13089

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/LSC/2015/0437**
Property	:	**39 and 41 Craven Hill Gardens, London W2 3EA**
Applicant	:	**38/41 CHG Residents Company Limited**
Representative	:	**In person**
Respondent	:	**The lessees specified in the list accompanying the application**
Representative	:	**N/A**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**(1) Judge Amran Vance** **(2) Mr H Geddes, JP, RIBA** **(3) Mr Alan Ring**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**13 March 2018 (but decision not issued until 19 November 2018)**

DECISION

Introductory Note

(1) Although the tribunal reached its decision in this application on 13 March 2018, the decision was not issued because it became apparent when the tribunal received a hearing bundle shortly before the hearing on 12 March 2018 that on 29 July 2017, in claim C02CL016, HHJ Bailey sitting in the County Court at Central London, made an order for possession of Ms Hyslop's flat which included a judgment as to the amount payable by her, by way of service charge, for the two service charge years in dispute in this application. Ms Hyslop subsequently obtained permission to appeal against the entirety of HHJ Bailey's order to a High Court judge and, on 6 November 2018, Freedman J set aside that order (*Hyslop v 38/41 CHG Residents Company Ltd* [2018] 11 WLUK 45).

(2) Given that as at the date of the tribunal's decision on 13 March 2018, there was a decision of the County Court as to Ms Hyslop's liability for the two service charge years that were the subject of our re-determination, which, if Ms Hyslop's appeal was unsuccessful, would have deprived this tribunal of jurisdiction by virtue of section 27A(4) of the 1985 Act, the tribunal notified the parties, in directions dated 11 April 2018, that its decision would not be issued until the final determination of Ms Hyslop's appeal. As that appeal has now been determined, and HHJ Bailey's decision set aside, our decision can now be issued.

(3) On 4 October 2018 the applicant has issued new proceedings before this tribunal (LON/00BK.2018/0365) against Ms Hyslop, seeking a determination in respect of her service charge liability for the service charge years ending 31 March 2017, 2018 and 2019. A case management hearing in respect of this new application took place before me on 15 November 2018. At that hearing both parties to the application agreed that it was now appropriate for this decision to be issued.

Decisions of the tribunal

2014/15 Service Charge Year

(4) The tribunal determines that the total actual service charge payable by Ms Iris Hyslop and the long lessees of 39 and 41 Craven Hill Gardens ("the Building") other than those that have entered into a Deed of Extension and Variation of their leases in the form at pages 69-71 of the hearing bundle for the service charge year ending 31 March 2015 is **£49,616.69** broken down as follows:

Item	Disputed ?	Amount Sought	Amount Payable FTT Determination
	£	£	£
Cleaning	No	2,678.04	2,678.04
Electricity	No	1,946.67	1,946.67
Entry System	No	1,310.52	1,310.52
Ariel System	No	444.13	444.13
General Repairs and Maintenance	No	9,202.37	9,202.37
Lift maintenance/telephone	No	6,415.01	6,415.01
Health & Safety	No	480.00	480.00
Insurance	Yes	8,292.26	7,878.86
Insurance Claims	No	2,216.40	2,216.40
Corporation Tax	Yes	16.83	0.00
Accountancy	Yes	2,790.00	2,400.00
Professional Fees	No	630.24	630.24
Management Fees	No	13,818.00	13,818.00
Fire Systems	No	196.45	196.45

TOTALS		**50,436.92**	**£49,616.69**

(5) The tribunal determines that the aggregate service charge payable by the long lessees of the Building who have entered into a Deed of Extension and Variation of their leases in the form at pages 69-71 of the hearing bundle for the service charge year ending 31 March 2015 is the same as specified in the previous table except that the accountancy fees and insurance costs are payable in full, meaning that the amount payable by them is **£50,420.09.**

2015/16 Service Charge Year

(6) The tribunal determines that the actual service charge costs payable by Ms Iris Hyslop for the service charge year ending 31 March 2016 is her apportioned contribution towards the sum of **£55,851.76** broken down as follows:

Item	**Disputed?**	**Amount Sought**	**Amount Payable - FTT Determination**
	£	**£**	**£**
Cleaning	No	3,025.47	3,025.47
Electricity	No	1,595.63	1,595.63
Entry System	No	1,315.16	1,315.16
Ariel System	No	471.51	471.51
General Repairs and Maintenance	No	5,894.04	5,894.04
Lift maintenance/telephone	No	8,811.17	8,811.17
Insurance	Yes	9,328.79	8,915.39

Insurance Claims	No	1,300.00	1,300.00
Accountancy	Yes	2,862.00	2,472.00
Professional Fees	Yes	6,156.07	2,651.07
Management Fees	No	14,233.12	14,233.12
Fire Systems	No	5,167.20	5,167.20
TOTALS		**60,160.16**	**55,851.76**

(7) The tribunal determines that the aggregate budgeted service charge costs for the service charge year ending 31 March 2016, in the sum of £57,599.00, are payable by the long lessees of the Building except that the sum of £450 for directors' and officers' insurance is not payable by those long lessees who have not entered into a Deed of Extension and Variation in the form at pages 69-71 of the hearing bundle.

(8) The tribunal determines that the actual reserve fund contributions demanded amounting to £90,000 for the 2014/15 service charge year and £40,000 for the 2015/16 service charge year are payable by all the long lessees in the Building in their apportioned shares and that the budgeted amount for the 2015/16 service charge year of £40,000 is also payable by all long lessees.

(9) Ms Hyslop's contributions specified above are payable by her if the service charge costs have been validly demanded from her and, if not, once validly demanded, subject to any limitation on recovery imposed by virtue of section 20B of the Landlord and Tenant Act 1985 ("the 1985 Act").

(10) Numbers in square brackets and in bold below refer to the hearing bundle prepared by the applicant for this determination.

Background

1. In its application the applicant sought a determination pursuant to s.27A of the 1985 Act as to the amount of service charges payable by the respondents in respect of the service charge years ending 31 March

2015 (actual costs) and 31 March 2016 (budgeted costs) in respect of 39 and 41 Craven Hill Gardens, London W2 3EA ("the Building"). The Building comprises two adjoining buildings each comprising 18 flats. At the hearing before us the applicant and Ms Hyslop asked the tribunal to also determine Ms Hyslop's liability for the actual costs payable for the year ending 31 March 2016.

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

3. This application was originally determined by the tribunal on the papers on 15 December 2015 in which it found that the landlord, 38/41 CHG Residents Company Limited ("CHG") was entitled to recover service charges for the 2014/15 service charge year in the sum of £180,420 (including £130,000 in respect of a reserve fund contribution) and £97,599 for the estimated service charges for the 2015/16 service charge year (including £40,000 for a reserve fund contribution). The tribunal's decision was issued on the same day and sent to CHG under cover of a letter in which the tribunal requested that CHG provide a copy to the respondents.

4. Ms Hyslop is the leaseholder of Flat 5, 41 Craven Hill Gardens and is one of the respondents to this application. She holds a long lease of her Flat which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

5. It was Ms Hyslop's case that she did not receive a copy of the applicant's application following issue by the tribunal and nor did she receive a copy of the tribunal's decision of 15 December 2015. She asserts that she only became aware of the application when she was served with a claim for possession of her flat issued in the Central London County Court on 5 August 2016 which was brought on the basis of non-payment by her of service charges.

6. There has been a long history of litigation between Ms Hyslop and CHG before this tribunal. As well as the application that led to the 15 December 2015 decision, separate applications were determined by the tribunal in decisions dated: 19 November 2001 **[287]** (1995/6, 1996/7, 1997/8, 1998/9 and 1999/2000 service charge years); 9 March 2011 **[90]** (2010/11 service charge year); 24 October 2012 **[114]** (2012/13 service charge year) and 13 May 2013 **[107]** (2011/12 and 2013/14 service charge years). The hearing bundle also contains a decision of the Upper Tribunal President to refuse permission to appeal a decision of the Leasehold Valuation Tribunal dated 3 September 2004 **[286]**.

7. Ms Hyslop sought permission to appeal the decision of 15 December 2015, and when it was refused by the tribunal on 13 September 2016, sought permission from the Upper Tribunal. The Deputy President of the Upper Tribunal considered her application was premature and

directed that she should first apply to this tribunal to set aside the decision under rule 51(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. She did so, but that application was refused by the tribunal on 10 January 2017. She then appealed that decision to the Upper Tribunal who determined that the 15 December 2015 decision needed to be set aside on the grounds of procedural irregularity, namely that the tribunal's obligation to provide a copy of its decision and written reasons to each party at the conclusion of proceedings could not be satisfied by providing those documents to one party with a request that they forward them on to every other party. Ms Hyslop's appeal was therefore successful; the decision of 15 December 2015 was set aside and remitted to this tribunal for redetermination.

8. Conscious of the forfeiture proceedings in the Central London County Court that had been held abeyance pending the outcome of the appeal, the Deputy President, in his decision, directed that CHG must within 21 days of the date of his decision make available to Ms Hyslop a copy of the hearing bundle prepared for the First-tier tribunal in anticipation of its 15 December 2015 decision, together with copies of any other report or professional advice on which the service charges in issue in the proceedings were based. This material was to be made available to be collected by Ms Hyslop from the offices of the managing agents of the Building, FW Gapp (or an alternative agent in the locality of the building). The Deputy President also directed that Ms Hyslop was to serve on CHG and file with this tribunal a statement of her case in response to the application not later than 14 days after the date on which a copy of the hearing bundle was made available for collection by her. He also directed that Ms Hyslop should focus on the 2015 service charges and the 2016 estimated charges, stating clearly which she disputes and why. Ms Hyslop was provided with a copy of the hearing bundle, was allowed to inspect documents relating to the claimed costs for both years **[281]** and subsequently filed her statement of case with the tribunal on 17 November 2017 **[278]**.

9. On 29 July 2017, in claim number C02CL016, His Honour Judge Bailey in the Central London County Court made an order for forfeiture of Ms Hyslop's lease, with possession to take effect on 20 March 2018 **[254]**. He also gave judgment for the CHG in the sums of: (a) £6,715.12 representing service charge arrears for the years ending March 2012, 2013 and 2014 together with contractual interest of £1,048.94; and (b) £7,764.06 together with £651.61 contractual interest for the service charge years ending March 2015 and 2016.

10. It is clear from the transcript of his judgment **[243]** that HHJ Bailey reached his decision on Ms Hyslop's liability on the basis that the service charge costs in question had all been the subject of previous determinations by this tribunal. Before him, Ms Hyslop argued that she had not been served with the service charge demands in respect the 2014/15 and 2015/16 service charge years. This is a position that she maintained before us relying, as she did before HHJ Bailey, on letters

that she said she sent to FW Gapp asserting this to be the case dated 15 September 2014 **[306]**, 14 April 2015 **[308]**, 2 October 2015 **[310]** and 25 July 2016 **[312]**. Ms Hyslop also maintains that she sent a further letter to FW Gapp on 3 October 2017 **[314]** after HHJ Bailey's decision. It is her case that these letters were ignored because Mr Gream, CHG's director, had instructed FW Gapp not to respond to communications from her. Ms Hyslop referred us to a letter from Mr Gream to her dated 15 January 2014 **[284]**, giving her notice under s.48 Landlord & Tenant Act 1985 that notices, including notices in proceedings, and any communication regarding her property, lease or obligations contained in her lease should be sent to CHG and not F W Gapp. He also stated in that letter that FW Gapp had been instructed to refuse or destroy any communication from her unless specifically permitted by CHG in advance.

11. In his judgment, HHJ Bailey referred to it as being most unfortunate that the suggestion that letters were not responded to for this reason was only raised in closing arguments and not raised during the course of evidence. He decided that on a balance of probabilities that the demands were made on Ms Hyslop and that the invoices in question were sent to her. He did not consider Ms Hyslop to be a reliable witness on the issue and considered that her annual battle over service charge had "become an important element" of her life.

12. The statement of Ms Hyslop's service charge account **[397]** indicates that following HHJ Bailey's order she paid the sum of £14,479.18 to CHG on 3 October 2017 and that CHG wrote off the sum of £10,810.98 on 21 November 2017. Mr Gream informed us that this write off concerned historic service charge arrears that it considered were not recoverable following HHJ Bailey's judgment. These two transactions left the balance on Ms Hyslop's service charge account at £4,820 as at 21 November 2017.

13. On 9 January 2018 Ms Hyslop was given permission to appeal HHJ Bailey's Order of 20 September 2017 to a High Court Judge to this extent:

    (i) against the entirety of the Order on the ground that by operation of an Order of the County Court dated 6 April 2017, CHG's claim stood struck out on 23 August 2017 for failure to pay the trial fee and no, or no proper application was made for relief from that sanction; and

    (ii) against the entirety of the Order, other than paragraph 1(a) on the ground that HHJ Bailey ought not to have proceeded to determine the claims brought in respect of the 2014/15 and 2015/16 service charge years pending final resolution of the

concurrent proceedings before this tribunal and/or the Upper Tribunal in relation to those years and/or that he was wrong to determine that there were service charge arrears due and owing by Ms Hyslop for those years.

14. Paragraph 1(a) of HHJ Bailey's Order concerned his judgment in respect of the service charges payable by Ms Hyslop for the service charge arrears for the years ending March 2012, 2013 and 2014.

15. At the hearing of this application we asked the parties if Ms Hyslop's appeal, which was to be listed for a one-day hearing not before 12 February 2018, had been heard or listed for hearing. Ms Hyslop's response was not entirely clear but her indication was that the appeal had not been listed because she had sought permission from the Court of Appeal to appeal the limited basis on which permission was granted by the High Court.

16. In order to deal with the redetermination required as a result of the decision of the Deputy President of the Upper Tribunal, the tribunal held a case management hearing on 12 December 2017 at which further directions were given for the future conduct of the application. These included a direction for CHG to provide to the leaseholders in the Building a list of expenditure for the Building for the years in dispute, annotated to show which expenditure has been allocated to which service charge heading. The directions also provided that if Ms Hyslop required any further information or documentation following this she was to write to the tribunal by 19 January 2018 and that if she wanted to amend her statement of case she should send an amended version to the tribunal and to CHG by 26 January 2018. CHG had until 9 February 21018 to file and serve a statement of case in reply. Ms Hyslop subsequently filed and served an amended statement of case dated 25 January 2018 and the hearing, which was listed for 12 and 13 March 2018, concluded on 12 March 2018. The tribunal reached its decision on 13 March 2018.

Ms Hyslop's Lease and the Varied Leases

17. Ms Hyslop's lease ("the Lease") was granted on 26 September 1997, commencing 25 March 1976, for a term of 99 years. It includes the following terms in respect of service charge liability:

4. The Lessee hereby covenants with the lessor and with and for the benefit of the lessees and occupiers from time to time during the currency of the term hereby granted of the other flats that the Lessee will at all times hereafter during the said term:-

(1) – (3) .....

(4) Pay to the Lessor without any deduction by way of further or additional rent (together with any Value Added Tax or other tax payable):

(i) A sum equal to the percentage set out against the demised premises in Column A of the Seventh Schedule hereto of the total of the General Expenses as defined in the Eight Schedule hereto of each year ending 31st March; and

(ii) (with the exception of Flats 1 to 4 of each of 39 and 41 Craven Hill Gardens aforesaid) a sum equal to the percentage set out against the demised premises in Column B of the Seventh Schedule hereto of the total of the Lift Expenses (as defined in the Eighth Schedule hereto) of each year ending 31st March;

such further and additional rent (hereinafter referred to as the 'service charge') to be paid as follows:

(a) – (c) .....

(d) The Lessee shall if required by the Lessor with the payment of rent reserved hereunder pay to the Lessor such sum in advance and on account of the service charge as the Lessor or its Managing Agents in their absolute discretion shall specify...

(e) as soon as practicable after the signature of the Certificate the Lessor shall furnish to the Lessee an account of the service charge payable by the Lessee for the year in question due credit being given therein for all interim payments made by the Lessee in respect of the said year and upon the furnishing of such account there shall be paid by the Lessee to the Lessor the amount of the service charge as aforesaid or any balance found payable or there shall be allowed by the Lessor to the Lessee any amount which may have been overpaid by the Lessee by way of interim payment as the case may require.

18. The Fifth Schedule of the Lease provides as follows:

THE FIFTH SCHEDULE

(Expenses and outgoings and other heads of expenditure of the Lessor of which the Lessee is to pay a proportionate part by way of Service Charge).

(1) The expenses of maintaining and repairing redecorating and renewing amending cleaning and re-pointing repainting graining varnishing whitening or colouring the building and all parts thereof and all the appurtenances apparatus and other things thereto belonging and more particularly described in Clause 5(6) hereof.

(2) The cost of insuring and keeping insured throughout the term hereby granted the building and all parts thereof and the fixtures and fittings therein and all the appurtenances apparatus and other things thereto belonging as more particularly described in clause 5(2) hereof and also against third-party risks and such other risks (if any) by way of comprehensive insurance as the Lessor shall determine including three years loss of rent and architects and surveyor's fees.

(3) The cost of decorating and the cost of maintenance or repair and otherwise in accordance with clauses 5(7), 5(9), 5(10), 5(11), 5(12) and 5(13) hereof

(4) .....

(5) The cost of keeping any parts of the building not specifically referred to in this Schedule in good repair and condition except those parts of the building to which the provisions of sub-clause 5(4) hereof apply.

(6) The fees of the Managing Agents for the Lessor for the collection of the rents of the flats in the building and for the general management thereof

(7) All fees and costs incurred in respect of the annual certificate and of accounts kept and audits made the purpose thereof

(8) The cost of taking all steps deemed desirable or expedient by the Lessor for complying with making representations against or otherwise contesting the incidence or the provisions of any legislation or orders or statutory requirements thereunder concerning town planning public health highways streets drainage or other matters relating to or alleged to relate to the building and for which the Lessee is not directly liable hereunder

(including but without prejudice to the generality of the foregoing the provision of fire fighting equipment and the compliance with fire regulations).

(9) .....

(10) The cost of providing a sinking fund to allow for reasonable expenses hereinbefore referred to in respect of subsequent years the amount of such sinking fund being at the absolute discretion of the Managing Agents for the time being of the Lessor

(11) The cost of any service or maintenance or similar contracts entered into the Lessor in relation to the whole or any part or parts of the building including the lift and other equipment referred to in Clause 5(10) hereof and any other equipment or installation of the building

19. The Seventh Schedule makes the following provision in respect of apportionment of service charges:

THE SEVENTH SCHEDULE

(Percentage of General Expenses and Lift Expenses attributable to each Flat)

	Column A	Column B
	Percentage of General Expenses	Percentage of Lift Expenses
41 Craven Hill Gardens		
Flat 5	2.50%	3.50%

20. Mr Gream informed us that following CHG's acquisition of the freehold of the Building many of the lessees have extended their leases and entered into Deeds of Extension and Variation in the form at pages 69-71 of the hearing bundle. The Deeds of Extension and Variation inserted two additional paragraphs to the Fifth Schedule, namely:

12. The cost of employing a Solicitor and/or Barrister in connection with the management of the Building and the pursuing of service charge arrears or other breaches of covenant or in connection with any other matter whatsoever reasonably incurred by the Lessor in relation to the management of the Building.

13. The cost of administering the Lessor and of complying with the requirements of the Company Acts".

The Hearing on 12 March 2018

21. Ms Hyslop attended the hearing as did Mr Gream, the director of CHG. Neither was legally represented. None of the other leaseholders in the Building attended or made written representations to the tribunal.

22. At the start of the hearing Ms Hyslop handed in copies of the following documents. Mr Gream did not object to her reliance on these documents and we admitted them in evidence:

    a. Ms Hyslop's "Further and amended Witness Statement" dated 26 February 2018;

    b. Her letter to the tribunal dated 12 December 2017; and

    c. A document from St Giles Insurance & Finance Ltd ("St Giles") explaining the cover offered under their Directors' and Officers' Insurance policy.

23. As the service charge accounts for the 2015/16 service charge year were now available and as both CHG and the only objecting respondent, Ms Hyslop, agreed that we should determine the actual charges payable by her for that year we agreed to do so. In this decision we therefore set out whether: (a) the actual service charge costs demanded for the 2014/15 service charge year are payable by the respondents (including Ms Hyslop); (b) the budgeted service charge costs demanded for the 2015/16 service charge year are payable by the respondents (including Ms Hyslop); and (c) whether the actual service charge costs demanded from Ms Hyslop for the 2015/16 service charge year are payable by her.

24. We also asked both parties whether they considered it appropriate us to make a determination as to: (a) whether or not Ms Hyslop received service charge demands for the two service charge years in dispute in this application and, if not (b) whether Ms Hyslop's contention that CHG's ability to now recover those costs from her is limited by virtue of section 20B of the 1985 Act. Ms Hyslop's position was that she wanted a decision on her appeal against the decision of HHJ Bailey before those issues were determined. Mr Gream did not oppose this.

25. It was our view, given that there was, as at the date of the hearing before us, a determination of a County Court judge for the years in dispute in this application, in which it was determined that Ms Hyslop had received the service charge demands for the years in question, that it would be inappropriate for this tribunal to determine these two issues. This is because:

a. it is possible that Ms Hyslop's appeal may be dismissed, in which case our determination would be otiose;

b. if her appeal is successful, then the High Court may decide to set aside HHJ Bailey's decision and remit the possession claim back to the County Court for redetermination, in which case the County Court judge dealing with the claim might be revisiting these two issues and hear oral evidence on the point.

26. It was also the case that there was no witness evidence before us as to how and when each service charge demand was sent to Ms Hyslop. Mr Gream informed us that these were sent by FW Gapp but he could not say who sent them and by what method. He believed that sometimes demands were just sent by post but that on other occasions they were hand delivered with photographic evidence taken to help verify delivery. Nor could Mr Gream confirm if FW Gapp had received the letters Ms Hyslop said that she sent them stating that she had not received service charge demands for the years in dispute, nor if, how and when they responded to her letters. Nor could Mr Gream confirm if the service charge demands for the years in dispute were included in the hearing bundle in the county court proceedings, which might be relevant to the question of whether Ms Hyslop received notice of incurred service charge costs for the purposes of s.20B(2) of the 1985 Act.

27. Given the complete lack of evidence before us on these points we did not consider we were able to determine (even if we considered it appropriate to do so) whether Ms Hyslop received the service charge demands for the two years in dispute, nor if CHG's ability to recover service charge costs from her is limited by section 20B of the 1985 Act.

28. We therefore restrict our decision to whether the sums demanded for the two service charge years in dispute were payable by the respondents and by Ms Hyslop *if these sums were validly demanded from her* and that both CHG and Ms Hyslop have permission to restore this application for a determination as to whether the sums in question were validly demanded and as to the impact, if any of s.20B of the 1985 Act.

29. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

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

The issues

31. The actual service charge costs incurred for the 2014/15 service charge years as shown in the annual service charge accounts **[151]** were £50,420.09. The actual service charge costs incurred for the 2015/16 service charge year were £60,160.16 **[224]**.

32. The only respondent who has participated in these proceedings is Ms Hyslop. She challenged the payability and reasonableness of the following heads of expenditure, as identified in the annual service charge accounts for the years in dispute:

    a. Insurance

    b. Corporation Tax

    c. Accountancy

    d. Professional Fees

33. Ms Hyslop also argued that the sums the applicant states were demanded from her in respect of reserve fund contributions for the two service charge years were unreasonable in amount.

34. Having heard evidence and submissions from the parties and considered all the documents provided, the tribunal has made determinations on the various issues as follows.

Insurance

35. The actual costs shown in the service charge accounts are £8,292.26 for the 2014/15 service charge year and £9,328.79 for the 2015/16 service charge year. Not only did these costs include the costs of insuring the Building (which were not disputed by Ms Hyslop) they also included costs incurred in taking out Directors' and Officers' Insurance with St Giles in the sum of £413.40 for the 2014/15 service charge year **[334]** and the same amount for the 2015/16 service charge year.

36. Mr Gream's position was that although these are administrative costs of CHG they are recoverable from Ms Hyslop through the service charge by virtue of the express provisions of paragraph 6 of the 5th Schedule to the Lease as being general management costs of the Building. Alternatively, he argued that such an obligation could be implied into paragraph 6. For those leaseholders who held Varied Leases he argued that the cost was recoverable under paragraph 13 of the Schedule to the Deed of Extension and Variation. Ms Hyslop's position was that the costs were not recoverable under the terms of her Lease.

37. In our determination, Ms Hyslop is correct. This insurance cover is for the benefit of the Directors and Officers of CHG and is described as covering financial loss that the directors of a company may be personally liable to pay such as where a decision taken results in financial loss to a resident. The cost of this insurance is not recoverable under paragraph 6 of the 5th Schedule to Ms Hyslop's lease because it is a company expense and not a service charge item. Further, whilst paragraph 6 provides for the recovery of fees incurred by the landlord's managing agents for the general management of the Building the clause is not broad enough to cover this type of insurance cover as it cannot be said that it is a cost of general management of the *Building*.

38. We reject Mr Gream's suggestion that an obligation should be implied in the wording of paragraph 6 and reject his similar contention in respect of the other costs in dispute. The terms of paragraph 6, in the context of the lease, are clear, and there is no need to resort to having to imply terms into the Lease. This is only required where the terms of a lease are ambiguous and in to give business efficacy to the lease. That is not the case with this Lease.

39. However, for those lessees that have entered into a Deed of Extension and Variation, we accept that the cost is recoverable under Paragraph 13 of the 5th Schedule, as a cost of administering the Company.

40. The amount payable by Ms Hyslop and those lessees that have not entered into a Deed of Extension and Variation is therefore their apportioned share of £7,878.86 for the 2014/15 service charge year and £8,915.39 for the 2015/16 service charge year. For those lessees that have entered into an entered into a Deed of Extension and Variation the full amount specified in the accounts is payable in their apportioned shares.

Corporation Tax

41. Mr Gream has adopted a practice of paying expenses incurred in the course of acting as a Director of CHG personally and then billing them to F W Gapp as a Director's expense claim. One such claim **[328]** included the sum of £16.83 which he paid to the Inland Revenue for Corporation Tax paid on 7 December 2014 for the 2013/2014 tax year.

42. Mr Gream's position was that the corporation tax payment and the room hire cost was recoverable through the service charge as a cost incurred by CHG for the benefit of the lessees and therefore recoverable for the same reasons as the St Giles insurance costs. Ms Hyslop contended that she was not liable to pay either sum under the terms of her Lease.

43. This sum is not, in our determination, payable by any of the lessees as a service charge cost. Corporation Tax is a tax on profits made by a company and is payable by the company. It cannot fall within the scope of paragraph 6 of the 5th Schedule of Ms Hyslop's lease for the same reasons as the St Giles insurance costs falls outside scope. Nor are we persuaded, on the evidence before us, that this is a cost of administering the company or a cost of complying with the Company Acts, such as would enable the cost to be recovered from those lessees that have entered into a Deed of Extension and Variation by virtue of paragraph 13 to the 5th Schedule. As it is a tax on profits made by the company it is payable out of those profits.

Accountancy

44. The 2014/15 service charge accounts include the sum of £2,790 under the heading of accountancy costs **[151].** Invoices from the accountants, Niren Blake LLP indicate that that sum breaks down as £2,400 for preparation of the service charge accounts **[335]** and £390 for preparation of the company accounts and corporation tax return **[336].**

45. The figure specified in the 2015/2016 accounts is £2,862 **[224]** which Mr Gream informed us comprised £2,472 for preparation of the service charge accounts and £390 for preparation of the company accounts and corporation tax return **[385].**

46. Mr Gream asserted that these sums were payable under paragraph 6 of the 5th Schedule of the leases as a running cost of CHG that benefitted all lessees or, alternatively, by those lessees who had entered into a Deed of Extension and Variation, under paragraph 13 of that Schedule.

47. Ms Hyslop's position was that the preparation of company accounts and a corporation tax return were costs incurred by the company and were payable by the shareholders of CHG. She also argued that the costs of preparing the service charge accounts were excessive in amount and queried the format of the accounts which she thought were unnecessarily repetitive. She also asserted that she believed that the cost of preparing the company accounts had been "mixed in" with the costs of preparing the service charge accounts and queried why the managing agents could not prepare the accounts.

48. In our determination, the costs of preparation of the company accounts are not payable by Ms Hyslop or those lessees who have not entered into a Deed of Extension and Variation because this is a company expense and is not within the scope of paragraph 6 of the 5th Schedule for the same reasons as the St Giles insurance costs. For those lessees that have entered into a Deed of Extension and Variation, we determine that the cost is recoverable under paragraph 13, as a cost of administering CHG, or as a cost of complying with the requirements of the Companies Acts.

49. In our determination, the costs of preparation of the service charge accounts, £2,400 for 2014/15 and £2,472 for 2015/16 are reasonable in amount. Ms Hyslop has not produced any comparable quotes to evidence the contrary and in our view, there is no evidence to support her contention that the amount incurred is unreasonable. The sums in question, for the preparation of service charge accounts for a Building comprising 36 flats held on long leases, involving approximately 13 heads of service charge expenditure, amount to about £67 per annum per flat and are not, in our view as an expert tribunal, unreasonable. We do not consider the accounts to be repetitive and clause 7 of the 5th Schedule of lease is sufficiently wide to allow for the costs of instructing external accountants to prepare them to be recoverable through the service charge. Further, where the costs of doing so are recoverable, subjecting service charge accounts to an annual examination by an independent accountant is recommended at paragraph 7.13 of the Royal Institution of Chartered Surveyors Residential Service Charge Code. There is no evidence to support Ms Hyslop's assertion that the cost of preparing the company accounts had been "mixed in" with the costs of preparing the service charge accounts.

50. The fact that CHG have managed to secure accountancy services at a lower cost (£1,620 for the 2016/17 service charge year) is, in our view, indicative of Mr Gream taking a responsible approach in seeking out a better deal for the lessees rather than suggesting that the fees incurred in the previous two service charge years were excessive in amount.

Professional Fees

51. Ms Hyslop did not challenge the sum of £630.24 shown in the 2014/15 service charge accounts which related to the costs of a chartered surveyor. The figure specified in the 2015/2016 accounts for professional fees is £6,156.07 **[224]** of which sum Ms Hyslop challenged the following:

    a. Fines imposed in the magistrates' court on FW Gapp in the sum of £650 **[322]** and CHG in the sums of £2,280 **[323]** and £110 **[325]** that had been passed on to lessees through the service charge;

    b. The £440 application fee paid to this tribunal for this application **[329]**;

    c. The sum of £141.83 for the costs of room hire for a residents meeting in May 2015, called so that the residents could discuss planned major works to the Building **[141]**.

d. The sum of £216.26 paid to CoDwellers.com for provision of an electronic notification service to lessees **[337]**

e. The sum of £25 paid for submission CHG's annual return to Companies House **[330]**;

f. The sum of £85 incurred for copying and posting the tribunal's decision of 15 December 2015 to lessees.

52. The fines in question concerned offences in complying with Landlord & Tenant Act legislation, including failing to supply the name and address of the landlord to a tenant and failing to supply a written summary of relevant costs. Mr Gream's case was that these fines were costs of compliance with Landlord & Tenant Act legislation that were recoverable under paragraph 8 of the 5th schedule to the lease. Ms Hyslop disagreed and in our determination, she is correct. These are not costs that are recoverable under the service charge by virtue of paragraph 8. That paragraph allows for the recovery of costs incurred by the landlord in complying with the provisions of legislation, orders or statutory requirements concerning the Building. It does not, in our view, enable fines imposed for *non-compliance* with legislation to be recovered through the service charge. Such fines are payable by FW Gapp and by CHG as imposed on them and not by the lessees.

53. Mr Gream argued that the application fee paid to the tribunal was recoverable under the service charge under paragraph 6 of the 5th schedule to the lease, as an incidental cost of management of the Building. He also contended that he needed to bring the application to ensure there were funds available to pay for planned major works and so the costs were recoverable by virtue of paragraph 1 of the 5th Schedule. Ms Hyslop contended that the cost was not recoverable and, again, we agree. Paragraph 6 allows for recovery of the costs of engaging managing agents. It does not allow for the recovery of legal costs incurred by CHG before this tribunal. Such costs might, arguably, be recoverable under clause 3(f) of the lease in circumstances where the costs were incidental to the preparation and service of a Notice under Sections 146 and 147 of the Law of Property Act 1925, but there was no evidence before us that this was the case (although, of course, CHG did, subsequently pursue forfeiture proceedings). Nor do we consider the cost is recoverable under paragraph 12 of the 5th Schedule for those lessees that have entered into a Deed of Extension and Variation because it was not a cost incurred in employing a solicitor or barrister, these proceedings having been commenced by CHG itself.

54. Mr Gream's position was that the room hire costs were costs that were recoverable under paragraph 6 of the 5th Schedule, as costs of the general management of the Building. Ms Hyslop disagreed, saying that the she did not receive an invitation to this meeting and that the amount incurred was also unreasonable. In our determination the sum

is recoverable under paragraph 6. It is clearly a cost of managing the Building and although Mr Gream initially paid the cost himself, it was ultimately paid for by F W Gapp, as indicated by the stamp on Mr Gream's Director's expense claim. We consider that hiring a room for the purposes of such a meeting was a reasonable cost and there is no evidence before us to indicate that the amount incurred is unreasonable.

55. As for the sum of £216.26 paid to CoDwellers.com, Mr Gream explained that this cost concerned an email alert service to lessees for issues relating to the Building, for example, notification of a water outage, and hosting of general information about the Building on a website which could be accessed by lessees. Ms Hyslop suggested that the cost was unreasonable as the email service was something the managing agents could have dealt with and it was obviously not necessary as the service is no longer being used. In our determination it was not unreasonable for the landlord to utilise this service. Mr Gream informed us, and Ms Hyslop did not disagree, that about 30-40 emails were sent using this service during the 2014/15 and 2015/16 service charge years. We consider this is likely to have been a useful service to lessees, that the cost incurred is modest and not unreasonable, and that it is recoverable as part of the managing agent's fees of the general management of the Building.

56. We determine that the £25 paid for submission of CHG's annual return to Companies House is not recoverable under paragraph 6 of the 5th Schedule, as suggested by Mr Gream. As Ms Hyslop contended, this is a company cost that is not recoverable through the service charge for the same reasons as the St Giles Insurance. However, it is, in our determination, recoverable under paragraph 13 of that schedule as incorporated into the leases of those lessees who entered into a Deed of Extension and Variation as the costs of cost of administering CHG or as a cost of complying with the requirements of the Companies Acts.

57. Similarly, we consider the sum of £85 incurred for copying and posting the tribunal's decision of 15 December 2015 to lessees is recoverable under paragraph 13 of the 5th Schedule, as a cost of administering CHG from those lessees who entered into a Deed of Extension and Variation, but not under paragraph 6 of that Schedule. We do not accept Ms Hyslop's suggestion that the application to the tribunal was unnecessary. The applicant was entitled to make the application for a determination of what charges were payable for the service charge years in dispute in light of Ms Hyslop's non-payment of the charges demanded. Nor do we accept her contention that as the Upper Tribunal has concluded that it was for the tribunal to issue the decision that the cost was unreasonably incurred. In incurring these costs, the applicant was complying with the tribunal's directions and cannot be criticised for doing so, regardless of the Upper Tribunal's later decision.

Reserve fund contributions

58. The service charge accounts for the years in dispute indicate that the reserve fund contributions demanded amounted to £90,000 for the 2014/15 service charge year (an initial demand of £40,000 followed by an additional demand for £50,000) and £40,000 for the 2015/16 service charge year. The demands were included in the bundle at **[388 – 392]**.

59. Mr Gream's evidence was that the reserve fund contributions had been demanded to fund CHG's planned maintenance programme of works to the Building. He explained that internal works had been carried out between 2012-2013 and that external works were carried out in the spring and summer of 2016. He states in his statement of case that all the 36 lessees paid their reserve fund contribution towards the 2016 works except for Ms Hyslop, who only paid her contribution after the possession order of her Flat was made by HHJ Bailey.

60. He says that a consultation process took place under section 20 of the 1985 Act, prior to commencement of the 2016 major works, and that a tender of £194,799.94 was accepted. Including F W Gapp's management fee, the estimated cost of the works was £219,149.93. He goes on to say that the works included the replacement of the roof as well as significant repairs and redecorations to the façade of the Building, and that the final cost, as specified in the 2017 service charge accounts was £218,752.75 **[239]**.

61. Ms Hyslop's challenge to the reserve fund costs amounted to a repetition of the arguments that she has raised in previous proceedings before this tribunal, namely that there has been a misuse of the reserve fund. It was her contention that hundreds of thousands of pounds, possibly as much as £500,000, had been misappropriated from the reserve funds and that, given this, it was unreasonable for CHG to demand additional contributions from her.

62. As Ms Hyslop acknowledges, we have no jurisdiction to determine issues relating to breach of trust except to the extent that this is necessary to decide a question arising under section 27A of the 1985 Act (see *Solitaire Property Management Company Limited, Holding & Management (Solitaire) Limited v Holden & Others* [2012] UKUT 86 (LC)).

63. We did not consider that embarking on a breach of trust inquiry was necessary to determine this dispute in circumstances where Ms Hyslop was unable to say when funds were misappropriated, by whom, and in what amount, let alone provide any evidence whatsoever to corroborate her assertions.

64. In our determination, the contributions demanded are reasonable in amount and are payable by the lessees under clause 4 and paragraph 10 of the 5th Schedule of the lease. We accept, as a matter of fact, Mr Gream's assertion that a planned maintenance programme was in place (Ms Hyslop did not disagree) and our examination of the service charge accounts leads us to conclude that the amounts demanded were proportionate to the anticipated cost of the works, having regard to the amounts standing in the reserve fund at the time of the demands.

65. The 2014/15 accounts show a bank balance in the general reserve fund of £68,286.55 as at 31 March 2014, rising to £104,254.55 as at 31 March 2015 following issue of the demands totalling £130,000. The 2016/2017 service charge accounts **[237]** show a brought forward balance in the general reserve of £240,907.49 as at 1 April 2016 and expenditure, in respect of the major works, of £218,752.75. There is nothing to suggest that the reserve fund was operated in anything other than a responsible and appropriate manner during the two service charge years in dispute in this application and we determine that the sums in dispute are payable by the lessees in their apportioned shares.

66. We therefore determine that the reserve fund contributions demanded in the sum of £90,000 for the 2014/15 service charge year and £40,000 budgeted for and demanded in the 2015/16 service charge year are payable by all lessees.

The 2015/16 Budget

67. The 2015/16 Budget **[143]** is in the sum of £57,599 for annual recurring service charge costs and £40,000 in respect of reserve fund contributions. We have already determined above that the reserve fund contribution is payable by all lessees.

68. Ms Hyslop has not made any specific challenge to the budgeted costs for this service charge year. Her challenge has been to the actual costs incurred. None of the other lessees have challenged the budget. We determine that the budgeted costs are reasonable in amount and are payable by all lessees, including Ms Hyslop, except for the sum of £450 budgeted for Directors and Officers Insurance which is not payable for the reasons set out above. We consider that the amounts budgeted for in respect of the remaining heads of expenditure are reasonable given that the actual expenditure for that year, as shown in the accounts, was £60,160.16.

Costs

69. If either party wishes to make an application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules

2013 they should do so within 28 days of the date of issue of this decision.

70. Ms Hyslop informed us that she did not want to request that the tribunal make an order section 20C of the 1985 Act.

Name: Amran Vance **Date:** **19 November 2018**

Appendix 1 - Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix 2 - Relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 the appropriate 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 the appropriate 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) the appropriate 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.