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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AG/LSC/2013/0028**
Property	:	**29 Tanza Road London NW3 2UA ("the property")**
Applicants	:	29 Tanza Road Management Company
Representative	:	Mr S Madge Wyld – Counsel instructed by Stephen Lake LLP
Respondent	:	Maria & Gaston Martinez Castillo (Flat A) Dr Ann Cartwright (Flat B) Mrs Rajamani Rowley OBE (Flat C) Dr K R Nagarah (Flat C) Richard Landau (Flat D)
Representative	:	Dr Cartwright
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Also in attendance	:	Mr R Landau- Director (29 Tanza Road Management Company) Ms Soledad Martinez - Director Mr D Nelder (tenant of flat B) Mr M Eldred expert witness
Tribunal Members		Ms M W Daley LLB (Hons) Mr S F Mason BSc FRICS FCIArb Mrs S Justice BSc
Date and venue of hearing	:	**7 May 2013 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**17 July 2013**

DECISION

Decisions of the Tribunal

(1) The Tribunal determine that the Respondents are required to contribute to the work set out in the Section 20 Notice dated 3 August 2012

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

The application

1. The Applicant sought a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether future service charges are reasonable and payable in respect of proposed major works to the drainage system at the subject property.

The issues

2. On 12 February 2013 an oral pre- trial review was held by the Tribunal in which the following issues were identified-: (i) whether the proposed drainage works are works of repair or improvement and whether none/part or all of the costs are recoverable under the terms of the lease; (ii) whether the works are required/are reasonable; (iii) whether the percentages sought to be charged for the works are in accordance with the terms of the lease.

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

The background

4. The premise which is the subject of this application is a large Victorian semi- detached property which has been converted into four residential flats known as flats A to D. Each of the flats is held subject to a long residential lease.

5. The Respondents hold long leases of flats A-D, which require the landlord to provide services and the Respondents, as tenants, to contribute towards their costs by way of a variable service charge. The

specific provisions of the lease will be referred to below, where appropriate.

6. In April 2010 the occupiers of flats A & D acquired the freehold of the premises from the freeholder Dr A Cartwright. Dr Cartwright as well as being the previous freeholder of the premises also retained the lease of flat B and is along with the other leaseholders a Respondent, in these proceedings.

The Hearing

7. At the hearing the Applicant was represented by Mr Madge-Wyld, counsel instructed by Stephen Lake LLP solicitors. The Respondents in this matter namely Dr Cartwright, Mrs Rajamani Rowley and Dr K R Nagarah of flat C were all represented by Dr Cartwright.

8. Mrs Martinez Castillo although a leaseholder had also along with Mr Landau purchased the freehold and was not opposing the Application.

9. At the hearing the following additional documents were provided-:

(i) The Applicant's skeleton argument and various legal authorities which are referred to below

(ii) The Respondent provided an additional report of Mr Eldred together with his notes.

10. The background to this matter was set out in the Application " During the course of preparing for and undertaking works to the basement flat, a specialist survey report and CCTV disclosed that there was significant damage to the drains which served the building. This required the renewal of the drainage system to comply with current building regulations and to stop an going leakage. The landlord's agent sent the Leaseholders Notice of Intention to Carry out Works on 3 August 2012, enclosing a specification of work and inviting observations and proposals for contractors to provide estimates within 1 month. On 26 November the managing agent sent out notice of reasons for awarding a contract to carry out works. The works are necessary and the costs recoverable under the lease."

11. At the hearing counsel, Mr Madge-Wyld called Mr Jose A Cruzat of D'Soto Architects to give evidence on the Applicant's behalf. Mr Cruzat provided a witness statement which was signed (although undated) by Mr Cruzat.

12. Mr Cruzat set out in his statement that he had been engaged by Ms Soledad Martinez in connection with work to be carried out to her flat, and had also advised her in her capacity as Director of the freehold company known as Tanza Road Management Company Limited.

13. Mr Cruzat stated that a report had been obtained from Spaflow (a specialist drainage company) prior to work being carried out in Ms Martinez' premises; this report was dated October 2010; however it was not until June 2012 that the full extent of the damage to the drains was discovered. This was confirmed in an email sent to Ms Martinez by Mr Cruzat dated 11 June 2012, in which Mr Cruzat stated as follows-"... [A]s you can see from the report the current pipe feeding OGT2 to the main manhole MH3 is broken therefore most likely letting water seep into the ground. Tomorrow we are meeting with Nick from Chess Structural Engineers and we are going to assess the situation. We all agree now that drastic action has to be taken to eliminate water seepage as this is affecting the progress of the works and in view that this month might be a wet month action has to be taken immediately... With respect to the overall drainage system, following discussions with Spa flow, Contractor and Structural Engineer in our view it is a waste of time to try to repair the existing drainage system as this will be costly and will not prove to be a permanent solution"

14. The first two recommendations were that the following works be carried out (A) Seal MH2 which has sunk into ground thus all pipes connecting underground are broken (B) Construct a new drainage system above the existing on proper bedding and to meet today's building regulations and Thames Water requirements. This will consist of new MH1("manhole 1"), MH2, refurbish MH3 and recommendations by Spa flow

15. The Tribunal noted that in the report prepared in October 2010, there was recommendation for the whole system to be thoroughly jet cleansed and de-scaled to clear it, and defects at the manholes to be repaired including the removal of the cover and the frame at manhole 2 and the repair of cracking at various manholes. However there was no recommendation for replacement of the drainage system.

16. The Tribunal asked why given that there was a recommendation for de-scaling in October 2012, was there a recommendation in June 2012 for reconstruction of the drainage system. Mr Cruzat stated that when the initial preparatory work of digging and underpinning was started in the basement, the sheer volume of water ingress meant that extent of the damage was likely to be greater than that seen on the CCTV video and thus more extensive remedial work was required.

17. The Tribunal were referred to paragraph 4 of the recommendations which stated at paragraph 9 of the October 2010 report, that -: "The cracked benching at MH2 ("Manhole") should be broken out and

replaced and the location of the water ingress found and sealed." This had occurred along with jet cleaning and de-scaling, however this had not stopped the ingress of water. Mr Cruzat stated that there then began a process of elimination in that it was noted that the pipes from MH1, MH2 and also MH3 were also damaged, and the drainage consultants stated that the most likely cause of the water penetration was damaged pipes. It was thought that the damage to the pipes could be caused by the fact that the manholes had sunk.

18. The Tribunal were referred to a plan which was referred to as a record of CCTV Survey of Drainage. On the survey it was noted in relation to manhole two, as follows-: " Open top back inlet gully pot has dropped and cracked, hole between slab and gully allowing water to escape to ground..."

19. The Tribunal were also informed that various tests were undertaken to trace the water source, including instructing a Hydrologist Richard Thomas, this was to establish whether the water was waste water or fresh water, and also to establish the extent of the damage to the system.

20. The experts established that the source of the water was the drains. This was followed by intermediate work being undertaken by jet washing the drains. Mr Cruzat stated that in accordance with his instructions there were various on site discussions with the structural engineer, the hydrologist and the drainage consultants to look at the alternatives to solve the issues as thoroughly as possible. This resulted to some changes to the initial report put forward by the drainage consultants. One of the modifications that was made, was that in the original report the proposal had been for a separate storm water and foul water drain, however as a result of discussions with building control, it was agreed that the same system could be used which had decreased the initial cost.

21. However the firm recommendation was that patched repairs would not be good enough and that unless the drainage system was reconstructed and the piping replaced, any repairs would be a futile exercise. Mr Cruzat stated that there was also the added difficult that no contractor was prepared to give a guarantee for any repair work carried out to the drains.

22. In cross- examination, the Respondent queried why the water had not been visible before the excavations for the basement work, and queried where the water had been going before. Mr Cruzat stated that in all probability the water had been leaking into the ground, and had then been partially absorbed by the garden and the surrounding trees. There was also the fact that water had almost certainly been leaking below the

foundation of the basement, which would in time cause structural damage.

23. The Respondents also asserted that the excavation work and other preparatory work for the excavation of the basement had actually caused the damage. The Respondent's referred to a digger which weighed approximately one tonne which had been brought onto the site in March prior to the excavations.

24. In reply, Mr Cruzat did not accept this as a likely explanation for the water seepage. Mr Cruzat stated that six bore holes had been drilled and three of them had filled up with water which was contaminated (the contamination was established by tests). He stated that a 1 by 1 metre hole had filled up with water within half an hour. This was very unusual and in his view together with the reports obtained by Spa Flow and the Structural engineer supported the need for the work set out in the Notice of Intention dated 3 August 2012, served as part of the section 20 Procedure.

25. The Notice of Intention together with a brief specification of works set out that there was a need for works to replace the existing drainage system to meet current building regulations. This was followed by a further letter dated 4th October 2012 containing estimates in relation to the proposed work, and a response to the leaseholders' observations. The two estimates provided were in the sum of £10,680.00 from Total Basement Solutions Limited and £10,956.00 from UK Drainage Network Water flow. (In relation to the observations from the leaseholders this is dealt with below).

26. On 26 November 2012 there was notice from the managing agents stating that they were now entering into a contract with UK Drainage Network Water Flow. The notice at paragraph 3 stated-: "Our reason for doing so are that UK Drainage Network Water Flow are deemed to be the best suited for the job of repairing and renewing the drainage network underneath 29 Tanza Road as they are more specialized and experienced in these areas of work; the Directors have therefore decided to instruct UK Drainage Network Water Flow as they are confident that they will complete the job efficiently and effectively..."

27. The Respondents in reply to the Application stated that the first intimation that they were given of any problem with the drains was when they received a letter on 3.08.2012(The Notice of Intention) and that they had not known about the Spaflow report until two and a half years after the report was commissioned. In their statement of case, the Respondents' stated that-: The letter identified drainage problems and claimed that the severity has been uncovered during the works currently being carried out to flat A. It gave no indication that an earlier survey had revealed problems. It also claimed that number 31 next door is also experiencing similar problems with their drainage system. We

have since found out that the drains at number 31 were repaired by Thames Water at no charge..."

28. The Respondents further stated that although there was in all probability some leakage, until the basement development, the external underground drainage system serviced all the flats and transported both surface water and foul water to the public sewer without need of repair or replacement.

29. The Respondents' claimed that the planning application had shown alteration of the common sewer system and that this was required solely for the purpose of the proposed development. In addition the Respondents considered that a 1 tonne mini excavator used in the garden had caused damage to the manhole.

30. In their final paragraph of their statement of case, they stated-: "In summary it is clear that relatively minimal repairs to the drains were needed before work started on the basement extensions and we have had great difficulty, and been involved in considerable expense, in establishing the facts of the situation. And we are not responsible, under the terms of our Leases, for contributing to any part of the proposed redesign and extension of the drainage system which is primarily for the benefit of flat 29A."

31. The Respondents also relied upon the evidence of Mr Michael Eldred as an expert witness.

32. Michael Eldred stated that he was a Chartered Engineer, and that he had been a Civil Engineer in excess of forty years, and that he had previously given evidence in civil proceedings, and therefore understood his duties to the Tribunal. He had been contacted by Dr Cartwright during the initial planning permission stage. He had been recommended to Dr Cartwright by the Heath and Hampstead Society.

33. In answer to a query from the Tribunal, he acknowledged that the society may have had some opposition to basement developments. However he stated that the only concern that the society had was that basement developments should be carried out properly, and that the usual objection to the developments was that the plans were not adequate.

34. He had been instructed in relation to the party wall agreement under section 6 of the Party Wall Act, as the excavations were within 6 metres of the foundation of the adjoining property. He was instructed to look at the engineer's proposals for maintaining the stability of the building and to negotiate a fair settlement with the surveyors, in relation to the disruption caused. His duty was to be fair to all of the parties.

35. The remit of his instructions had changed in that he was subsequently asked to express an opinion in relation to the proposed major works. In preparing to give advice he stated that he had looked at all of the documents provided and had made a fair assessment based on those documents, and it was this that had given rise to his opinion. He accepted that in relation to his reports, which were headed technical notes, although they were referred to by the Respondents as reports, they were in fact aid memoirs, and this was the basis upon which he relied in giving evidence.

36. As party wall surveyor there had been an agreement for him to carry out an inspection before the work commenced and afterwards. Mr Eldred had however considered that there was a need to inspect whilst the works were being undertaken. He had carried out an initial inspection in 2010; this was a fairly brief visit in the run up to the application for planning permission. In paragraph 21 of his technical note dated 13 March 2013 he stated-: I am an observer and not party to either the design or the construction contract. On 19 March, the Architect informed the leaseholder that the ground and structural alteration work would take 14 weeks to complete ... The work was affected by heavy rainfall which entered the excavations in May and June and to some extent by ground water encountered. On 11 July I learnt... that it had been necessary to pump a lot of water out of the excavations on many days in that period. On the same day the contractors' site manager told me that the water had been about half rainwater and ground water and half from leaking drains... On 24 July I saw that underpinning of the basement walls was continuing and that much of the working area below the right side of the building was flooded to a small depth with foul water..."

37. Mr Eldred in his technical note dated 12 October 2012. Mr Eldred made a number of observations (which mirrored the Respondents' Statement of Case and the observations made by the Respondents to the Section 20 initial notice) Mr Eldred supported the Respondents' views, that but for the basement work, the drainage repair would not be necessary.

- He stated that the successful planning application had shown alterations to the common sewer system that were required solely for the purpose of the proposed development.

- The original shallow basement pre work showed no sign of water penetration.

- In March a 1 tonne mini excavator used the side path over the sewer to gain access to the rear garden

- The renewal works to the drains were considered necessary only after the foundation underpinning works commenced and foul water leaked into the basement excavations

- The inclement weather in May and June caused working conditions to heighten the risk of ground and building movement when using the underpinning method of deepening the basement.

- The proposed work was more extensive than that which served the building adequately before the basement development. "

38. In cross- examination Mr Madge- Wyld referred to Mr Eldred's observations found at paragraphs 25 and 6 of his October and March reports, which supported the existence of water leakage He was asked whether the drains could have continued as they were. Mr Eldred stated that "but for the excavations the drains could have been left in disrepair to no one's inconvenience"

39. Mr Madge- Wyld referred to the SPA Flow report and the fact that the defects were set out prior to the excavation of the basement. He was asked whether it was possible that the work was more extensive than set out in report, due to the fact that The 2010 Report was based on a visual inspection. Mr Eldred stated that he did not know.

40. Mr Eldred stated had estimated that the cost of remedial work was in the sum of £2000.00. Mr Madge- Wyld asked how he had come to such a precise figure. Mr Eldred stated that he had used the arithmetical calculation using schedule of rates, based on drawings that had been produced (UKDN) and had allowed a 10% contingency. Mr Madge-Wyld queried the validity of this, given that the Applicant had been unable to obtain a contractor willing to estimate for a patch repair.

41. The Respondents in their reply to the section 20 observations had stated that they had been unaware of any water penetration issues until the basement works had commenced. The Respondents also placed reliance on short statements from Dr Ann Cartwright dated 15.04.2013, Dr P R Sowerby dated 11 April 2013, Rajamani Rowley OBE dated 12 April 2013 and Rekha Kodikara (occupier) of flat 29C all stated that they had previously been unaware of problems with water seepage, prior to the basement works being carried out.

42. The Respondents further stated (a) that they were not required under the terms of the lease to contribute to the cost of the major works as the terms of the lease do not require them to contribute towards the cost of maintaining, repairing or replacing any services to any part of the building that did not exist when the leases were first granted, and (b) The covenant given by our clients does not extend to the

installation of any larger or different drains but simply to the maintenance or renewal of the existing drains.

43. The Respondents also repeated the arguments raised that the drainage system had been damaged by the Applicant's basement renovations, and was more extensive than required because of the basement extension.

44. In his summing up Counsel referred to clause 1 of the lease, which stated-: 1. the Lessor Hereby Demises... unto the Lessee All That the flat... situated on the Entrance floor of the building and now known as flat B 29 Tanza Road Hampstead... TOGETHER ALSO WITH the free and uninterrupted passage of water soil electricity gas and other matters from and to the flat in and through the sewers drains watercourses pipes conduits cables wires meters and appliance which are now or may at any time hereafter during the term hereby granted be in on over or under all or part of the flat or building. Counsel also referred to clause 2(27) the service charge covenant and Clause 4(3) the repair obligation.

45. Mr Madge-Wyld referred to *Elmcroft Development Ltd –v- Tankersley-Sawyer [1984] and Ravenseft Properties Ltd –v- Davtone Holding Investment Trust Ltd*, where the only sensible way of making good the damage was to eradicate the underlying cause of the damage.

46. Counsel in Paragraph 28 of his Skeleton argument stated that the word "renew" did not add anything to the covenant; it still required the Landlord to remedy the defects. Mr Madge-Wyld in *Ravenseft Properties Ltd* referred to paragraphs, B-C and G in which it was stated that -: The true test is...that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the Landlord a wholly different thing from that he demised. In paragraph G of the decision it was stated that-: *"(Counsel Mr Colyer) stated that the result of carrying out this improvement is to give back to the landlord a safe building instead of a dangerous one and this meant that the premises were now of a wholly different character...Further he argues that because they are of a wholly different character... the work necessary ... is an improvement.. and, therefore cannot fall within the ambit of the covenant to repair..."* Judge Forbes stated that *"...he could not accept this"*. Forbes J referred to the experts' reports that accepted that the work that was required, and claimed to be an improvement, was now standard practice, he referred to *The Lurcott Case [1911] 1 KB. 905,* in which Sir Herbert Cozens-Hardy had held that the defendants were required notwithstanding the exact wording of their lease to make good by repairing the wall in the only sense in which it could in fact be repaired.

47. Counsel Mr Madge-Wyld stated that the Tribunal should consider the proportion of the cost to the value of the building, and the fact that there was no change of character. Essentially all that was being done was old pipes were being replaced by new ones. Although the basement was being excavated it remained part of the building, and as such was within the repairing covenant.

48. Mr Madge-Wyld submitted that the cost of the repair was reasonable, and that the Tribunal should bear in mind the fact that no one would guarantee the patch repairs suggested by the Respondents, and that there was a possibility that the cost of such repairs although initially cheaper, could escalate once the work commenced. He submitted that provided the landlord acted reasonably it was for the landlord to decide on the nature of the work.

49. The Applicant also relied upon paragraph 17 of the witness statement of Ms Soledad Martinez, in which she stated-: I confirm that, neither those parts of the drains that relate specifically to my Flat (A) nor to Thames Water, are included in the costing..."

Submissions on Application under Section 20C and refund of fees

50. Both parties were given the opportunity to make written submission on the issue of costs. The Applicant's submissions dated 8 May 2013 put forward two submissions, namely that (i) they were entitled to the cost in accordance with the terms of the lease (ii) If they were successful in their application, then it would not be appropriate for the Tribunal to make a section 20 Order under the 1985 Act.

51. In the written submissions the Applicant referred to Freeholders of 69 Marina, St Leonards on Sea v Oram [2011] EWCA. The basis of the Court of Appeal decision was stated to be that as the lessor was unable by way of section 81 (1) of the Housing Act 1996 to serve a section 146 notice until he has obtained a determination from, either the court or the LVT, then seeking a determination was a legitimate part of the Section 146 process. Accordingly the lessee was liable to pay the service charge. Paragraph 5 of the submissions stated-: As such, wherever a lessee denies that he is liable to pay a service charge, the landlord has no option but to have the court or the LVT determine the lessee's liability to pay it.

52. Counsel in the written submissions stated that the facts in 69 Marina, were indistinguishable from the case before the Tribunal.

53. Counsel also asserted that 69 Marina made it clear that it is irrelevant that a section 146 notice has not been served, and that the costs of the work had yet to be incurred " all that is relevant is that the conduct of

the Respondents necessitate the Applicant to ask the LVT for a determination for the purpose of section 81(1) Housing Act 1996".

54. Counsel also asserted that in applying *Iperion Investment v Broadwalk* House Residents Ltd (1995) in the event that the landlord is successful, there was no reason for a section 20C order to be made.

55. The Respondent by submissions dated 18 May 2013, asserted that if the Applicant had behaved in a reasonable and responsible way this case would never have gone to the Tribunal. They asserted that had they known about the SPA Flow report and had the recommendations been carried out, then they would have contributed to the cost of those works, and the subsequent works would not have been necessary.

56. The Respondents in submissions, (which dealt with the issues of whether the cost should be awarded to the Applicant, or a Section 20C order be made that substantially mirrored their objections set out in their statement of case, asserted that lack of communication lead to mistrust which contributed to their unwillingness to pay the service charges when requested. In the penultimate paragraph of their written submissions, they stated-: *"The Respondents acknowledge that it would have been reasonable for them to make an appropriate contribution to the implementation of the Spa flow recommendations, but this option has never been offered by the Applicant. The Applicant went to the Tribunal after making inappropriate demands and without providing adequate information to the Respondents..."*

The Tribunal's decision

57. The Tribunal having considered the oral and written submissions relied upon by the parties have determined that the major works are required, and are within the scope of the lease. Accordingly the sum claimed is reasonable and payable in accordance with the terms of the lease.

58. The Tribunal noted that both parties accepted that the drains were the original drains which had served the property since Victorian times. In the technical note prepared by Mr Eldred he accepted that the drains in all probability leaked but not so as to impair their function or cause nuisance to the lower adjoining property.

59. The Tribunal also noted the Report prepared by Spa flow, and state with some concern, that had this report been provided by the Applicant prior to the basement work commencing, then this may have gone some way to reducing the climate of mistrust which evidently exist between the parties .

60. However this report provides sufficient information upon which the Tribunal can be satisfied that the drains were in a poor condition prior

to the work being undertaken. Although the basement excavation work meant that the leak was discovered as an active problem, which affected the work, it was not caused by the work, and would in the passage of time have made itself known (as is the manner of water leaks). Mr Eldred in his report noted that the drain was in all probability in land which was back filled after the house was built, and as such from the oral evidence before the Tribunal, there was a possibility of movement of the manholes which had a potential to damage the pipes.

61. The Tribunal noted that it is not asserted that any work was carried out to the drains before; given this, it is unrealistic to expect, given the age of the drains, that there were no issues prior to the excavations. The Tribunal also noted that the Respondent did not have reports or evidence from contractors to suggest that the repairs they preferred were viable or that it was possible to obtain a guarantee for the repair rather than the replacement of the drain. There was also nothing to suggest that the cost of the proposed work preferred by the Applicants was unreasonable

62. The Tribunal in considering whether the work was payable in accordance with the terms of the lease noted that in clause 3 (b) the Lessor was required to-: "maintain keep in repair and renew the gas and water pipes sewers drains and electric cables and wires in under and upon the Building and the gardens and grounds thereof other than those repairable by the lessees under the terms of their respective Leases.."

63. This work requires renewal of the pipe work, which on a simple interpretation may require new pipes in the event that new pipes are needed, the Tribunal accepts on a balance of probabilities the evidence of the Applicant that the pipe work and drainage system needs replacing, and accordingly the Tribunal finds that the cost of the work is reasonable and payable.

64. Such payment falling due as required under the terms of the lease.

Application under s.20C and refund of fees

65. In the pre-trial review and at the hearing, the Respondents applied for an order under section 20C of the 1985.

66. However the Tribunal before looking at clause 2(3), has to determine whether given that the Application is effectively an Application under Section 27A(3) before the costs have been incurred, the Tribunal needs to determine whether there is an obligation to pay the service charges in advance.

67. The Tribunal consider that the terms of the lease before it, operate in such a way as to create no obligation for payment to be made prior to expenditure, therefore the service charges are not due to be paid in advance. Clause 2 (27) of the lease (provided to the Tribunal) states-: To pay and contribute to the Lessor a proportionate part... of the costs and expense outgoings and matters mentioned in the Schedule hereto. The amount of such contribution shall be ascertained and certified by the Lessor's managing agent... and who shall deliver to the Lessee a fully itemised account showing how the proportion is calculated... The Lessee shall on each of the said quarter days fixed for payment of rent as aforesaid pay (in addition to the rent due on that date) the sum of Ten Pounds on account of such contribution and shall on the Twenty Fifth day of December in each year pay the balance (if any) ascertained and certified as aforesaid together with the instalment of Ten pounds due on that day... (ii) In computing the amount of such contribution the said Managing Agent shall in addition to the amounts actually paid or incurred during each year include the sum of One hundred and fifty pounds."

68. The obligations in the lease are to contribute ten pounds on each quarter day and the balance on 25 December, as the amount is to be "ascertained and certified" unless the lease has been varied (no variation having been brought to the Tribunal's attention). Then the wording implies that the payments are for actual cost incurred rather than cost to be incurred.

69. As no sums have been incurred in relation to the major works, them the Landlord cannot serve a section 146 notice in respect of sums which are not due in advance, accordingly the Applicant is not entitled to costs under clause 2(3) of the Lease, and as such as the Tribunal is a no cost jurisdiction no costs are due under the service charge.

70. The Tribunal have not however made an order under Section 20C, as no costs are payable for the reasons set out above. Had the Tribunal determined that costs were payable, for the avoidance of doubt, the Tribunal would not have made an order in favour of the Respondents, giving its determination in relation to the service charges.

71. The Tribunal however determines that the Tribunal and hearing fee are payable by the Respondents. The Applicants shall set out the sum due, which shall be payable within 28 days of the date of this determination.

Name: Ms M W Daley **Date:** 17.07.2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

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

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

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

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

(3) For this purpose -

(a) "costs" includes overheads, and

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

Section 19

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

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

(b) where they are incurred on the 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

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the 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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.