lessor to create a reserve fund.

19 Clause 3 provides for the service charge payable by the lessees to be paid in advance by two equal instalments on 1 January and 1 July each year based upon an estimate provided by the lessor. In particular:

> *"3.5 The Lessee shall pay for every subsequent Financial Year a provisional sum calculated upon a reasonable estimate by the Lessor (or its surveyor or agents acting on its behalf) of what the Annual Expenditure is likely to be for that Financial Year by two half yearly payments on the Service Charge Payment Dates.*
>
> *3.6 If the Service Charge for any Financial Year shall:*
>
> *(a) exceed the provisional sum actually paid by the Lessee for that Financial Year, the excess shall be due to the Lessor on demand; or*
>
> *(b) be less than the provisional sum actually paid by the Lessee for that Financial Year the overpayment shall be due to the Lessee and any overpayment by the Lessee shall be credited against future payments due from the Lessee to the Lessor".*

## 20 The Hearing

21 For ease of reference, both Mr Blumentals and Mrs Shimizu are referred to as the Applicants albeit that the Lease to Flat 12, Falcon Heights as appears from the Official Copy Entries (9 RB) to be in the sole name of Mrs Shimizu. The Applicants confirmed at the start of the hearing that the application concerned solely their liability to pay and the reasonableness of certain service charge items for the years ending 31 December 2011, 2012, 2013, 2014, 2015 and 2016 and not service charge payments on account for the year ending 31 December 2017.

22 The Applicants said that they only came to the Tribunal as a last course of action. That they had over a number of years been trying to obtain information about and details of service charge items from the Respondent and the Respondent's managing agents but to no avail. That it was unfortunate that it had taken these proceedings for them to obtain documents that they had been seeking for some time. They accepted upon being questioned by the Tribunal that they had on occasions attended the Respondent's managing agents' offices to look at documents and indeed taken a copy of the service charge ledger away with them but questions they subsequently raised, they said, about items revealed by the ledger had not been answered to their satisfaction. They were not happy they said to just have copies of invoices for works allegedly carried out but not receipts for payment of those invoices or for materials referred to in those invoices. That as such, they said there was no evidence that work which had been invoiced had actually taken place.

23 The Applicants were also of the view that the Respondent was in breach of the terms of the Lease in two ways. Firstly, by not invoking and applying the arbitration clause, clause 3.10(43 AB) and secondly in allowing Mr B Manning who had historically worked for the Respondent as a site manager to as such run a business from his flat in breach of clause 2.13 of the Lease (36 AB). In such circumstances, they contended that by reason

of such alleged breaches, the Respondent was not entitled to recover service charges from them.

24 The Tribunal does not agree with the Applicants. A breach by the Respondent lessor of a term of the Lease does not preclude the Respondent from relying upon and seeking to enforce the provisions in the Lease which allow for the collection of service charges from the lessees at the Property.

25 Mr Dillon took the Tribunal through the Lease. He said that the bundle produced by the Applicants had been produced very late in the day and not in accordance with Directions. That it contained new material, such as the Applicants' Statement of Case (2-8 AB) which the Respondent had not had sufficient or adequate opportunity to properly consider. Upon being questioned by the Tribunal, Mr Dillon confirmed that he had had the Applicants' bundle for around 10 days. He did not seek the exclusion of the Applicants' bundle or any part of it but instead asked the Tribunal to bear in mind the fact that the bundle had been filed late in the day when it considered the evidence before it and its decision.

26 Mr Dillon referred the Tribunal to the case of **Schilling & Schilling v Canary Riverside Developments PTD Limited** (2005) LRX/26/31/47 2005, a Decision of the Lands Tribunal as it then was. The burden of proof that items of expenditure that made up the service charge had not been reasonably incurred Mr Dillon said rested on the Applicants. That they had in his submission failed to meet that evidential burden. He referred to the failure of the Applicants to produce Witness Statements and to a letter from the Applicants to the Tribunal (192 AB) dated 28 August 2017 which stated that the Applicants had no Witness Statements to produce and that the Applicants could not produce alternative quotes because they had not been notified prior to work being carried out. That Mr Dillon said was wrong. That it was perfectly possible to obtain estimates for historic works. For example, where works were carried out to the intercom system, it would be possible to find out the make of the intercom and to make enquiries of the manufacturer as to the cost of replacing the intercom or to carry out repairs to it. That it was possible to ask a contractor to inspect work that had been carried out and for him to produce an estimate of what he would charge for such work.

27 The Tribunal is sympathetic as to the Applicants' position. It is a common problem faced by lessees in applications of this nature when they are seeking to challenge the cost of works that have already been carried out. The Tribunal takes that difficulty into account when weighing up such evidence as a lessee is able to produce. However, the Tribunal must determine matters upon the basis of the evidence before it. Where a lessor has produced evidence of works being carried out for example in the form of invoices for such works which the lessee then seeks to challenge as being unreasonably incurred (whether by reference to the standard of work or the cost of the work or both), then there is an evidential burden on the lessee to provide a prima facie case of unreasonable cost or standard. As an expert Tribunal, the Tribunal will bring to bear its own expertise in

weighing up such evidence. The Tribunal makes its decision in this case by the application of those evidential principles.

28 With the agreement of the parties, each item of expenditure challenged by the Applicants was addressed in turn.

29 **Expenditure for the year ending 31 December 2011**

30 **£16.27 – supply and fit replacement lift motor room lock**

31 There is an invoice from BD Manning at 108 RB.

32 **The Applicants' Case**

33 The Applicants said that historically work to the lift that just serves Block A was not charged to the lessees of Blocks B and C. That because the lessees of Blocks B and C did not have the benefit of that lift.

34 **The Respondent's Case**

35 Mr Dillon said that the Applicants must pay what the Lease says they must pay. That this item was correctly charged as part of the service charge payable by the Applicants under the terms of the Lease.

35 **The Tribunal's Decision**

36 The Tribunal referred the parties to clause 5 of the Lease. Clause 5.1(a) provides for the lessor to *"maintain repair amend alter re-build renew and reinstate the retained parts (other than the Lift)"*.

37 The *"Lift"* is defined at clause 1.27 to mean the lift in Block A.

38 However, clause 5.2 of the Lease provides that the Lessor covenants to *"maintain the lift"*. Clause 5.3.1 also contains a provision for monies to be paid into the reserve fund to cover inter alia *"lift maintenance"*.

39 Mr Dillon for the Respondent says that the effect is that the costs of the maintenance and repair of the lift in Block A forms part of the service charge which is payable by the Applicants. The Applicants say that is wrong, that such costs are not payable by them.

40 At first blush when reading the Lease, there would appear to be an ambiguity or at least a tension between clause 5.1(a) which specifically excludes the lift in Block A from the 'Retained Parts' (and the definition of the 'Retained Parts' at clause 1.17 includes lifts) for the purposes of maintenance and repair, and clause 5.2 which provides for the lessor to maintain the lift.

41 However, when read as a whole that ambiguity or tension is in the view of the Tribunal resolved. Clause 3.1 provides for the lessee to pay the 'Service Charge'. 'Service Charge' is defined to mean *"the proportion of Annual Expenditure (as defined by clause 3.9 hereof) specified in the*

*Particulars"*. Annual Expenditure at clause 3.9 is the costs, expenses and outgoings incurred by the lessor in providing the services set out in clause 5. The lessee is thus required to pay a service charge which is a proportion of the costs and expenses incurred by the lessor in providing the services in clause 5. The question then is, what is that proportion? It is as specified in the Particulars; *"6.66% in respect of the expenditure incurred by the lessor pursuant to clause 5.1"*. The lessee pays a proportion of the expenditure incurred in respect of the services provided by the lessor as set out in clause 5.1 which are stated to exclude those relating to the lift in Block A. The lessee does not accordingly pay a percentage or proportion of the expenses incurred by the lessor in relation to clause 5.2. That makes sense given that there is no lift in Block C.

42 If the Tribunal's interpretation of the Lease is wrong, then in the alternative, given that there is at the very least an arguable ambiguity in the terms of the Lease, then the Tribunal approaches the interpretation of the Lease by reading the document as a whole and by having regard to all the relevant circumstances which would have been known to the parties to the Lease when it was drafted. In particular, it would have been known to the parties at the time the Lease was drafted that there was only one lift and that was in Block A. That there was no lift serving Block C. The lift in Block A was not to any benefit to the lessees of Block C. A reasonable person with that background knowledge would in the view of the Tribunal have understood the parties to have intended and to have meant that a lessee of Block C would not be required to contribute to the cost of maintaining a lift that solely served Block A. Further, if there is an ambiguity it is open to the Tribunal to construe the Lease, as it does, against the interests of the party who is presumed to have drawn it up which is the lessor (the Respondent's predecessor in title).

43 It is for those reasons that the Tribunal determines that costs incurred by the Respondent in carrying out works of repair or maintenance to the lift of Block A are not recoverable as part of their service charge from the Applicants as lessees of a flat in Block C. The sum of £16.27 appears to relate solely to the lift motor room lock in Block A and as such is clearly part of the provision of the lift in Block A. Accordingly the Tribunal determines that this sum does not form part of the service charge that may be recovered by the Respondent from the Applicants.

44 **£70 – work to intercom**

45 The invoice for this appears at 108 RB. It is the same invoice as above from Mr B D Manning and is described as *"to supply and fit replacement intercom unit to Block C"*.

46 **The Applicants' Case**

47 The Applicants said there was no evidence that the work had been carried out; no evidence in the form of a receipt for the cost of purchasing replacement parts.

48 **The Respondent's Case**

49 Mr Dillon said that the evidence was in the form of the invoice at 108 RB. The Respondent also relied upon the statement of James Stevington (TAB 2 RB), a director of the Respondent company, that in his belief all works set out in the invoices which were disputed had been carried out to a reasonable standard and at a reasonable cost. Mr Dillon also referred to clause 3.3 of the Lease (17 RB) which provides for an account to be produced at the end of each financial year showing the annual expenditure for that year to be certified by an accountant as being *"conclusive evidence for the purposes of the matters referred to in such account"*.

50 **The Tribunal's Decision**

51 There is no evidence adduced by the Applicants that the work to the intercom unit to Block C was not carried out. There was no evidence adduced by the Applicants that the work was carried out other than to a reasonable standard and other than at a reasonable cost. In the circumstances and upon the basis of the evidence before it, the Tribunal determines that this sum is reasonably incurred.

52 **£85 – roof inspection**

53 The invoice for this item is at page 109 RB. It is from Mr B D Manning dated 11 September 2011 and is stated to cover the carrying out of a roof inspection with a roofer, the carrying out of a water test and the supply of materials to the roofer to repair the roof.

54 **The Applicants' Case**

55 The Applicants said that this item should have been charged against the buildings insurance and recovered from the insurers and not charged to the lessees as part of the service charge. The Applicants made reference to the case of **Continental Property Ventures Inc v White** (2006) 1 EGLR 85.

56 **The Respondent's Case**

57 Mr Dillon said that even if it was right that the cost of these works could be reclaimed from insurers or from the NHBC, that the cost was still payable in the first instance as part of the service charge. If a landlord, he submitted, was slow in bringing an insurance claim, a lessee could go to the County Court and seek an injunction compelling the lessor to make a claim.

58 Mr Mellory-Pratt the representative of the Respondent's managing agent said that the cost of these works in any event fell within the buildings insurance excess of £250 and that was the reason why he did not submit an insurance claim. The work he said was to trace and find a leak in Block A for a roofer to repair. That if the roofer had carried out the inspection and tracing work, then the job would have cost more.

59 **The Tribunal's Decision**

60 The Tribunal accepts Mr Mellory-Pratt's contention that it would not make commercial sense to make an insurance claim for this matter where the sum claimed fell within the buildings insurance excess. There was no evidence adduced by the Applicants that the work was not carried out or was not necessary or was not reasonably incurred. As such, the Tribunal is satisfied that the cost of £85 was reasonably incurred and is recoverable as part of the service charge.

61 **£436.49 – invoice B D Manning 29 November 2011**

62 The invoice for this item appears at 110 RB.

63 The Applicant had asked for a breakdown of this item and that is contained within the invoice and having examined the invoice, the Applicants confirmed that they accepted this figure.

64 **Year ending 31 December 2012**

65 **£580.54 – invoice B D Manning 28 December 2011**

66 The invoice for this item appears at 111 RB.

67 **The Applicants' Case**

68 The Applicants said that it was wrong for the Respondent just to accept the figures in the invoice. Certain of the items contained in the invoice should, the Applicants said, have been recovered from the NHBC being work consequent on works carried out by NHBC.

69 **The Respondent's Case**

70 The Respondents' case is that whether or not these works could or should have been recovered from the NHBC, they still remain payable in the first instance as part of the service charge. It was not accepted that these works could in any event have been recovered from NHBC.

71 **The Tribunal's Decision**

72 On the basis of the evidence before it, the Tribunal is satisfied that this item of expenditure was reasonably incurred. There was no evidence adduced by the Applicants to the effect that the work was not carried out or was not carried out for a reasonable sum. As such, the Tribunal is satisfied that these costs are recoverable as part of the service charge.

73 **£164.99 – Screwfix Direct Limited invoice 15 August 2012**

74 The invoice for this matter appears at page 112 RB and relates to the purchase of a wet or dry vacuum machine.

75 **The Applicants' Case**

76 The Applicants said that this item was over-priced and that alternative quotes should have been obtained. They complained that the vacuum machine was not kept on site. They suggested that Screwfix advertise such machines for £59.

77 **The Respondent's Case**

78 Mr Dillon said that the evidence was that this was purchased by the Respondent. That no evidence was adduced by the Applicants that the cost of purchasing the machine had been unreasonably incurred.

79 **The Tribunal's Decision**

80 The Tribunal is satisfied upon the evidence before it that the cost of this item was reasonably incurred. There was no evidence adduced by the Applicants for example in the form of alternative quotes. As such, the Tribunal determines that this item was reasonably incurred and is recoverable as part of the service charge.

81 **£148 – emergency sweeping and vacuuming of garage following flood**

82 The invoice for this item is at 113 RB.

83 **The Applicants' Case**

84 The Applicants said that these works form part of the site manager's remit which is at 135 AB. That it is work covered by the annual retainer paid to Mr B D Manning at the time as site manager. The work should not have been charged by Mr Manning in addition to his retainer. Further, the Applicants say, they were present at the time and they disputed that 3 men were present and that the work took in total 10 man hours.

85 **The Respondent's Case**

86 The Respondent says that the work was carried out. That Mr Manning's son helped out with the work. That there was no Witness Statement from the Applicants to challenge the evidence that this work was carried out.

87 Mr Manning's role as site manager was a consistent theme of the Applicants case. The Respondent says that his fees appear as *"site maintenance fees"* in the service charge accounts (for example the sum of £1400 for the year ending 31 December 2013 (54 RB) and £3900 in the accounts for the year ending 31 December 2012 (47 RB)). That the reason why the figure for 2012 was higher than 2013 was because that prior to 2013, all the site manager's fees had been charged under one heading. However from 2013 onwards, they were charged as a separate retainer fee, which in 2013 was £1400, plus additional fees for works carried out over and above those covered by the retainer. Those additional fees were part of the 'repairs and maintenance' item in the accounts. That the work carried out by Mr Manning under his retainer was of a low level form of obligation. For example, it did not cover emergency work. Mr Mellory-

Pratt confirmed that Mr Manning had been retained not as a caretaker but as a site manager. That prior to agreeing a standard fee for his retainer/remit of £1400 in 2013, a decision had to be made in each case as to whether or not work carried out by him was within his remit or outside of it. That he said would depend upon the cost of the works and the nature of the works. That if the costs were significant, that would be referred to the directors of the Respondent company for approval, which was sometimes given and sometimes not. Mr Steventon said that the remit figure in 2013 of £1400 had been agreed at the Respondent Company's AGM by all lessees present and was only intended to cover simple tasks such as changing light bulbs. That Mr Manning's retainer would for example not cover the repairing of sump pumps per se, but the regular inspection of them and arranging specialist maintenance help as and when required. That the cost of clearing the garage after a flood was not covered by Mr Manning's remit.

88 **The Tribunal's Decision**

89 There was no evidence adduced by the Applicants that the work covered by the invoice at 113 RB was not carried out, nor the sum charged was unreasonably incurred. Further, the Tribunal is satisfied that the work covered by that invoice goes beyond that contained in the site manager remit at 135 AB. As such, the Tribunal is satisfied that this item of expenditure was reasonably and properly incurred and is recoverable as part of the service charge.

90 **£448.87 – B D Manning invoice 10 November 2012**

91 The invoice for this matter is at 114 RB.

92 **The Applicants' Case**

93 The invoice purports to cover inter alia the cost of supplying and replacing emergency light fittings to Blocks A and C. The Applicants said that the cost for the light fittings is too much. That they believe that the light fittings had not been replaced, just the lamps within the fittings. They referred to a number of invoices from a company called Beales Electrical Contracting Services Limited at pages 165-170 AB which they said was evidence that the replacement of lamps could be carried out for a much lower sum.

94 **The Respondent's Case**

95 The Respondent says that the work set out in the invoice was carried out. That it was to supply and replace emergency light fittings, not just lamps.

96 **The Tribunal's Decision**

97 There was no evidence before the Tribunal that this work was not carried out or that the cost was unreasonable. The the invoice was to supply and replace emergency light fittings not just lamps. In the circumstances, upon

the basis of the evidence before it, the Tribunal determines that this sum was reasonably incurred and is recoverable as part of the service charge.

98 **Year ending 31 December 2013**

99 **£153.46 – invoice B D Manning, 23 February 2013**

100 The invoice for this matter is at 115 RB.

101 **The Applicants' Case**

102 The Applicants said this is work that should have been charged to NHBC. It relates to the ingress of water to the garage which it is understood NHBC were responsible for and had been trying to resolve.

103 **The Respondent's Case**

104 The Respondent said that whether or not this work could or should have been charged to NHBC, it was in the first instance recoverable as part of the service charge. Had it been charged to NHBC, then there would have been a credit made to the service charge account. In the event it was not work which the Respondent accepted should be charged to the NHBC.

105 **The Tribunal's Decision**

106 The Tribunal is not able from the evidence before it to determine whether or not these works should have been referred to and claimed back from the NHBC. If that had been the case and had that been carried out, there would no doubt have been a credit to the service charge account. However, given the Tribunal is satisfied that the work was carried out and there was no evidence before it that the cost was not unreasonably incurred, the Tribunal determines that this item was reasonably incurred and is recoverable as part of the service charge.

107 **£75 – part of invoice B D Manning, 23 February 2013**

108 The invoice for this matter appears at 116 RB.

109 **The Applicants' Case**

110 The Applicants said that they accepted the work was carried out but should have been covered by the general remit of Mr Manning as site manager, not charged in addition to that remit.

111 **The Respondent's Case**

112 The Respondent says that the work goes beyond Mr Manning's remit. That it was noteworthy from Mr Manning's invoices that there were occasions when he 'charged' for time spent on a free of charge ('FOC') basis and it was understood he did so because such work was within his remit. That Mr Manning clearly recognised what work was within his remit and was outside. That this work was outside of that remit.

113 **The Tribunal's Decision**

114 There was no evidence before the Tribunal that this work was not properly carried out and that the costs were not reasonably incurred. Given the nature of the work as described in the invoice, the Tribunal is satisfied that the work fell outside of Mr Manning's remit. As such, the Tribunal determines that the sum of £75 was reasonably incurred and is recoverable as part of the service charge.

115 **£52 – invoice B D Manning, 23 February 2013**

116 This appears on the same invoice as on the matter above.

117 **The Applicants' Case**

118 The Applicants very fairly said that they accepted that the sum was reasonable but suggested that as the work was described as for the supply of materials and redecoration to one wall and ceiling to the 'garage lift lobby', that should only be charged to the lessees of Block A and not to the lessees of Blocks B and C.

119 **The Respondent's Case**

120 The Respondent says this was a cost providing services as defined in the Lease. That the Respondent cannot under the terms of the Lease apportion costs between one block and another.

121 **The Tribunal's Decision**

122 For the reasons stated above, the Tribunal is of the view that works that are carried out solely to the lift in Block A are not recoverable from the Applicants as lessees of a flat in Block C. The garage lift lobby presumably simply serves as a lobby or entrance way to the lift and as such is for the benefit solely of users to the lift in Block A. It is for practical purposes part of the lift system. As such, the Tribunal determines that this item is not recoverable by the Respondent from the Applicants as part of the service charge.

123 **£145.97 – invoice B D Manning, 23 February 2013**

124 The invoice is at 117 RB.

125 **The Applicants' Case**

126 The Applicants said there are two items on this invoice which should not be recovered from them as they relate to works to the lift at Block A. The first is £94.49 which is described in the invoice as *"Briton 2130 overhead delayed action door closure to garage lift lobby door"*. The second is £23.74 which is described as *"1 no. 2D light fitting for lift lobby"*.

127 **The Respondent's Case**

128 As before, the Respondent's case is that the works carried out to the lift in Block A are recoverable under the terms of the Lease from the lessees of Blocks B and C.

129 **The Tribunal's Decision**

130 The Tribunal is satisfied upon the basis of the evidence before it that these works relate to the lobby serving the lift in Block A. As such, for the reasons stated above, the Tribunal determines that these two items of £94.49 and £23.74 are not recoverable from the Applicants as part of the service charge.

131 **Year ending 31 December 2014**

132 **£139 – invoice B D Manning, 23 January 2014**

133 The invoice for this matter is at 118 RB.

134 Mr Mellory-Pratt said by reference to an email at 118.1 RB that he sent to a Mr Tony Braithwaite of NHBC, that the cost of these works was in the event recovered from NHBC and as such, that sum has been credited to the service charge account. In the circumstances, the Applicants confirmed that this item was no longer in issue.

135 **£303.70 – invoice B D Manning, 14 February 2014**

136 The invoice appears at 119 RB.

137 The Applicants disputed two items. The sum of £174 for the supply and replacement of emergency light fittings to Block C, and £29.70 for the supply of two pin lamps.

138 Mr Mellory-Pratt again explained that the sum of £174 had in the event been recovered from NHBC. That NHBC had been sent a copy of Mr Manning's invoice of 14 February 2014 and were happy with it and this sum had therefore been credited to the service charge account. The Applicants confirmed that as such this item was no longer in dispute.

139 The Applicants also confirmed that the balance of this invoice including the sum of £29.70 was no longer in dispute.

140 **£349 – invoice B D Manning, 3 March 2014**

141 The invoice is at 120 RB.

142 The Applicants' case was that £75 of this invoice should have been included within the site manager's remit. Mr Mellory-Pratt again explained that this sum had in fact been recovered as before from NHBC and re-credited to the service charge account. As such, the Applicants confirmed that this item is no longer in dispute.

143 **£150.60 – invoice B D Manning, 17 March 2014**

144 This invoice is at 121 RB.

145 **The Applicants' Case**

146 The Applicants said that these works related to a pedestrian gate allowing access onto and from Churchfield Road. That when the gate was originally installed, it was faulty. That as such, Mr Manning had to carry out works of repair. That the original installer should have been made to come out and rectify the defective original installation. The Applicants accept that the work carried out by Mr Manning was well done but believe that properly the cost of that work should be recovered from the original installer and therefore it was unreasonable to seek payment from the lessees as part of the service charge. The Applicants said they did not, subject thereto, dispute the figure.

147 **The Respondent's Case**

148 Mr Dillon said that the Applicants' approach was the wrong way round. That they did not dispute that this work was properly carried out by Mr Manning. That what they should have challenged was the original work carried out by the original installer.

149 **The Tribunal's Decision**

150 The Tribunal agrees with Mr Dillon. The Applicants on their own case do not dispute that the work carried out by Mr Manning was properly carried out and for a reasonable sum. Whether or not the Respondent could or should have sought to recover the cost of the original works from the original installer is another matter. There was no evidence before the Tribunal as to the cost of those original works, as to the identity of the installer, or as to whether or not those works were defective. The Applicants sought to challenge the work carried out by Mr Manning which in the event they did not dispute was necessary or reasonably incurred. The Tribunal determines that this sum was reasonably incurred and is payable as part of the service charge.

151 **£1650 and £1140 – invoice B D Manning, 23 April 2014**
**G Parnell Roofing Limited invoice, 22 April 2014**

152 The invoices for these matters appear respectively at pages 122 RB and 123 RB.

153 **The Applicants' Case**

154 The Applicants said that these were works that properly should have been subject to a buildings insurance claim and the cost thereof recovered from the insurers. That even if an insurance claim had been unsuccessful, it is something that the Respondent should have tried. That the work was necessitated by damage caused by a storm. That the state of the roof coverings to the car park vents had been discussed a year previously and

Mr Manning had concluded that there was nothing wrong with the coverings. That this was storm damage, which was why it should have been the subject of an insurance claim. That Mr Blumentals had spoken to the insurance company who had told him that they had not been approached. Mr Blumentals could not say whether he viewed the figures as reasonable or not.

155 **The Respondent's Case**

156 Mr Dillon said this was not a matter where it was necessary to consult the lessees pursuant to the provisions of section 20 of the Landlord & Tenant Act 1985 given the sums involved. Mr Mellory-Pratt said that the Respondent had been looking to carry out work to the car park vents prior to the storm. Indeed that it had obtained quotes for such works from two companies Cambuild (123.1RB) and C&D Roofing. Those quotes had been quite high and they had been discussed with Mr Manning who suggested he could do some of the work and that G Parnell Roofing Limited could do another part of it, so the overall cost would be lower. That in the event is what happened. Mr Mellory-Pratt said that the directors of the Respondent company had agreed prior to the storm to have the work carried out because such work was necessary to due to wear and tear not because of any subsequent storm damage.

157 Mr Dillon said that it was wrong for the Applicants to suggest that the Respondent should have made an insurance claim in circumstances where the Respondent believed the work was necessitated by reason of wear and tear as opposed to storm damage. That it was noteworthy that the evidence of Mr Mellory-Pratt was that quotes for the work had been carried out prior to the storm.

158 **The Tribunal's Decision**

159 The invoice from Mr Manning at 122 RB is dated 23 April 2014. The invoice from G Parnell Roofing Limited at 123 RB is dated 22 April 2014. There is an estimate from CAM Builders (Construction & Maintenance) Dorset Limited at 123.1 RB dated 3 March 2013. There does not appear to be an estimate in the bundle from a company called C&D Roofing but at 123.2 RB is an estimate from a company called NGM which appears to include work to 4 roof vents dated 1 March 2012. Those 2 estimates are consistent with the Respondents case that the Respondent was considering work to the garage roof vents prior to the storm. As such, upon the basis of the evidence before it, the Tribunal accepts Mr Mellory-Pratt's evidence that work was required to the car park vents due to wear and tear which had been identified prior to the storm. That as such, this work was not carried out by reasons of storm damage but due to identified wear and tear. There was no evidence before the Tribunal that the work had not been carried out, had not been carried out at a reasonable standard and was not for a reasonable sum. As such, the Tribunal determines that these costs were reasonably incurred and are recoverable as part of the service charge.

160 **£375 – invoice B D Manning, 10 June 2014**

161 This invoice is at 124 RB.

162 **The Applicants' Case**

163 The Applicants dispute that the work covered by this invoice was carried out. Further or in the alternative, it was to cover work not done properly in the first place. That as such, the sum of £375 was unreasonable.

164 **The Respondent's Case**

165 Mr Mellory-Pratt said the work was carried out following complaints from lessees that the roof to one of the car park roof vents should have a fall on it to allow water to run off. That water had been pooling on the roof. It was not work carried out to rectify previous work but instead was extra work. Mr Dillon said in any event, even if the Applicants were right in saying that this was work carried out to rectify previous work, they were again challenging the wrong invoice. That they should be challenging the original work badly carried out, not the cost of rectification.

166 **The Tribunal's Decision**

167 Upon the basis of the evidence before it, the Tribunal is satisfied that this work was properly and reasonably carried out. The invoice refers to alterations to the garage roof vents which are consistent with Mr Mellory-Pratt's explanation of the works. There is no evidence before the Tribunal that the sum charged for the works was not reasonably incurred. As such, the Tribunal determines that the cost of these works was reasonably incurred and is recoverable as part of the service charge.

168 **£55 (2 x £27.50) – invoice B D Manning, 26 June 2014**

169 The invoice is at 125 RB. In addition there are emails relating to this matter at 125.1 RB-125.3 RB.

170 Mr Dillon explained that this was a charge for time spent by Mr Manning looking for the owner of a scooter that had been wrongly parked in the underground car park. It was untaxed. In the event, the scooter had been traced as belonging to a tenant of one of the lessees. These costs in the event had been agreed to be paid as to half £27.50 by the individual lessee and the balance of £27.50 as part of the service charge.

171 Mr Dillon confirmed however that the Respondent accepted that these costs were in fact entirely a matter between the Respondent and the individual lessee. Although the invoice was for £55 because the lessee had already agreed to pay £27.50, the amount in dispute was only the balance of £27.50. The Respondent accepts that that balance will not be recovered as part of the service charge but instead will seek to recover it from the individual lessee.

172 **The Tribunal's Decision**

173 In accordance with the concession made by the Respondent at the hearing, the Tribunal determines that the balance of this invoice which was in dispute of £27.50 is not recoverable as part of the service charge.

174 **£415 – invoice B D Manning, 21 July 2014**

175 This invoice is at 127 RB.

176 Mr Dillon explained that of this sum, £167.45 had been charged to the lessee of Flat 11 so the balance that formed part of the service charge was £247.55 which in the event that had been recovered from NHBC and credited to the service charge account.

177 In the circumstances, the Applicants accepted that this item was no longer in dispute.

178 **£50 – invoice Devere Parking Services Limited, 24 September 2014**

179 Mr Mellory-Pratt explained that this was a charge made by Devere Parking Services Limited, a form of retention, for them to supply ongoing car parking security services. If a lessee found another car parked in their car parking space, they could telephone Devere Parking Services Limited who would take action to have the car removed.

180 As the nature of the charge had been explained to the Applicants, they confirmed that they accepted this charge as reasonable.

181 **£130 – invoice M C Cleaning Services, 11 August 2014**

182 This invoice appears at 129 RB.

183 **The Applicants' Case**

184 The Applicants said that window cleaning was not an item which was recoverable as part of the service charge under the terms of the Lease and that in any event, their windows had not been cleaned (indeed they did not need cleaning). That any costs incurred in cleaning windows should be charged to the lessees of flats whose windows had been cleaned.

185 **The Respondent's Case**

186 Mr Mellory-Pratt agreed that window cleaning was not an item which could be recovered as part of the service charge. That in practice lessees tended to carry out their own window cleaning. However, the managing agents had noticed that the frames of certain windows were in a bad condition and were concerned that if they were not cleaned there would be further deterioration and thus an increase in future costs of repair. That it was thought sensible for good property management reasons to carry out a one-off clean of all window frames at the development including windows. Mr Dillon contended that the costs thereof were costs that fell under the provisions of clause 5.1(j) of the Lease. That was a form

of sweeping-up provision which covered works carried out by the Respondent from time to time which were not otherwise expressly mentioned in the Lease but which the Respondent reasonably believed were for the benefit of the lessees or which were reasonably necessary for the maintenance upkeep and cleanliness of the development or in keeping with the principles of good property management.

187 **The Tribunal's Decision**

188 There was no evidence before the Tribunal to the effect that this work had not been not carried out. If the window frames to the Applicants' property were not cleaned because they had kept them clean themselves, there was no evidence to suggest that the work was not carried out to clean the frames to other flats. The Tribunal accepts Mr Mellory-Pratt's evidence that this work was carried out for reasons of good property management to prevent further deterioration to window frames. It agrees with Mr Dillon that such work is covered by the provisions of clause 5.1(j) of the Lease. As such, the Tribunal determines that these charges were properly and reasonably incurred and are recoverable as part of the service charge.

189 **Year ending 31 December 2015**

190 **£174 – invoice B D Manning, 8 March 2015**

191 The invoice is at 130 RB.

192 **The Applicants' Case**

193 The Applicants contend that the cost of this work was excessive. The work relates to the supply of an emergency light fitting and they say that the work could have been carried out for less money. They refer again to the invoices from Beales at pages 165 AB-170 AB.

194 **The Respondent's Case**

195 Mr Mellory-Pratt said that it was the Respondent's practice to buy a number of lamps and to hold a few in stock. That this was not simply a question of supplying a lamp but of supplying a complete light fitting. That the installation thereof had been carried out by Mr Manning free of charge or more particularly as part of his retainer. That he was comfortable that Mr Manning had the requisite experience and skills to fit an emergency light fitting. As such, in his view, the cost of the supply of an emergency light fitting as set out in the invoice was reasonably incurred.

196 **The Tribunal's Decision**

197 There was no evidence before the Tribunal to the effect that the cost of an emergency light fitting for £174 was unreasonably incurred. That the invoices relied upon by the Applicants from Beales were not on a like for like basis but referred to lamps not light fittings. In the circumstances, upon the basis of the evidence before it, the Tribunal is satisfied that this

cost was reasonably incurred and is recoverable as part of the service charge.

198 **£264 – invoice Beales, 2 June 2015**

199 This invoice is at 131 RB. This item was no longer in dispute and was accepted by the Applicants.

200 **£301.80 – Lawn mower**

201 The invoices/receipts for this sum are at 133 RB. They appear to be for the cost of a lawn mower for £276, 1 litre of oil for £5.80 and an item described as 'pump 3 energy supreme A' for £20.

202 **The Applicants' Case**

203 The Applicants said that this item, £276, relates to the cost of replacing a lawn mower used at the property. That the original lawnmower which was replaced was a very basic lawn mower. That all that was required was to replace with a lawn mower of a similar type which could have been obtained for example from B&Q for around half the price. The Applicants also questioned where the lawn mower was now.

204 **The Respondent's Case**

205 Mr Dillon said that no evidence had been adduced by the Applicants to support their contention that a lawn mower could have been purchased for a lower sum. It would have been quite easy for them to obtain estimates from other lawn mower suppliers. That the Tribunal must decide the matter upon the basis of the evidence before it.

206 **The Tribunal's Decision**

207 The Tribunal has some sympathy with the Applicants' position. There is little lawn at the property and certainly not it would appear sufficient to warrant the purchase of an expensive lawn mower. However, the Tribunal must decide the matter upon the basis of the evidence before it and the Applicants have failed to adduce any evidence in support of their contention that a lawn mower could have been purchased for a lesser sum. It would not have been difficult for them to do so and had they done so, the Tribunal may well have given significant weight to that evidence. However, upon the basis of the evidence before it, the Tribunal determines that the cost of replacing the lawn mower was reasonably incurred and this sum is recoverable as part of the service charge. If it is the case that the lawn mower is no longer on site, for example if it has been taken by Mr Manning, then that is a separate matter for the Applicants to pursue. The question for the Tribunal is whether or not this item of expenditure was reasonably incurred at the time that it was incurred.

208 **£250 – invoice B D Manning, 8 July 2016**

209 The invoice is at 134 RB.

210 **The Applicants' Case**

211 These are works described as emergency works to re-start the sump pump following a failure of the pump. It was work to clear flooding from the garage area including the store room entrance areas. The Applicants say that these works were part of Mr Manning's remit and should have been covered by the retainer fee paid to him. That because the remit (135 AB) states at paragraph 3 that it includes the *"regular running of sump pumps for surface water"*. Further, it was understood that a payment was made to a specialist company once a year to service the pumps. The Applicants believe the pumps had failed due to rubble in the pump closures and perhaps should have been recovered from NHBC. The Applicants noted that there was no detail on the invoice as to time spent by Mr Manning.

212 **The Respondent's Case**

213 Mr Mellory-Pratt said that Mr Manning had spent a considerable amount of time clearing the flooding following the failure of the sump pump. He had tried unsuccessfully to get the pump working. That a specialist firm had been consulted who said the pumps had not failed because of debris and this was not a matter which would have formed the subject of a claim to NHBC.

214 **The Tribunal's Decision**

215 The Tribunal is satisfied upon the basis of the evidence before it that the works to carry out clearance of flooding caused by the failure of the pumps are not works which fall within Mr Manning's retainer. His remit appears to be to periodically run the pumps and presumably to inspect. The works of repair are of a specialist nature which reasonably would involve referral to a specialist company. The work to clear flooding from the garage was work that went beyond Mr Manning's remit and was work that was properly incurred. The Tribunal accepts Mr Mellory-Pratt's evidence that the cost of these works were not works that were recoverable from NHBC. In all the circumstances, the Tribunal accepts that these costs were reasonably incurred and are recoverable as part of the service charge.

216 **£90 – invoice Fix A Door Limited, 9 September 2015**

217 The invoice is at 135 RB.

218 **The Applicants' Case**

219 The Applicants' case is that the works covered by this invoice which are works to carry out a service to a car park shutter are works covered by Mr Manning's remit and should have been carried out by him and not by Fix A Door Limited. The Applicants referred to document 136 AB which they said were a note of questions and responses put by them to Rebbeck Bros which they say confirmed that the remit included regular inspections and maintenance of the garage door when required.

220 **The Respondent's Case**

221 Mr Mellory-Pratt said that Fix A Door Limited was a specialist company that was retained to maintain the garage doors. That it was good practice to use a competent specialist contractor for such work. That Mr Manning's involvement had been for simple maintenance works and adjustments. That the works carried out by Fix A Door Limited went beyond Mr Manning's retainer.

222 **The Tribunal's Decision**

223 The Tribunal agrees with Mr Mellory-Pratt. That it would be unreasonable for Mr Manning's remit to extend to carrying out service works to the car park shutters. That in any event the remit does not appear to do so. That it was good practice to retain a specialist company to carry out such works. There was no evidence before the Tribunal that this cost had not been reasonably incurred and as such the Tribunal determines that it is recoverable as part of the service charge.

224 **£280, £640 and £584.94 – invoices The Saint of Paint, 27 October 2015 and Ace Plumbing Heating & Drainage, 6 July 2015**

225 The invoices are at 137 and 138 RB.

226 **The Applicants' Case**

227 The Applicants' case is that these are works which properly should be recoverable under the terms of the buildings insurance policy or from the lessee of the flat concerned.

228 **The Respondent's Case**

229 Mr Mellory-Pratt explained that these works related to a buildings insurance claim in relation to Flat 5. There had been a leak from inside Flat 5 believed to be from a soil pipe which had caused damage to the lobby next to the car park. That the element of the cost that related to the repair of the pipe in Flat 5 had been re-charged to Flat 5. That in fact the only elements of these charges which were sought to be recovered as part of the service charge were the insurance excess of £250 and £190 that had been spent in installing an inspection hatch to the basement lobby to assist in tracing any future leaks.

230 Mr Dillon referred the Tribunal to clause 3.9 of the Lease. In particular that the definition of 'annual expenditure' excluded *"any expenditure in respect of any part of the Development for which the Lessee or any other Lessee or the owner or occupier of any other lettable unit within the Development shall be wholly responsible ..."*. The effect of clause 3.9 Mr Dillon said was that there could not be included within the service charge an item of expenditure for which a lessee was wholly responsible. That expression meant wholly responsible under the terms of the Lease. In this case damage had been caused to common parts which it was the

responsibility under the terms of the Lease for the Respondent to repair. A claim had been made against the insurance in relation to those works but the excess still fell to be paid by the lessees as part of the service charge.

231 **The Tribunal's Decision**

232 The Tribunal agrees with Mr Dillon's interpretation of clause 3.9. Where damage is caused to a common area, it is the Respondent's responsibility to repair that damage. Whether or not in turn it might recover the costs of that repair from an individual lessee was a different matter. In a case where damage was caused to the interior of one flat by reason of a leak from a neighbouring flat, that would be a matter between the individual lessees concerned and not something with which in the absence of damage to a common part or an area outside of the demise of an individual flat(s) that the Respondent need concern itself with. That if it did, it would not be able to recover any costs incurred as a consequence as part of the service charge. In this case damage was caused to a common part, the cost of which was reclaimed as part of the insurance but the excess still fell to be paid as part of the service charge. As such the Tribunal determines that the sum of £250 being the cost of repair amounting to the buildings insurance excess, is recoverable as part of the service charge. If the Respondent in turn decided to seek to recover that sum from the individual lessee concerned (and the Tribunal does not make a determination as to whether or not that would be possible) that would be a separate matter which if successful would allow a credit to the service charge account.

233 As to the sum of £190 spent in installing an inspection hatch, the Applicants very fairly at the hearing accepted this was reasonable (the nature of the works having been explained to them) and this item was no longer in dispute.

234 **£180 described by the Applicants as 'electric gates'**

235 The Respondent explained that this item related to an annual maintenance charge for the electric gates, and in the circumstances the Applicants reasonably confirmed at the hearing that the item was no longer in dispute.

236 **Year ending 31 December 2016**

237 **£84 – invoice Just Limited, 31 December 2015**

238 The invoice is at 146 RB.

239 At the hearing the Applicants reasonably said they now accepted that this was a reasonable expense and not in dispute.

240 **£563.66 – invoice B D Manning, 8 January 2016**

241 The Applicants said there was only one item in this invoice that was challenged and that was the sum of £213.66 described as *"supply new*

*stock 2 pin 4 pin and garage tube lamps and starters".* There was they contend no evidence that those had been purchased or as to where they were now.

242 Mr Mellory-Pratt said that they had been purchased and historically had been stored in the electrical/water meter cupboard and in the basement pump room. In the circumstances the Applicants confirmed that this item was now accepted.

243 **£270 – invoice Mango Property Maintenance, 13 January 2016**

244 The invoice is at 153 RB.

245 The Applicants said this appeared to be described in the maintenance ledger produced by Rebbeck Bros at 133 AB as 'gate repairs' and they queried what gate repairs had been carried out. Mr Mellory-Pratt explained that that was an error on the ledger. That this did not relate to gate repairs but to the items set out in the invoice. In the circumstances, the Applicants reasonably said that they accepted that mistake and that this invoice did not relate to 'gate repairs'. It is addressed further below.

246 **£50 – invoice B D Manning, 31 January 2016**

247 The invoice is at 149 RB.

248 Mr Mellory-Pratt explained that this work related to an emergency that had occurred when the garage door had failed to open. That it had been important to get the garage door open to allow lessees to get to work. The Applicants said that they had been on site and that they did not accept that Mr Manning had been on site for any length of time. Further, that such works were part of his remit.

249 Mr Mellory-Pratt said that the work went beyond Mr Manning's remit and that he had been on site for the whole time. Mr Steventon said that he had been woken by a resident at between 5.30 and 6.00 am that day to say that the garage door had seized. It could not be opened either automatically or with the emergency chain. That he was aware that Mr Manning had been on site from 6.30/7.00 am onwards and had tried to dismantle the door. It was he said a big job. That Fix A Door Limited had been called to assist who attended later in the day and Mr Manning had helped Fix A Door Limited dismantle the garage door.

250 **The Tribunal's Decision**

251 Upon the basis of the evidence before it, the Tribunal is satisfied that Mr Manning did carry out works to dismantle and to assist in dismantling the garage door as a matter of emergency and that such works were not included within his remit. That as such these charges were reasonably incurred and were recoverable as part of the service charge.

252 **£60 – invoice Dave Johnson Locksmith, 8 February 2016**

253 **The Applicants' Case**

254 The Applicants said that these works which are described as tightening an internal handle on a communal door, lubricating the mechanism and closure, were covered by Mr Manning's remit.

255 **The Respondent's Case**

256 The Respondent said these works related to the communal door in Block A. That the works required were more technical than that covered by Mr Manning's remit and as such went beyond that remit. That the employment of a locksmith was therefore necessary.

257 **The Tribunal's Decision**

258 The Tribunal notes that paragraph 4 of Mr Manning's remit covers *"adjustment of door closures to avoid slamming doors, replace where necessary"*. The works described in the invoice appear to be works of maintenance to tighten an internal handle and to lubricate the mechanism. As such the Tribunal agrees with the Applicants that these works appear to be works which could have been undertaken by Mr Manning under the terms of his remit. That the costs of such works were therefore covered by Mr Manning's retainer. As such, the costs of employing a third party locksmith to carry out the works were not reasonably incurred and are not recoverable as part of the service charge.

259 **£252 – invoices Just Cleaning Limited, 4 March 2016 and 7 October 2016**

260 The invoices are at 151 and 152 RB.

261 **The Applicants' Case**

262 The Applicants' case is that the works to clear builders' spoil set out in the invoice at 152 RB should have been recovered from NHBC and not charged as part of the service charge.

263 **The Respondent's Case**

264 Mr Mellory-Pratt said that the cost of clearing the rubbish referred in the invoice at 152RB could not be recovered from NHBC. It was an accumulation of rubbish in the electrical store room. That it had not been possible to identify who was responsible for that rubbish. That as to the invoice at 151 RB, this covered the cost of removing rubbish in the cycle store and having what he described as a *"big tidy up"* to remove rubbish that had accumulated over a couple of years.

265 **The Tribunal's Decision**

266 The Tribunal is satisfied, upon the basis of the evidence before it, that these were works to clear rubbish left in communal areas which was the responsibility of the Respondent to clear, and that the costs incurred were

reasonably incurred. That as such, these charges are recoverable as part of the service charge.

267 **£270 – invoice Mango Property Maintenance, 13 January 2016**

268 The invoice is at 153 RB.

269 This invoice had already been referred to above.

270 **The Applicants' Case**

271 The Applicants said that this was an invoice to cover the cost of rectifying poor work carried out by Mr Manning.

272 **The Respondent's Case**

273 The Respondent said that the work referred to was carried out by Mr Manning some two years earlier. That subsequently new cracks and movement had appeared in the brickwork and slabs. That for health and safety reasons, it was necessary to carry out work to re-bed the paving slabs.

274 **The Tribunal's Decision**

275 Upon the basis of the evidence before it, the Tribunal is satisfied that this work was reasonably carried out and reasonably incurred. There was no evidence to suggest the works were not necessary or unreasonable in amount. As such the Tribunal determines that this sum is recoverable as part of the service charge.

276 **£78 – invoice Mango Property Maintenance, 28 January 2016**

277 The invoice is at 154 RB.

278 **The Applicants' Case**

279 The Applicants said that these were works that were carried out to rectify defective works carried out by Mr Manning and as such he should have been asked to put the work right rather than employ a third party contractor to carry out works of rectification.

280 **The Respondent's Case**

281 The Respondent's case was that this work was properly carried out. The Tribunal made the point that both invoices (at 153RB and 154RB) were only 15 days apart and that both referred to removing and replacing "*loose coping stones on the left hand side of wall*". Mr Mellory-Pratt said in response that he understood that the reference was to different coping stones albeit on the same wall.

282 **The Tribunal's Decision**

283 There was no evidence before the Tribunal to the effect that this work was not properly and reasonably carried out. The Tribunal therefore determines that the work was reasonably carried out and that this sum is recoverable as part of the service charge.

284 **£3188 – annual figure for repairs and maintenance for the year ending 31 December 2016**

285 This figure is taken from the service charge accounts for the year ending 31 December 2016 (74 RB). In their Statement of Case, the Applicants asked for details ie a breakdown. They accepted that they had now, with reference to the accounts, that breakdown and therefore save that there were items contained within the heading of 'repairs and maintenance' in the accounts which they had disputed during the course of these proceedings, the balance of that figure was now accepted by them.

286 **£3649 – levy for new garage door, motor and roof repairs**

287 **The Applicants' Case**

288 The Applicants' case is that the roof repair element of these works should be covered by the buildings insurance policy. That is the sum as shown on the levy at 181 RB of £1278.

289 **The Respondent's Case**

290 Mr Mellory-Pratt explained that this item formed part of a levy raised by the Respondent to cover the cost of works to the roof and for a new garage door motor. That the garage door motor had already been paid for at the date of the levy and the works to the roof were in the course of being carried out. That although there were funds in the service charge account to cover these, those funds had been ear-marked for other matters and so it was decided to raise a separate levy. It was not felt that the works were covered by the insurance policy because they related to wear and tear over time. That had the Respondent considered that the works were covered by the insurance policy, they would certainly have put in an insurance claim. Mr Mellory-Pratt said that his firm employed an insurance manager who advised them and that he certainly would have advised them to put in an insurance claim had it been appropriate to do so.

291 **The Tribunal's Decision**

292 There was no evidence before the Tribunal that the works to which the levy related had not been carried out or had not been reasonably incurred. The Tribunal accepts the evidence of Mr Mellory-Pratt that it was decided that the costs of the roof repair works were not covered by the insurance policy. A copy of the policy was not produced to the Tribunal and there is no evidence from the Applicants to the effect that the works were otherwise than due to wear and tear. As such the Tribunal determines that these sums were reasonably incurred and are recoverable as part of the service charge.

293 **£1255 – works to garage door/car park shutter/garage door motor/gear box**

294 The invoices are at £198-209 RB.

295 At the hearing the Applicants confirmed that this matter was no longer in dispute.

296 **Section 20C Application**

297 The Tribunal asked Mr Dillon to take it to those provisions in the Lease which the Respondent relied upon to allow it to recover the cost of these proceedings as part of the service charge. Given the lateness of the hour, and to allow both parties to properly consider that question, the Tribunal directed that both parties may, but were not obliged to, submit brief written submissions on the point within 7 days. Both parties also made oral submissions at the hearing.

298 **The Applicants' Case**

299 The Applicants' case is firstly, the Lease does not contain a provision which allows in any event the Respondent to cover the costs that it incurs in respect of these proceedings as part of the service charge.

300 Secondly, the Applicants say that they only came to the Tribunal because they felt they had no other choice. That it was a last resort. They would not have had to make an application they say if the questions they had put to the Respondent had been answered. That they were obliged to come to the Tribunal to get the information to which they were entitled. Only now having come to the Tribunal have they had answers to at least some of their questions. That in those circumstances it would be wrong for them to in any event have to pay the costs of these proceedings as part of their service charge.

301 **The Respondent's Case**

302 The Respondent did not make a further written submission. Mr Dillon said that the Tribunal should bear in mind that only one party, the Respondent, had submitted Witness Statements. That the allegations he submitted made by the Applicants were vague and that they had produced no specific examples of breaches on the part of the Respondent. Mr Mellory-Pratt said that his company Rebbeck Bros were registered with the Association of Residential Managing Agents and always sought to work with leaseholders with transparency. He had he said spent a lot of time responding to queries raised by the Applicants explaining items of expenditure and how they had come about. He had also explained where appropriate where a claim against insurance or NHBC had not been made. He said he had worked hard to help the Applicants understand the management of the property and indeed had invited them to his offices to view invoices. The Applicants had, he said, been into his office around

four times and when they had come in, he had spent time going through the documents with them and explaining expenditure that had been incurred. He said there had historically been a trend of service charges being raised, no payment received, reminders being sent out, and then threats of litigation. His company he said managed a couple of thousands units and always used the same procedures which were approved by the Association of Residential Managing Agents. That he had suggested to the Applicants that if they were not happy, they (Mrs Shimizu) should seek to become a director of the Respondent company in order to help, as he put it, 'steer the ship'. In short, he said that he had always sought to act in the best interests of the lessees.

303 The Tribunal asked Mr Dillon to identify the clause in the Lease which he relied on to allow the Respondent to recover the costs relating to these proceedings as part of the service charge. After some consideration, Mr Dillon referred the Tribunal to clause 5.1(j) of the Lease which he said did 'just about enough' to encompass the point. It was at this stage that the Tribunal made a direction that both parties could if they wished submit to the Tribunal within 7 days further written submissions on that point.

304 **The Tribunal's Decision**

305 The Tribunal does not agree with the Respondent that clause 5.1(j) is sufficiently wide enough to allow the Respondent to recover the costs of these proceedings as part of the service charge. The clause is set out in full above. It is a clause that should be given its clear and ordinary meaning. It is a form of sweeping-up provision to cover services performed by the Respondent relating to the development for the benefit of the lessee and other lessees or which are reasonably necessary for the maintenance, upkeep and cleanliness of the development or otherwise in accordance with the principles of good property management. These are proceedings brought by the Applicants against the Respondent. The Respondent is doing no more than responding, as it should do, to the proceedings. In doing so, it is not in the view of the Tribunal providing a service relating to the development which is reasonably calculated to be for the benefit of the Applicants or other lessees or is otherwise reasonably necessary for the maintenance, upkeep and cleanliness of the development or is in keeping with the principles of good property management.

306 Even if the Tribunal were wrong about that, whilst it appreciates the submissions made by Mr Dillon that there has been a failure by the Applicants to produce Witness Statements or evidence in support of their criticisms of the costs and expenses incurred by the Respondent, the Tribunal is satisfied that on balance the Applicants' concerns as regards the service charges demanded were reasonable and genuine and it was appropriate for them to bring these proceedings. Further, the Applicants have succeeded in part particularly as regards service charges relating to the lift in Block A.

307 For those reasons, the Tribunal makes an Order pursuant to section 20C of the Landlord & Tenant Act 1985 that the costs incurred by the Respondent in connection with the proceedings before the Tribunal are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

308 **Summary of Tribunal's Decision**

309 The items of service charge expense challenged by the Applicants have been reasonably incurred and are recoverable by the Respondent from the Applicants (or more particularly Mrs Shimizu as the lessee) as part of their service charge save for the following items which the Tribunal determines cannot be recovered by the Respondent as part of the service charge:

**Year ending 31 December 2011**
Supply and fit replacement lift motor room lock £16.27

**Year ending 31 December 2013**
Invoice B D Manning, 23 February 2013, work to the garage lift lobby £52.00

**Year ending 31 December 2014**
Invoice B D Manning, 23 February 2013, *Briton 2130 overhead delayed action door closure to garage lift lobby door* £94.49, and *1 no. 2D light fitting for lift lobby* £23.74

**Year ending 31 December 2014**
Invoice B D Manning, 26 June 2014, balance of costs for tracing owner of a scooter £27.50

**Year ending 31 December 2016**
Invoice David Johnson Locksmith £60.00

**Total: £274.00**

The proportion payable by the Applicants under the terms of the Lease: 6.66% equates to **£18.25**.

The Applicants are therefore entitled to a credit for that sum.

Dated this 21st day of November 2017

Judge N Jutton

## 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.