10174

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UD/LIS/2013/0113**
Property	:	**First Floor Flat, 33 Magdalen Road, St Leonards, East Sussex TN37 6ET**
Applicants	:	**Mr F and Mrs A Mwambingu**
Representative	:	**In person**
Respondent	:	**Fable Estates Limited**
Representative	:	**Mr C Hills, Bridgeford & Co.**
Type of Application	:	**Determination of service charges under section 27A Landlord and Tenant Act 1985 ("the 1985 Act") and of administration charges under Schedule 11 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Surveyor Member)** **Mr P Gammon MBE BA (Lay Member)**
Date and venue of Hearing	:	**11 June 2014 at Horntye Centre, Hastings**
Date of decision	:	**4 July 2014**

DECISION

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The Applications

1. By an application dated 11 November 2013 the Applicant lessees applied under section 27A of the 1985 Act for a determination of their liability to pay various service charges. The Respondent is the lessor.

2. At the conclusion of the hearing the Applicants requested an order under section 20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges recoverable by the Respondent from the Applicants are as follows:

Year	£
2007	Nil
2011	£1246.12 of which £544.96 not yet validly demanded
2013	Nil at this time, as no valid demands have yet been made

4. None of the administration charges raised against the Applicants in 2013 are payable by them.

5. An order is made under section 20C of the 1985 Act.

The Inspection

6. The Tribunal inspected the property prior to the hearing, accompanied by the Applicants and three personnel from Bridgefords, the managing agents. 33 Magdalen Road forms part of a mid to late Victorian terrace of houses and in particular is legally linked with No. 34 in that the two houses have been jointly converted into eight flats (four in each building) now dealt with as a single entity for service charge purposes. The inspection therefore included both Nos. 33 and 34. Each building comprises five storeys, including basement and rooms in the roof, with rendered & painted elevations at both front and rear. The main roofs have a modern style concrete interlocking tile in place of the original slate that would have been used. The front elevations, which face approximately east, are in poor decorative order and in need of additional repair. It was noted that the large central chimney stack between 33 & 34 had lost a substantial area of render leaving the

brickwork underneath exposed. The front guttering drained partly into a downpipe on No. 33 and partly to one on No. 35 adjoining. The guttering to No. 35 (which is not part of the Respondent's responsibility) was noted to have substantial weed growth and the Applicants commented that, as a result, the guttering to No. 34 overflows when it rains. A number of the windows, principally at the lower and dormer levels, had been replaced in generally non-matching PVCu but the remaining timber windows and the main front doors to the properties were in very poor decorative order with little paint remaining in many places. Areas of defective render, particularly to mouldings, were noted and it was considered that substantial expenditure was required to bring the front of the property back up to a reasonable standard.

7. The rear of the property was accessed by an alleyway along the side of No. 32 but there is also vehicular access off Blomfield Road to the north. From the Tribunal's ground level inspection standing on the road, the rear elevations were found to be in a much better, and indeed generally very good, state of repair and decoration, having been the subject of substantial recent expenditure. The chimneys and fire walls to the rear half of the main roofs all appeared to have been repaired and coated with a protective coating. Each property has a small three storey rear extension, one overclad at the uppermost level, and the pitched roofs to both of these appeared to have been recovered recently in slate or a slate substitute. At lower level, attention was drawn to two single storey extensions with shallow pitched mineral felt type covered roofs. These roof coverings were noted not to look new but there was no obvious sign of deterioration visible from the Tribunal's brief inspection.

8. None of the flats were inspected but the Tribunal visited both common part staircases. These extend from the main front entrance doors up to first floor landing level in each instance, with the areas above forming part of the upper maisonettes. The common parts were both in poor decorative order with a mixture of poor quality and condition carpet and vinyl/lino and were each served by two light bulbs internally with an additional one outside the front door to No. 34. There was no fire alarm system but each common part had two battery operated domestic style smoke detectors. The Tribunal's attention was drawn to indications of damp just inside the front door of No. 34, above the electricity cupboard, possibly linked to the poor external condition of the property and the blocked guttering of No. 35.

The Lease

9. The Tribunal was provided with a copy of the lease for the First Floor Flat at 33 Magdelan Road. The lease was granted on 12 March 1979 for a term of 99 years from 24 December 1977 at a yearly ground rent of £25.00 (payable in equal parts on each 24 June and 25 December) during the first 33 years and rising thereafter. Neither of the parties

informed the Tribunal of any extension of the lease term or other revision to the lease.

10. The relevant provisions in the lease may be summarised as follows:

(a) The Lessee covenants to keep the Lessor indemnified from and against 1/8th of all costs incurred by the Lessor in carrying out his obligations under the Sixth Schedule "and to pay to the Lessor with each payment of rent hereunder the sum of ... £25.00 on account of such liability and such further amount on demand each year as shall be shown to be due from accounts produced annually by the Lessor" (Para.4 (ii), Part 1, Fifth Sch.)

(b) The Lessor agrees that he "will (subject to the Lessee paying his contribution in respect thereof) observe and perform the covenants set out in the Sixth Schedule..." (Clause 4 (d))

(c) The Sixth Schedule sets out the Lessor's repairing, maintenance and insurance obligations with respect to the Property, which is defined as 33 and 34 Magdalen Road. The Lessor is responsible for decoration of the exterior, and keeping in good and tenantable state of repair decoration and condition those parts of the property that are not demised to lessees. This obligation covers the common parts and main structural parts of the building including the roof foundations staircases landings external walls and external parts of the property (First and Second Schedules)

(d) The Lessor is required to insure the Property from loss or damage "by fire lightning and civil aircraft ...to the full rebuilding value thereof..." (Para 5(a) Sixth Sch.)

(e) There is no provision for the building up of a reserve fund

(f) The Lessor is to "keep proper accounts of all expenditure on carrying out his obligations hereunder and of fees of Managing Agents and to produce to the Lessee annual statements of such expenditure and of cash in hand against future liabilities" (Para 6, Sixth Sch.)

(g) The Lessee covenants "to pay to the Lessor all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Lessor in the preparation of a notice or in contemplation of proceedings under Section 146 and 147 of the Law of Property Act 1925 ..." (Para.11, Part 1, Fifth Sch.).

Procedural Background

11. At a case management conference held on 13 December 2013, it emerged that the Applicants wished to raise a number of issues not

specifically set out in the original application form, and it was agreed that these would be included within the determination. Directions were given which included the provision of documents by the Respondent, followed by preparation of statements of case. The parties were given permission to adduce expert evidence regarding the standard of damp works in basement Flat 33A.

Representation and Evidence at the Hearing

12. Both Applicants attended the hearing, and Mr Mwambigu presented their case. He referred to various documents appended to the Applicants' statement of case. He called Ms D Burges, a former lessee of Flat 33A, to give evidence. He also sought to rely on a brief unsigned document from a company named Damp Solutions Ltd as expert evidence.

13. The Respondent's case was put by Mr C Hills, the Managing Director of Bridgefords Ltd, who are the Respondent's managing agents. He was assisted by Mrs Holdsworth, also from Bridgefords. The Tribunal was referred to documents supplied with the Respondent's statement of case. A number of additional documents were produced in the course of the hearing and were admitted in evidence.

14. At the conclusion of the hearing, the Respondent was given permission to produce a copy of the written advice Mr Hills said had previously been received as to whether and to what extent the lease permits the lessor to demand service charge monies in advance of costs being incurred. The Respondent did not have this advice available at the hearing. The Applicants were given 14 days to make submissions in response.

The Law and Jurisdiction

15. The tribunal has power under section 27A of the 1985 Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

16. By section 19 of the 1985 Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

17. By section 20 of the 1985 Act and regulations made there under, where costs are incurred on qualifying works or the lessor enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal. In the absence of any required consultation, the

limit on recovery is £250.00 per lessee in respect of qualifying works, and £100.00 per lessee in each accounting period in respect of long term agreements.

18. Section 20B of the 1985 Act provides that costs incurred more than 18 months before a demand is made for their payment will not be recoverable unless within that period the lessee was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge. The case of *Gilje v Charlegrove Securities* [2003] EWHC 1284 (Ch) establishes that section 20B has no application where on account demands have been made.

19. Under section 20C of the 1985 Act a lessee may apply for an order that all or any of the costs incurred by a lessor in connection with proceedings before a 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 lessee or any other person or persons specified in the application.

20. Under Schedule 11 of the 2002 Act the Tribunal has jurisdiction to determine the payability of administration charges, where the amount of the charge is not fixed by the lease. A charge made in connection with a breach of the lease is an administration charge, and will be payable only to the extent it is reasonable.

The Issues

21. The Applicants told the Tribunal that they were no longer disputing the service charge of £347.19 for 2009. Accordingly it was not necessary to make any determination for that year.

22. The Applicants disputed liability for the sum of £129.25 which they had characterised as a service charge for 2008. However it became clear that the charge related to 2007 and it was dealt with on that basis.

23. Various aspects of the 2011 service charge were in dispute.

24. The cost of insurance and an on account demand for service charges were in dispute for 2013. The cost of damp works incurred but not yet demanded was also challenged.

25. Administration charges raised in 2013 were in dispute.

26. In respect of both 2007 and 2011, it is necessary to decide whether the Applicants are deemed to have received various demands and notices addressed not to them but to the previous lessee of the First Floor Flat Mr I Alkaisi.

27. In respect of 2011 and 2013, it is necessary to decide whether the lease permits the lessor to demand payment of service charges on account, aside from the twice-yearly sums of £25.00 specifically provided for in the Fifth Schedule. This issue had not been raised by the Applicants in their statement of case but it was so fundamental to the merits that the Tribunal considered it had to be addressed in order to deal with the case justly and fairly. Mr Hills was able to address the point at the hearing, and the parties were also given the opportunity to make post-hearing submissions in this regard (see para. 14 above).

Whether documents addressed to the former lessee are deemed to have been received by the Applicants

28. The Applicants told the Tribunal that they purchased their flat in April 2008. No documents were produced to verify this, but it was not disputed by the Respondent. Mr Mwambingu said that he had not received any demand for the 2007 service charge or the section 20 notices relating to the major works commenced in 2011. He confirmed that following their purchase, the Applicants were living at the flat at the times it was said these communications had been sent out.

29. There was no direct evidence from the Respondent but Mr Hills told the Tribunal that the Respondent had verbally confirmed to him that it had never received any notice of the transfer of the lease to the Applicants as required by the lease. It was not until sometime after August 2010 that it had somehow been discovered that the flat had been sold by Mr Alkaisi to the Applicants. Until then letters, notices and demands continued to be addressed to Mr Alkaisi and sent by first class post to the flat.

30. The Applicants did not challenge the Respondent's assertion that notice of transfer had not been given, and the Tribunal therefore accepts that as the position. In those circumstances the Respondent cannot be faulted for continuing to address communications to the previous lessee. Those communications were sent to the property address, at which the Applicants were living. The Tribunal concludes these were adequately served and the Applicants are deemed to have received them.

Whether the lease permits the Respondent to demand payments on account of the service charge

31. Mr Hills accepted that during the relevant periods there have been no demands for the £25.00 bi-annual payments on account specifically provided for by the lease. Instead demands for much larger payments on account have been made in advance of major works being undertaken. He contended that despite the specific reference to the lessee paying just £25.00 in para.4 (ii), Part 1, of the Fifth Schedule of the lease, there were two other provisions in the lease which

contradicted this and allowed the lessor to demand higher amounts on account. Firstly, he relied on the words in parentheses which appear at the beginning of clause 4(d):

"The Lessor agrees that he "will (subject to the Lessee paying his contribution in respect thereof) observe and perform the covenants set out in the Sixth Schedule..."

Mr Hills said these words must mean that the lessor must have the lessee's money in advance of carrying out his obligations.

Secondly, he referred to the lessor's obligation as set out in Para. 6 of the Sixth Schedule:

"The Lessor is to "keep proper accounts of all expenditure on carrying out his obligations hereunder and of fees of Managing Agents and to produce to the Lessee annual statements of such expenditure and of cash in hand against future liabilities".

It was said that the reference to "cash in hand" must mean that the lessor could collect service charges in advance.

32. Mr Hills also told the Tribunal that solicitors' advice had been taken on the point. Following the hearing, and pursuant to permission given by the Tribunal, the Respondent provided a copy of various emails from the Respondent's solicitors to Bridgefords. Only one of these, dated 1 May 2014, had any bearing on the issue. The pertinent paragraph was as follows:

"Under the lease you notify the anticipated interim service charge contribution but in addition, under clause 5(ii) you are only obliged to carry out the services if the interim contribution is paid and also any additional contribution also paid if it is found that the Periodical Service Charge does not provide sufficient funds for you to carry out the services. That is combined with the Fifth Schedule Third Part para (b)(iii)whereby the tenant covenants to pay any additional sums under clause 5(ii)".

33. The Applicants made no pertinent submissions on this issue at the hearing. They made post-hearing written submissions, having first had the opportunity to consider the Respondent's material, but these did not take matters any further, other than noting that the lease provisions referred to by the Respondent's solicitors (see para. 32) did not marry up with their own lease.

34. The issue here is the correct construction of the lease. This is a question of determining what meaning the words used would convey to a reasonable person having all the contextual background knowledge which would reasonably have been available to the parties in the situation they were in at the time the lease was entered into. The lease should be read as a whole to consider the context of the words in

dispute. Where ordinary words are used, they should be given their natural and ordinary meaning.

35. In this lease, the draftsman clearly considered whether the lessor should be able to demand that service charges be paid in advance of expenditure. Paragraph 4 (ii) of the First Part of the Fifth Schedule specifically requires the lessee to pay £25.00 on account each rent day, and it then goes on to specify that the lessee will pay "such further amount as shall be shown to be due from the accounts produced anually by the lessor". In other words, anything due over and above the bi-annual payments of £25.00 is not payable until the accounts have been prepared, which must of necessity be after the year end and after the expenditure has been incurred. There is nothing ambiguous about the meaning of Paragraph 4(ii). It would have been a simple matter to provide that the sum of £25.00 might be varied, a provision commonly encountered in residential leases. However that was not done, and there is nothing anywhere else in the lease that indicates this was other than intentional.

36. The Tribunal does not accept that the parenthetical words in clause 4(b) modify or qualify that meaning. Firstly, the words in parentheses do not specifically refer to payment in advance, and even if they did such a reference would naturally be taken as applying only to the bi-annual payments of £25.00. Secondly, the lease does not contain any mechanism for unlimited payments in advance to be collected. Thirdly, the Tribunal is not aware of any authority to support the Respondent's contention that the words should have the meaning it suggests. Fourthly, the principal case that has considered the meaning of very similar words, albeit in slightly a different context, reached a conclusion that does not assist the Respondent. In *Yorkbrook Investments Ltd v. Batten* (1986) 18 HLR 25 the Court of Appeal had to decide whether the words were a condition precedent to the performance of the landlord's repairing obligations. The lease in that case provided for payments on account. The court noted the statutory regime in place when the lease was entered into (1976), which allowed tenants to challenge the reasonableness of service charges. The court held that the words were not a condition precedent to the landlord's obligation to perform and that the tenant could recover damages for breach of the landlord's covenants even though his payments were several years in arrears.

37. Nor does the reference to "cash in hand" cast doubt on the clear meaning of the lease provisions with regard to collection of the service charge. The words simply contemplate the possibility that there may be a surplus remaining from the bi-annual payments of £25.00 on account. In 1979, when this lease was entered into, that may well have been a realistic prospect.

38. The extract from the solicitors' email does not assist. The author appears to have been looking at a different lease, as the provisions

referred to simply do not match those in the lease provided to the Tribunal for the subject property.

39. Accordingly the Tribunal finds that, however inconvenient it may be to the lessor, this lease does not allow the lessor to collect payment in advance of expenditure other than by bi-annual payments of £25.00. Any additional funds can be demanded only after the annual accounts have been prepared and produced to the lessee.

The 2007 service charge

40. The Applicants objected to paying their £129.25 share of the 2007 service charge on the grounds that (a) they had not received a demand and (b) they were not the owners of the flat in 2007.

41. The Respondent had produced a copy of the 2007 accounts, and £129.25 represented a 1/8th share of the total expenditure not met from what was described in the accounts as a "General Reserve". No demand had been included in the Respondent's bundle but the Respondent relied on a statement of account for the First Floor Flat (first produced at the hearing) showing the sum of £129.25 entered as a debit on 31 December 2007. The Tribunal queried how the sum could have been ascertained on 31 December 2007, before the annual accounts had been prepared. A letter was then produced dated 24 June 2009 addressed to the former lessee Mr Alkaisi, which was relied on as the demand. This referred to an enclosed certified statement of service charge for year ended 31 December 2007 and stated that the service charge of £129.25 had been debited to his account.

42. As set out at para. 30 above, the Tribunal finds that the Applicants are to be treated as having received the letter of 24 June 2009. Further, as a matter of law, the fact that the Applicants were not the lessees of the flat in 2007 does not affect their liability to pay a service charge first demanded after they acquired the lease. However there was no evidence before the Tribunal that the 2007 service charge costs were either demanded or notified in writing to the lessees at any time prior to 26 June 2009 (allowing two days for posting). The consequent effect of section 20B of the 1985 Act is that only those costs incurred on or after 26 December 2007 are recoverable. There was no evidence before the Tribunal as to precisely when any of the 2007 costs were incurred. The Respondent clearly knew when the demand went out and should have been aware of the section 20B issue. Evidence could have been produced on when costs were incurred but this was not done. Indeed it was only after the Tribunal queried the position that it became clear that the 31 December 2007 debit entry in the Respondent's statement of account could not be accepted as accurately reflecting the date of the demand. The Tribunal has to do the best it can on the evidence available. As 26 December is only 5 days prior to the year end, the Tribunal finds, on a balance of probabilities, that the relevant costs were all incurred before 26 December 2007. On that basis the demand

sent out on 24 June 2009 was made too late and none of the sum demanded is payable.

The 2011 service charge

43. The Applicants have been asked to pay two amounts relating to this year. In August 2011 the sum of £6065.81 was demanded of every lessee as a payment on account of the estimated cost of major works to the property. In October 2012 the 2011 annual accounts were prepared and then a further demand was issued for £701.16. Both sums are challenged by the Applicants.

44. The unchallenged evidence from Mr Hills was that major works to both the exterior and interior of the property had been planned since 2006. The first stage consultation notice under section 20 of the 1985 Act was dated 6 March 2006, but matters were then put on hold due to the prospect of a Right to Manage application. A copy of the notice was provided to the Applicants' solicitors in December 2007 as part of replies to pre-contract enquiries. The first stage notice was then re-issued dated 24 August 2010 and sent out by post. It was addressed to Mr Alkaisi the former lessee, because at that time the lessor was still unaware the Mr Alkaisi had sold the flat (no notice of transfer having been given). Copies of the original and re-issued notices were produced by the Respondent at the hearing.

45. On 29 July 2011 a second stage consultation notice was sent out by post, this time addressed to Mr Mwambingu at the flat (although Mr Mwambingu denies receiving it). The notice states that copies of all estimates and the specification of works were attached. The consultation period ended on 28 August 2011. On 9 September a third notice was sent out confirming details of the contract entered into. In the meantime a demand for £6065.81, being 1/8th of the estimated cost of the works inclusive of VAT and professional fees, was issued on 12 August 2011.

46. Mr Hills explained that because not all lessees paid as demanded, it was not possible to proceed with all the planned works. Eventually work was carried out to the back of the property, but not to the front or internally. The work took place during 2011 and 2012. The sum of £7373.00 is the stated figure for actual incurred costs of major works in the 2011 service charge accounts. The 2012 accounts are not yet available.

47. Mr Mwambingu objected to paying the sum of £6065.81 as he contended that the section 20 consultation procedure had not been carried out correctly. He thought he should have been involved in "looking at the contractors who attended". He denied receiving any section 20 notices. He felt that the estimate of the builder awarded the contract was too high, and produced another estimate he had obtained from a builder in December 2013 for work to the front and interior,

based on the same specification. This estimate was in the sum of £10,750.00.

48. Mr Hills said that section 20 notices were sent out by first class post. He was not aware of any notices being returned by Royal Mail. He contended that the section 20 procedure had been adhered to, and the sum requested was 1/8th of the estimated costs. The contract had been awarded to the cheapest contractor. The estimated cost for the rear of the property had been £16558.00 + VAT +professional fees.

49. The Tribunal does not accept the Applicants' contention that the section 20 consultation procedure was defective. The notices are in order, and there is unchallenged evidence that they were sent out. In any event a landlord is not required to consult under section 20 before demanding payment on account (assuming the lease permits such demands). The limitation on recovery of costs if the consultation procedure is not followed only applies if costs have been incurred (section 20(3) of the 1985 Act). If the Respondent was permitted under this lease to collect the costs in advance the Tribunal would sanction the demand for £6065.81, but in light of our finding against the Respondent on this issue, the demand cannot be upheld. However, inclusion of the sum of £7373.00 as actual service charge expenditure on major works in 2011 is accepted. There is no reason to doubt that this cost was reasonable or that the works were carried out to a reasonable standard. Although no valid demand for payment has been made for the Applicants' 1/8th share of this sum, it is not too late to do so because the Applicants were informed by means of the 2011 accounts dated October 2012 that the costs had been incurred and would be payable as a service charge.

50. The balance of the service charge for 2011 was said to be £5609.28. The second demand for £701.16 is the Applicants' 1/8th share of this figure. Two heads of expenditure within this total were challenged.

51. The sum of £3073.00 has been charged for common parts electricity. The Appellants queried how such a charge could be correct, given there are only 5 light bulbs consuming power. At the hearing the Respondent stated (for the first time) that all but £60.00 was to be credited by the supplier, as there had been an error. The service charge should therefore be reduced by £3013.00.

52. The Appellants also queried a one-off cleaning and waste removal charge of £175.00 saying they were unaware of any cleaning ever having been done. The Respondents produced an invoice and work sheet in support of the expenditure. The Tribunal prefers the Respondent's evidence and allows the charge.

53. The effect of the reduction in electricity costs is that the 2011 service charge for costs other than major works is determined at £2596.00. Adding the £7373.00 cost of the major works produces a total of £9969.00 for the 2011 service charge, of which the Applicants' share is

£1246.12. The sum of £701.16 has already been demanded, and the balance of £544.96 may be demanded now.

Service Charges for 2013

54. No accounts have yet been prepared for 2013. However in August 2013 the Applicants received a demand for the sum of £521.31 on account of the estimated cost of damp works to Flat 34A. They challenge the payability of this demand on the basis that they did not receive section 20 consultation notices, and do not understand why the estimated cost was so much higher than the cost of damp works already carried out to Flat 33A.

55. Mr Hills stated that the section 20 procedure had been done correctly, and copy notices were produced. Letters written by Mr Mwambingu in August 2013 proved that he had received the second notice and do not mention lack of receipt of the first notice. Contractor's sketch drawings showed that much more extensive work was required in Flat 34A than in Flat 33A. The 34A works have not yet been carried out.

56. The Tribunal does not find any defect with the section 20 consultation, but again the demand is for money in advance of costs being incurred, which is not permitted under the lease. Accordingly the demand is invalid and the money is not yet payable.

57. Separate damp-proofing works were carried out to Flat 33A in May 2013 at a cost of £1012.00. The Applicants stated the work had not been done properly, and relied on a purported expert report dated 8 April 2014. However the previous lessee of the flat, who lived there until August 2013, told the Tribunal that she had no knowledge of the work being defective (although there had been problems with earlier damp work done by another contractor). The Applicants also queried whether fitting of new skirting boards (a small part of the cost) should be payable through the service charge.

58. Mr Hills said the works were covered by a guarantee and he was not aware of any concerns raised by the current lessee of Flat 33A. The skirting boards had to be reinstated following the works.

59. The unsigned brief document dated 8 April 2014 from Damp Solutions Ltd is not an expert report and no reliance can be placed on it. There is no other evidence that the cost of the works at 33A was unreasonable or that the work was not done to a reasonable standard. Reinstatement of skirting boards is reasonably included. However as no valid service charge demand has yet been made in respect of this cost (and the Respondent did not contend otherwise), it is not yet payable.

60. Finally, the Applicants challenged the charge for buildings insurance in 2013. This appears to have been billed directly by the lessor's insurance brokers, and it is unclear whether any of the statutory formalities for

service charge demands have been complied with. However the Applicants' challenge was limited to the cost, which is £353.77 for their flat, this being ¼ of the £1415.07 premium for No. 33 alone. The Applicants had obtained a much lower quote from the same insurers for a total of £461.04 for No.33. They also contended that the Respondent had a statutory obligation to consult with them as insurance was a long-term agreement.

61. Mr Hills referred to a letter from the brokers which noted that the Applicants' quote was for a purpose-built block of flats, did not have sufficient cover either for building reinstatement value or insured risks, and it was not known if the claims experience had been declared.

62. The quote obtained by the Applicants is not comparable with the current cover and is for a completely different type of building. Without more cogent evidence, the Tribunal cannot be satisfied that the current cost is other than reasonable. Further, insurance is taken out on annual basis and there is no obligation to consult. The following points should however be noted:

- The lease requires the Applicants to pay 1/8th of the cost of insuring Nos. 33 and 34, not ¼ of the cost of insuring No. 33
- The scope of the insurance stipulated under the lease is wholly inadequate to protect either the interests of the lessor or the lessees and the actual All Risks cover is clearly more appropriate
- The lessor should obtain insurance at market rates
- Any commission paid to the lessor should be credited to the lessees unless the lessor is receiving this in return for providing a service
- Insurance costs form part of the service charge and should be administered and demanded accordingly.

2013 Administration Charges

63. The Applicants' statement of case referred to disputed charges which they identified as "Administration £168, Land Registry £24, Legal fees £107.50". They said these had not been agreed and had been unnecessarily incurred.

64. The Respondent's statement of account noted "Administration fee re arrears" of £209.25, but the Tribunal was told that this figure was wrong, and the correct amount was £168.00, which was Bridgefords' charge for providing information about the Applicants' service charge arrears. The Tribunal was told there were further charges of £24.00 for Land Registry fees, and £322.00+ VAT for solicitors fees. When asked why these amounts did not appear on the statement of account, the Tribunal was told that the solicitors had obtained payment direct from the Applicants' mortgagees, as part of a total amount of £7863.66 paid

by the mortgagees in September 2013 (of which £7452.66 had been passed to Bridgefords).

65. Neither side produced any documents whatsoever in relation to these charges, although the Respondent was clearly on notice that the Applicants were disputing them. None of the invoices were available. Mr Hills said the charges had been incurred in collecting the service charge arrears and that they were authorised by paragraph 11 of Part 1 of the Fifth Schedule of the lease. He confirmed that no section 146 notice had been prepared.

66. Following the hearing, the Respondent sent to the Tribunal copy correspondence between the Respondents' solicitors and the Applicants. The Respondent had neither sought nor been granted permission to adduce further evidence on this point. Accordingly it has not been taken into consideration.

67. The only evidence at the hearing about the work giving rise to the charges was Mr Hills's assertion that it related to collection of arrears. In *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2011] EWCA Civ 1258, the Court of Appeal held that wording very similar to that found in paragraph 11 was wide enough to allow a landlord to recover the costs of tribunal proceedings it had instigated with a view to determining service charges, as a pre-condition to serving a section 146 notice. However in this case the tribunal proceedings were instituted by the lessees, after the arrears had had been paid. There was no evidence before the Tribunal that these administration charges were incurred in active contemplation of proceedings under section 146 (or to obtain a determination as required by section 81 Housing Act 1996). The Tribunal cannot be satisfied that the work charged for had progressed far enough to fall within the scope of the clause, and finds that any costs incurred by the managing agents or the solicitors in attempting to collect the arrears through correspondence alone would not be such as to fall within paragraph 11. There is no other provision in the lease which might sanction such charges and accordingly they are all disallowed. In consequence there is no need to address the separate issue of whether the amount of the charges was reasonable.

Section 20C Application

68. Neither side made any relevant submissions, other than to refer to the merits of their respective cases. In deciding whether to make an order under section 20C the Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. In relation to conduct of the proceedings, both sides can be criticised. The Applicants did not properly comply with the Directions and both sides omitted to produce relevant documents. With regard to the outcome, this is largely favourable to the Applicants. Although many of the specific arguments made by the Applicants were not upheld, their overall objections to payability of the service charges have been largely vindicated, because

the proceedings have brought to light that the Respondent and their managing agents have departed from the requirements of the lease as to the administration and collection of service charges. For these reasons it is just and equitable for an order to be made that, to such extent as they may otherwise be recoverable, the Respondent's costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants. (It should also be noted that in any event the lease would not appear to contain any provision permitting recovery of costs in section 27A proceedings instigated by lessees).

Concluding Remarks

69. In certain respects, the evidence produced by both parties was incomplete. The Tribunal can do no more than reach a decision on the evidence before it.

70. It is clear that Bridgefords is holding a significant amount of money which must now be repaid to the Applicants (or possibly their mortgagees).

71. It is apparent from the Respondent's statement of account that no service charges whatsoever have been demanded for 2008, 2010, or 2012, apart from one ad hoc charge for £41.25 in 2012. Neither Mr Hills nor Mrs Handsford were able to explain the reason for this. No accounts were seen relating to these years. By virtue of section 20B of the 1985 Act it is now too late to make demands in respect of 2008 or 2010, and it may also be too late in respect of most if not all of 2012, unless written notification of the costs was given to the lessees within 18 months of the costs being incurred.

Dated: 4 July 2014

Judge E Morrison (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.