11615

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/12UB/LSC/2016/0044**
Property	:	3 & 5 Honey Hill Mews, Cambridge CB3 0AL
Applicants	:	Roger Cox (3) Stephen Ingram & Ms Xi Lin (5)
Representative	:	Mr Ingram (lead) & Mr Cox, both in person
Respondent	:	Honey Hill Mews (1990) Ltd
Representative	:	Richard Adkinson (col), inst by Wilkin Chapman LLP [ref LIT/LC/KR/1010005/6]
Type of Application	:	For determination of reasonableness and payability of service charges for the years 2010 to 2016 [LTA 1985, s.27A] For an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before the First-tier 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 or any other person or persons specified in the application. [LTA 1985, s.20C]
Tribunal	:	G K Sinclair, M Krisko BSc (Est Man) FRICS & D S Reeve MVO MBE
Date and venue of Hearing	:	27th September 2016 at Cambridge County Court
Date of decision	:	10th October 2016

DECISION

- Summary ..... paras 1–5
- Relevant lease provisions ..... paras 6–12
- Material statutory provisions ..... paras 13–21
- Hearing and evidence ..... paras 22–39
- Discussion and findings ..... paras 40–56

Summary

1. These applications concern an elongated purpose-built block of 16 flats above garages or car ports at ground level, with a shared driveway and gardens. The estate is situate just off Pound Hill, Cambridge and was erected in the mid-1980s. It is of brick construction under pitched roofs of interlocking tiles.

2. The applications were brought by the lessees on or after 24th June 2016, despite the freeholder company having issued County Court money claims for recovery of sums owed on 3rd May 2016. This was not apparent when either the first or second set of tribunal directions were issued, but on enquiry of the court office at Cambridge on the morning of the hearing it became clear that on 18th July 2016 Deputy District Judge Gill stayed the court proceedings pending determination by the tribunal of these applications, with a proviso that the claimant freeholder be at liberty to restore the claims by 19th December 2016, failing which they will be struck out.

3. For the reasons which follow the tribunal determines that :
   a. At the date of issue of the court proceedings no sums were due because no demand for payment had ever been served, with or without the statutory summary of the rights and obligations of tenants of dwellings in relation to service charges
   b. At the date of these applications to the tribunal there was still nothing due by way of service charge, for precisely the same reasons
   c. The respondent freeholder has purported to correct this by issuing a letter dated 19th August 2016 demanding payment of sums due quarterly in advance from early 2015, including future sums not yet due or payable
   d. The tribunal's first directions sought clarity from the applicants about what exactly was being challenged, by reference to the demands served, but it was impossible for them to comply because no demands had ever been served and the accounts for the year ending 31st May 2015 were eventually supplied only under cover of the above-mentioned letter dated 19th August 2016 – well after the date for the applicant lessees' compliance with the directions
   e. The backdated claim by Mr Cox challenging his liability to pay service charges as far back as 2001 is outwith the tribunal's jurisdiction because the issues of both liability and the amounts due have been determined by a series of court judgments against him, many of them entered by default and – on the basis of the information disclosed to this tribunal – quite wrongfully
   f. As they did not purchase their flat and assume liability for service charges until early 2015 the claim by the second applicants (Mr Ingram & Ms Xi Lin) is restricted to the period January 2015 onwards
   g. A challenge concerning liability for major works to windows undertaken in the current financial year ending 31st May 2017 is premature, but unless

the freeholder applies to the tribunal for dispensation under section 20ZA the liability of the applicant lessees will be restricted to £250 per flat

h. Although the lease enables the freeholder to maintain a reserve fund the accounts demonstrate that :
   i. This has never been complied with
   ii. An unjustified surplus has been built up, with the service charge accounts for 2015 showing excess cash at the bank
   iii. There are worrying signs that service charge funds, which should be held on trust, have been mixed with company (i.e. shareholder) funds

i. In all the circumstances the freeholder holds moneys which are repayable to lessees and therefore nothing is currently payable by the applicants

4. On the issue of recoverability of the freeholder's costs incurred in connection with these proceedings, the tribunal is not satisfied that the lease permits the recovery of legal costs of litigation by way of service charge. If the tribunal is wrong in its interpretation of the lease then, in view of the applicants' overall success and the freeholder's utter failure to comply with either the lease or the law the tribunal makes an order under section 20C and directs that no sums are to be included in any service charge payable by the applicants in respect of this or any future accounting period. Such sums are not due, but they are also not just.

5. Under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the tribunal also orders the respondent freeholder to reimburse the tribunal issue and hearing fees paid by the applicants, namely £125 for the section 27A application and £190 for the hearing. (No issue fee is required for a section 20C application).

Relevant lease provisions

6. The lease for flat 3 is dated 25th May 1990 and grants a 99 year term commencing on 1st January 1985. It is a tripartite lease, with a management company, Honey Hill Mews Ltd, specifically named and given defined responsibilities. By a deed of variation dated 30th October 1991, between the respondent company (which is not the same as that named in the original lease) and one T J Blackhurst, the new management company was also identified as freeholder and in consideration of the sum of £425 payable by the lessee the term was extended to 999 years, the ground rent was reduced to one peppercorn, and various other variations were agreed.

7. The lease for flat 5 is dated 13th February 1986 and, where material, is of similar wording as that for flat 3. It too was amended by a deed of variation dated 4th July 1991 to similar effect.

8. In each case the service charge contribution is specified as one sixteenth part of the annual estate management costs as defined in the ninth schedule, namely

> ...the aggregate in any one year of the costs expenses provisions liabilities and payments incurred or otherwise provided for by the lessor in relation to the following matters.

There are then listed some of the usual items, including the performance by the management company of the provisions of various paragraphs in the seventh schedule (insurance, maintenance & repair, decoration, etc), the enforcement of

regulations set out in the eighth schedule, the provision of services of common benefit, etc.

9. Two sub-paragraphs in paragraph 1 of the ninth schedule are highly pertinent :
   (g) The allocation of such amounts as the management company shall consider reasonable to a reserve fund or funds for the replacement of any plant or equipment or for future expenses liabilities or payments whether certain or contingent and whether obligatory or discretionary (subject always to the provisions of section 90 of the Housing Finance Act 1972)[1]
   (h) The employment of any accountant solicitor or other professional person for any purposes connected with the management of the estate.

10. The machinery for calculation and payment of the service charge appears in paragraph 2 of the ninth schedule, but it contains an unfortunate confusion about the role of the management company's accountant. Bizarrely, paragraph 2(a) also defines the management company's financial year as "any period of twelve months commencing on the first day of November". By deed of variation this was changed to "first June (or such other date as the management company shall from time to time nominate) in every year".

11. The confusion arises because sub-paragraph (b) refers to the annual account being "certified" by the accountant whereas sub-paragraph (c) requires the management company "within a reasonable time after the account... has been taken and audited as aforesaid" to supply the lessee with a copy of the account together with a notice specifying the service charge payable in relation thereto. There is no earlier reference to the carrying out of an audit of the account, a more extensive and expensive task than that required for its certification.

12. Sub-paragraph (c) goes on to provide for payment by the lessee within 21 days of the service charge specified in the account less the aggregate of the amount already paid (by four equal quarterly payments)[2] on account
    PROVIDED that if the service charge is less than the aggregate of such amounts the shortfall may be retained by the management company and shall be taken into account in the calculation of the next amount payable by the lessee under paragraph 2 of this schedule.

Material statutory provisions

13. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :
    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...

14. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    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.

[1] See now the Landlord and Tenant Act 1985, section 21 (referred to below)

[2] See sixth schedule, paragraph 1(b), as varied by clause 1(f) of the deed of variation

15. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

16. By section 21 of the same Act a tenant may require the landlord in writing to supply him with a written summary of the costs incurred over the previous twelve months. The landlord shall comply with the request within one month of the request or within six months of the end of the period referred to in subsection (1)(a) or (b) whichever is the later.[3] The section sets out the requirements of a summary of costs to be supplied under section 21, and if the relevant costs are payable by the tenants of more than four dwellings the summary must be certified by a "qualified accountant".[4]

17. Three further provisions, concerning demands for payment of service charge, are relevant to this case and were explored at the hearing. First, by section 47 of the Landlord and Tenant Act 1987, where any written demand is given to a tenant of premises for rent or other sums payable under the lease (which expression would include a demand for payment of service charge), the demand must contain the name and address of the landlord.

18. Secondly, since 1st October 2007 section 21B of the 1985 Act provides that a demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges. The content of that summary is prescribed by the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007.[5] The document must contain the prescribed heading and text and must be legible in a typewritten or printed form of at least 10 point.[6]

19. Thirdly, in order that leaseholders can keep track of what they may owe, and to discourage tardiness by freeholders or their managing agents, section 20B of the 1985 Act provides that :
    (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
    (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that

3 See s.21(4). Subsection (1)(a) refers to cases – as here – where the accounts are made up for periods of 12 months, the request being limited to the last such period ending not later than the date of the request

4 See s.21(6)

5 SI 2007/1257

6 *Op cit*, reg 3

he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

20. The Court of Appeal has held[7] that costs would be incurred for the purpose of section 20B when the landlord is sent an invoice or on payment by the landlord, as opposed to when the service is actually provided. Whether the costs are incurred on the sending of the invoice or on later payment by the landlord will depend on the facts. For example, where payment of an invoice is delayed by reason of a genuine dispute the latter payment date is likely to be the date on which the cost is incurred.

21. Finally, matters revealed during the course of the hearing highlight the need to comply with section 42, which provides that any sums paid to the landlord or managing agent by the contributing tenants by way of relevant service charges, and any investments representing those sums, shall (together with any income accruing thereon) be held by the payee either as a single fund or, if he thinks fit, in two or more separate funds upon trust to defray costs incurred in connection with the matters for which the relevant service charges were payable (whether incurred by himself or by any other person), and subject to that, on trust for the persons who are the contributing tenants for the time being.

Hearing and evidence

22. By the first set of directions issued by Regional Judge Edgington responsibility for the preparation of the hearing bundle was placed on the applicants. This was not successful. The bundle did not even conform with its list of contents. The applications included were not those to the tribunal but rather the money claims issued by the respondent freeholder against the applicants in the County Court, and an order requiring the lessees to produce a copy of the proceedings mentioned in paragraph 6 of their Defence (neither of which was enclosed). The bundle was a complete mess, and the exhibits to Mr Crankshaw's witness statement (for the respondent) had to be submitted as a separate bundle. Then, on the day before the hearing, the respondent submitted its own, more helpful and comprehensive bundle (albeit with many documents blurred and difficult to read due to copying errors). The tribunal therefore notified the parties that the hearing would be put back an hour to allow the tribunal to read the new material.

23. The section 27A application raised, in respect of each of the years 2010 to 2016, essentially the same points concerning :
    a. Whether the £310 now being charged quarterly was excessive as it was subsidising one lessee who was refusing to pay
    b. That no service charge demand had been received accompanied with a summary of the rights and obligations of tenants in relation to the service charge
    c. The landlord's failure to comply with section 20 in respect of major works
    d. Whether the landlord company was acting ultra vires due to its failure to obtain authority from its lessee shareholders; and
    e. The inappropriate use of service charge moneys to fund legal proceedings.

24. In his initial directions Regional Judge Edgington ruled out as irrelevant to the tribunal's jurisdiction any matters of company law. If the amount of the service

[7] *OM Property Management Ltd v Burr* [2013] EWCA Civ 479

charge was being challenged in respect of each of the years stated then a detailed Statement of Case was required, attaching the relevant demands and setting out which items were being challenged, specifying what alternative amounts would be regarded by the applicants as reasonable.

25. A detailed Statement of Case was filed and served within the time prescribed, but it did not attach any demands or go into detail. It restricted the challenge to the specific procedural point that no demands had been served accompanied by the required summaries. The tribunal did not therefore need to examine specific items within the service charge account. However, in respect of Mr Cox's flat 3, the Statement of Case now challenged and sought disclosure of service charge summaries going back as far as 2001. To this the respondent submitted its own Statement of Case explaining that Mr Cox's liability to pay service charges for most of these years had already been determined by court judgments against him, all of which had since been enforced by the grant of charging orders secured on the flat and, in January 2016, the making of an order for sale and Mr Cox later surrendering the keys.[8] The respondent also argued that challenges in respect of those very early years were out of time and that it had a limitation defence.

26. The tribunal then issued additional directions dated 2nd September 2016. These sought to clarify the issues in advance of the hearing :
    a. All the applicants, having confirmed in their Statement of Case that their only basis of challenge to the service charge demands (save for the section 20 issue) was that "no service charge demand, and/or reminder letters have been sent out or accompanied by a formal summary of rights and obligations" by the landlord, were immediately to confirm in writing to both the respondent's solicitors and to the tribunal office that they had in fact received service charge demands or invoices but that such documents were unaccompanied by the required summary of tenant's rights and obligations
    b. They were also asked to identify specific major works carried out and in respect of which the section 20 consultation procedure was ignored
    c. Mr Cox was asked to justify enlarging the scope of the tribunal's enquiry to many years before the start date of 2010 mentioned in the application and to say whether he admitted that judgments had been entered against him for most of the years in dispute. He was to identify any years when no judgment applied
    d. The second applicants (flat 5) having only acquired their flat in 2015, they were asked to identify the specific years challenged by them
    e. The respondent was asked to provide proof, by schedule preferably, of the years and amounts covered by the various judgments relied upon.

27. In response the applicants clarified that no service charge demands had ever been received at all. They enclosed a letter dated 27th April 2016 from the respondent informing them of redecoration work to some of the windows that was due to start by erection of scaffolding in week commencing 9th May and last three to four weeks, and the name of the contractor selected. The cost of the work was not stated. (It was confirmed during the hearing that the cost of this work falls within

[8] NB. This was not treated as either a surrender of the lease or a forfeiture, merely as entry by a chargee in possession. Mr Cox is still registered on the leasehold title as proprietor and, hence, is potentially still liable for further service charges

the service charge year commencing 1st June 2016).

28. Mr Cox conceded that judgments had been entered against him for all but 2015 onwards and flat 5 limited their application to 2015 onwards.

29. At the hearing the respondent was represented by counsel, with Mr Crankshaw (a director of the company) assisting him. Mr Ingram represented flat 5 and also assisted Mr Cox of flat 3, who seemed genuinely confused by the proceedings and had difficulty in expressing himself (other than when commenting that after he ceased being a director of the company he had wanted the whole responsibility outsourced to a professional managing agent).

30. With the judgments being conceded by Mr Cox and the period under challenge by Mr Ingram being restricted to after their acquisition of flat 5 in early 2015 the issue of limitation fell away entirely. The tribunal explained to Mr Cox that as judgments had been entered against him (albeit in the vast majority of cases by default, and thus without the court considering the merits) it had no jurisdiction to determine what had already been determined by a court.

31. On the validity of the service charge demands it was accepted by both sides that none had ever been served, let alone without being accompanied by the required summary of tenants' rights and obligations. As at the date when the freeholder issued County Court money claims against the lessees of flats 3 and 5 nothing was yet due or payable. As at the date when the applicants filed their section 27A application that remained the position. However, the respondent sought to cure that defect when, on 19th August 2016, it sent a letter to each of the applicants stating :

> It has been brought to the attention of the directors that in accordance with section 21B of the Landlord and Tenant Act 1985, a Statutory prescribed summary of rights and obligations ought to be attached to the service charge demand. This letter should be considered to be a demand for service charges for the following periods.

The letter then listed each quarter from 1st March 2015 right through to 1st September 2016 and even 1st December 2016. As at that date neither of the last two liabilities were due. As at the date of this decision the December payment is still not due.

32. The respondent considered this to be a valid demand. The applicants did not.

33. On the subject of major works the attitude adopted by the respondent was that the directions required the applicants to identify the works concerned, their value, etc. What they had done was to produce the letter dated 27th April 2016 announcing the imminent redecoration of the windows, but they had not identified the date and cost of the qualifying works, their description and why they trigger the duty to consult [see paragraph 24 of the respondent's undated Statement in Response, signed by counsel]. Mr Adkinson argued that it was not for the respondent to anticipate the applicants' case, and that the burden was on them to establish it. This was notwithstanding that the respondent knew about the redecoration of the windows that it had organised, that the work had now been carried out, and that it had even been paid for. Neither he nor his client were minded to state what that cost was, although he acknowledged that it was

of sufficient scale to trigger the duty to consult.

34. By separate letter dated 19th August 2016 the respondent's solicitors sent the applicants a copy of the service charge accounts for the year ending 31st May 2015 – nearly 15 months after the accounting period had ended. That was hardly "upon the expiration of the management company's financial year", as required by the ninth schedule to the lease.

35. The account, signed by accountants Prentis & Co LLP but undated, is described merely as a summary under section 21 of the 1985 Act. It lists various types of expenditure but unhelpfully does not provide a total. The expenditure recorded amounts to £10 161. The second page is described as an analysis of the balance sheet for the year ended 31st May 2015. It begins with the balance of service charge demands issued for that year of £18 640 and those received of £17 450. The amounts demanded thus exceed that year's actual expenditure by just over £8 500. The "cash at bank" was surprising, being recorded as £44 203.

36. Significantly, there is no reference anywhere to the respondent having identified any periodic works for which a reserve fund should be established, of transfers to such a reserve account, or the amounts held therein at the beginning and end of the relevant accounting period. When questioned by the tribunal whether any surveyor's condition report was obtained periodically to determine what major items of work might be required and for which provision ought to be made Mr Crankshaw said that he had asked the company's usual carpenter for his advice. He had not sought any professional advice.

37. When asked by the tribunal why, if there was no reserve fund, the amount held at the bank was so large and why it had not been returned to the lessees, Mr Crankshaw said that funds needed to be held for general expenditure.

38. Mr Ingram was puzzled by the "cash at bank" figure, and tried to refer to a set of accounts that was not before the tribunal but which, he said, showed a balance in excess of £50 000. Mr Adkinson explained that Mr Ingram was not referring to the same thing but to the company's own accounts, and that the total figure also included the debt owed by Mr Cox, which would not be realised until flat 3 was sold. This debt is in respect of service charges. As the leases have been extended by variation from 99 years to 999, and at a peppercorn rent, there is little value in the freehold reversion as an investment asset. The only income available to the company is therefore the sums received on account of service charges. Mr Adkinson acknowledged that there appeared to have been a merger of company funds and service charges, which ought to be kept separately.

39. Addressing the section 20C issue, Mr Adkinson argued that the provisions in the lease, specifically at paragraph 1(h) in the ninth schedule, entitled the freeholder to recover its legal costs of the proceedings by way of service charge as the word "solicitor" is mentioned and they are costs "connected with the management of the estate". He cited two authorities in his support: *Reston Ltd v Hudson* [1990] 2 EGLR 51 (last paragraph), and *Conway & ors v Jam Factory Freehold Ltd* [2014] 1 EGLR 111, at paragraphs [11] & [40–47]. In response the tribunal invited him to consider the more frequently referred to authorities of *Sella House Ltd v Mears* [1989] 1 EGLR 65 and *Holding & Management Ltd v Property*

Holding & Investment Trust plc [1989] 1 WLR 1313, where the Court of Appeal suggested that the claim was an attempt by the landlord to get through the back door what has been refused at the front. It was, submitted Mr Adkinson, a matter of interpretation of the specific provision in the lease, and that in this case legal costs were recoverable.

Discussion and findings

40. The tribunal is disappointed to see a freeholder and management company both owned and controlled by its lessee shareholders that is run, and manages this estate, so badly. Unless others have the time and skill to assume control it would be sensible if Mr Cox's suggestion to employ a professional managing agent were to be adopted.

41. This is a case where no written demands were made and no summaries ever even considered necessary. Decisions seem to have been taken at annual general meetings but with little or no understanding of the governing principles. At a meeting in December 2014 a decision was taken to increase the quarterly charge to £310, so taking the freeholder's case at its very highest and without challenging specific expenditure items (such as an audit fee, where no audit is required by the lease), the annual budgeted income is almost double the actual costs and is not reasonable. No evidence has been provided of any increase in costs in the year ending 31st May 2016.

42. Despite a failure to issue proper demands the company, seemingly without ever bothering to take legal advice, issued County Court money claims against Mr Cox. The bundle contains one court order by Deputy District Judge Jackson, dated 22nd November 2002, which begins with the words "Upon hearing Company Secretary[9] for the claimant and the defendant in person". This suggests that the case was heard on its merits, but what points of law were taken is unknown. This is an area of landlord and tenant law with which many solicitors or legal advice services are unfamiliar, even if such help is available.

43. All other judgments entered against Mr Cox appear to have been default judgments. They include all quarterly service charges to date except for those beginning in December 2015, June 2016 and September 2016. Judgment was entered against Mr Cox in respect of the March 2016 quarterly payment on 23rd May 2016.

44. Upon the basis of the information before this tribunal these service charges were not lawfully due and it is likely that these judgments, had they been considered on their legal merits instead of by default, would never have been made. Had Mr Cox obtained legal advice then action could have been taken and the continued errors in management by the company curtailed a long time ago. Judgments and orders that he pay the company's court issue fees and/or other legal costs may well have been avoided, and so too the various charging orders and the eventual order for possession and sale of his flat.

45. There is nothing that this tribunal can do about that other than, by serving a copy of this decision upon Cambridge County Court, draw it to the court's attention. Without wishing him any disrespect, the impression that the tribunal formed of

[9] At all material times this has been Mr Crankshaw

Mr Cox was that he is a vulnerable person who needs assistance in such matters. Mr Ingram was kindly able to help. Through his inability or failure to engage with the County Court and allow default judgments to be entered on claims without any consideration of their merits he has suffered an injustice.

46. However, determinations having been made, it is a matter for the County Court whether an appeal out of time ought to be permitted and one or more of these judgments be set aside. While these orders stand, however, there has been a determination of liability and payability by a court of law and this tribunal has no jurisdiction to interfere.

47. As stated at the outset of this decision, further money claims have been issued by the freeholder company but (at least in respect of Mr Ingram and Ms Xi Lin) have been stayed by order of Deputy District Judge Gill on 18th July 2016.

48. Although the lessees did not comply with Regional Judge Edgington's directions by identifying specific items of service charge expenditure that were challenged this was largely because they were wholly unable to do so. The respondent freeholder had never served an annual account upon them (save perhaps at Annual General Meetings of the company) and so no actual figures were revealed in respect of the year ending 31st May 2015 until nearly 15 months later, and after the respective dates of the court proceedings, this application, and for compliance with directions. They were supplied by letter dated 19th August 2016, the same date on which a largely backdated written demand was made for service charges for the quarters March 2015 right through to December 2016 !!

49. The tribunal is satisfied that the respondent freeholder has never complied with paragraph 2 of the ninth schedule. Instead, it has decided at an AGM what to charge in advance to cover its costs. No end of year account has ever taken place with a view to establishing whether a balance is due to the company above the aggregate of payments already made by lessees or whether there is a surplus to be taken into account when calculating the next demand. The quarterly charge of £310 has never been properly assessed and is unreasonable in amount. The service charge account being in significant surplus, and there being no properly constituted (or any) reserve fund in place, nothing is currently payable.

50. The quarterly payments provided for in the lease (as varied) being in the nature of advance payments, there have been no final service charge accounts and balancing demands which the applicants have been able to challenge. This includes demands for expenditure incurred on qualifying works, within the meaning of section 20. Should any such demands be made in respect of sums actually incurred then they remain open to challenge.

51. The tribunal was not impressed by the attitude taken by the company and its counsel to the section 20 challenge. How could the applicants provide details of the actual work to the windows, and its cost, when the company had refused to disclose that – even at the hearing? The bill has been paid, but when and in what amount Mr Crankshaw is not saying. Mr Adkinson took a technical pleading point, almost certainly because it was all he could do. His client did not, and could not, give him any on the merits of the case. As he acknowledged that the cost was sufficiently high to trigger section 20 consultation the tribunal gives

warning that, in the absence of an application to it under section 20ZA, the cost of such work eventually claimed against the applicants shall be limited to £250 per flat.

52. Other matters of grave concern to the tribunal are the comparison between the sums demanded by way of service charge and the much lower level of annual expenditure, resulting in the build up of a wholly unwarranted cash surplus. This is only made worse by the discovery that these funds, which are lessees' funds that should be held on trust, have been intermingled with or treated as company funds. As the lessees and shareholders are the same this is an easy mistake for the legally unqualified to make, but it has consequences. Judgment against the company could be enforced against funds which are in its bank account but which should not.

53. If, for example, the true cost of the major works carried out to the windows this year is capped at £250 per unit then the loss should fall on the company; not on the service charge fund. While the lessees are also the shareholders their remedy, if any, against unlawful actions by the directors lies in the Companies Court and not here.

54. On the issue of section 20C the tribunal considers, having taken into account the various cases cited, that the provision in the ninth schedule is insufficiently precise to justify the recovery of legal costs as part of the general service charge. Even if the tribunal were wrong in its interpretation, it adopts the approach of Nicholls LJ in *Holding & Management Ltd v Property Holding & Investment Trust plc*, that the landlord should not get through the back door what has been refused at the front, or that of Peter Gibson LJ in *Iperion Investments Corpn v Broadwalk House Residents Ltd* [1995] 2EGLR 47 that the landlord was entitled to recover its costs of proceedings, provided those costs were properly incurred in managing the property. That would not be the case if the landlord incurred costs improperly (whether in bringing or defending proceedings, or otherwise) or unreasonably.

55. It should come as no surprise that this tribunal determines that the landlord here has incurred costs unreasonably in defending these proceedings, and for the avoidance of doubt the tribunal makes an order under section 20C. While it has its own views on the reasonableness of the freeholder issuing court proceedings the lessees must in that respect seek relief under section 20C by raising the issue with the court.

56. For these reasons the tribunal determines as set out in paragraphs 3 to 5 above.

Dated 10th October 2016

Graham Sinclair

Graham Sinclair
Tribunal Judge