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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AC/LSC/2013/0621**
Property	:	**2a Boot Parade, High Street, HA8 7HE**
Applicant	:	**Metropolitan Properties (Colman) Limited**
Representatives	:	**Bude Nathan Iwanier Solicitors** **Ms Mathers (Counsel)**
Respondent	:	**Gunter Heinrich Krieg**
Representative	:	**None**
Type of Application	:	**For the determination of the reasonableness of Service Charges**
Tribunal Members	:	**Mr M Martynski (Tribunal Judge)** **Mr M Cartwright JP FRICS** **Mr J E Francis QPM**
Date and venue of Hearing	:	**6 & 7 January 2014**
Date of Decision	:	**20 January 2014**

DECISION

Decision summary

1. Of the sum claimed in the County Court proceedings between the parties, the order from the County Court transferring the matter to gives this Tribunal jurisdiction only to consider the reasonableness of Service Charges.

2. Within the sum of £10,034.71 claimed in the County Court proceedings, the sum of £9,212.21 represents Service Charges. The remainder represents an Administration Charge consisting of legal costs amounting to £822.50.

3. As to the Service Charges, all have been reasonably incurred save for Accountancy Fees of £386.99 (Respondent's share).

4. The Tribunal does not have the jurisdiction, in this particular case, to consider the *payability* of Service and Administration Charges.

5. No order is made under section 20C of the Landlord and Tenant Act 1985.

6. The Respondent must pay the Applicant the sum of £100.00 within 28 days of this decision, in respect of tribunal fees paid by the Applicant.

Background

7. The Applicant Company is the freehold owner of Boot Parade ('the Building') which is a three-storey purpose built block comprising ten residential flats on the first and second floors with ten commercial units on the ground floor.

8. The Respondent is the long leaseholder of flat 2A, ('the Flat') which is situated on the second floor of the building. The Respondent has owned the flat since 1996.

9. The Service Charge year for the Building is the calendar year and accounts are made up for that period following the end of each calendar year. The Respondent, under the terms of his lease, is liable to contribute 9.969% to the costs of the maintenance of 'the buildings' as defined in his lease. The lease defines 'the buildings' as:-

> The residential flats and all structures ancillary thereto ..... excluding the shop units on the ground floor of the Buildings

10. The Building is managed by the Freshwater group of companies. The Applicant owns one of the leasehold flats.

11. Proceedings were issued by the Applicant against the Respondent in the Northampton County Court (which were transferred to the Barnet County Court) under Claim Number 3YJ78404. In those proceedings the Claimant claimed the sum of £10,034.71 plus interest under the terms of the lease at 14% per annum. The amount claimed represents the balance on the Respondent's Service Charge account for the Flat as at 24 January 2013. The Service Charge account was last in credit in 1999.

12. The Respondent (after judgement in default of defence had been entered and then set aside at his application) filed a defence in the County Court. The case set out in that defence can be summarised as follows:-

    a. Demands (unspecified but served after 1 June 2009) for various sums from the Applicant under the lease had with them Statements of Rights and Obligations but those Statements of Rights and Obligations were not in the correct statutory form[1]. The error in the statements was that they referred to the *Lands Tribunal* as opposed to the *Upper Tribunal*

    b. More than £7,000 of the sum claimed by the Applicant is in respect of planned major works and therefore '*an inspection of the building is required to determine the necessity and reasonableness of the service charges....*'

13. The claim was transferred to the Tribunal by order of Deputy District Judge Shelton dated 12 August 2013. The terms of that order are:-

> The case be stayed and referred to the Leasehold Valuation Tribunal to determine the reasonableness of the service charges.

14. After the matter was referred to the First Tier Tribunal (formerly the Leasehold Valuation Tribunal), directions were given at an oral hearing which took place on 1 October 2013.

15. The Respondent then proceeded to raise numerous challenges to the Service Charges. Those challenges were set out in a schedule and in Statement of Cases/witness statements. There was no argument raised by the Respondent that the terms of his lease did not allow for the charging of the various costs in dispute.

16. There have been previous proceedings between the parties regarding Service Charges in this tribunal which culminated in a decision of a

[1] Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (England) Regulations 2007 & Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007

Leasehold Valuation Tribunal dated 5 July 2011[2]. That tribunal was dealing with a reference to it of proceedings from the Willesden County Court. In those proceedings the Applicant had sued the Respondent for outstanding Service Charges. The sums claimed in those proceedings, like the proceedings now before this Tribunal, were based on a running balance on the Respondent's Service Charge account. The actual amount sued for in the previous proceedings was a balance of £4,921.11[3] as at 29 September 2010 (the last entry on the account to that date being a demand for ground rent in advance).

17. The Respondent raised numerous issues regarding the reasonableness and payability of Service Charges claimed in those proceedings. Those issues were considered by the tribunal and the tribunal concluded, in its decision dated 5 July 2011, that the Service Charges were payable by the Respondent in full as claimed.

The inspection

18. The Tribunal inspected the Building on the morning of 6 January 2014 in company with; Mr Roger Harper (Area Manager for Freshwater), Ms Mathers (Counsel for the Applicant), and the Respondent.

19. At the time of inspection the upper floors of the Building were scaffolded at the front and rear with full access scaffolding. The scaffolding at the front elevation and at a small part of the rear elevation had shroud protection. Major works, mainly consisting of decoration and associated repair, were in progress.

20. At one side of the Building there is a pedestrian and road access way running under the upper floors of the Building. This leads to a car park area. The pavemented pedestrian part of the access way leads around the rear of the building to give access to the stairs which lead to the residential flats and to the rear doors of the commercial units.

21. There are two sets of stairs, one at either end, of the rear of Building which lead up to a wide walkway. From that walkway the front doors of eight of the flats are accessed directly. The Respondent's property (at one far end of the Building) is reached by a further set of stairs (his front door and flat is situated on the second floor). At the opposite end of the Building is a further set of stairs leading from the walkway to the remaining flat (again which occupies the second floor) which is occupied by a Mr Richman. The wide walkway area at first floor level is covered with asphalt.

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[2] Reference Number: LON/00AC/LSC/2010/0861

[3] That tribunal only considered the sum of £4,171.11, that being the amount of Service Charges in the claim, the remainder of the claim being for matters such as ground rent that fell outside the tribunal's jurisdiction

22. In the car parking area near to the raised pavement running along the back of the Building is an open drain with a protective grille.

23. The long leaseholders of the residential flats have no formal legal right to use the parking area at the rear. However, the Applicant allows them to use that area and indeed has allocated parking spaces to them.

The hearing

24. The Applicant was represented by Counsel, Ms Mathers, at the hearing. The Respondent was in person. Mr Richman, one of the other leaseholders in the Building was present on the first day of the hearing but was unable to attend on the second day. Evidence for the Applicant was given by Mr Harper, the Applicant's Area Manager.

The issues

The years to be considered by the Tribunal

25. The directions given prior to the hearing directed the Respondent to set out, in schedule form, the issues that he wished to take regarding the claim against him. He complied with this direction and set out, year by year, the various issues that he wished to raise. Issues were raised for various years going back to 2000. The Respondent raised, or appeared to raise, further issues in his statement of case/witness statement, some of which were in respect of items pre-dating the Service Charge year 2010.

26. The Applicant argued that the Tribunal should not consider any Service Charge issue that concerned any Service Charge year prior to 2010. The reason for this was that the previous tribunal dealing with the previous County Court referral had considered the Service Charge years prior to 2010 and had found all Service Charges to be reasonably incurred. Service Charges incurred therefore prior to 2010 had already been the subject of enquiry and decision and could not be re-opened.

27. We were not clear as to why the Respondent felt that the years prior to 2010 should be re-opened for examination. We agree with the Applicant's submissions set out above. Further, the Service Charges that are the subject of the current County Court proceedings and which have been referred to the First Tier Tribunal concern only Service Charges which have been incurred from 2010 onwards.

28. The Tribunal therefore declines to consider any challenge to pre-2010 Service Charges raised by the Respondent.

Section 21B Landlord and Tenant Act 1985 & Paragraph 4, Schedule 11 Commonhold and Leasehold Reform Act 2002 – the payability of Service and Administration Charges

29. The relevant statutory provisions provide that any demand for a Service Charge or Administration Charge sent to a leaseholder must be accompanied by a Statement of Rights and Obligations. The form of that statement is prescribed by Statutory Instrument. The relevant Statutory Instruments do not allow for any variation from the wording that they prescribe.

30. It was conceded by the Applicant therefore that seemingly any derivation from the prescribed statutory wording in a statement of Rights and Obligations would mean that the statutory requirement to serve the statement had not been complied with.

31. The consequence of non-compliance with the statutory requirements is that the leaseholder has a right to withhold payment of the charges demanded. In effect therefore, those charges are not payable by the leaseholder.

32. The Applicant further conceded that the Statements of Rights and Obligations sent to the Respondent which accompanied Service and Administration Charge demands over the period being considered by the Tribunal were defective in that they referred to the '*Lands Tribunal*' as opposed to the '*Upper Tribunal*'.

33. The Applicant did not seek to argue against the Respondent's contention that accordingly the sums claimed in the demands sued upon in the County Court proceedings from 2010 onwards were effectively not payable.

34. The Applicant re-served upon the Respondent all the relevant demands with new Statements of Rights and Obligations by letter dated 2 January 2014. The Respondent admitted that he had received these new demands on 3 January 2014. He conceded that the Statements of Rights and Obligations that accompanied those demand were in the correct statutory form.

35. It was accepted that the Applicant had complied with the terms of the Respondent's lease in that it had provided a certificate for the Service Charges claimed for the years 2010, 11, & 12. The Respondent's lease

provides that the charges in question are payable on demand[4]. If therefore the demands were served upon the Respondent on 3 January 2014 and were accompanied with valid Statements of Rights and Obligations, those demands became payable on that day.

36. The consequence of this is that none of the sums claimed in the County Court proceedings referred to the Tribunal were payable by the Respondent at any time prior to 3 January 2014.

37. However, under the terms of the Court Order transferring the proceedings to the First Tier Tribunal, the only issue for this Tribunal is the *reasonableness* of Service Charges. The Court Order does not give us the jurisdiction to consider the *payability* of Service and Administration Charges, that will be a matter for the County Court when these proceedings are returned to it.

38. The Tribunal therefore declines to make any formal finding in respect of the payability of either Service or Administration Charges.

The split of charges between the commercial and residential tenants

39. Where there are costs that are incurred for the joint benefit of the commercial and residential parts of the Building, it is the general practice of the Applicant to split those charges on a 50/50 basis.

40. The Respondent and Mr Richman referred to a decision of a Leasehold Valuation Tribunal which pre-dated 1996 where it was alleged that a Tribunal determined that the correct split of charges at the Building was 1/3 for residential leaseholders and 2/3 for commercial tenants. It was accepted by the Respondent that for so long as he has been the owner of the Flat, the split has generally been 50/50.

41. No record of the alleged decision was produced and so far as this Tribunal is aware, there are no public records of decisions going back that far.

42. In general and subject to individual consideration of each type of expenditure, it seems to the Tribunal that a general approach of a 50/50 split of costs for the Building is reasonable.

Porterage

43. The Applicant employs a 'Porter'. This Porter works at three sites owned by the Respondent. The amount of the Porter's time allocated to

[4] clause 2)b)vii)

the Building is 8 hours per week (including travel[5] and some accommodation expenses). The Porter is allegedly on call 24 hours a day. The Porter provides a cleaning service for the Building and checks the Building regularly. He is also supposed to be a point of contact for the residents for any issues that arise at the Building.

44. Twenty per cent of the costs of the Porter are attributed to the Building. That 20% is then apportioned 50/50 between residential and commercial tenants.

45. Over the years in question, the costs of the Porter to the residential tenants are:
2010: £3,636
2011: £4,264
2012: £3,578

This equates to yearly figures for the Respondent of approximately; £363, £426 and £357.

46. The first question we considered was the reasonableness of a service of this kind. There are no internal common parts nor is there any main communal door/entranceway at Boot Court. In response to the Tribunal's question about whether any cleaning or other such service was actually required at Boot Court, Mr Harper for the Applicant replied that the Building and appurtenant parts would be 'knee deep' in litter if there were no cleaning.

47. With some hesitation, we consider that the Porter service is just about reasonable (in terms of the service itself and its costs) for the following reasons;

(a) There is probably a need for a regular cleaner for the external parts
(b) Given the extent and number of stairs in the external common parts they will benefit from regular attention especially outside the Summer period
(c) There is undoubtedly a problem of dumping in the car parking area and the entrance way to that area (both parties referred to this and we were shown a number of photographs demonstrating the issue)
(d) The Porter, in being a point of contact for leaseholders, performs some management functions – the management charge for the building for each flat of around £60.00 per year (referred to in more detail later on) is very low. If the Porter is not a point of contact then management charges may be higher

[5] It was said by Mr Harper that the sites in question are fairly local – around a two-mile radius and that the Porter lived relatively locally.

(e) If the Porter is scrapped and a cleaning contractor is employed for say 1.5 hours per week the cost would be likely to be in the region of £2,300-£2,500 per year. Any saving in costs between this charge and the Porter's charge may well be taken up in additional management charges

(f) According to Mr Harper, he is willing to discuss with leaseholders an alternative arrangement to the Porter

48. The Respondent raised as an issue the standard of the service provided by the Porter. He produced a vast number of photographs of the external common parts some of which showed some cleaning issues. The Respondent also alleged that the Porter may not be at the Building for the full amount of time that he is supposed to be there.

49. On the second day of the hearing the Respondent stated that he wished to rely on a log, compiled by Mr Richman, of the time spent at the Building by the Porter. The Tribunal declined to allow the Respondent to rely on this log as; first, it had not been sent to the Applicant prior to the hearing in accordance with the directions, and; second, Mr Richman was not in attendance to be questioned on the log.

50. We were not satisfied that there was sufficient evidence that the Porterage work had not been carried out to a reasonable standard or that the Porter was not there for the full time allocated. There may well have been occasions when there was some cleaning that was not done properly or that was not attended to for some time. The Respondent did not present the Tribunal with a list of dates and issues and there was no evidence that he had raised the issue either direct with the Porter or systematically[6] with the Applicant or its managing agents.

51. Finally in relation to the Porter the Tribunal considered the split of his cost 50/50 with the commercial units. The Tribunal did not consider that the Porter would take any greater percentage of this time in the car park area or the frontage of the shops at the front of the building so as to justify a greater allocation of his costs to the commercial premises. Some cleaning of the car part area in any event inevitably is of benefit to the residential leaseholders as they may be affected by litter or dumping in that area.

Accountant's costs

52. The costs for the years in question are:-
2010: £1,752
2011: £2,160
2012: £2,520

[6] There was only passing reference to this issue in correspondence between the parties seen by the Tribunal

53. The accounts for the Building are very simple. The main accounts for the residential leaseholders take up three/four pages with standard notes to those accounts. There are generally just six or seven categories of expenditure. It is fair to say that most reasonably intelligent and averagely numerate people would be capable of producing these accounts. They do not appear to require any special expertise or certainly no more expertise than a trainee accountant. It has to be borne in mind that these charges are only for the Residential part of the accounts, there is a separate charge for the commercial part of the accounts (which are similarly very straight forward) which appears to be approximately another 50% of the charge levied for the residential parts.

54. In the Tribunal's experience[7] of Service Charge accounts and accountant's fees, Accountants producing accounts of this simplicity would be charging in the region of £500.

55. The Applicant was given the chance to explain why the Accountant's charges were so high in this case. The Applicant produced a 'Memorandum of Fees Accrued' dated 10 May 2011 produced by the Accountants which described the work that they did. The work carried out appeared to be very thorough – described as a 'Rolls Royce' job by Mr Harper. Further, it was said that the major works accounting that was done for 2012 would have meant that the accounts were more involved and would have required more work.

56. The Respondent did not have any alternative figures or quotes.

57. On any view the fee for the accounts appears excessive. The explanations given did not justify the amount of the fees. The work carried out (as set out in the Memorandum produced) could and should have been done within a limited amount of time – say 5 hours. The costs of the major works would not have led to any significant extra work on the part of the accountants. The figures would have been dealt with in detail by those organising the works and in any event, as the works and their costs have not been finalised, all that the accounts dealt with was the estimated costs of works and the payment on account demanded from leaseholders.

58. Preparing accounts of this nature could only attract an hourly rate of around £125.00. As stated above, the time attributable to the preparation of the accounts could be reasonably estimated at 5 hours. This would give a charge of £750.00 per annum including VAT. The Tribunal settles upon a sum of £850.00 per annum as being a reasonable cost that allows for the benefit of any doubt in favour of the Applicant.

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[7] The parties were informed of this during the hearing and given the opportunity of commenting on it

The major works

59. The first of the Respondent's concerns regarding the major works and their cost was the need for scaffolding to carry out the works. He argued that full scaffolding was not necessary and that the works could be done by the use of a hired scissor lift at a much lesser cost.

60. After having inspected the works and relying on its own expertise and experience[8] the Tribunal has no doubt that scaffolding is required and is reasonable in order to provide a safe working environment for the contractors and members of the public.

61. The major works involve decorating and working upon a very large surface area over the second and third floors. It is obvious that a continuous access to that area, as opposed to one small area at a time (which is all that could be achieved with a scissor lift) is going to be a far more efficient way of working.

62. The Applicant and the contractors are bound in law to provide a safe working environment and to protect the public from danger. The works involve the hacking away of loose and damaged render in places which could easily fall from the building. The only safe way to protect against the falling of this material is full scaffolding with shroud protection so as to restrict the fall of material from the Building to the ground.

63. The Respondent was next concerned about the repair and decoration of leaseholders' windows and doors that were the leaseholders' own responsibility and the costs of which should not be charged to other leaseholders. He was also concerned about being charged for the costs of repairing/replacing render that had been damaged (he alleged) by the erection of shop signs above the commercial units. On looking at the costing and specification, the Tribunal raised questions about the proposed 1/3 commercial – 2/3 residential split of the costs associated with the recovering of the walkways.

64. The immediate answer to all of these points is that the works are currently in progress. The final extent of those works and the breakdown and allocation/split of their cost is not yet known. The Respondent has only so far been asked to make a contribution in advance to those works of £7991.74. Therefore the only question that the Tribunal can currently rule on is whether or not the amount of that payment on account is reasonable. If, on the completion and final accounting of the works the Respondent has concerns regarding the quality, extent or cost of the works and if he cannot resolve these by

[8] The parties were informed of this during the hearing and given the opportunity of commenting on it

discussion with the Applicant, it is open to him to make an application to the Tribunal to rule on these issues.

65. The Respondent was further concerned that the covering of the walkway at first floor level had been damaged by other leaseholders using it for recreational activities such as having chairs and tables out and letting children play on pogoes and trampolines. The making good of the walkway, argued the Respondent, should be charged to those that had damaged it.

66. We reject this claim. The asphalt covering on the walkways is clearly sufficient to withstand most if not all of the activities complained of by the Respondent. Even if this were not the case, we do not see how the Applicant could possibly identify what damage was caused by what leaseholder and how and when that damage was incurred so as to be able to make a claim against an individual leaseholder.

67. The Respondent complained that the Applicant was not sufficiently robust in preventing the use of the walkway for anything but access to and from the flats.

68. We saw that the managing agents have written to leaseholders telling them to keep the walkway free from clutter and not to use it for purposes other than access. There is only so much they can do to police the situation however. From the photographs supplied by the Respondent, the activities taking place on the walkway appear to be happening in Spring/Summer and appear to be fairly innocuous.

69. The works went out to tender and a statutory consultation process was conducted with the leaseholders. Bearing in mind the other comments above regarding our view of the works, the sum claimed on account in respect of those works appears to be reasonable.

Costs of drain clearance

70. Over the period in question these costs amounted to approximately £346 (Respondent's share – approx. £34). The Respondent argued that this drain, believed to be at least partly the open drain with grille situated in the car park area as described in the 'Inspection' section of this decision, served the car park, not the residential part of the Building and so he should not be liable to contribute to the costs of its maintenance.

71. It is impossible (without carrying out a drain survey) to know exactly what water from where may discharge into this drain. It may or may not be that water discharges from the residential parts through gutters and pipes into this drain. It is however clear that the drain serves to collect run off water from the raised pavement at the rear of the Building which gives pedestrian access to the flats. The Respondent is liable to contribute to the cost of anything appurtenant to the residential part of the Building and to the main drains serving the

residential parts and he is therefore liable to pay towards the costs of this drain.

Management fee

72. This is approximately £68 per year and for this the Respondent gets a basic management service. In fact we saw evidence of very long letters written to the Respondent by the managing agents in respect of his complaints and evidence that the managers had responded to and taken action in respect of various matters raised by the Respondent including the issue of the use of the walkway and an issue regarding a gate to the roadway leading to the car park area.

73. We conclude that the management fee is reasonable and that the management is carried out to a reasonable basic standard.

Management and administration fees on the major works

74. These are to be charged at 14% and will include project management and administration costs.

75. In the Tribunal's experience and knowledge[9], this level of fee is within a normal range and in the absence of any other specific objection is reasonable.

Split of costs of communal lighting

76. There is an external lighting system for Building. The lighting would be needed for leaseholders regardless of the commercial units. At least some of the commercial units have additional lighting at their rear entrances which are not charged for communally.

77. The split of costs for the basic lighting of 50/50 appears entirely reasonable in the circumstances.

Refuse removal

78. This is a cost of £152 (Respondent's share £15) for the removal of dumped rubbish at/around the vehicle/pedestrian entranceway to the car parking area. Photographs provided by the Respondent showed rubbish dumped all around this area.

79. There is no doubt that this cost was reasonably incurred and that it was reasonably split 50/50 between residential and commercial.

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[9] The parties were informed of this during the hearing and given the opportunity of commenting on it

Health and Safety Risk Assessment – 2012 - £504
Asbestos Survey – 2012 - £540

80. Again in the Tribunal's own experience and knowledge[10] this expenditure and these reports are necessary for a building of this kind and the costs of them are reasonable.

Repointing – 2012 - £106
Staircase works – 2010 - £972

81. In neither case was the Respondent able to give any credible reason why the works were not done to a reasonable standard or why the costs were not reasonable.

82. According to Mr Harvey, the works to the staircase under Freshwater internal procedures would have been the subject of a mini tender. The Respondent's only comments on these works were that he only saw the stairs being painted; he did not see the works themselves being carried out.

Legal fees

83. Costs of £822.50 were charged to the Respondent's account in 2010 for the legal fees of the previous proceedings taken against him.

84. Counsel for the Applicant pointed out that this is an Administration Charge as these fees were charged directly to the Respondent, not as part of the annual Service Charge. Therefore under the terms of the Court order transferring the proceedings to the Tribunal which only referred to Service Charges, we have no jurisdiction to consider these charges. This must either be a matter for the court or will have to be the subject of a further referral from the court.

Cleaning materials

85. In line with the Porter's costs, the costs of cleaning materials are split between the three properties that the Porter serves and a 20% proportion is attributed to the Building. However, some of those cleaning materials are not applicable to the Building, for example toilet paper.

86. The cost of cleaning materials to the Respondent over the period in question is approximately £53.00. The amount of that cost attributable to cleaning materials that could not be used at the Building must be minimal. The Tribunal is unable to say the costs overall therefore are unreasonable. However, consideration should be given in future to a more accurate division of cost.

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[10] See above

Costs

Tribunal Fees

87. The Applicant has paid a hearing fee to the tribunal of £190.00. The Tribunal orders the Respondent to pay £100 to the Applicant in respect of that fee.

88. We have not ordered the Respondent to pay the full amount of £190 in recognition of the fact that he was successful in respect of a significant part of the Service Charges, those being the accountancy fees.

Section 20C

89. The tribunal has the power to order that none of or only some of the costs incurred in these proceedings can be passed through the Service Charge.

90. We are not prepared to make such an order in this case. The Respondent has not been successful in the vast majority of the issues that he raised and he has put the Applicant to a large amount of time and expense in pursuing him for Service Charges that are in the main reasonable and payable. The time and effort on the part of the Applicant in pursuing the case would have been almost the same even if the accountancy issue had not been pursued or had been conceded.

Mark Martynski
Tribunal Judge

20 January 2014