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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AM/LSC/2015/0090**
Property	:	**Flats 7A and 7C, 7 Castlewood Road, London N16 6DU**
Applicants	:	**(1) Avon Estates (London) Limited** **(2) Nationworth Limited** **(the "Tenants")**
Representative	:	**Scott Cohen, solicitors for the First Applicant.**
Attendances on behalf of Applicants	:	**(1) Mr J Gurvits of Avon Estates (London) Limited** **(2) Mr S Babad**
Respondent	:	**Sinclair Gardens Investments (Kensington) Limited (the "Landlord")**
Representative	:	**W H Matthews & Co, solicitors**
Attendances on behalf of Respondent		**(1) Mr Paul Letman, counsel** **(2) Mr Mark Kelly,Property Manager (Director of Hurst Management)** **(3) Ms Carly Sturgess, observer**
Type of application	:	**For the determination of the Tenant's liability to pay service charges**
Tribunal members	:	**Amran Vance, Tribunal Judge** **Mr Frank Coffey, FRICS**
Date and venue of hearing	:	**28 May 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**24 June 2015**

DECISION

Decision of the tribunal

1. The Tribunal makes the determinations as set out under the various headings in this Decision

2. The Tribunal does not make an Order under section 20C of the Landlord and Tenant Act 1985.

3. Numbers appearing in bold and square brackets below relate to the hearing bundle supplied by the Landlord.

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

Background

5. This is an application made under s.27A Landlord & Tenant Act 1985 ("the 1985 Act") for the determination of the reasonableness and payability of service charges demanded from the Tenants for the service charge years ending 31 March 2012; 30 March 2013 and for the period from 1 April 2014 to 8 October 2014 (the latter date being the date that a Right to Manage Company commenced management of 7 Castlewood Road, London N16 6DU ("the Building").

6. The First Applicant is the lessee of Flat 7A, 7 Castlewood Road, London N16 6DU and the Second Applicant is the lessee of Flat 7C. The Building is an end of terrace four-storey house (including a basement and attic) built around 1870. There are three flats in total. The Respondent holds the reversionary interest in the freehold of the Building.

7. There is currently an enfranchisement claim being pursued by the Tenants. A price has been agreed and completion is fixed for 28 days after the final determination of this application.

8. An oral case management conference was held on 10 March 2015 and was attended by Mr Babad on behalf of the Tenants and by Sarah Ramsey of counsel for the Landlord. Directions were issued by the Tribunal on the same day **[17-22]**.

9. By letter dated 1 May 2015 **[292-3]** the First Applicant sought to amend its application to dispute the method of apportionment of service charges between the Tenants. The application was refused by the Tribunal on 7 May 2015 **[294-5]** and the Applicants subsequently issued a separate application for a determination as to the correct apportionment. This is due to be heard on 11 August 2015.

10. Three previous applications in which the tribunal was asked to determine the payability of service charges under s.27A of the 1985 Act are relevant to this Application:

(a) Application **LON/00AM/LSC/2004/0060,** brought by the Respondent against the First Applicant, was heard in October 2004 and a copy of the decision of the tribunal ("the 2004 Tribunal") dated 29 November 2004 is at **[97-112]**("the November 2004 Tribunal Decision"). It was pointed out to the parties at the start of the hearing on 28 May 2015 that Mr Coffey sat as a member of this tribunal but neither party suggested that he should recuse himself and the Tribunal saw no reason for him to do so, given the passage of time and his very limited recollection of the application.

(b) Application **LON/00AM/LSC/2010/0214** was brought by the Respondent against both Applicants and was heard on 26 August 2010. The tribunal's decision dated 18 November 2010 is at **[113-118]** ("the November 2010 Tribunal Decision").

(c) Application **LON/00AM/LSC/2011/0469** was brought by the Respondent against both Applicants and an individual named Mr Popat. It was heard on 10 November 2011 and the tribunal's decision dated 18 January 2012 is at **[119-133]** ("the January 2012 Tribunal Decision"). The First Applicant unsuccessfully appealed this decision to the Upper Tribunal (Lands Chamber) **[2013] UKUT 0264 (LC)** whose decision dated 30 May 2013 is at **[268-282]**.

The hearing

11. Both Applicants were represented at the hearing by Mr Gurvits and Mr Babad who appeared in person. The Respondent was represented by Mr Letman of counsel.

12. The tribunal heard evidence from Mr Gurvits and from Mr Kelly, a Property Manager with Hurst Management, who managed the Building during the relevant years in dispute in this application. Two witness statements from Mr Kelly were included in the hearing bundle, an initial statement served on 9 March 2015 **[32-183]** and a second statement served on 9 April 2015 **[189-282]**.

13. A witness statement from Mr Babad dated 1 May 2015 appears in the hearing bundle at **[283-291].** The Applicants also served a statement of case **[23-36]** and a Scott Schedule identifying the charges in issue. A version of that Scott Schedule containing the Respondent's comments appears at **[184-188]**.

The Lease

14. A copy of the lease of Flat 7A is at **[55-80]** (the "Lease") and it appears to be common ground between the parties that the lease for Flat 7C is in identical terms. At clause 3(A) the Lessee covenants to pay, by way of the service charge, a due proportion of the costs and expenses incurred or to be incurred by the Lessor in carrying out the obligations or functions set out in clauses 3, 4 and 6 of the lease and in the Ninth Schedule.

15. The Lessor's covenant at clause 6(A) provides as follows:

> *"That the Lessor shall at all times during the term hereby granted manage the Estate and the Block in a proper and reasonable manner and shall be entitled*
>
> *(i) to appoint if the Lessor so desires managing agents for the purposes of managing the Estate and the Block and to remunerate them properly for their services*
>
> *(ii) to employ architects surveyors solicitors accountants contractors builders gardeners and any other person firm or company properly required to be employed in connection with or for the purposes of or in relation to the estate and the Block or any part thereof and pay them all proper fees charges salaries wages costs expenses and outgoings*
>
> *(iii)* .....

16. The Ninth Schedule sets out covenants to be observed by the Lessor at the Lessee's expense. They include an obligation to keep the main structure of the Block in good and substantial repair, to manage the Block and keep it adequately lit, and also to insure and keep insured the Block to the full rebuilding cost *"... through a policy or policies effected and maintained with such reputable insurers as the Lessor shall deem appropriate ..."*

The issues

17. At the start of the hearing Mr Gurvits confirmed that the Tenants were dropping their challenge to a valuation risk fee incurred in the 2011/12 service charge year. Mr Letman confirmed that the Landlord agreed that the costs of a glass repair demanded for the 2013/14 service charge year was not recoverable. This left the following in dispute:

(a) **Insurance costs** for each of the three relevant service charge years. The amounts in dispute are £5,337.11, as specified in the 2011/12 service charge statement **[138]**, £5,297.36 as specified in the 2012/13 service charge statement **[157]** (subject to a credit of £609.56 as referred to in the 2013/14 service charge statement **[169]**). Copies of the Certificates of Insurance for the first two service charge years are at **[255-260]** and **[261-266]** respectively. Details of the expenditure incurred are set out in the property expenditure accounts at **[139]**, **[158]** and **[170]**.

(b) **Legal Fees** totalling £5,311.40 for the 2011/12 service charge year and £5,790 for the 2013/14 service charge year;

(c) **Additional Management costs** of £2,380 for the 2013/14 service charge year;

(d) **Administration fee** of £450 for the 2013/14 service charge year;

(e) **Costs of hedge cutting** (£156) for the 2011/12 service charge year;

(f) **Management fees** of £982.60 for the 2011/12 service charge year; £1,015.21 for the 2012/13 service charge year and £1,145.06 for the 2013/14 service charge year (subject to a pro rate credit of £609.56); and

(g) An **insurance cancellation** charge of £52 for the 2013/14 service charge year.

Insurance Costs

The Tenants' Case

18. The Tenants argued that the Building had been overvalued for insurance purposes (in the sum of £679,772 as stated in the Certificate dated 20 November 2012 **[255]** and £701,525 in the Certificate dated 20 November 2013 **[261]**). They had obtained their own valuation, with a view to the anticipated enfranchisement, which suggested an insurance reinstatement value of only £520,000 **[286]** and a quote for insuring the Building for the period 30 June 2015 to 29 March 2016 at a premium of £771.68 **[288]**. They suggested that this sum, pro rata, amounted to £1027.97 per annum and that as this was about 25% of the premiums paid by the Landlord each year that the costs incurred by the Landlord for insurance were clearly unreasonable.

19. Before the Tribunal, the Tenants expanded on their statement of case to suggest that there was an inappropriate relationship between the

insurance brokers engaged by the Landlord, Cullenglow Limited trading as Princess Insurance Agencies ("PIA"), the Landlord itself ("Sinclair") and the managing agents of the Building (First Management trading as Hurst Management).

20. Mr Kelly confirmed that all three of these companies were owned by the same parent company, Forbes Corroon Ltd and that Mr Gregory Cutler, the Director of Sinclair was also a Director of Cullenglow Limited. In addition, he, Mr Kelly, was a director of both Cullenglow Limited and First Management.

21. According to Mr Gurvits the shared directorships between the three companies and the sole parent company meant that there was not an arms-length relationship between PIA and the Landlord meaning that the insurance premiums paid could not be relied upon as having being obtained in the normal course of business in the insurance market. Nor, they said, could the reinstatement value ascribed to the Building for insurance purposes.

22. The Tenants also contended that commission paid to PIA by the insurance company of 12.5% (and applied towards a brokerage and claims handling fee by PIA) was unjustified as the likely level of claims handling did not justify a fee in this amount. They submitted that the sum that it was reasonable for the Tenants to pay towards the insurance premiums should, at the very least, be reduced by 12% as per the decision of the tribunal in **LON/00AM/LSC/2011/0469** who made a 12% deduction because it considered that there was no evidence that the fee was justified.

23. The Tenants also initially contended that it by engaging the services of PIA to deal with claims handling as well as a separate firm of brokers, H W Wood to secure quotes from insurers the Landlord was unnecessarily increasing costs. However, that challenge was dropped during the course of the hearing.

The Landlord's Case

24. The Landlord contended that he costs were reasonably incurred for the reasons set out in detail at Appendix B of Mr Kelly's second witness statement **[203-216]**.

25. Mr Kelly's evidence was that a full measured valuation of the Building was obtained every three to four years in accordance with the recommendations of the Royal Institute of Chartered Surveyors, with the most recent valuation having taken place in August 2011 **[232]**.

26. He explained that the Landlord engages PIA to act as an insurance agent and that they dealt with the handling of insurance claims up to

£4,500 in value. Claims exceeding that amount are referred to a firm of loss adjustors.

27. His evidence was that each November PIA prepares an Insurance Schedule covering the last five years claims history for each property in the Landlord's portfolio which is then provided to a firm of brokers, H W Wood, who are instructed to make enquiries of insurers to obtain renewal terms for the forthcoming year. He believed that one advantage of using H W Wood is that they have access to major "A" rated insurers. At paragraphs 6.5 to 6.13 of his witness statement he sets out details of the insurers of the Building for the period 2007 onwards.

28. Mr Kelly also confirmed that, each year H W Wood, carry out market testing of the annual property premiums obtained to ensure that they are reasonable and in line with the premium rates from insurers of repute as available to commercial landlords.

29. At paragraph 10 of his witness statement he lists ten advantages of the Landlord utilising the services of PIA to insure its entire portfolio of properties. These include claims settlement authority up to a fixed level, access to a panel of approved building contractors, having a separate insurance certificate for each building as opposed to a Block Policy meaning that claims experience on one property will not affect the rates of premiums on another property within the portfolio and the fact that all properties are insured regardless of postal code or being in a high risk area.

30. In his view the premiums paid in each year have been reasonable and negotiated in the normal course of business. The current insurer, Liberty are rated "A-" which he considers to be the minimum required to amount to an insurer of repute.

31. As to commission, he states that no commission is paid to the Landlord or Hurst Managements by the insurer. PIA pays HW Wood a fee for their services and PIA receives a commission from the insurers amounting to 12.5% for buildings insurance and 7% for terrorism insurance (increasing to 20% from November 2012). Mr Kelly states that PIA undertake brokerage and claims handling in return for the commission paid to it by the insurer.

32. In the course of his submissions Mr Letman referred the Tribunal to the authorities in ***Forcelux Ltd v Sweetman*** [2001] 2 EGLR 173 which considered the decision in ***Havenridge Ltd v Boston Dyers Ltd.*** He also referred us to the decisions in **Berrycroft Management Company Limited and Ors v Sinclair Gardens Investments (Kensington) Ltd** (1996) 75 P&CR 210 and ***Williams v Southwark Borough Council*** (2001) 33 HLR 22.

33. In ***Forcelux Ltd v Sweetman*** [2001] 2 EGLR 173 it was held that for the purposes of s.19(2A) of the 1985 Act, the question is not whether costs are "reasonable" but whether they are "reasonably incurred". The question to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the cost was reasonably incurred.

34. In ***Havenridge Ltd v Boston Dyers Ltd*** [1994] 2 EGLR 73, the Court of Appeal considered that it was not necessary for a landlord to "shop around" for the cheapest insurance and that it was sufficient if it effected insurance in accordance with the terms of the relevant lease with an insurer of repute. The Court found that a landlord must prove either that the rate is representative of the market rate, or that the contract was negotiated at arm's length and in the market-place.

35. In cross-examination of Mr Babad, Mr Letman queried why the surveyor who assessed the reinstatement value of the Building at the Tenants request had based his valuation on a gross internal floor area of 230 m^2 when the Building had been measured by the parties prior to the second Tribunal proceedings at 270m^2. Mr Babad's response was that he could not comment on the surveyors measurements and that he did not know what documents the surveyor was provided with.

36. Mr Letman also queried if the surveyor has adjusted for the non-standard nature of the Building and Mr Babad agreed that no adjustments were made.

Decision and Reasons

37. The Tribunal determines that the costs of the premiums have been reasonably incurred and that they are payable by the Tenants in their apportioned share. In the Tribunal's view the evidence indicates that the insurance obtained by the Landlord was obtained in the normal course of business, in the insurance market and through an insurer of repute. Our reasons are set out in the following paragraphs which deal, in turn, with the Tenant's challenges.

<u>Were the premiums excessive or based on an incorrect valuation so as to mean that they were unreasonably incurred?</u>

38. We recognise (as was accepted by the Landlord) that the premiums in question are high for a property of this size and type but we do not consider there is evidence that they are so high as to be unrepresentative of the market rate given the likely difficulties in securing insurance for the Building.

39. We accept Mr Kelly's evidence that the premiums obtained are market tested by H W Wood each year to ensure that they are in line with the

premium rates from insurers of repute. In addition, a separate, independent, check regarding market testing was carried out by Stackhouse Poland prior to the 2012 insurance renewal **[235-237]** which, in the Tribunal's view operated as an additional safeguard so as to ensure that premiums were kept in line with market norms.

40. We also consider that securing insurance for the Landlord's portfolio of properties does not appear to have been straightforward and the reason for that appears to be the poor claims history for some of the properties in the portfolio. A letter to PIA dated 27 September 2012 Stackhouse Poland state that five insurers had been approached for alternative quotations in respect of the Landlord's portfolio, Aviva, Axa, Allianz, RSA and Zurich, and that most had declined to provide insurance. Although quotes were received for some properties, it appears from responses received from Aviva and Zurich that the principal reason for declining insurance was due to the claims history for some of the properties **[238, 239, 241]**.

41. It is also clear from a property diary printout exhibited to Mr Kelly's witness statement **[248-250]** that this Building has a very substantial claims history. There are 75 entries listed on that printout for the period October 1999 to November 2010 and we were informed that many of the claims related to subsidence. This poor claims history was accepted by Mr Gurvits but he argued that the fact that there had been no claims since November 2010 meant that claims history for the Building was unlikely to cause difficulties with securing insurance as in his experience insurers only needed details of the last five years claims history. However, that submission was unsupported by any evidence.

42. Weighing up the available evidence the Tribunal considers that given the poor claims history for the Building there are likely to be significant advantages to it being included within the Landlord's property portfolio for the reasons advanced by Mr Kelly. We accept that given the outcome of the 2012 Stackhouse Poland exercise there may well have been difficulties in securing suitable insurance for the Building outside the portfolio.

43. The fact that the Tenants have obtained their own insurance quote for the Building specifying a much lower premium than those paid by the Landlord would, on the face of it, run counter to this conclusion. However, in the Tribunal's view this quote cannot reasonably be said to for like for like with the insurance secured by the Landlord.

44. The quote in question was obtained through a broker, Guardian Imperial Limited ("Guardian") **[288]** who obtained a quote from SJL Insurance Services ("SJL"). However, SJL do not appear to be the actual insurers as the certificate provided by them refers to the

proposed insurers being "certain underwriters at Lloyds". This indicates that SJL may be an insurance broker rather than an insurer.

45. In the Tribunal's view this quote cannot be considered to be like for like with the insurance secured by the Landlord as:

(a) The quote specifies that the Building comprises three flats occupied by leaseholders. This is incorrect as each of the flats is sublet;

(b) The quoted reinstatement value of £520,000 is substantially less than the reinstatement value under the policies secured by the Landlord; and

(c) The Tribunal is completely unaware as to what documents were provided to Guardian and SJL in order to obtain this quote. Neither Mr Babad nor Mr Gurvits could provide this information and there is nothing of assistance in the documents before us. Mr Babad believed that the claims history of the Building had been provided by a colleague but he stated in evidence that he had not seen the documents sent to the Guardian and did not know what they passed on to SJL

46. In the Tribunal's view these fundamental variances mean that the quote obtained by the Tenants fatally undermines their case that the amount of the premiums obtained by the Landlord is manifestly excessive. It would have assisted their position if there was clear evidence that the claims history for this Building had been disclosed along with the agreed fact that the relevant leases do not contain a restriction on subletting (both of which matters may attract a higher than normal premium) and also if we had sight of the proposal form provided to the insurers. In addition, to be satisfied that competing policies are, in fact, like for like the respective policy wordings would need to be compared. No evidence of this nature is before the Tribunal.

47. In our view there is simply inadequate evidence that the insurance premiums charged were other than at market rates. That the Tenants may now be able to secure insurance at a lower cost is beside the point given our finding above that the approach taken by the Landlord in this case has not unreasonable and given the very wide discretion allowed to it under the terms of the lease when securing insurance.

48. As to the Tenants' contention that the Building was overvalued by the Landlord for insurance purposes we do not consider there to be any satisfactory evidence that this was the case. All we have been provided with is one page calculation sheet as opposed to a full valuation report There is no evidence before us to indicate that the surveyor instructed

by the Tenants actually measured the Building as opposed to being supplied with a figure for the gross floor area. Nor were Mr Babad or Mr Gurvits able to say what documents were provided to their surveyor.

49. Whilst not forming part of our reasoning we also note that if the Landlord's contention regarding the floor area being 270m² as opposed to 230 m² is correct, then applying the £ per square metre multiplier used by the Tenants' surveyor brings his reinstatement value fairly close to the reinstatement figure used by the Landlord when securing insurance.

50. In the Tribunal's view the Tenants have failed to establish that the Landlord's reinstatement value was excessive

Was there an inappropriate relationship between sister companies?

51. The Tenants did not challenge Mr Kelly's evidence concerning the relationship between PIA, the Landlord and Hurst Managements and it was not disputed that they have a close relationship. In fact, it is clear that these are sister companies. The question is whether or not the Tenants argument that the proximity of that relationship means that the insurance premiums were not negotiated at arms length is correct.

52. In our view, the Tenants' argument fails. Firstly, we do not accept the Tenants' suggestion that the fact that PIA and Landlord are sister companies is sufficient, in itself, to mean that the two companies do not operate independently from each other and not at arm's length. There would need to be some evidence to corroborate this bare assertion and none is before the Tribunal.

53. Secondly, the instruction by PIA of an intermediate company, H W Wood, to go to the market to obtain renewal terms is a sufficient safeguard to mean that the process of obtaining insurance premiums was, irrespective of the relationship between the sister companies, carried out by a disinterested third party and at arms length from the Landlord. There was no suggestion by the Tenants that HW Wood were in any way connected to the Landlord, or that in obtaining quotes from the market it acted otherwise than an as an entirely independent company.

54. In our view this arrangement is sufficient to mean that the actual negotiation of the insurance premiums secured was an arm's length transaction, in the normal course of business, which took place in the insurance market.

Was the commission paid to PIA unjustified?

55. The Tribunal accepts Mr Kelly's evidence regarding the claims handling function performed by PIA and the role it plays in securing market testing of insurance premiums. These functions are described in some detail by Mr Kelly in his witness statement at **[214-215]**. By way of example he states that during the year November 2013 to November 2014 PIA dealt with over a hundred claims on behalf of the insurer. In the Tribunal's view the evidence indicates that the level of claims handling is sufficient to justify the 12.5% handling fee under challenge.

Legal Fees

56. The legal costs in question relate to solicitor's costs and counsel's fees incurred in pursuing the previous tribunal claims referred to above.

57. The sum of £5,311.40 charged to the 2011/12 service charge year is broken down as follows

- £2,547 **[253-4]** - solicitors fees relating to the 2010 Tribunal Proceedings
- £200 **[148-9]** – tribunal fee relating to the 2011 Tribunal Proceedings
- £2,564 **[150-1]** – solicitors fees relating to the 2011 Tribunal Proceedings

58. The sum of £5,790 for the 2013/14 service charge year is broken down as follows:

- £720 **[177]** - counsel's fees to settle a statement of case in the Upper Tribunal Proceedings
- £2,370 **[178-9]** - solicitors fees in the Upper Tribunal Proceedings
- £2,700 **[180]** - counsel's fees for settling skeleton argument and brief fee for Upper Tribunal Proceedings

The Tenants' Case

59. The Tenants' primary contention was that the legal fees in question were not recoverable under the terms of the Lease. They also considered the sums demanded to be unreasonable in amount.

60. Their position was that in order for legal fees to recoverable there needs to be clear and unambiguous wording to that effect and there was no such clarity in the wording of the Lease.

61. They make several representations in respect of the quantum of these costs at paragraphs 9 of their statement of case **[24-25]** and in the Scott Schedule at **[28-29].**

The Landlord's Case

62. The Landlord's case is set out in Appendix C to Mr Kelly's statement **[217-223]**. Its position was that the wording of the Lease allows recovery of these costs and that this issue had already been determined by the 2004 Tribunal who, at paragraphs 93 **[108]** and **[121]** of its decision, concluded that the terms of the lease entitled the Landlord to recover its reasonable costs of proceedings before this tribunal.

63. As to the quantum of the costs, Mr Letman submitted that these should be assessed on the indemnity basis and that the burden of proof was on the tenants to show that the costs were unusual or excessive.

Decision and Reasons

64. We deal first with the Landlord's contention that the issue of whether or not legal fees are recoverable under the terms of the Lease was an issue that had already been conclusively determined in previous tribunal proceedings.

65. Although he did not use the phrase Mr Letman's suggestion was that that this was a question of issue *estoppel*, meaning that there had been a previous judicial decision in which this issue had already been decided. The problem with that submission is that for issue estoppel to arise three requirements need to be met:

(a) that the same question had previously been decided;

(b) that the judicial decision which is said to create the estoppel was final; and

(c) the parties to the judicial decision are required to be the same persons as the parties to the proceedings in which the estoppel is raised (see *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 565, HL, per Lord Guest).

66. In this case, whilst the First Applicant was a party to the 2004 Tribunal proceedings, the Second Applicant was not. Both Applicants were parties to the 2011 Tribunal proceedings but the only element of legal costs in issue in that application were counsel's fees which were conceded by the Tenants without the Tribunal needing to decide the point.

67. As such, the only previous tribunal that decided upon the issue of whether or not legal fees are recoverable under the terms of the Lease was the 2004 Tribunal. However, the fact that the parties to that application were not the same as this application means that no issue estoppel arises.

68. If we are wrong in that conclusion than, in any event, it is our view that the injustice to the Tenants in not allowing this issue to be relitigated outweighs the hardship to the Landlord in having to resist the point given that what is in issue is the simple question of the construction of a lease.

69. Turning to the construction of the Lease, this Tribunal agrees with the decision of the 2004 Tribunal that clause 6 of the Lease is sufficiently broad to encompass the costs of instructing solicitors and counsel in tribunal proceedings. In our view the costs were incurred "*...in connection with or for the purposes of or in relation to the estate and the Block or any part thereof...*". In our view seeking a determination from this tribunal as to the payability of service charges by the Tenants is conduct that concerned "the estate" and/or "the Block". We do not agree with the Tenants' submission that the in order for solicitors costs to be recovered under this clause the solicitors need to be engaged in management. The clause is much broader than that limited interpretation.

70. We do not accept, however, that costs should be assessed on the indemnity basis. In his witness statement Mr Kelly makes several references the provisions of the Civil Procedure Rules which are not directly relevant to the proceedings before this Tribunal. Nor do we consider that the concept of indemnity costs to be helpful when examining, as we are here, whether or not costs have reasonably incurred, This tribunal is not carrying out a summary assessment of costs and what it is required to do is to simply determine if the Landlord acted reasonably in incurring the costs in question.

71. As to the specific challenges to the amounts claimed our determination is that all the sums claimed were reasonably incurred. We do not agree with the Tenants' challenges that the solicitor's hourly rate of £240, increasing to £250 per hour, was too high and that the total time spent was excessive. The solicitors are based in Surbiton, south-west London, and an hourly rate in these sums is not

unreasonable given their geographical location and the fairly specialised nature of these types of proceedings.

72. Nor does an examination of the narratives of their bills indicate that the sums claimed are disproportionate in terms of time engaged. For example, in 2011, 24 minutes was spent setting an application to this tribunal and 30 minutes in drafting a brief to counsel and answering queries raised **[151]**.

73. Nor do we accept that Tenant's contention that some duplication in costs may have occurred as the solicitors could have copied and pasted parts of documents utilised in earlier tribunal proceedings between the parties. This is a completely unrealistic contention given the fact sensitive nature of each set of proceedings.

74. The Tribunal also considers counsel's fees to be reasonable in amount for the work undertaken as indicated in the respective fee notes. We do not agree with the Tenants that there should be a proportionate reduction in the costs of solicitors and counsel in seeking to advance a cross-appeal that was refused by the Upper Tribunal. At paragraph 55 of the Upper Tribunal's decision **[282]** it is recorded that it did not consider there are any valid grounds for granting a section 20C order in respect of the costs of the appeal hearing. If the Upper Tribunal considered it appropriate it could have made a s.20C order in respect of any costs associated with the cross-appeal. It did not do so and the Tenants did not appeal that decision. In light of this, it would be inappropriate for this Tribunal to go behind that decision.

Additional Management costs

75. The disputed sum of £2,380 **[141]** concerns a fee of Hurst Management for Mr Kelly preparing and providing evidence to the tribunal on 10 November 2011 and additional supplementary evidence as requested by the tribunal. A breakdown of the costs incurred is at **[251-2]**.

The Tenants' Case

76. The Tenants position was that these were litigation costs and not a charge for management of the Building or the estate that therefore unrecoverable under the terms of the lease for the same reasons that the disputed solicitors and counsels fees were unrecoverable.

77. They also contended that the amounts charged were excessive and that there was likely duplication of costs given that lawyers had also been instructed by the Landlord.

The Landlord's Case

78. The Landlord's case was these costs were outside of the scope of the routine charges that Hurst Management charges for managing the Building and Estate on behalf of the Landlord and that the costs were recoverable under the Lease and reasonable in amount.

Decision and Reasons

79. It is our view that these costs are recoverable under clause 6 of the Lease in that, like legal costs, that clause is sufficiently broad to encompass the costs of managing agents incurred in respect of tribunal proceedings. In our view the costs were incurred "*...in connection with or for the purposes of or in relation to the estate and the Block or any part thereof...*".

80. We also accept that these costs fall outside the day to day management functions of the managing agents and therefore are payable by the Tenants in addition to the annual management fee. We did not have sight of a copy of the management agreement between the Landlord and the Hurst Managements but Mr Kelly has summarised the management services provided at Annex A of his witness statement **[194-202]** and we accept his evidence as reliable. We also note that the 2011 tribunal had the benefit of seeing the management agreement and that it noted that in keeping with the recommendations of the RICS code of guidance a separate menu of charges was set out in the agreement which confirmed an hourly rate of £135 which it considered to be reasonable.

81. The hourly rate charged by Mr Kelly for this disputed invoice is £142 per hour plus VAT. There is no explanation as why this has increased from £135 per hour and we were not informed that a new management agreement had been entered into. In light of that and as these charges were incurred in respect of the 2011 Tribunal proceedings we consider that the hourly rate should be limited to £135 plus VAT which was the rate specified in the agreement presented to that Tribunal.

82. As to the time spent by Mr Kelly we have examined the breakdown provided and considered the multiple issues in dispute within the 2011 Tribunal proceedings. In our view the time spent was reasonable and proportionate to the issues in dispute except for the seven hours spent on travel from Bognor Regis to the tribunal. We do not consider it appropriate for travel to be charged at the full hourly rate as Mr Kelly could usefully have undertaken other work during that time. In keeping with the usual rule regarding solicitors and counsels fees we consider this should have been charged at half the hourly rate, namely £67.50 per hour plus VAT.

83. The amount that it is reasonable for the Tenants to pay in respect of this item is therefore £1,424.70 plus VAT of £275.10 totalling £1,699.80.

Administration fee

84. The amount in dispute of £450 for the 2013/14 service charge year concerned costs charged by Hurst Management for administering an anticipated external redecorations programme for proposed works to take place in 2013. A copy of the relevant invoice is at **[172]**. This item was wrongly described as an accountancy fee in the service charge accounts **[52]**.

The Tenants' Case

85. The Tenants contented it was unreasonable for them to have to pay these costs as the proposed works did not in fact take place. They also submitted that as Mr Kelly was not a RICS qualified surveyor he was not qualified to carry out this exercise and that the costs were, in any event, excessive.

The Landlord's Case

86. Mr Kelly summarises the work he carried out at paragraph 15 of his witness statement **[191-2]**. In evidence before us he confirmed that the works in question comprised proposed external works at an estimated cost of £6,000 and that the reason that these works did not take place was because the lessees acquired the Right to Manage the Building.

87. Mr Kelly confirmed that he: carried out an inspection of the Building at ground level to determine the extent of the likely works required; agreed a specification of works; served an initial s.20 consultation notice on the lessees; administered a tendering process; spoke to contractors; and served a statement of estimates on the lessees.

88. He stated that the managing agents usually make a charge for their services of 12.5% of the contract price with 50% of the cost incurred prior to the appointment of the contractor. He therefore limited the charge to 50% of the lowest tender received of £6,000 plus VAT.

Decision and Reasons

89. We consider these costs to have ben properly incurred and that they are reasonable in amount. The Tenants have not challenged the need for the proposed external works and if it was not for their acquisition

of the RTM function there is no reason to doubt that these works would not have proceeded.

90. We do not accept that the fact that Mr Kelly is not a RICS qualified surveyor means that he was unqualified to carry out the work in question. He is clearly an experienced managing agent with, we were told, 23 years of property management experience. That in our view was sufficient for the actual work undertaken given the modest nature of the likely works as reflected in the contract price. It should also be borne in mind that if a full survey by a RICS qualified surveyor had been obtained this additional costs would have to be borne by the Tenants.

Costs of hedge cutting

91. This disputed item of £156 for the 2011/12 service charge year concerned the costs of cutting the hedge and bushes to the front of the Building and removal of cuttings. A copy invoice is at **[142]**.

The Tenants' Case

92. The Tenants positon was that they had obtained an alternative quote that indicated that these costs could have been carried out at a cost of £70 plus VAT.

The Landlord's Case

93. The Landlord's position was that these costs had been reasonably incurred.

Decision and Reasons

94. We consider these costs to have been properly incurred, reasonable in amount and payable by the Tenants. The description in the invoice indicates that the work involved was substantial and we do not consider that Tenants have established that it was unreasonable for the Landlord to have incurred these costs. They may well have obtained a lower quote but that does not mean that it was unreasonable to for the Landlord to have incurred the cost at the time in question especially since we have no evidence before us as to amount of work required at the relevant time compared to when the Tenants quote was obtained.

Management fees

95. The sums in dispute comprise £982.60 for the 2011/12 service charge year **[153-6]**; £1,015.21 for the 2012/13 service charge year **[165-8]**

and £1,145.06 for the 2013/14 service charge year **[181-183]** (subject to a and a pro rate credit of £609.56).

The Tenants' Case

96. The Tenants case is that these costs are excessive and should be limited to £450 per annum. Mr Babad's evidence was that he managed a number of buildings of a similar size and that that £450 was appropriate given the amount of work involved. He pointed out that at paragraph 33 of decision of the 2011 Tribunal it concluded that given the limited amount of duties carried out, a charge of £200 plus VAT per unit was reasonable, as opposed to the £260 plus Vat per unit charged at that time.

The Landlord's Case

97. The Landlord's position was that these costs had been reasonably incurred. At paragraph 2 of his witness statement [200-1]Mr Kelly states that the 2011 Tribunal ignored the time spent in dealing with Tenants who had not paid any service charge since 2007 without a tribunal determination. He also pointed out that in recent years there has been a substantial increase in legislation impacting on a managing agents workload and time.

Decision and Reasons

98. Firstly, the 2011 Tribunal has already determined that the sum of £220 plus VAT per unit is payable for the service charge year ending 31 March 2012. The Landlord did not appeal that determination and it is binding upon it.

99. We concur with the 2011 Tribunal that the work involved in managing a property of this size and type is fairly modest given that there are only three flats and the very limited common parts. We are not persuaded by Mr Kelly's unparticularised suggestion that there has a large regulatory and legislative burden imposed on managing agents. Nor do we consider his comments concerning the 2011 Tribunal ignoring time spent in dealing with Tenants who have not paid their service charge to be persuasive given that the Landlord has received determinations in its favour concerning the payability of both legal costs and the costs of the managing agents for preparation and attendance at this Tribunal.

100. We do not disagree with the 2011 Tribunal's assessment and on balance, we allowing for inflation and a modest uplift we consider that the amount that it is reasonable for the Tenants to pay for the 2012/13

service charge year is £220 per unit pus VAT and £225 plus VAT for the 2013/14 service charge year. There will need to be a pro rata adjustment for the latter year.

Insurance cancellation charge

101. The charge in question of £52 for the 2013/14 service charge year concerns a charge incurred by PIA for the cancellation of insurance following the acquisition of the Right to Manage.

The Tenants' Case

102. The Tenants case was that this was not a recoverable service charge and that if it was a cost of the Right to Manage procedure it should be claimed from the RTM company.

The Landlord's Case

103. The Landlord's position was that these costs had been reasonably incurred. Mr Letman submitted that it was akin to charge payable when household insurance is cancelled.

Decision and Reasons

104. This does not appear to be a cost charged by the insurers and we see no reason why PIA should impose an additional charge for the cancellation of insurance given that this would be a very straightforward issue to communicate. We agree with the Tenants that this does not appear to be an item properly recoverable through the service charge and it is therefore not payable by the Tenants.

S.20C Landlord & Tenant Act 1985

105. Section 20C of the Landlord & Tenant Act 1985 Act provides that a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by a landlord in connection with proceedings before a court or residential property 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 tenant.

106. When exercising its' discretion as to whether or not to make a s.20C order the tribunal has to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the degree to which the Applicants have succeeded in this application.

107. Given the very limited degree to which the Applicants have succeeded we decline to make a s20C order.

Name: Amran Vance, Tribunal Judge

Date: 24 June 2015

Annex

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 - Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

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

.

(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19 – Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

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

Section 27A – Liability to pay service charges: jurisdiction

(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 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.

[.....]

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the

Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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