10218

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AC/LSC/2013/0359**
Property	**:**	**Quadrant Close, The Burroughs, Hendon, London NW4 3BU**
Applicants	**:**	**Mr S Rosenthal** **Mr H Rose** **Mrs R Merkel** **Mr B Erdos** **Mr W Kaczynski,** **Mr W Hajioff** **Mr I Herstain** **Mr G Myers** **Mr and Mrs O Maqsood** **Mrs B Williams and Mr T Katz** **Mrs V Hatter** **Mr S Surr** **Mr S Cohen** **Ms S Cheng** **Doublesite Ltd.** **Mr M Ismail** **Ms J Kendix** **Mr and Mrs J Golker** **Mrs E Matos** **Mr C Woolf** **Mr J Joffe** **Mr J Pereiria and Ms M Janetzky** **Mr and Mrs J Grertler** **Mr P Gaffney** **Mr D Morris**
Representative	**:**	**None notified**
Respondent	**:**	**Actionleague Ltd.**
Representative	**:**	**Estate and Management Ltd** **OM Property Management Ltd.**

© CROWN COPYRIGHT 2013

Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge and/or administration charge**
Tribunal Members	**:**	**Judge Goulden** **Mr S F Mason BSc FRICS FCIArb** **Mr O N Miller BSc**
Dates and venue of Hearing	**:**	**26 and 27 March 2014 and 9 and 11 April 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**22 July 2014**

DECISION

Determinations of the Tribunal

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

(2) The Tribunal makes an order under Section 20C of the Landlord and Tenant Act 1985 so that only the sum of £18,000 inclusive of VAT being the brief fee for Counsel for the Respondent may be placed on the service charge account, subject to the specific provisions within the various leases to allow for recovery of such costs on which no determination is made.

(3) The Tribunal makes no Order for penal costs.

(4) The Tribunal makes no Order for reimbursement of the application and/or the hearing fees

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of service charge years ending 31 March 2007 to 31 March 2011.

2. The relevant legal provisions are set out in the Appendix to this decision and will not be repeated in the body of this decision.

3. Directions of the Tribunal had been issued on 13 June 2013 following an oral Pre Trial Review held on the same date.

4. A Case Management Conference was held on 5 December 2013, at which time, there were two live applications, both with the same Applicants but where the Respondents were named as Actionleague Ltd (1) and Daejan Properties Ltd (2). The case references for those two applications were LON/OOAC/LSC/2013/0359 and LON/OOAC/LSC/2013/0725. However, the application under Case Reference number LON/OOAC/LSC/2013/0725 was withdrawn and the reference to the Respondent was confined to Actionleague Ltd. This was formally noted in the Tribunal's Directions of 5 December 2013.

5. Ms C Collier (Flat 1) and Rev S and Mrs A Neuman (Flat 26) who were originally Applicants withdrew from the application before the hearing.

The background

6. Quadrant Close, The Burroughs, London NW4 3BU ("the property") is a purpose built block of flats c 1934 consisting of 5 adjoined blocks, with no interlinking access, comprising 54 flats. Each block has a main entrance door and rear door to the communal garden and garage block. Each block also has a main staircase, a rear service staircase and a lift (no longer working) in each entry lobby.

7. In the Respondent's Statement of Case, it was stated Estates & Management Ltd. is part of the Consensus Business Group, principal advisor to the trustee of the Tchenguiz Family Trust whose core business is the acquisition and management of commercial and residential real estate. Consensus Business Group purchased Actionleague in January 2006 from Paul Rayden who was also the owner and CEO of County Estate Management ("CEM"). At the time of purchase CEM had been the managing agent. CEM came under the operational control of the Peverel Group (itself acquired by Consensus Business Group in 2008) on 1 January 2010. In April 2010 management was moved to OM Property Management, another company within the Peverel Group. It was contended that at all material times, CEM, Estates & Management, Actionleague and the Peverel Group of companies were all in the ultimate ownership of the Tchenguiz Family Trust. The Tribunal was asked to note that at no time did Estates & Management manage the development on behalf of the Respondent. It was stated *"CEM is currently in liquidation and the Respondent has undertaken to deal with this matter to the best of its ability despite its lack of first hand knowledge regarding the management of development. The service charges in dispute are 2007, 2008, 2009, 2010 and 2011. Unfortunately we are further stymied by the fact that we have been advised that all of the CEM files up to 2008 which remained within Paul Rayden's control were either recycled or incinerated in and around 2011".*

8. At the time that Consensus Business Group purchased Actionleague in January 2006, there were serious arrears of service charges apparently going back to 2004. The Tribunal was advised that Paul Rayden's directorship ended on 28 February 2008 and after that date it had been discovered that service charges had not been demanded from the 2004/2005 service charge year.

9. As at the date of the Right to Manage in September 2011, the total arrears were around £109,824.00.

10. In the Respondent's Statement of Case it was stated *"A deficit of £58,368 was carried through from 2004 to the following year in 2005. This figure included but was not limited to a major works deficit of £41,189 (from the tenants as at 25 March 2004) and lift work deficits of £11,813. Unfortunately CEM (under Paul Rayden's*

management) failed to raise demands within 18 months (or at all) for the £58,368 in 2004 or 2005 and the figure was simply carried through to 2006 and onwards. It was not until 2008, that CBG started to become aware of any issues with the recovery of service charges at the development and it was not until after that time that the true picture regarding Paul Rayden's management of the development became clear. CBG was then faced with a number of money claims from suppliers........which were settled by (the Respondent) *for some £34,898.49. This landlord loan to the development was subsequently waived in July 2009 as a gesture of goodwill.....regrettably, the loan still appears in the scheme accounts at the time of change of management."*

11. In respect of the arrears, the Respondent contended said that there were serial non payers and irrecoverable service charge arrears dating back to 2004 and the full co-operation of all of the tenants had not been forthcoming.

12. Actionleague had been represented by Estate and Management Ltd. from the years ending March 2007 to September 2011, although, as stated in paragraph 7 above, had not managed the development at Quadrant Close. The Right to Manage took place on 12 September 2011. Photographs of the building were provided in the hearing bundles. Neither side requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

13. The Applicants hold long leases of the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The leases were in several different forms.

14. The substantive hearing took four days. Mr S Rosenthal, Mr H Rose and Mrs R Merkel appeared on each of the four days. Mr H Lederman of Counsel appeared on behalf of Mr Rosenthal and Mr Rose only, assisted by his pupil, Mr I Meikle. Mr Rosenthal, Mr Rose, Mrs Merkel, Mrs V Hatter and Mrs J Katz (the new managing agent) all gave oral evidence. There were appearances on behalf of the Applicants by other tenants on various days during the hearing. The Respondent was represented by Mr A Skelly of Counsel, Ms E Fingleton, in house solicitor with Estates & Management Ltd. and Ms M Khan, in house solicitor with Peverel. Oral evidence was provided by Mrs S Belsham, Ms S Alloway and Mr S Docherty.

15. On the first day of the hearing, the Respondent's representatives handed to the Tribunal and to Mr Lederman, Counsel for two of the Applicants, a very large lever arch file containing a considerable number of invoices. Mr Lederman made an application for an adjournment of the hearing to consider the invoices, which was resisted

on behalf of the Respondent. The Tribunal retired to consider the application. The application was refused on the basis that, taking into account the burden on the public purse, there were many issues which could be discussed on that hearing day and the Applicants would therefore have time to consider the invoices overnight. The hearing therefore proceeded.

16. Mr Lederman, for the two Applicants for whom he acted, then made an application for another issue to be considered, namely sums collected for roof repairs but not reflected in the accounts which resulted in a deficit of £65,000. Mr Skelly for the Respondent objected on the basis that there had been a clear Scott Schedule setting out the matters in issue for some time, and the matters now raised fell outside the years in the Scott Schedule. Mr Lederman said that he had only recently been instructed. The Tribunal retired to consider the application. Although it was accepted that the Tribunal's Directions of 5 December 2013, had set out clear instructions with regard to the preparation and completion of the Scott Schedule (only the dates of which were subsequently varied), this Tribunal, with some reluctance, permitted the issue to be aired, but limited to that specific issue.

17. During the hearing, and in respect of the items on the Scott Schedule, the parties agreed that round figures only would be used. There were certain concessions made on behalf of the Respondent, namely £4,183 for professional fees for year ended March 2008; £9,709 for lighting for year ended March 2010; £3,773 for insurance for year ended March 2011; £2,000 for incorrect apportionment of service charge for year ended March 2011, £53.41 for interest on loan for service charge year ended March 2011 and £210 and £60 administration charges both for year ended March 2011 for Mr Rose and Mr Rosenthal only. On receiving confirmation that the sum of £1,177.48 had been paid by Mr Rose towards roof works, it was conceded that this sum would be credited to his account. The Respondent also conceded that the landlord's loan which was made as a gesture of goodwill to pay some of the suppliers in the sum of £34,898.49 need not be repaid by the tenants. No determination is required of the Tribunal in respect of these sums.

The issues

18. The Applicants identified the relevant issues for determination as follows:

    (i) General repairs

    (ii) Legal expenses

    (iii) Management fees

(iv) Professional fees in respect of proposed electrical works and S20 consultation

(v) Bank charges and interest

(vi) Insurance

(vii) Payments unsupported by documents

(viii) Write back

(ix) Administration charges

(x) Lighting

(xi) Lift maintenance and repairs

(xii) Accountancy fees

(xiii) Whether service charge demands were statute barred

(xiv) Health and Safety costs

(xv) Limitation of landlord's costs of proceedings under S20C

(xvi) Penal costs

(xvii) Reimbursement of fees

19. As a general point and as was explained on several occasions throughout the hearing, the Tribunal's jurisdiction is narrow in that it can deal only with reasonableness of costs incurred by the landlord which have been placed on the service charge account and/or standard of the works carried out for those costs. The Tribunal is only able to have regard to the evidence placed before the Tribunal, both oral and written.

20. The Tribunal is critical of the manner in which the case was conducted on both sides. There was a paucity of evidence, and the Tribunal was inundated with documentation from both sides on each day of the hearing. In the case of the Applicants, several skeleton arguments and several subsequent submissions were handed to the Tribunal. Added to this, Mr S Rosenthal was originally the lead Applicant for all the Applicants, save for Mrs Merkel. By the time of the hearing however, Mr Rosenthal and Mr H Rose (only) had instructed Mr Lederman

through the Bar's direct access scheme. Mr Lederman was therefore Counsel for two Applicants only, and the Tribunal was unsure whether or not Mr Rosenthal was able to take instructions as to what the remaining Applicants wished to do. Mrs Merkel, who appeared every day of the hearing, was not represented by Mr Rosenthal or by Mr Lederman. The Tribunal's task was clearly more onerous than necessary. The Tribunal has rarely seen a case where there was so much documentation, revised and/or amended documentation (including the Scott Schedule) and contradictory evidence.

21. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows. Absence of invoices was raised in the Scott Schedule, and on several occasions by Mr Lederman. However, this is not, of itself, a bar to the Tribunal finding that the costs were reasonably incurred.

General repairs

22. These were in the Scott Schedule in the sum of £5,551 (2007) and £14,000 (2010). The sum of £9,709 was conceded on the basis of duplication in the year 2010 (see paragraph 17). Therefore the sum to be determined for 2010 was £4,291. In respect of the sum of £5,551, it was contended that there were no invoices and no evidence that it had been paid. In respect of the sum of £4,291, it was contended that the entrance door/intercom system was defective and had not been adequately repaired.

23. The Respondent handed to the Tribunal a bundle of invoices to substantiate the payment of £5,551 and with regard to the general repairs in 2010, it was contended that the door and intercom works had been a constant problem due to their age, the glass was constantly being broken and this was a health and safety concern.

24. Evidence in respect of the invoices was provided by Mr S Doherty, Client Accountant, OM Property Management Ltd. His view was that the sums had been certified by qualified accountants and he had no reason to believe that they had not been paid. He did not know why the sum of £5,551 had been demanded in a later year.

The Tribunal's Determination

25. Mr Doherty's statement of 27 September 2013 was sparse. His work was said to involve *"analysing and interpreting historic service charge accounts and supporting documents for developments owned and managed by companies within the Peverel Property Management Group of which OM Property Management is a member. This includes dealing with issues raised in proceedings bought* (sic) *by and against*

Group Companies in Courts and Tribunals" In connection with this matter, he analysed the accounts and correlated the invoices to the accounts. He had no specific knowledge of the issues.

26. Some of the invoices supplied in respect of the sum of £5,551 (2007) appeared to be for a different service charge year or years. The evidence on behalf of the Respondent as to the reason for this was less than satisfactory. However, trawling through all the invoices would be a disproportionate use of the Tribunal's time. The Tribunal has taken into account the amount involved.

27. The Tribunal notes that there has been a concession of £9,709 in respect of the 2010 year. The explanation in respect of the balance by the Respondent for that year is accepted by the Tribunal.

28. The Tribunal determines that in respect of general repairs the sum of £5,551 (2007) and £4,291 (2010) are relevant and reasonably incurred and properly chargeable to the service charge account.

Legal expenses

29. The sums challenged under this head were £2,982 (2007) and £1,664 (2008). In 2009 there was a credit of £207, which was not challenged.

30. The Applicants contended that legal fees were irrecoverable by the wording of some forms of lease and if legal fees were so recoverable under the lease terms, they were unreasonably incurred. It was argued that Mr Rayden, the managing agent at that time, had no intention of proceeding with legal proceedings with no explanation provided for halting proceedings. A case was cited in support.

31. The Respondent contended that whilst the fees were for a specific property, *"the view was taken that this may occur in other properties within the block so it was dealt with as a fact finding mission. Therefore the service charge is recoverable".* The Respondent relied on Clause 4(a) of the lease dated 25 March 1993 between Daejan Properties Ltd (1) and Actionleague (2).

The Tribunal's determination

32. The Tribunal finds difficulty in accepting the Applicants' argument that the managing agent at the time had not intended proceeding with legal proceedings. This cannot be known. The arrears were substantial. The tenants would not pay willingly and instituting legal proceedings would be a proper method for the Respondent to pursue non payers. The reason for commencing and subsequently halting proceedings is not within the knowledge of the Applicants.

33. The Tribunal has considered the sums incurred. It is also noted that there was a credit of £207 in 2009.

34. The Tribunal determines that the sums of £2,982 (2007) and £1,664 (2008) are relevant and reasonably incurred and properly chargeable to the service charge account.

Management fees

35. The sums under this head in the Scott Schedule were £16,370 (2007), £17,700 (2008) £19,135 (2009) £18,820 (2010) and £19,292 (2011).

36. The Applicants contended that whilst there was no general objection to the level of management fees, for the work actually carried out, they were excessive, since there had been prolonged disrepair and substandard management. A reduction of 75% per annum was suggested.

37. The Respondent contended that whilst it was accepted that there had been difficulties, the issues relating to management were due to a lack of funding because of service charge arrears.

38. Evidence for the Respondent was given by Mrs S Belsham, Regional Manager, of Peverel Property Management Ltd. In her witness statement of 27 September 2013, she said that she managed a team of five property managers and their portfolios from the Midlands down to the South Coast, as well as managing a small portfolio of her own. Her work included dealing with issues raised in proceedings brought by and against Group Companies in courts and tribunals. Prior to joining her present firm in 2008, she worked at County Estate Management and had been involved in the management of the subject blocks since 2003.

39. Mrs Belsham described the property as set out in paragraph 6 above, and said that originally all the flats had been heated by a communal boiler, but in about 1998, this was removed and all flats were fitted with their own boilers for heating and hot water and the boiler room was converted in a flat, 21A.

40. In her witness statement, Mrs Belsham expanded on the reasons for the problems affecting the property. She stated, inter alia, that the freehold interest in the property was sold by Paul Rayden to Consensus Business Group in January 2006. Paul Rayden was also the owner and CEO of County Estate Management and had continued to manage the property post transfer *"and all management decisions continued to be dealt with by Paul Rayden until he sold County Estate Management to Consensus Business Group in 2008. All the County Estate Management files up to 2008 were archived in garages belonging to Paul Rayden"*. She understood that those files were either recycled or

incinerated in 2011. Estates and Management only became aware of the problems after 2008.

41. During the time Mrs Belsham managed the property, she said that the then chairman of the Residents Association had been kept up to date with the property and the day to day problems faced by the management. He had approved service charge budgets and discussed the year end accounts. He had also been made aware of the major works which were needed to the blocks which included replacement of old and brittle wiring to the landlord's communal electricity supply; replacement of old and dangerous lifts, faulty drains (*"A section 20 Notice was served but the works were put on hold by Paul Rayden"*); external and internal redecoration.

42. Although Mrs Belsham empathised with concerns and criticisms with regard to the state of the development, she was hampered by the *"vast"* debt owed by serial non payers, as a result of which all non essential works had to be stopped, e g cleaning and gardening. It was stated that other items such as the block insurance and electricity were still paid by way of an overdraft facility and from the tenants who continued to pay their service charges. For some reason Paul Rayden *"for reasons unknown or at least not explained to me"* had stopped credit control against some tenants including stopping legal proceedings. Mrs Belsham tried to obtain arrears from 2004 but the majority would not pay.

The Tribunal's Determination

43. Mrs Belsham was a credible witness and explained the very many difficulties encountered with regard to management of the block, particularly where, in this case, the arrears were substantial. She was clearly placed in a difficult position by her superior, Paul Rayden, who apparently did commence legal proceedings in respect of arrears which were then halted. Letters from solicitors in the hearing bundle appeared to support this. No reason was given for stopping proceedings and Mrs Belsham said that there was difficulty in her challenging her superior in this respect.

44. It is the view of this Tribunal, that some services were provided (including inter alia, lift maintenance, insurance and provision of cleaning and gardening) until such time as there were difficulties in funding. The failure to pursue non payers exacerbated an already difficult situation.

45. There has been a management failing but Mr Lederman's suggested 75% reduction is unrealistic. Mrs Belsham had tried to obtain arrears from 2004 but the majority of lessees refused to pay.

46. The Tribunal makes a deduction of 25% across the board. The Tribunal determines that in respect of the management fees the sum of £12,277(2007), £13,275 (2008) £14,351 (2009) £14,115 (2010) and £14,461 (2011) are relevant and reasonably incurred and properly chargeable to the service charge account.

Professional fees in respect of proposed electrical works and S20 consultation

47. The sums in the Scott Schedule under this head were £6,721 (2007) and £4,303 (2009) challenged on the basis that no invoices had been provided , there had been no evidence of services and no evidence of compliance with S20 consultation. The sum of £4,303 (2009) should have been £4,183 and that sum was conceded during the hearing on behalf of the Respondent (see paragraph 17). Mr Lederman said *"we query whether Actionleague ever intended to carry out works....the money was wasted"* . He suggested that since the professional fees were all linked to the physical works, the cost should be limited to £250 per flat.

48. Evidence was given by Mrs Belsham at the hearing. She said that an electrical works report had been commissioned in 2003, which had recommended replacement of the electrical installation to the common parts and the provision of new mains supplies to the flats. The reports had been prepared by Waterfield Odam & Associates and Nixon Associates. However, the electricity provider, EDF, said they wanted individual meters for each of the flats to be relocated into external cabinets in the grounds, so that they could be read individually and with ease. This became an issue since access to all flats could not be obtained and the works therefore could not proceed. Paul Rayden on behalf of Daejan instructed Mrs Belsham to commission a further report from Vican Consultants who had replaced Waterfield Odam & Associates, since apparently Paul Rayden had thought the previous consultants had been confused as to the work to be carried out. No money could be obtained from the tenants in order to fund the works themselves and this was why the works did not proceed.

The Tribunal's Determination

49. In view of the concession referred to above, the Tribunal is dealing only with the sum of £6,721.

50. The Tribunal rejects the Applicants' contention that consultation under S20 of the Act was required. The professional fees were in contemplation only of the works relating to replacement of electrical mains which included electrical feeds/mains into the individual apartments. The Tribunal also rejects the Applicants' contention that CEM decided against the use of the Nixon or Waterfield reports because the works did not proceed and therefore the costs were wasted.

51. Mrs Belsham gave several reasons why the works could not, and did not, proceed, which included the requirements of the statutory electrical service provider.

52. The Tribunal determines that the professional fees in the sum of £6,721 (2007) were relevant and reasonably incurred and properly chargeable to the service charge account.

Bank charges and interest

53. The bank charges and interest were £4,495 (2007), £4,919 (2008) and £3,217 (2009). The Applicants also challenged charges on late payment of creditors' invoices in the sum of £1,967 (2009). The challenge was that there was no provision in certain leases to make such charges and the Respondent *"is required to prove that this amount of borrowing was reasonably* (sic) *and justified as a cost to service charge"*.

54. The Respondent contended that the bank charges related to the overdraft charges on the service charge account, which had to be used due to the level of significant service charge arrears and the charges on late payment of creditors' invoices were placed on the service charge account *"as the managing agents were unable to pay the invoices due to lack of service charge funds, which was as a result of the significant service charge arrears"*.

The Tribunal's Determination

55. The Respondent's explanation is accepted. The charges arose as a direct result of the lessees' refusal to pay their service charges. The lessees are therefore liable.

56. The Tribunal determines that the bank charges and interest in the sum of £4,495 (2007), £4,919 (2008) and £3,217 (2009) and the charge in the sum of £1,967 (2009) in respect of late payment of creditors' invoices are relevant and reasonably incurred and properly chargeable to the service charge account.

Insurance

57. The sums challenged were £20,969 (2007) £25,687 (2008) £22,689 (2010) and £26,589 (2011) on the basis that no subsidence questionnaire form had been provided to the insurers as requested on several occasions, public liability cover was withdrawn for a three year period and there had been a lack of electrical testing, stair carpets were judged to be unsafe. Mr Lederman suggested that an appropriate sum for insurance cover should be no more than £14,000

58. Evidence on behalf of the Applicant was provided by Mrs J Katz, Managing Agent, Fresh Property Management Ltd. She gave evidence in respect of alternative insurance cover arranged by a Mr I Clements, Sheerwater Insurance Services Ltd. who provided a witness statement but did not attend in order to be questioned. He had produced a property owners fact find form which the Tribunal considered unsatisfactory and on which the "*target premium*" was to be noted.

59. Evidence for the Respondent was provided by Ms S Alloway ACII, Insurance Manager, Kidlington Properties Ltd., which is an insurance intermediary for the Freshwater Group. She said that at the 2006 renewal the company had remarketed the risk. The insurers re-surveyed the risk on 2 May 2007. As a result the insurers required a current safety test certificate in respect of the fixed electrical installation in the common parts, to be provided by 30 July 2007 and the stair carpet to the common parts was to be removed or replaced to avoid potential trip hazards, to be completed by 30 July 2007. Despite reminders to the managing agents, no response had been received. At the 2008 renewal, the insurers withdrew public liability cover as a result of the second requirement not being completed and applied a £5,000 subsidence excess, as they had not received a subsidence questionnaire satisfactorily completed. The electrical test certificate requirement had not been complied with and the decision was taken not to remarket in 2009 or 2010, since this would have been disclosable information.

The Tribunal's Determination

60. The insurance was at a consistent level until 2004 and then rose until 2011. The Tribunal considers that the reason for this sharp increase was in some respects due to the failure by the Respondent to supply information reasonably required by the insurers and/or their brokers for example failure to complete the subsidence questionnaire, failure to obtain an electrical test certificate and failure to attend to the poor condition of the common parts carpets.

61. The Respondent is under no obligation to obtain the cheapest quotation. The Right to Manage company appears, from Mr Clements fact find questionnaire, to have tried to obtain the cheapest quotation

62. The Tribunal determines that in respect of the insurance the sum of £17,000 (2007) £17,510 (2008) £18,035 (2009) £18,576 (2010) and £19,133 (2011) are relevant and reasonably incurred and properly chargeable to the service charge account.

Payments unsupported by documents

63. The Applicants' case was that the sum of £1,032 in 2007 was not supported by evidence. The Respondent's case stated *"the auditors have agreed to include this sum as part of the total expenditure due to the evidence of entries in the year end reports to which they had access, without the supporting documentation to accompany those entries".*

64. Mr Doherty said that the previous accountants had ceased trading and the accounts had been prepared by Gibson Appelby.

The Tribunal's Determination

65. In the Accountants Certificate dated 4 January 2008, it was stated *"during the year ended 31 March 2007 total expenditure recorded was £85,171. Included within this amount are various payments totalling £1,032 for which no supporting documentation was available. A list of this expenditure is attached to this statement".*

66. The Applicants' case is not persuasive.

67. The Tribunal determines that the sum of £1,032 under this head is relevant and reasonably incurred and properly chargeable to the service charge account.

Write back

68. There was a challenge to a write back of £32,750 on the basis that the Respondent should prove this was an authorised transaction. The Respondent stated *"this amount has the effect of reducing the service charge deficit thereby also reducing the amount of any recovery of this deficit in this or later years".*

69. Mr Rose said in his statement that the write back was not a matter on which he was asked to agree and he required an explanation.

70. Mr Doherty said that the accounts had been prepared and certified by qualified accountants and was the first year these accounts had been prepared by those accountants. The sum referred to was a correction to the deficit. He said that he had not spoken to the accountants but *"it is quite clear what it relates to".*

The Tribunal's Determination

71. The auditor's notes to the summary of costs for the year 2007 under the heading *"Adjustment to service charge deficit"* it states *"in accordance*

with recommended accounting practice a balance sheet now has been incorporated in the accounts of Quadrant Close. When preparing calculations the known assets of Quadrant Close exceeded known liabilities by an amount of £32,570. On the instructions of the managing agents this difference has now been written back as a prior year adjustment, reducing the deficit previously shown on the service charge fund by the same amount. It is considered that the deficit on the service charge fund was previously overstated"

72. The Tribunal has not heard any persuasive evidence on behalf of the Applicants that the write back of £32,570 is not authorised.

Accountancy fees

73. The sums in issue were £9,435 (2008) £561 (2009) £1,296 (2010). No invoices were produced and the Applicants maintained that the costs were excessive and/or the services provided were not of a reasonable standard.

74. Mr Rose in his statement said that the accountancy fees *"require justification in the light of the various errors of accounting and charging that appear to have occurred"*. In oral evidence he said that the accountancy fees should have been no more than £1,500 to £2000 per annum.

75. Mr Doherty said that the invoices were not available, but there had been a credit for £1,346.

76. From perusal of the summary of costs for the year ended 2008, the sum of £9,435 accountancy fees was split. Column (a) £6,615 was for expenditure demanded and paid during that year and column (c) £2,820 was expenditure neither demanded or paid during that year. In the previous year there appeared a credit for £2,991.

The Tribunal's Determination

77. From the evidence of Mr Rose, it appears that the accountancy fees for 2009 and 2010 were not challenged since he accepts that accountancy fees should be in the region of £1,500 to £2,000. The Tribunal does not intend to reduce either of those amounts and is surprised that the sums challenged for 2009 and 2010 continued to be challenged by the Applicants.

78. With regard to the sum of £9,435 for 2008, whilst it does appear high, there was a credit in the previous year.

79. The Tribunal determines that in respect of accountancy fees the sums of £6,000 ((2008) £561 (2009) and £1,296 (2010) are relevant and reasonably incurred and properly chargeable to the service charge account.

Lighting

80. The sum of £9,709 was challenged on the basis that the Respondent was required to justify the same. The Respondent stated *"this invoice stems from the emergency strip lighting that had to be installed at the property"* An invoice from W E Mannin Ltd. was produced in support.

The Tribunal's Determination

81. No persuasive evidence has been supplied by the Applicants. The Tribunal determined that the sum of £9,709 in respect of lighting is relevant and reasonably incurred and properly chargeable to the service charge account.

Lift maintenance and repairs

82. The Applicants' challenge was that they required justification of the sum of £7,783 in 2010 and £7,488 in 2011. A 50% reduction was requested. The Respondent contended that the lifts were often misused which resulted in numerous call outs which were extremely expensive. The lifts are in need of replacement and are original to the blocks. An invoice was produced in support.

The Tribunal's Determination

83. No persuasive evidence has been supplied by the Applicants. Indeed it is understood that since the Right to Manage in 2011 the lifts continue to be inoperable and have not been replaced due to lack of service charge funds.

84. The sums of £7,783 (2010) and £7,488 (2011) are relevant and reasonably incurred and properly chargeable to the service charge account.

Administration charges

85. The administration charges of £210 and £60 were conceded in respect of the sums due from Mr Rose and Mr Rosenthal, but not in respect of Mrs Merkel.

The Tribunal's Determination

86. The Respondent had conceded that the administration charges were not payable by Mr Rose and Mr Rosenthal. In any event, the sums are considered de minimis.

87. The Tribunal determines that all the administration charges are disallowed.

Application under S.20C

88. The application lodged by Mr Rosenthal did not contain an application under S20C of the 1985 Act. However, this application was added at a later date. In addition, at the hearing, the Applicants formally applied for an Order under section 20C of the 1985 Act.

89. At the end of the hearing, Mr Skelly's fees were said to be £18,000 inclusive of VAT. Attached to Counsel's closing submissions was a schedule of Respondent's total legal costs, including Counsel's fees, in the sum of £36,277.59 inclusive of VAT.

90. In order to save Tribunal time, the Tribunal permitted written submissions to be provided after the close of the hearing.

91. In closing written submissions on behalf of those Applicants by whom he was instructed, Mr Lederman argued that the leases of certain Respondents did not permit legal costs relating to the Tribunal proceedings to be charged to the service charge account. Further Mr Rosenthal was making submissions in respect of those Applicants whom he represented and who were a party to the application only. It was contended that the Respondent was not entitled to recover all or at least a substantial part of the costs incurred in these proceedings within the service charge. In written submissions on this issue, Mr Lederman set out the addresses of 15 flats where, in his view *"the terms of the leases are not sufficiently clear or specific"*.

92. In closing written submissions on behalf of the Respondent, Mr Skelly said, inter alia, that if the leases or some of the leases provide for costs to be placed on the service charge account, *"it is R's intention to seek to recover its legal costs, consisting only of Counsel's fees for attendance at the hearing (this is in the sum of £15,000 plus VAT)"*.

The Tribunal's Determination

93. S20C of the Act is referred to in the Appendix to this Decision.

94. The question for the Tribunal is whether it is reasonable to allow the Respondent to place S20C costs on the service charge account.

95. In applications of this nature, the Tribunal endeavours to view the matter as a whole including, but not limited to, the degree of success, the conduct of the parties and as to whether, in the Tribunal's opinion, resolution could or might have been possible with goodwill on both sides.

96. In this particular case, the Tribunal considers that resolution between the parties without the need for a determination by the Tribunal would have been remote and there appears to have been no possibility of settlement through mediation. There is clearly little goodwill on either side.

97. In the judgement of His Honour Judge Rich in a Lands Tribunal Decision dated 5 March 2001 **(The Tenants of Langford Court v Doren Ltd)** it was stated, inter alia *"where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an order under Section 20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct. In my judgment the primary consideration that the LVT should keep in mind is that the power to make a order under Section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not to be used in circumstances that makes its use unjust".*

98. Under new legislation, there is now a limited power for the Tribunal to order costs, but Judge Rich's comments are still valid.

99. In accordance with S 20C (3) of the Act, the applicable principle is to be a consideration of what is just and equitable in the circumstances. Of course, excessive costs unreasonably incurred would not be recoverable by the landlord in any event (because of S19 of the Act) so the S20C power should be used only to avoid the unjust payment of otherwise recoverable costs.

100. In his judgement, Judge Rich indicated an extra restrictive factor as follows:-

"Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused his rights or used them oppressively that is a salutary power, which may be used with justice and equity, but those entrusted with the discretion given by Section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression"

101. It is clear from the tenor of the documentation before this Tribunal and from the evidence presented at the hearing that the relationship between the parties is acrimonious and has been so for some considerable time. The Applicants and Respondent have both been unsuccessful in part.

102. On the one hand, the services provided to the Applicants had been poor, the accounts had been in some disarray, and where certain sums had been challenged, concessions had been made on behalf of the Respondent.

103. On the other hand, the tenants were in substantial arrears, as a consequence of which the Respondent was starved of funds and could not maintain the property and/or provide the services required; a loan which had been made by the landlord to pay off some suppliers in the sum of £34,898.49 does now not need to be repaid by the lessees, as a gesture of goodwill, which is to their benefit, Directions were not adhered to, there was difficulty in identification of the names of all the Applicants due to *"communication difficulties with some of the Applicants"* and the Tribunal was surprised that certain issues continued to be pursued.

104. The sum proposed to be placed on the service charge account by the Respondent is £36,277.59. However, this is at odds with Mr Skelly's submission at the substantive hearing (supported by his written submissions on this issue as set out in paragraph 92 above) that only his brief fee of £18,000 inclusive of VAT would be sought.

105. The Tribunal determines that, of the total legal costs as set out in the paragraph above, it is just and equitable that the sum of £18,000 inclusive of VAT (being £15,000 plus VAT of £3,000) only, being the brief fees of Counsel for the Respondent in connection with proceedings before this Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

106. The Tribunal does not propose to make a determination as to whether there is a contractual entitlement for the Respondent to place such costs on the service charge. It has been argued that certain leases do not allow this, but this is a matter for the Respondent to satisfy itself that such costs may be placed on the service charge account. Of course, a lessee may challenge the payability of such charges if it is to be contended that their particular lease does not permit this.

Application for penal costs

107. This application was made on behalf of Mr Rosenthal and Mr Rose under Schedule 12 paragraph 10 of the Commonhold and Leasehold

Reform Act ("the 2002 Act") in respect of costs wasted by production of the invoice bundle by the Respondent on the first day of the hearing.

108. It was submitted, inter alia, *"it was inevitable they would have to consider the position carefully when this bundle was produced....the need to consider the position and seek an adjournment entailed a delay of about 1.5 hours hearing time at the first day of the hearing".* It was argued that *"the late production of this bundle was disruptive and amounted to unreasonable conduct and should merit an award of costs of up to £500, the maximum available under the 2002 Act..."*

109. In closing submissions on behalf of the Respondent it was contended that *"it is the conduct of the Applicant which calls for scrutiny, and which may in some respects be labelled 'unreasonable'....* It was argued, inter alia, that Directions had not been complied with and at the start of the hearing, the Respondent did not know with certainty who the Applicants were nor who Mr Rosenthal purported to represent. Further issues, other than those in the Scott Schedule, had been raised the day before the start of the hearing, which had the effect of lengthening the hearing. The Respondent contended that the Applicants had been unreasonable and sought an order for costs.

The Tribunal's Determination

110. The Tribunal accepts that Schedule 12 paragraph 10 of the 2002 Act is applicable in this case and is set out in the Annex to this Decision.

111. Whilst it is correct that an application to adjourn the proceedings was sought by Mr Lederman when the bundle of invoices was produced by the Respondent on the first day of the hearing, it was refused by the Tribunal. The day was not wasted since there were many other issues which could be explored. There was therefore no disruption to the Tribunal proceedings. Further, the Applicants did not adhere to the Tribunal's Directions. It is noted that by a Direction following a Case Management Conference dated 5 December 2013, Mr Rosenthal was directed to approach the Applicants who had been added on 1 August 2013 and 5 December 2013 to seek confirmation that he may act as their representative and was directed to confirm the position with the Tribunal and the Respondent. He failed to do so. Applicants are expected to process their application in a timely manner.

112. The presentation of the cases from both sides was poor and therefore it could be argued that in certain respects both sides may have been unreasonable. However the Tribunal does not consider that the complaints made in either application fall within the wording of Clause 2(b) of Schedule 12 paragraph 10 of the 2002 Act.

113. The applications are rejected. The Tribunal makes no order as to costs.

Application for reimbursement of fees

114. This application was made by Counsel for the Applicants whom he represented at the close of the hearing. In closing submissions he confirmed that the application was made under the old rules as the application had commenced before July 2013. It was stated that in order to gain the concessions made by the Respondent, proceedings had to be commenced and the case had to be brought to a hearing.

115. It did not appear from the closing submissions received from Counsel for the Respondent that this issue had been addressed.

The Tribunal's Determination

116. The Tribunal considered whether to exercise its discretion under Regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003.

117. The Tribunal acknowledges that both sides may have incurred costs which are irrecoverable. The Applicants have not been wholly successful. It is felt that, in the particular circumstances of this case, to make an order for the Respondent to reimburse any part of the application and/or hearing fees would be punitive.

118. The Tribunal does not intend to exercise its discretion under this head and declines to make an order for reimbursement by the Respondent to the Applicants of the application and/or hearing fees or any part thereof.

Name: J Goulden **Date:** 22 July 2014

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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
(a) £500, or
(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.