10809

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UF/LSC/2014/0040**
Property	:	**Falaise, Fort Road, West Quay, Newhaven, East Sussex BN9 9GE**
Applicant	:	**Mr D Garland, Mr I Vincent and other lessees (see page 2)**
Representative	:	**Mrs S Massingham**
Respondent	:	**West Register (Realisations) Limited**
Representative	:	**Mr J Upton, counsel**
Type of Applications	:	**Determination of service charges (section 27A) and dispensation from consultation (sections 20 and 20ZA) Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge E Morrison** **Mr R A Wilkey FRICS**
Dates and venue of hearing	:	**23 January 2015 at Eastbourne County Court** **13 and 14 April 2015 at Tribunal Centre, Chichester**
Date of Decision	:	**27 April 2015**

DECISION

LIST OF APPLICANTS

Original Applicants:

Mr I Vincent (Flat 5)
Mr D Garland (Flat 33)

Joined Applicants:

Mr C Kirwan and Ms M Phippard (Flat 3)
Dr A C Alleyne (Flat 9)
Mr B R Diggins and Ms K E Murrell (Flat 21)
Mrs T C Clarke (Flat 30)
Mr and Mrs W Edmeads (Flat 36)
Mr and Mrs J Burton (Flat 38)
Mr W Harrop and Ms C Geoghan (Flat 40)
Mr V H Thompson (Flat 41)
Mr and Mrs R Papworth (Flat 42)
Mr P Crone (Flat 44)
Ms S Palmer (Flat 45)
Ms C E Hill (Flat 47)
Mr and Mrs R H Donald (Flat 48)
Mr and Mrs J C Cutler (Flat 49)
Mr J Fox and Ms M Cosham (Flat 53)

The Applications

1. By an application dated 19 April 2014 two of the lessees of flats at Falaise applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of their liability to pay service charges for service charge years 2008-2013 inclusive. An application was also made for an order under section 20C of the Act. Subsequently the lessees of 15 other flats were joined as Applicants at their request.

2. The Respondent is the freeholder of the block and on 6 February 2015, after the first day's hearing, the Respondent made an application under section 20ZA of the Act for dispensation from the consultation requirements provided for by section 20 of the Act with respect to the charges made in 2012 and/or 2013 under three qualifying long term agreements.

Summary of Decision

3. The service charges recoverable by the Respondent in respect of Falaise are as follows:

Year	£
2008	Nil
2009	30,121.75
2010	63,200.54
2011	63,157.56
2012	56,395.19
2013	91,479.12

Each lessee is liable to pay a contribution towards these service charges in the proportion set out in the relevant lease (to the extent that payment has not already been made).

4. Dispensation subject to terms is given in respect of the Respondent's management agreement with Lambert Smith Hampton and its cleaning contract with CRN Ltd. The terms are set out at paragraphs 117 and 119 below.

5. An order is made under section 20C with respect to both the section 27A and section 20ZA applications.

The Lease

6. The Tribunal had before it a copy of a sample lease and was told that leases for all the other long leasehold flats were in similar form, save that the proportion payable by each lessee towards the service charge varied from flat to flat. The lease was granted for a term of 125 years from 29 September 2006 at a yearly ground rent of £250.00 for the first 25 years and rising thereafter and was made between Oakdene Homes plc (the developer), Oakdene Estate Management Limited (the management company), and the lessee.

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

   (a) Each tenant is liable to pay the management company a specified proportion of a general service charge described in the Second Schedule;
   (b) On account payments for each service charge year are payable on 1 January and 1 July in each year in such sum as the management company may reasonably demand;
   (c) The management company covenants, amongst other things, to insure the block and to keep in good and substantial repair the "Retained Parts" ;
   (d) The Retained Parts comprise those parts of the block and surrounding paths etc. which are not included in any demise, and they include the structure, roofs, foundations, load-bearing walls and common areas;
   (e) The service charge comprises the cost of performing the management company's obligations together with the costs of management including managing agents;

(f) After the end of each service charge period a statement of the service charge expenditure certified by a qualified accountant is to be prepared and submitted to the tenant;

(g) Any amount due from the tenant is payable within 28 days of demand following production of the accounts, and any overpayment by the tenant may be refunded to the tenant or carried forward;

(h) The service charge may include reasonable provision for future expenditure (i.e. a reserve fund);

(i) If the management company fails to perform its obligations the landlord becomes responsible for its performance.

The Inspection

8. The Tribunal inspected the subject property on the morning of 23 January 2015 immediately before the hearing, accompanied by the parties' representatives. Falaise is a detached block of 52 self-contained flats, which was constructed in 2007, as part of a larger development, on five principal floors together with parking for residents beneath the main building. It occupies a somewhat restricted site overlooking the Marina and River Ouse, about three quarters of a mile south of Newhaven town centre shopping facilities and railway station.

9. The building is arranged as four sections, known as cores, and each is served by a passenger lift. The cores are not linked internally except in the basement car park. The Tribunal walked through the car park area and was shown two of the common staircases within the cores. The attention of the Tribunal was particularly drawn to various matters including:

• Graffiti to one of the elevations which has been partly painted over.
• A speed warning sign is in the wrong place.
• Work has been carried out to seal joints and prevent leaks around several soil stack clusters where they pass through the concrete which forms the roof of the car park. It was apparent that liquid continues to lie on adjacent surfaces.
•Access was obtained to an electricity meter room with a rubber floor mat. This room leads to a gas meter room. Several areas of blockwork were stained and perishing. The Tribunal was informed that the same configuration exists in respect of the other three cores and that there is similar deterioration to blockwork.
•Staircases to the upper parts which are visible in the parking area have been constructed using the wrong materials. The Tribunal was told by Mr Mitchell (of the managing agents) that they are porous and "not fit for purpose".
•A room containing three water pumps for the building. The Tribunal was told that one pipe had fractured and all pumps had been taken away and refurbished.
•A cupboard housing the hydraulic tank for the lift. The Tribunal was told that this room has flooded in the past.

•Vertical cracks were noted to several internal walls in the common stairwells. In the case of core two, a tell-tale had been fixed across the crack to monitor movement.
•Nosings to several stair treads have been replaced. They have been screwed in position whereas the original nosings had been stuck in place.
•There are signs of water ingress around several window openings on half landings of the common stairwells. In addition, several ceiling tiles show signs of water staining.
•On the fourth floor of core two, parts of the structure have been removed to investigate leaks and there is a hole in the party wall above.

Procedural Background

10. Directions were originally issued by the Tribunal on 10 June 2014 following a case management hearing. The Applicants complied with these directions; the Respondent did not. The Respondent's statement of case was not received by Mrs Massingham until 7 days before the hearing, and the only witness statement from the Respondent was sent to Mrs Massingham, exhibiting 2013 service charge accounts never previously provided, late on 21 January 2015. Despite this Mrs Massingham, who is not a lawyer, confirmed at the start of the hearing on 23 January 2015 that she was ready to proceed.

11. Following the first hearing further directions were issued dated 26 January 2015 with respect to the Respondent's proposed application under section 20ZA.

12. Although the section 20ZA application was made by the Respondent to the section 27A application, in this decision the term Applicants refers to those persons listed on page 2, and the term Respondent refers to West Register (Realisations) Ltd.

Representation and Evidence at the Hearing

13. The Applicants were represented by Mrs Massingham. She had provided a statement of case with accompanying documents including a schedule of items in dispute. The Respondent had converted this schedule into a Scott Schedule and when the Respondent's comments were received, she had replied by way of additional comments on the Schedule and made some further submissions by way of reply.

14. The Respondent was represented by Mr Jonathan Upton of counsel. Until a week before the hearing, the Respondent had done little more than comment, by way of Scott Schedule, on the items in dispute, but as explained above a statement of case and witness statement were provided shortly before the first day's hearing, along with numerous Bundles. Unfortunately there were errors in the preparation of the Bundles and not all relevant documents were included.

15. A supplementary lengthy Bundle was prepared prior to the second day of the hearing dealing with the section 20ZA application. This included two witness statements from each side. Only those lessees who were parties to the section 27A application responded to the section 20ZA application, and they were also represented by Mrs Massingham.

16. At the hearing, matters were dealt with largely by submission, supported by the statements of case, witness statements, and supplemental oral evidence from Mr Colin Mitchell, a management surveyor from the Respondent's managing agents, and Mr Jim Storey, Head of Residential Investment UK at the Respondent company.

17. The documentary evidence was in the region of 3500 pages.

18. On 23 January 2015, the Tribunal heard evidence and submissions relating to service charge years 2008-2011. The remaining years and the section 20ZA application were addressed on 13 and 14 April 2015.

The Law and Jurisdiction

19. The tribunal has power under section 27A of the 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.

20. By section 19 of the 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.

21. Section 20 of the Act and regulations thereunder provide that where costs of more than £250.00 per lessee have been incurred on qualifying works or more than £100.00 per lessee under a qualifying long term agreement, the relevant contributions of tenants will be limited to those sums unless the consultation requirements have been either complied with or dispensed with by the determination of a Tribunal.

22. A lessor may ask a tribunal for a determination to dispense with all or any of the consultation requirements, and the tribunal may make the determination if it satisfied that it is reasonable to dispense with the requirements (section 20ZA).

23. Section 20B 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 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.

24. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord 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 tenant or any other person or persons specified in the application.

Background

25. The matters in this section are not in dispute. Following construction of Falaise in 2007 the developer lessor Oakdene Homes plc went into administration. The management company named in the lease never functioned and also went into administration. The administrators of Oakdene Homes plc, Price Waterhouse Coopers, appointed Qube Management Ltd to manage the block. On about 11 September 2009 the Respondent purchased the freehold. Qube remained the managing agents until 30 June 2012, after which date they were replaced by Lambert Smith Hampton ("LSH"). Until 24 December 2014 the Respondent still owned 24 flats, which had never been sold.

26. The building suffers from serious structural defects. Each flat has the benefit of a 10 year Zurich New Home Structural Defects Insurance Policy. There have been lengthy delays and difficulties in arranging for remedial work to be carried out by Zurich under the terms of the warranty. Although Zurich has now agreed to carry out the remedial work, it has not yet started.

Service charge year 2008

27. The service charge accounts prepared for this year and certified on 2 February 2010 note total expenditure of £40,287.39. A page in the accounts entitled "Summary of Use of Funds" notes "Service charges levied" of £- (blank)and "Developer Empty Property Contribution" of £31,422.32, resulting in a deficit of £8865.07.

28. Mrs Massingham for the Applicants submitted that the figures in the accounts were not accurate. She had various challenges including that invoices supporting the expenditure were missing or those provided did not match the figures in the accounts. However she accepted that the lessees had never received any demand to contribute towards service charge expenditure for 2008.

29. Mr Upton submitted that if service charges had not been demanded, there was nothing for the Tribunal to adjudicate upon. The Respondent had no intention now to raise demands for 2008.

Determination

30. There clearly was some service charge expenditure in 2008, but the lessees have not been (and will not be) asked to contribute anything. There is therefore no need for the service charge accounts to be considered further and the Tribunal determines that the service charge payable by the Applicants for 2008 is Nil.

Service charge year 2009

31 The accounts for 2009 were certified by accountants on 9 December 2011 with total expenditure at £60,211.75. Service charges of £20,285.57 had been demanded from the lessees and there had been a contribution of £38,833.34 by the lessor in respect of empty flats, resulting in a deficit of £1092.84. Mrs Massingham stated that there had never been a demand in respect of the deficit; this was not challenged by the Respondent, and Mr Upton said there was no intention to recover that sum now.

32. No copy demands were in evidence but Mrs Massingham did not dispute that on account demands had been received for the sum noted in the accounts. She said that the fact that the accounts had not been supplied until after 9 December 2011 could mean the service charges were irrecoverable by virtue of the 18-month rule in section 20B. In response to this Mr Upton submitted that as the Respondent was only seeking to uphold service charges insofar as demanded on account, section 20B had no application, on the authority of *Gilje v Charlegrove Securities* [2003] EWHC 1284 (Ch).

33. Mr Upton's submission on the effect of the *Gilje* case is correct. If a tenant is not being asked to pay more than the sum already demanded on account, section 20B does not bar recovery. Thus the 2009 accounts cannot be challenged under section 20B

34. Mrs Massingham had also challenged a number of heads of expenditure.

35. Electricity charges: The Respondent acknowledged that there had been an error (blamed on Price Waterhouse Coopers) and that the amount should be reduced by £5695.87 from £11,599.33 to a figure of £5903.46 which Mrs Massingham was prepared to accept as a reasonable sum for the electricity. However she still queried if it should be paid because the electricity bills had not actually been paid to E-on, the supplier. This non-payment affected the "credit history and character reference" of the building. In response, Mr Upton said that a tenant was not absolved from responsibility to pay a service charge to a landlord just because the landlord had failed to pay the supplier.

36. The Tribunal agrees that non payment of the electricity bills is a matter solely between customer and supplier. It does not affect a lessee's

liability to contribute towards costs that have been incurred and accordingly the sum of £5903.46 is properly payable through the service charge for electricity.

37. Lifts: Mrs Massingham was now prepared to agree the figure of £2841.51 stated in the accounts.

38. Fire Alarm: Mrs Massingham was now prepared to agree the figure of £571.55 stated in the accounts.

39. Car Park Maintenance: The accounts include a charge of £1914.00 for "Communal Area Cleaning inc Window cleaning" and a separate charge of £1404.15 for "Car Park Maintenance". Mrs Massingham doubted that the car park cost (which did not appear in any other service charge accounts) could be correct. The car park was part of the communal area. Mr Upton referred the Tribunal to the copy invoices supporting this expenditure. There were 9 in all, and when the Tribunal added up the sums charged, the total cost was £1914.00. Most of them referred to "communal cleaning inc car park". The Respondent could not point to any other invoices supporting an additional charge of £1404.15. On this evidence the Tribunal cannot be satisfied that there is any justification for this charge and determines that the sum of £1404.15 is irrecoverable.

40. Accountancy fees: The accounts include a charge of £992.91 for audit fees. The lease requires the service charge accounts to be certified by a qualified accountant. Mrs Massingham said there was no supporting invoice for this charge and thought £500.00 would be a more reasonable figure for the work involved. Mr Upton then referred to an invoice exhibited to Mr Mitchell's witness statement (provided just before the hearing) which referred to a charge of £815.00 + VAT for this work. Upon seeing this, Mrs Massingham withdrew her objection to the charge.

41. Insurance: The accounts charge £22,989.98 for "Insurance". The lease provides for the cost of insuring the building to be recovered through the service charge. The invoices supporting the charge were all from Zurich and consisted of sums charged for inspecting individual flats and for the surety (10 year defects) policy. Mrs Massingham said these were not building insurance costs, and no evidence had been produced about any buildings insurance. Mr Upton then conceded that these invoices were not costs recoverable through the service charge. Accordingly the Tribunal determines that the sum of £22,989.98 is irrecoverable.

Determination:

42. The following sums are deducted from the total service charge expenditure of £60,211.75 (of which £1092.84 has not been demanded in any event:

Electricity	5,695.87
Car park Maintenance	1,404.15
Insurance	22,989.98
Total deductions:	**30,090.00**

This results in a total service charge payable of £30121.75 to be apportioned between all 52 flats in accordance with their respective contributions.

Service Charge year 2010

43. The accounts, certified on 16 September 2013, note total expenditure of £66,488.25, against charges levied of £87,248.63. No copy demands were in evidence but Mrs Massingham did not raise any points with regard to them. However she had disputed various heads of expenditure.

44. Electricity: Having received further copy invoices from the Respondent, Mrs Massingham was now prepared to accept the stated figure of £7332.79.

45. Audit fee: This was claimed at £1242.00 but no invoice was available or other evidence as to the work done. Mrs Massingham suggested the figure should be limited to that allowed for the previous year of £992.91. Mr Upton suggested a slight uplift to £1000.00 on the basis that costs rarely go down. Mrs Massingham then agreed the figure of £1000.00 (a reduction of £242.00).

46. Lift-related expenditure: The accounts list £10,513.92 for lift maintenance and £2387.75 for lift surveying costs. Mrs Massingham accepted the reasonableness of these charges but contended that they had been incurred as part of one set of works on the lifts which spanned 2010 and 2011, that the costs (even for 2010) exceeded £250.00 for at least some lessees, and that no proper section 20 consultation had been carried out. Most of the invoices for the lift costs had been omitted from the Bundles prepared by the Respondent but Mrs Massingham confirmed that she had seen these invoices and referred the Tribunal to a list of invoices she had prepared and annexed to her statement of case.

47. By looking at Mrs Massingham's helpful description of each invoice it was clear to the Tribunal that the vast majority of the invoices (which actually exceed the amount included in the service charge) related to the lift maintenance contract or reactive breakdown call-outs. There was no indication from the evidence available that there were separate works on the lifts in 2010 that cost so much that section 20 consultation was required. The charges are allowed in full.

48. BT late charge: Mrs Massingham had challenged a charge of £148.50 and the Respondent now agreed this should be taken out of the service charge.

49. Soil stack repair: Within the expenditure for general repairs, the sum of £1268.20 was disputed. Mrs Massingham said this related to the charges for repairs to the leaking soil stacks in the car park. The repairs had not been carried out to a reasonable standard as the leaks continued to this day. Although Mrs Massingham's schedule listed three invoices (one from Palmer and two from Just Drains) totalling £1268.28, only the Palmer invoice for £683.28 had been included in the Bundles.

50. In response Mr Upton submitted that repair works carried out by the lessor were recoverable though the service charge. Zurich would be undertaking major works due to the poor build quality of the building. It was reasonable for the lessor to opt for a low-cost temporary repair in the meantime, rather than ripping out and replacing all the pipework. Some of the repair work had been effective; not all the soil stacks repaired were still leaking If this was a cost incurred due to a problem covered by the Zurich warranty the lessees would be able to re-claim what they paid from Zurich in any event. When Mrs Massingham replied that no claim had been made to Zurich in respect of the soil stacks, Mr Upton said it was for the lessees to make the claim.

51. The invoice from Palmer plumbing shows that leaks were investigated and a repair carried out in August 2010. It is plain from the narrative in the invoice that this was never regarded as a permanent solution. The Tribunal cannot be satisfied, almost four and a half years later, that the limited work done then was not carried out to a reasonable standard, and the Palmer invoice is therefore payable. However as the other invoices totalling £585.00 have not been made available by the Respondent, and there is no other information with regard to them and what work was done, they are disallowed.

52. Insurance: The accounts include a charge of £2312.21 but a note to the accounts states that "no charge, other than an opening prepayment, has been provided to cover property insurance. The [cover] is arranged and paid for by [the Respondent] who have confirmed they are not able to provide details of costs on an individual property basis and thus have not charged any sums in the current year".

53. Mrs Massingham queried the charge of £2312.21. She had asked the Respondent for evidence that insurance was in place but it had never been provided. Mr Story stated there was a block policy for the whole residential portfolio owned by the Respondent's parent company, RBS, but he didn't know where the figure in the accounts came from, and no invoice was available.

54. In the absence of any evidence that this sum was actually incurred for buildings insurance at Falaise, the charge of £2312.21 is disallowed.

Determination:

55. The following sums are deducted from the total service charge expenditure of £66,488.25:

Audit fee	242.00
BT charge	148.50
Just Drains invoices	585.00
Insurance	2312.21
Total deductions:	**3287.71**

This results in a total service charge payable of £63,200.54 to be apportioned between all 52 flats in accordance with their respective contributions.

Service charge year 2011

56. The 2011 accounts were signed off on 27 September 2013 noting total expenditure of £63,638.86 and service charges levied of £84,938.00. Again no copy demands were in evidence, but no point was taken about them.

57. Electricity: Having initially disputed this item, Mrs Massingham was now prepared to agree the sum claimed of £5873.99.

58. Drainage: This cost of 809.28 was challenged by Mrs Massingham. Four invoices in the Bundles were relied on by the Respondent. These charge for various investigations and repairs relating to both clean water and soil stack leaks. Mrs Massingham submitted that no proper survey had been done, none of the work had put matters right and so the lessees should not have to pay. In respect of a charge of £132.00 for investigating damp and leaks in Flat 37 this should be the individual lessee's responsibility.

59. Mr Upton submitted it was all repair work payable under the service charge clauses in the lease. It had been reasonable for the lessor to carry out relatively cheap repairs pending remedial works by Zurich, although Mr Mitchell in his witness statement accepted that he could only speculate about the understanding of the former managing agents Qube as to the extent of the structural problems.

60. The invoice for the work in Flat 37 is not one of the invoices comprising the drainage item in the service charge account. The four invoices relied on by the Respondent show that a limited amount of work was carried out by three different contractors at very modest cost on various dates during 2011. Although the work did not solve all the problems, it cost very little and there is no cogent evidence that the work that was done

was not carried out to a reasonable standard at the time. Accordingly the charges are all allowed.

61. Lift-related expenditure: The accounts list £7603.03 for lift maintenance and £2196.06 for lift surveying costs. At the hearing Mrs Massingham did not pursue a section 20 issue regarding these costs or attempt to link them to the costs in 2010, other than saying that she thought service charge monies collected in 2010 had been used to pay for the 2011 lift works. She had come to this conclusion because the invoices provided for lift maintenance added up to £19,131.63, much more than actually charged. As to lift survey costs, the only point was that the invoice was for £36.06 less than the amount charged.

62. The Respondent's Scott Schedule (prepared by a person described as an accountant, but otherwise unidentified) noted that £14,108.84 had been paid from "Lift" reserves towards the lift expenses in 2011 (leaving an "unexplained difference" of £72.12). Mr Upton could not explain what these reserves were or where they had come from. Mrs Massingham said they could not be the general service charge reserve fund as the accounts showed this fund was intact. Nor had any further demand been made in subsequent years for these costs. The Tribunal therefore concludes that the sum of £14,108.84 was not paid from service charge funds.

63. In the absence of any evidence that the lessees have been asked to pay more than £7603.03 for lift maintenance expenses in this year, whereas the true cost was much higher, no section 20 issue arises. No challenge is made to the reasonableness of the charges and so they are allowed in full. In respect of the lift survey costs, the sum recoverable is reduced to £2160.00, in line with the invoice.

64. Management fees: Mrs Massingham was now prepared to agree the figure of £16,526.50

65. Lift phone charges: Mr Upton agreed that £445.30 should be deducted from the lift phone charge of £1552.09.

66. Invoices from De Silva/Grayland: Mrs Massingham withdrew her objection to these charges.

Determination

67. The following sums are deducted from the total service charge expenditure of £63,638.86:

Lift phone charges	445.30
Lift survey charges	36.00
Total deductions	**481.30**

This results in a total service charge payable of £63,157.56 to be apportioned between all 52 flats in accordance with their respective contributions.

Service charge year 2012

68. The 2012 accounts are not full accounts but do include a certificate of expenditure dated 15 May 2014. This lists total expenditure of £66,571.75 against a budget of £85,270.00. The Tribunal was not told whether on account demands were issued based on the budget figure, but no point was taken with regard to the validity of the demands or under section 20B.

69. Between the first day's hearing on 23 January 2015 and the second day's hearing on 13 April 2015, the parties met to attempt to narrow the issues relating to the 2012 and 2013 service charge accounts. As a result many points were resolved, either by the Applicants agreeing a particular charge or by the Respondent agreeing that a charge should be withdrawn or reduced. Mrs Massingham produced a helpful schedule, in effect a revised Scott schedule for these years, which was then used to identify the remaining areas of dispute. Furthermore, at the hearing on 13 April 2015, when the 2012 service charge was first addressed, further points were agreed, either at the outset or following brief submissions, so that the Tribunal was not required to reach a determination on these.

70. The effect of the matters agreed with regard to 2012 was that the following sums should be deducted from the service charge:

£	Head of expenditure
1080.00	Professional fees
405.00	Lift maintenance (BT)
358.80	Repairs & Maintenance (R & M) (Bramber Construction)
1447.20	R & M (Colt)
445.22	R & M (Omega –reduction from 1024.98)
3736.22	**Total agreed deductions**

This left just two invoices in dispute for 2012.

71. CLC: Mrs Massingham disputed the payability and reasonableness of an invoice from CLC contractors dated 31 December 2012 valuing work in the sum of £5737.54 inc. VAT. The invoice referred to Exploritary *[sic]* works at Falaise but gave no other description of the work or services provided. Mrs Massingham thought it might relate to Core 2, where the ceiling had fallen down, but if so the cost should be claimed

from Zurich under the structural defects policy, rather than from the lessees through the service charge. She had asked LSH for more information about what work was carried out, but nothing had been supplied.

72. Mr Mitchell stated that the cost was incurred in exploring the water leaks in Falaise, particularly through one balcony adjacent to Core 2. This was before the full extent of the problems was appreciated. CRN had put up scaffolding, and had carried out some investigation. Mr Mitchell accepted he had no report from CLC, or from the person who valued their work, or other documentary evidence showing what they did, but he said their findings fed into a report prepared by LSH in May 2013 concerning the construction defects.

73. Mr Upton submitted that even if Zurich eventually reimbursed this cost, as an element of the lessees' claim under the policy, it was still payable through the service charge in the first instance.

74. The Tribunal agrees with Mr Upton's argument on payability. If the work falls within the landlord/management company's repairing and maintenance obligations under the lease, the cost can, if shown to be reasonable, be recovered through the service charge. The policyholders under the Zurich policies are the individual lessees. If they are asked to pay, through the service charge, for a cost that should be covered by the policy, it is for them to make a claim and seek reimbursement (and the landlord/ LSH would not be acting reasonably if it obstructed that process).

75. As to reasonableness of the charge, the Tribunal does not accept Mr Mitchell's assertion that proof of CLC's work is to be found in the LSH report. The report makes no mention of any investigation by CLC; to the contrary, it specifically refers to and relies on investigations by Cunningham Lindsey, the loss adjusters, and by a chartered surveyor employed by LSH. There is no documentary evidence whatsoever to establish what CLC did, to justify a charge of £5737.54 or any other figure. The Tribunal therefore cannot be satisfied that the charge or any part of it is reasonable, and it is disallowed.

76. Express Lifts: This invoice for £702.80 was for repairing damage to the roof of a lift car caused by a third party. Mrs Massingham said it should have been settled by a claim under the Respondent's general buildings insurance policy. Mr Upton accepted that if an insurance claim could have been made, then it should not be put through the service charge. The invoice was received at around the time LSH took over management from Qube. An insurance claim had been made for other damage to the lifts; it was not clear why this invoice had not been included.

77. The Tribunal finds that as this invoice should have been included in the insurance claim, it is not reasonable to include it in the service charge and it is to be deducted.

Determination

78. The combined effect of the matters agreed and the Tribunal's decisions are that the following sums are deducted from the total service charge expenditure of £66,571.75:

Agreed deductions	3736.22
CLC	5737.54
Express Lifts	702.80
Total deductions	**10,176.56**

This results in a total service charge payable of £56,395.19 to be apportioned between all 52 flats in accordance with their respective contributions.

Service charge year 2013

79. The 2013 accounts are dated 16 January 2015. They list expenditure of £135,612.22 (more than twice the figure for 2011) against a budget of £78,297.28. Again, no point was taken with regard to the validity of the demands or under section 20B. 2013 was the first complete year during which the block was managed by LSH.

80. Initially a very significant number of issues were raised by the Applicants in respect of this year. Not only were many invoices queried, but it was contended that two qualifying long-term agreements entered into during the year had not been consulted on at all. The most significant of these contracts was a Planned Preventative Maintenance ("PPM") contract between LSH (as agent for the Respondent) and a company named CRN Ltd ("CRN"). The Applicants were unaware of the detail of this contract until about the time of the first day's hearing, when they learnt that the contract (for 3 years) had an annual basic cost of £63,024.52 inc. VAT i.e. almost as much as the total service charge for each of the previous three years. A second contract with CRN, again for 3 years, for cleaning services was also a qualifying long term agreement. The Respondent admitted a total failure to consult with the lessees as required by section 20. An application for dispensation under section 20ZA was made in respect of both CRN contracts, and also the management contract appointing LSH as managing agents, which had also been entered into without consultation.

81. The schedule produced following the meeting between the parties referred to at para. 69 above, showed that many matters had now been resolved, either by the Applicants agreeing a particular charge or the Respondent agreeing that a charge should be withdrawn or reduced. Further matters were agreed at the outset of the Tribunal's consideration of this year's service charge on the second day of the hearing.

82. The effect of the matters agreed with regard to 2013 was that the following sums should be deducted from the service charge:

£	Head of expenditure
594.72	Repairs and maintenance
300.44	" (reduction from 415.25)
563.76	"
948.00	"
456.00	"
390.00	"
1812.00	"
476.96	"
703.60	" (reduction from 1055.40)
270.00	"
573.60	"
287.52	"
335.72	"
525.60	"
222.00	"
255.66	" (reduction from 588.00)
864.00	Lift maintenance and repairs
1766.77	"
1231.87	"
5220.00	"
2457.00	"
4320.00	"
4320.00	"
414.00	Electrical repairs
250.00	Legal & Professional
29,559.22	**Total agreed deductions**

The costs remaining in dispute were then identified and addressed.

83. Acer: This contractor submitted an invoice totalling £6065.50 but only £2238.24 had been included in the service charge, and having heard Mrs Massingham's submissions the Respondent conceded that only £1616.49 of this related to work on Falaise. Mrs Massingham accepted this figure as the correct charge but contended that Acer's work – removing loose stair nosings and reinstalling using adhesive and mechanical fixings – was not of a reasonable standard. Originally the stair nosings were fixed by adhesive alone. The addition of metal screws was unsightly. Mr Upton said the charge was fair and reasonable for the work done.

84. There is no evidence that the price charged was unreasonable or that the work itself was not carried out properly. Generally the landlord can

choose the method of repair. The charge of £1616.49 will remain, although £621.73 is deducted as conceded by the Respondent.

85. C & M Woodturning: This charge of £151.20 was withdrawn by the Respondent at the hearing.

86. Quickcall - Plumbing: Quickcall had raised 3 invoices in respect of separate visits to Falaise when a plumber attended following water leaks in the common parts and elsewhere. Mrs Massingham repeated her argument that such costs should be recovered direct from Zurich, rather than from the lessees via the service charge. Mr Upton repeated his submission noted at para. 73 above, with which the Tribunal agrees, and the total cost of £1272.00 is allowed.

87. Quickcall – Water Pumps: Quickcall had raised 3 invoices for work on the buildings water pumps totalling £5471.38. Mrs Massingham said she had requested copy quotations for the work, but had received nothing and she queried if the cost was reasonable for the work done. Mr Mitchell explained there had been a flood in the pump room, not caused by the pumps, but it was then discovered that two of the three pumps required complete overhaul and rebuilding. They had to be dismantled, taken off site, rebuilt by specialists, returned to site, commissioned and tested. He thought that Quickcall had used specialist sub-contractors.

88. This was clearly a substantial job. The invoices themselves provide some detail as to what was done and how the charges are calculated. In the absence of any evidence that the cost was unreasonable, the full amount is allowed.

89. Quickcall – Electrical: Mrs Massingham challenged an invoice for £711.84 which included work on a neighbouring block. Mr Upton accepted an apportionment was required, and it was agreed that £197.73 should be deducted from the charge.

90. CRN – Electrical: This was a September 2013 charge by CRN of £3,744.00 for carrying out "the remedial works as highlighted under 'defects' in the 5 yearly wiring report. Mrs Massingham queried the charge as she had asked what work had been done, and had no response.

91. The Respondent relied on an Electrical Installation Condition Report dated some months earlier than the invoice, which noted several items inspected as either potentially dangerous with urgent remedial work required, or with improvement recommended. Mr Mitchell first told the Tribunal that the charge was for carrying out the inspection, but when shown separate invoices for the inspection he accepted the disputed charge must be for work after the inspection. However he could not assist in identifying what work was done. No documents were available.

92. While it is clear that CRN did some work, on the evidence provided the Tribunal is unable to ascertain what this was, or whether the charge is reasonable. It is not understood why LSH would not hold proper records about work carried out on its instructions; without some evidence about this the entire charge is disallowed.

93. CRN - PPM invoice: As mentioned above at para. 80, the Respondent acting via LSH entered into a 3 year contract for "Planned Preventative Maintenance Services" dated 1 August 2013. The basic cost was £63,024.52 per annum. On 16 December 2013 CRN issued its first invoice under the contract for work carried out in the previous month, in the sum of £4651.01. The schedule attached to the invoice showed that the vast majority of the charge related to lighting (internal, external, emergency and car park), but did not explain what was actually done.

94. Mrs Massingham objected to the PPM contract as a whole, as being completely inappropriate for a block of 52 flats. There had been no section 20 consultation and the lessees had been kept entirely in the dark about it. She said that given the dreadful state of the building it was not reasonable for the lessees to pay this sort of money for something of no benefit to them. Previously if a light needed attention, a resident would simply call LSH's helpdesk. She did not think any of the work in this invoice was reasonably incurred. The 5 year statutory electrical test had recently been carried out, remedial works done (according to the Respondent) in September 2013, and other invoices showed that Metro Safety were carrying out regular inspections of the emergency lighting during 2013 in any event.

95. Mr Upton accepted that the charge of £4651.01 could not be correlated to charging structure set out in the PPM contract. He then told the Tribunal and Mrs Massingham that in reality the PPM contract had never been put into effect; after this first invoice, it had been realised that there had been no section 20 consultation, and although CRN continued to do work, it was only when needed and was paid for on a reactive basis. As the charge for £4651.01 was the only invoice issued under the contract, it turned out that dispensation from the consultation requirements was not needed after all. Given the significant problems at Falaise, it had been reasonable for a contractor to be engaged to inspect in order to identify and resolve issues before they escalated.

96. The Tribunal is far from satisfied that it was reasonable for the Respondent/LSH to enter into the PPM contract, regardless of the failure to consult. The components covered by the contract are fairly straightforward, and for the most part do not involve moving parts which may have a restricted longevity thus benefitting from regular inspection. This expensive contract, if effected, would have doubled the previous annual service charge. Set against the huge structural issues affecting Falaise which are not yet resolved, the ambit of the PPM contract is a low priority and the cost entirely disproportionate.

97. In any event, the charge made in this invoice cannot be married up with the schedule of charges under contract. Simply assessing reasonableness under section 19, the Tribunal is not satisfied it was reasonable to incur the charge. There is no evidence that any work was actually needed. The lighting had recently been completely tested and remedial work carried out. Furthermore, there is no evidence as to what work was actually done. The entire amount of £4651.01 is therefore disallowed.

98. CLC: This is a further charge of £3619.20 for exploratory works, which have already been considered at paras. 71-75 above. The charge is disallowed for the reasons previously stated.

99. LSH: This is a fee of £1008.00 for inspection and investigation of water ingress at Falaise in March 2013 by a building surveyor, including the preparation of a report, meeting with tenants, and specifying remedial works. Mrs Massingham argued this work should be covered within the normal management fee. Mr Upton submitted it was work outside the duties covered by the management fee. Reference by both sides was made to the (unsigned and undated) management agreement between LSH and the Respondent.

100. Although, as pointed out by Mrs Massingham, the standard fee as set out in the agreement includes monthly inspections and dealing with lessees, detailed surveys are specifically excluded (clause 5.1.7 of the agreement). The report prepared by LSH was in evidence. The Tribunal finds that this work was outside LSH's normal duties and there is no evidence that either the work or the cost was unreasonable. The cost is therefore allowed.

101. Security: Superior Security charged £1800.00 per month for providing a night-time patrol to 3 blocks including Falaise in May – July 2013, following incidents of vandalism. Mrs Massingham queried whether it was necessary to continue the patrol for more than a month and asked how many hours cover was provided. In response it was said that the residents had requested security following incidents with school-age children. It had been intended to continue until the end of the school summer holiday, but the residents had asked for arrangement to be ended earlier than that. Security had attended daily from 7pm – 7am. There had been no vandalism since.

102. The Tribunal is satisfied that security services were reasonably obtained, there is no evidence of unreasonable cost, and the charge is allowed in full.

103. Management fees: LSH took over from Qube on 1 July 2012. The management fee for 2013 was £15,600.00 + VAT = £18720.00, equating to £300.00 + VAT per flat. The Applicants contended this was an excessive amount. They were paying for a gold star service but not getting it. A local agent would provide management services for

£175.00 + VAT per flat; this rate had recently been negotiated with Brighton firm Graves Jenkins for a sister block. Mrs Massingham noted various areas of dissatisfaction including the poor state of the building, use of distant contractors, muddled service charge invoicing and incompetent preparation of service charge accounts, failure to process insurance claims, and lack of attention. Mr Lovell's witness statement on behalf of the Applicants (on which he was not challenged) strongly criticised LSH over many issues including the misconceived PPM contract, its failure properly to deal with the structural problems and progress dealings with Zurich and the loss adjusters, and its failure to control expenditure on the lifts and resolve the lift problems.

104. The Respondent relied on the witness statements of Mr Mitchell and Mr Story prepared in relation to the 20ZA application. Mr Story gave oral evidence to explain why the Respondent had decided to appoint a single national agent to manage its long leasehold properties. The Tribunal was told that West Register has a nationwide property portfolio including in excess of 650 long leasehold dwellings. It was decided that a single national managing agent was needed in order to standardise contractual arrangements and information/reporting, and to achieve economies of scale in terms of management time. For example, instead of having different meetings with different agents about different properties, there could be one regular meeting with one agent at which all properties would be covered. Mr Story had no direct knowledge of how LSH came to be appointed, but he understood there had been a competitive tender process between LSH and one other company. LSH was chosen because of its expertise and specialism in block management. Mr Mitchell, who joined LSH after the agreement was entered into, said that LSH provided added value due to the breadth of its services and in-house expertise. He also said that he spent more time on Falaise than other properties due to its ongoing problems.

105. Neither witness was able to clear up one point: the date when the management agreement was entered into. The copy in evidence was unsigned and undated. It was unclear from this when the agreement came into effect. Surprisingly, neither Mr Story nor Mr Mitchell had been able to track down a copy of a signed and dated agreement at their respective companies. Although the Respondent's statement of case referred to a commencement date of 19 September 2011 no-one knew where this date came from. However all agreed that LSH had taken over management of Falaise from Qube on 1 July 2012.

106. Mr Upton cited the Upper Tribunal decision of *A2 Housing Group v Spencer Taylor* LRX/36/2006 as authority that a landlord's decision to use a single contract for provision of services to all its properties can be reasonable, even if the cost of so doing is more than the cost of using individual local providers. Furthermore, testing of reasonableness of the cost must be by reference to other suppliers in the single contract market, not by reference to suppliers of individual services to individual estates. Mr Upton submitted that the Respondent had

shown proper reasons for using a single contract, and that there was no evidence that other providers of nationwide single contract services would have charged less than £300.00 + VAT. The charges of a local firm like Graves Jenkins were not a relevant comparator.

107. In response Mrs Massingham said that a single contract was prejudicial to the lessees at Falaise, who wanted a local firm with hands-on approach. She disputed that there had been a proper testing of the single contract market as required by *A2 Housing*. No evidence whatsoever of the tender process had been produced. No specification or tender documents, no quotes, no firm evidence of the number of firms invited to tender, no paper trail whatsoever of LSH's appointment had been disclosed. There wasn't even a signed or dated agreement.

108. The Tribunal accepts Mr Story's explanation as to why the Respondent wished to appoint a single managing agent for its entire residential long leasehold portfolio, and concludes this was a reasonable course of action. It is less easy to be satisfied that the cost, calculated at £300.00 + VAT per flat, is reasonable. There is clear evidence that a local agent would charge less; indeed Mr Mitchell expressly admitted that the going rate in Newhaven would be about £175.00 + VAT. However *A2 Housing* makes it clear that local rates are not an appropriate comparator. There is no evidence before the Tribunal as to what other single contract providers would charge. It is almost incomprehensible that neither the Respondent or LSH have sufficient administrative integrity to retain documentation of the tender process, but the fact is that no such evidence was made available. By contrast, it is understandable that the Applicants would have found it very difficult to obtain comparative quotes themselves, without a specification, knowledge of the portfolio, or a legitimate commercial basis for their enquiry.

109. This lack of evidence poses a real difficulty for the Tribunal, but on balance the Tribunal does not find that the fee itself is unreasonable, assuming the services were provided to a reasonable standard. There is on the one hand some evidence, albeit limited and hearsay, that there was some competitive tendering process. On the other hand there is no evidence at all from the Applicants that the charge is unreasonably high compared with charges made by other providers of nationwide single contract management services. The Tribunal also notes that in 2011, when Qube managed Falaise, the management fees were £16,526.50, not very much lower than the fees charged by LSH.

110. There remains the issue of whether the fees should be reduced on the ground that the services provided by LSH were not of a reasonable standard, as required by section 19. Mrs Massingham and Mr Lovell pointed out various shortcomings; there was no serious challenge by the Respondent to any of these. In the view of the Tribunal the main areas where LSH's services have fallen below a reasonable standard and/or the standard set out in the management agreement are as follows:

- Poor administration of service charges, to the detriment of the lessees, as shown by the very high number and very high total value of invoices originally included in the 2013 service charge accounts, but withdrawn shortly before or at the hearing.

- Failure to produce end of year service charge accounts in a timely manner. The management agreement specifies this should be done no later than 4 months after the year end. The 2012 accounts are dated 15 May 2014. The 2013 accounts are dated 16 January 2015.

- Wholesale disregard of the law relating to consultation with lessees before entering into qualifying long-term agreements.

- Failure to advise the lessees of the existence of the PPF contract even though this would have doubled the annual service charge.

- Failure to keep proper records of work carried out by contractors, as evidenced by the inability to produce such records in these proceedings.

- Failure to keep proper records relating to the tender process for the three qualifying long term agreements that are subject of the section 20ZA application discussed below, as evidenced by the inability to produce such records in these proceedings.

- Lack of evidence that LSH have taken a pro-active role in assisting the lessees to resolve the longstanding structural issues, despite their contractual obligation to supervise the maintenance and repair of the building in accordance with the landlord's responsibilities under the lease.

111. In light of these shortcomings of service the Tribunal determines that the management fee for 2013 should be reduced to £200.00 + VAT per flat, reducing the total payable by £6240.00 to £12,480.00

Determination:

112. The following sums are deducted from the total service charge expenditure of £135,612.22:

Agreed deductions	29,559.22
Acer	621.75
C & M Woodturning	151.20
Quickcall - electrical	197.73
CRN - electrical	3744.00
CLC	3619.20
Management fees	6240.00
Total deductions	**44,133.10**

This results in a total service charge payable of £91.479.12 to be apportioned between all 52 flats in accordance with their respective contributions.

2013 – Applications under section 20ZA

113. The Respondent's application for dispensation from the consultation requirements related to three contracts. It was admitted that they were qualifying long term agreements and that there had been no consultation whatsoever.

114. The contracts were:

- Planned Preventative Maintenance ("PPM") contract between Respondent and CRN dated 1 August 2013.
- Management agreement between the Respondent and LSH, undated, but pursuant to which LSH began charging for services at Falaise in July 2012
- Cleaning contract between Respondent and CRN dated 1 June 2013

The PPM contract

115. A substantial part of the statements of case and evidence related to the PPM contract which was by far the most costly. The Respondent's written case sought full unconditional dispensation for this contract, and the Applicants' very detailed statements were prepared to answer this case. However, shortly before the Tribunal embarked on the section 20ZA application, Mr Upton announced that as it had now emerged that CRN had only ever issued one invoice under the contract (see para.95 above) and the contract was not being adhered to, there was no need to pursue the section 20ZA application and he sought to withdraw it.

116. Mrs Massingham did not oppose withdrawal but pointed out that the Applicants had incurred legal costs responding to the application. The Tribunal gave leave to withdraw on condition that the Respondent pay the Applicants' costs of the application insofar as they related to the PPM contract.

The management contract

117. The Tribunal then heard evidence and detailed submissions with respect to the LSH management agreement and the relevant issues on dispensation, in particular the question of prejudice. Some but not all of this evidence is set out at paragraphs 104-107 above. When oral submissions were invited on the question of dispensation subject to terms, it emerged – after some discussion - that the parties were now

prepared to agree that dispensation should be given on the following terms:

- The management fee charged through the service charge to be reduced to £250.00 + VAT per flat per annum for so long as the agreement subsists[1];
- The Respondent to pay the Applicants' reasonable costs of the section 20ZA application insofar as they related to the management contract;
- The Respondent will not seek to recover from the lessees its legal costs in relation to either the section 20ZA application or the section 27A application;
- The Respondent will not oppose an order under section 20C of the Act with respect to both applications.

118. The Tribunal considers it has received sufficient evidence to justify an order on these terms and makes a determination accordingly.

The CRN cleaning contract

119. Having reached agreement on the management contract Mrs Massingham then conceded that dispensation also should be given on this contract, subject only to payment of the Applicants' costs. Mr Upton agreed to this on behalf of the Respondent and the Tribunal makes an order accordingly.

The Applicants' costs of the section 20ZA application

120. Mrs Massingham produced copy invoices and fee-notes verifying costs incurred of £4035.00 for dealing with all aspects of the section 20ZA application. This figure was agreed by the Respondent and the Tribunal orders that £4035.00 be paid to Mrs Massingham by 12 May 2015.

Section 20C Application

121. In deciding whether to make an order under section 20C a 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. As set out above it was a condition of dispensation under section 20ZA that the Respondent would not oppose a section 20C order. In any event, the Applicants have established that they had very good grounds for commencing these proceedings and they have successful in reducing the service charges by over £88,000.00. The Respondent's conduct of the proceedings can be fairly criticised, particularly its late submission of evidence prior to the first day's

[1] It will be noted that in relation to 2013 the recoverable amount is £200.00 + VAT per flat in any event – see para.111.

hearing, and the making of a section 20ZA application in relation to the PPM contract only to abandon it at the eleventh hour. For these reasons the Tribunal determines 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 (legal or other) 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.

Dated: 27 April 2015

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.