10276

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CB/LSC/2014/0060**
Property	:	**Flats at 140 -142 Whetstone Lane, Birkenhead, CH41 2TQ**
Applicants	:	**Ms Rachel Zu Zhao (Flats 11 & 12), Mrs Cynthia Doreen Cale (Flats 1 & 6), Mr Olayemi Adeyemi (Flat 2), Mrs Glenys Marguerite Bor (Flats 3 & 7) Mr M C Souster & Mrs J E Souster (Flat 4), Ms Ophelia Saka & Mr Frankin Saka (Flat 10)**
Representative	:	**Ms Rachel Zu Zhao, as Lead Applicant**
Respondent	:	**Equity Track Limited**
Representative	:	**Miss Rebecca Ackerley of Counsel**
Type of Application	:	**Applications for a determination of liability to pay and reasonableness of service charges and administration charges**
Tribunal Members	:	**P J Mulvenna LLB DMA (chairman) K Kasambara BSc MSc MRICS Mrs H Clayton**
Date and venue of Hearing	:	**22 September 2014 at Birkenhead County Court**
Date of Decision	:	**22 September 2014**

DECISION

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DECISION

1. **That the sums due under the following demands are not payable by the Applicants to the Respondent until the Respondent complies with the relevant statutory provisions as indicated:**

    (i) Section 47 of the Landlord and Tenant Act 1987, as the Respondent had not given notice to the Applicants of an address for the service of notices –

        (a) Demand dated 12 March 2014 for flat roof recovering in the sum of £631.50, including administration charge of £50.00;

        (b) Demand dated 24 March 2014 for overdue account in the sum of £144.00;

        (c) Demand dated 17 April 2014 for additional expenditure in the sum of £545.33;

        (d) Demand dated 23 April 2014 for overdue account in the sum of £1,370.83, including administration charge of £50.00.

    (ii) Section 48 of the Landlord and Tenant Act 1987, as the landlord was noted as Anthony Richard Sayers rather than the Respondent –

        (a) Demand dated 15 November 2013 for service charge for the period from 1 November to 31 December 2013 in the sum of £97.50;

        (b) Demand dated 10 December 2013 for service charge for electrical work in the sum of £42.00;

        (c) Demand dated 7 January 2014 for service charge for the period from 1 January to 31 June 2014 in the sum of £292.50.

2. **That the service charges levied by the Respondent for the period from 1 November to 31 December 2013 are unreasonable in respect of the following heads of expenditure which are to be reduced to the sums indicated:**

    (i)Accountancy fees – from £175.00 to £75.00

    (ii) Cleaning communal areas - £648.00 disallowed in their entirety

    (iii) Management fees – from £480.00 to £200.00

    (iv) Repair provision (including electrical work) – from £6,164.00 to £3,000.00.

3. **That the service charges estimated by the Respondent for the year ending 31 December 2014 are reasonable and payable by the Applicant but will require to be adjusted following the year end to reflect actual expenditure and to take account of appropriate adjustments.**

4. **That the administration charges levied by the Respondent are not payable by the Applicants in any circumstances.**
5. **That no order be made for the award of costs to either party.**
6. **That the Respondent reimburse the First Applicant the application fee of £125.00 and the hearing fee of £190.00.**
7. **That an order be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants.**

DETERMINATION AND REASONS

INTRODUCTION

1. Ms Rachel Zu Zhao ('the Lead Applicant') made applications to the Tribunal on 28 April 2014 for the determination of the reasonableness and payability of the service charges for the period from 1 November to 31 December 2013 and for the year ending 31 December 2014, together with a determination of the payability of administration charges, demanded by Blue Property Management UK Limited ('the Managing Agent') acting on behalf of Equity Track Limited ('the Respondent') in respect of Flats 11 and 12, 140 – 142 Whetstone Road, Birkenhead, CH41 2TQ. The lessees of further flats at 140 – 142 Whetstone Lane, namely, Mrs Cynthia Doreen Cale (Flats 1 & 6), Mr Olayemi Adeyemi (Flat 2), Mrs Glenys Marguerite Bor (Flats 3 & 7), Mr Martin Clive Souster & Mrs Janet Enid Souster (Flat 4) and Ms Ophelia Saka & Mr Franklin Saka (Flat 10) joined in the application. The Tribunal notified the Respondent of the position on 18 July 2104. The Lead Applicant and the lessees of the further flats now joined in are together referred to as 'the Applicants'. Flats 1, 2, 3, 4, 6, 7, 10, 11 and 12 are together referred to as 'the Property'. The building within which the flats are contained is referred to as 'the Building'.

2. The Property comprises nine self-contained, one bedroom flats in a converted pair of semi-detached houses which contains twelve such flats in total. The Building, which has three upper floors and a basement, fronts onto a relatively busy road (B5148). It is a Grade II Listed Building situated in the Clifton Park Conservation Area of Birkenhead. It is thought to have been designed by the architect, Walter Scott, was built around 1840 to 1850, converted in the early 1970s and refurbished in 2012. Externally, there is a small walled area at the front of the Building and an enclosed garden with paved and lawned areas, but without planting save for a mature tree and some ivy growth on the back wall, to the rear. Car parking provision and bin storage is situated at the rear outside the walled area but on land within the Respondent's ownership. The internal common areas include an entrance hall, together with stairs and landings giving access to all floors. The Property has reasonable access to public transport and to local shops and other facilities and amenities.

3. The Applicants have leasehold interests for a term of 125 years from and including 1 January 2013 in their respective flats comprising the Property which are held under identical leases. The Tribunal has seen representative Leases (in respect of Flats 11 and 12), both made on 19 July 2013 between (1) Anthony Richard Sayers and (2) the Lead Applicant ('the Leases').

4. Each of the Applicants acquired their respective interests as investments and they are let to occupying tenants. The other flats are thought to be occupied on the same basis. All twelve flats were thought to be occupied at the time of the Tribunal's inspection.

5. The Respondent has a freehold interest in the land upon which the Building is situate, together with adjoining land, both within and outside the wall enclosing the Building and rear garden. The Respondent acquired the freehold interest from Anthony Richard Sayers on 13 November 2013.

6. The Managing Agent was appointed under the terms of a Property Management Agreement ('the Management Agreement') made between (1) Anthony Richard Sayers and (2) Blue Property Management UK Limited on 7 April 2013. The Management Agreement was produced to the Tribunal. The Tribunal has seen no evidence that there is a formal agreement between the Respondent and the Managing Agent (although the Management Agreement has provision for assignment at clause 11), but accepts that they have proceeded as if they were the parties to the Management Agreement.

THE INSPECTION

7. The Tribunal inspected the common parts of the Building externally and internally on the morning of 22 September 2014. The top floor of the Building could not be accessed because of investigations being undertaken by the Police in relation to a stabbing incident.

8. The Applicants were represented by the Lead Applicant. The Respondent was represented by Miss Rebecca Ackerley of Counsel, accompanied by Ms Tamara Gifford and Mr Barry Jones representing the Managing Agent.

9. The Tribunal found the Building to be in a poor condition. The front elevation, although having attractive features, was in need of decoration. Other elevations had signs of ageing brickwork and vegetation growth. Externally, the lawn had been mown on the day of the inspection but the grounds were otherwise in poor condition with access to the car parking provision and bin stores being restricted by fly tipped material comprising, in the main, used carpets, underlay and packaging. The areas which were not lawned had established weed growth, although weed killer had been applied shortly before the time set for the inspection. Internally, the entrance hall was dismal and unwelcoming with a tiled floor and white walls. The stairs and landings were similarly dismal with plain white walls and banisters, and dull carpeting which was practical but unattractive. The communal lighting was in good working order.

10. Both internally and externally, there were signs of vandalism, but there was no evidence as to the source, whether occupiers, visitors or trespassers, or a combination of them. There was evidence that some occupiers deposited refuse

in the ground floor entrance hall or adjacent areas and also that others dropped refuse from the windows of their flats into the rear garden area.

DIRECTIONS & PROCEEDINGS

11. Directions were issued by Judge J Holbrook, sitting as a procedural chairman, on 14 May 2014 and subsequently amended at the parties' request. The parties substantially complied with the Directions, but had failed marginally to meet target dates. There was no evidence that such failure prejudiced the other party.

12. The substantive hearing of the applications was held on 22 September 2014 at Birkenhead County Court. The Applicants were represented by the Lead Applicant. The Respondent was represented by Miss Rebecca Ackerley of Counsel, accompanied by Ms Tamara Gifford and Mr Barry Jones representing the Managing Agent.

THE LAW

13. The material statutory provisions in this case are as follows.

(i) The Landlord and Tenant Act 1985

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... (c) the amount which is payable'.

Section 27A (3) provides that an application may also be made 'if costs were incurred.'

Section 19(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.

(ii) The Commonhold and Leasehold Reform Act, Schedule 11, Paragraph 5 provides for applications to be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

THE LEASES

14. The Tribunal had before them copies of the Leases which have been read and interpreted as a whole. In reaching its conclusions and findings, the Tribunal

has had particular regard to the following matters or provisions contained in the Lease:

(a) The definition of 'Services', 'Service Charge' and related expressions in Clause 1.1.

(b) The Demise in Clause 2, with particular reference to the payment of the Service Charge in 2.2, any Maintenance Adjustment in 2.3 and any Special Contribution in 2.4.

(c) The Tenant's covenants in Clause 3.

(d) The Landlord's covenants in Clause 4.

(e) The Service Charge provisions contained in the Schedule 4.

THE EVIDENCE, SUBMISSIONS & THE TRIBUNAL'S CONCLUSIONS & REASONS

15. The Applicants have asked for a determination of the reasonableness and payability of the service charges for the period from 1 November to 31 December 2013 and for the year ending 31 December 2014, together with a determination of the payability of administration charges demanded in the same periods. The Tribunal had before them the service charge and administration charge demands in question which complied with The Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 and The Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007.

16. The Tribunal heard oral evidence and submissions from the Lead Applicant on behalf of the Applicants, together with oral evidence from Ms Gifford and Mr Jones and oral submissions from Miss Ackerley on behalf of the Respondent. The Tribunal also had before them the written evidence and submissions of the Applicants and the Respondent.

17. The Applicants' claims embrace a number of issues which the Tribunal has considered on the whole of the written and oral evidence and submissions now before them and has reached the following conclusions.

(a) Notice of Transfer of Freehold Interest

18. The Applicants claim that the Respondent did not give notice in accordance with Section 3 of the Landlord and Tenant Act 1985 of acquisition of the freehold interest in the Property and has thus committed an offence. The Tribunal has not seen any evidence of notice having been given, but that has no bearing on the payability or reasonableness of the service charges or the administration charges. In those circumstances, the failure to give notice is not material to the Tribunal's deliberations.

19. The Applicants also claim that the previous freeholder failed to serve notice under Section 5 of the Landlord and Tenant Act 1987 of the proposal to dispose of his interest. The Tribunal has not seen any evidence of notice being given but, equally, none of the Applicants has indicated that they would have accepted an offer to acquire the freehold interest. None of the Applicants have

given any evidence of prejudice. The failure to give notice is not material to the Tribunal's determination of the issues before them.

20. The Tribunal would add that they have no jurisdiction to determine issues arising from a failure to give notice under either of the above provisions.

(b) Failure to include relevant information in demands

21. The Applicants claim that the service charges included in demands are not payable because the Respondent has failed, in some, to comply with the requirement of Section 47 of the Landlord and Tenant Act 1987 to include the landlord's name and address in the demands and, in others, to comply with the requirement of Section 48 of that Act to give notice of the landlord's address for service of notices. In both cases, any amount otherwise due from the tenant to the landlord is to be treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord to the tenant.

22. The Tribunal are satisfied that the following demands do not comply with the legislative requirements indicated:

    (i) Section 47 of the Landlord and Tenant Act 1987, as the Respondent had not given notice to the Applicants of an address for the service of notices –

        (a) Demand dated 12 March 2014 for flat roof recovering in the sum of £631.50, including administration charge of £50.00;

        (b) Demand dated 24 March 2014 for overdue account in the sum of £144.00;

        (c) Demand dated 17 April 2014 for additional expenditure in the sum of £545.33;

        (d) Demand dated 23 April 2014 for overdue account in the sum of £1,370.83, including administration charge of £50.00.

    (ii) Section 48 of the Landlord and Tenant Act 1987, as the landlord was noted as Anthony Richard Sayers rather than the Respondent –

        (a) Demand dated 15 November 2013 for service charge for the period from 1 November to 31 December 2013 in the sum of £97.50;

        (b) Demand dated 10 December 2013 for service charge for electrical work in the sum of £42.00;

        (c) Demand dated 7 January 2014 for service charge for the period from 1 January to 31 June 2014 in the sum of £292.50.

23. The Tribunal finds that the sums due under the above demands are not payable by the Applicants to the Respondent until the Respondent complies with the relevant statutory provisions. The Tribunal accepts the submission made on behalf of the Respondent that the defects are capable of being remedied by the re-service of compliant demands.

(c) General findings

24. The Tribunal has made a number of general findings which are of relevance in considering the issues which were raised in the proceedings. Some are not quantifiable in terms of monetary value but they all impact on objective assessments of reasonableness and are material to such assessments.

(c) (i) The Building

25. The Building is an old building which, on visual inspection, is showing signs of age. It is in need of decoration, both internally and externally. There is no reliable evidence before the Tribunal that any of the parties has any reliable, expert information as to the structural stability of the Building or the requirement for any major repair or refurbishment works which might be required in the short term, the medium term or the long term. The Applicants had surveys undertaken at the time they acquired their leasehold interests, but they appear to have been based on the need to satisfy lending institutions that the Building provided good security for monies advanced rather than to address structural matters. There is no evidence that the Managing Agents undertook a structural survey on their appointment or that the Respondent commissioned a survey on acquiring the freehold interest.

26. In these circumstances, there is extreme difficulty in planning future remedial action and/or maintenance activity. That difficulty is likely to give rise to continuing friction between the parties as unforeseen work is required and, with it, the consequential need for the expenditure on such works to be funded.

27. The position is potentially aggravated by the fact that the Building is a Grade II Listed Building and is in a Conservation Area. The Local Planning Authority will have to be consulted in some instances and, in others, formal applications will need to be made for the relevant consent. It could well be that consent will require the use of particular materials or methods of working which might add to the cost of works.

(c) (ii) Vandalism and abuse

28. The Tribunal has heard evidence from the Managing Agent of incidents of vandalism and abuse of the Building by residents. The Applicants disputed the levels of vandalism and abuse claimed by the Managing Agent, and suggested that the Managing Agents have contributed to problems by inadequately addressing them, for example, by fitting poor locking devices to doors.

29. The Tribunal prefers the evidence of the Managing Agent. They visit the Building on a regular basis and are better placed to comment on the continuing incidence of vandalism and abuse than the Applicants who visit occasionally (if at all, in some cases) and are able only to comment on the position at a particular point in time. This is borne out by the Tribunal's visit. There was a significant Police presence at the Building investigating a serious crime and evidence of fly tipping. The Tribunal were informed that neither was typical and it would, therefore, be wrong to place weight on that single experience in assessing the position.

30. These problems will continue to impede planned maintenance and other service provision and give rise to responsive as opposed to planned activity,

thus increasing costs. The appointment of local contractors will not necessarily reduce the need for responsive activity as actual attendance at the Building rather than ease of attendance would be the main factor to secure a reduction of the problem and it is actual attendance which gives rise to expenditure. That is not to say that the unit cost of local contractors might be less expensive, but simply to emphasise that a local base will not necessarily mean more preventative activity in respect of vandalism and abuse without an attendant increase in cost.

(c) (iii) The Management Agreement

31. The relationship between the Respondent and the Managing Agent is a cause for some disquiet. It is based on the Management Agreement to which the Respondent is not a party. That raises questions of enforceability which are not issues to be determined by the Tribunal but are important in the assessment of reasonableness, not least because the Applicants, who are not a party to the Management Agreement, will look to the Respondent to redress any complaints as to service performance.

32. In this respect, the Tribunal has had no evidence of any control exercised by the Respondent over the Managing Agent's performance. There is no evidence of any structures in place to demonstrate that the Managing Agent must account to the Respondent for the need for the execution of any works or the provision of any services. There is no provision for quality or expenditure control.

33. The difficulties which arise from the lack of such controls are exemplified by the way in which the Managing Agent has arranged for the execution of works or the provision of services. The way in which the Managing Agent should have proceeded with the arrangements is set forth in paragraphs 2 to 5 of Part 1 of Schedule 1 to the Management Agreement:

> '2. To confer regularly with the [Respondent] upon [the Managing Agent's] management of the Property.
>
> 8. To tender, negotiate and sign contracts for agreed service contracts to include, where appropriate and without limitation, grounds keeping, general cleaning and the supply of consumables, window cleaning, all mechanical and electrical contracts (door entry, TV aerial system, door entry gates, lifts CCTV systems, extraction systems, fire systems, dry risers, fire lighting equipment, emergency lighting), utility services.
>
> 9. To manage the agreed service contracts to include those referred to in paragraph 3 above.
>
> 10. To tender, negotiate and place contracts for repairs to the Property where costs do not exceed £1,000 (plus VAT), provided that such repairs do not require specialist technical surveying or engineering advice or specific attendance by [the Managing Agent] on site.'

34. The Tribunal has seen no evidence of regular conference between the Respondent and the Managing Agent on the management of the Property. There is no evidence that the Managing Agent has tendered or negotiated contracts. In the main, all works and services have been carried out in-house or

by companies in the same group without exposure to competitive tendering. That is arguably a breach of the Management Agreement but such questions are not within the jurisdiction of the Tribunal.

35. The Tribunal does, however, have jurisdiction to determine the reasonableness of expenditure and the present position in which the Managing Agents determine the level of works or service provision required, award the work to in-house contractors or to those in the same group without exposure to competition and without independent quality or cost controls gives rise to serious questions as to reasonableness. There can be no confidence in a system which has no procedures for an objective assessment of the reasonableness of expenditure and value for money.

(c) (iv) The Leases

36. The Leases provide the bases upon which expenditure might be recovered by way of service charge. The Leases provide at Clause 2 that the Applicants are to pay to the Respondent:

Under Clause 2.2 –

> 'In respect of every Maintenance Year the Service Charge to the Landlord by two equal instalments in advance on the Service Charge Payment Dates provided that in respect of the Maintenance Year current at the date of this Lease the Tenant shall on execution of this Lease pay a proportionate payment for the half-year current at the date of this Lease.'

Under Clause 2.3 –

> 'Within 21 days of written demand a due proportion of any Maintenance Adjustment pursuant to paragraph 2 of part B of Schedule 4.'

Under Clause 2.4 –

> 'Within 21 days of written demand any due proportion (calculated on the same basis as the Service Charge Provision) of any Special Contribution that may be levied by the Landlord.'

37. Schedule 4 to the Lease provides that 'Maintenance adjustments' are to be calculated at the end of each Maintenance Year by reference to actual expenditure as compared with estimated expenditure. 'Special Contribution' is defined as –

> 'any amount which the Landlord reasonably considers necessary for the purposes set out in Parts C and D of this Schedule [services and additional items] for which no provision or inadequate provision has been made within the Service Charge and for which no reserve provision or inadequate reserve provision has been made under Part B of this Schedule [computation of annual maintenance provision]'

38. The Tribunal recognises that these provisions, particularly that relating to the Special Contribution, operate very much in the Respondent's favour. That aspect was pursued at some length by the Tribunal with Miss Ackerley and her arguments and submissions in relation to the operation of the provision were entirely meritorious. The Lead Applicant suggested that, because of the nature of the provisions, the Tribunal should apply the contra proferentem rule in

construing the provisions. The Tribunal would observe that the rule should be applied in cases were there is ambiguity of meaning (see *Killick -v- Second Covent Garden Property Company Limited [1973] 1 WLR* 658) and there is no ambiguity in this case. Nonetheless, the Tribunal further observes that the Special Contribution provision relates to 'any amount which the Landlord **reasonably** considers necessary...' (the Tribunal's emphasis). In this respect, the Tribunal find that the test of reasonableness is an objective one and, as such, any demand for a Special Contribution is open to scrutiny by the Tribunal on that basis.

(c) (v) The acquisition of the Applicants' leasehold interests

39. The Applicants have claimed that they were misled as to the likely service charge amounts by the agent's information. It is evident that the Applicants all followed the usual land acquisition procedures with the benefit of legal advice. It is clear from the terms of the Leases, which would have been supplied in draft form to the Applicants through their legal advisers, that the service charges were variable and were intended to recover expenditure incurred in the delivery of the services. It was open to each of the Applicants to raise enquiries as to the likely level of services and the estimated costs. It was also open to the Applicants to commission surveys of the condition of the Property and the Building to satisfy them that no major works were required and to test the validity of the estimates supplied. It is apparent that some did make such enquiries and commission surveys, although it is not clear whether such surveys were more in the nature of valuations rather than full structural surveys.

40. The Tribunal does not find that there is any sustainable evidence that the reasonableness or payabilty of the service charges were affected by any pre-acquisition representations. The Tribunal's jurisdiction is limited to those issues. It might be that the Applicants, or any of them, could have an arguable case against the seller's agents, the seller or their own legal and/or property advisers on the basis of misrepresentation or negligence. Those are not, however, matters which the Tribunal has jurisdiction to determine and they are not material to an assessment of the reasonableness or payability of the service charges.

(d) The Service Charges Generally

41. The Tribunal has had regard to *Yorkbrook Investments Limited -v- Batten (1986) 18 HLR 25* in which it was held that there is no presumption for or against the reasonableness of standard or of costs as regards service charges. If a defence to a claim for maintenance costs is that the standard or the costs of the service are unreasonable, the tenant will need to specify the item complained of and the general nature – but not the evidence – of his case; once the tenant gives evidence establishing a prima facie case, it will be for the landlord to meet those allegations. The Tribunal is satisfied that the Applicants in the present proceedings have established a prima facie case.

42. The Managing Agent has provided evidence of services provided by way of invoices, correspondence and checklists, but they contain little narrative as to the need for the provision, the level of service provided or the provision of quality or expenditure control. There is no doubt that the absence of such

narrative has arisen as a result of the shortcomings mentioned in (c) (iii) above. The information provided is insufficient to enable the Applicants to satisfy themselves that they are being asked to pay reasonable amounts which represent value for money. It is the Leaseholders who ultimately have to bear the costs and it is incumbent upon the Respondent and the Managing Agent to provide sufficient information to enable them to assess the position.

43. In this respect, the Tribunal would observe that Section 22 of the Landlord and Tenant Act 1985 makes provision for the inspection by the tenant of specified documentation. It appears that the Applicants were offered facilities for inspection but, having regard to the information contained in the documentation placed before the Tribunal, it is unlikely that it would have fulfilled the purpose for which inspection might reasonably be considered to be necessary. It is essential that the information kept by the Respondent (or those acting on the Respondent's behalf) should be clear and transparent disclosing an audit trail which would show the basis upon which the services were considered necessary; the process of commissioning, including a tendering process or a clear explanation as to why tenders had not been obtained; the basis of any estimated cost; the computation of the final cost; and a statement reflecting quality control and satisfactory completion. None of that information is currently available.

44. The Applicants have submitted evidence of comparable charges in respect of the challenged aspects of the service charges. That evidence took the form of quotations from local contractors for various services. They were all cheaper than the charges levied by the Respondent. The Tribunal does not, however, have detailed specifications as to the level or extent of the services covered by the quotations. There is no evidence as to the competence of the contractors concerned. There is no evidence that they were aware of, or took into account, the listed status of the Building or its situation in a conservation area.

45. The Tribunal has had regard to *Forcelux -v- Sweetman [2001] 2 EGLR 173* in which it was held that reasonable expenditure did not have to be the cheapest available, as long as it was within the market norm. The Tribunal are aware from their own experience and knowledge that the service charges for the Property are not substantially different from those of other, similar developments in the immediate area or in the wider area of the Tribunal's Northern Region. In the whole of these circumstances, the Tribunal finds that the comparable evidence submitted by the Applicants is of little assistance in assessing the reasonableness of the service charges in this particular case.

46. With these principles in mind, the Tribunal has assessed the reasonableness of the service charges which have been challenged by the Applicants on bases other than in reliance on the comparable evidence produced. In this respect, the Lead Applicant helpfully produced at the hearing a summary of the challenged items of expenditure with an indication as to Applicants' suggested basis of charge.

(e) Service Charges for the period from 15 November to 31 December 2013

47. The Applicants suggested that, in some cases, they should pay a proportion of the charge based on 2/12ths of the estimated costs for the year, that is, in

respect of the two months to which the demand related. The Tribunal does not accept that such an approach should be adopted where there is clear evidence of actual expenditure which is recoverable under the terms of the Leases. It is unlikely in most cases that expenditure will be incurred on a constant basis throughout the year.

(e) (i) Accountancy fees

48. The Applicants challenged the accountancy fees in the sum of £175.00 and suggested that the charge should be based on a 2/12ths proportion of the estimated annual charge. That is rejected for the reasons given in paragraph 47 above. The Tribunal notes that the charge levied comprises invoices paid to Blue Accounting UK Limited in the sum of £100.00 and David Harrison in the sum of £75.00. The Management Agreement, at paragraph 27 of Part1 of Schedule 1, provides that the Managing Agent is –

> 'To maintain adequate bookkeeping procedures, prepare and arrange for the production of Service Charge accounts for consideration by the [Respondent] and thereafter instruct auditors and deal with any queries raised by the auditors.'

49. It is evident that the Managing Agents sub-contracted at least part of their duty in this respect to Blue Accounting UK Limited and did not, in any event, instruct auditors. The management fee payable to the Managing Agents is expressed, at Clause 7 of the Management Agreement, to be 'in consideration for the performance of its obligations under this Agreement.' In these circumstances, the Tribunal finds that the fee paid to Blue Accounting UK Limited is not recoverable as part of the service charge. The remuneration for the work undertaken by Blue Accounting UK Limited is included in the management fee.

50. The Lead Applicant produced evidence that David Harrison did not have an accountancy practising certificate. There is no evidence that the Respondent or the Managing Agent was aware of that position at the time David Harrison was commissioned. The Tribunal is satisfied that the Respondent and the Management Agent acted in good faith.

51. The Tribunal accordingly orders that the accountancy fees by reduced from £175.00 to £75.00.

(e) (ii) Bank charges

52. The Applicants challenged the recovery of bank charges of £20.00 on the basis that they were not expressly mentioned in the Leases or, alternatively, that they should be limited to the level of the bank charges made for November and December 2013. The Tribunal finds that there is no merit in the challenge for the following reasons.

53. The Leases provide, at paragraph 1.11 of part D of Schedule 4, for the recovery of –

> 'All other costs and expenses not referred to above incurred in the management of the Block.'

54. The Tribunal rejects the Applicants' argument that this provision should be construed restrictively in accordance with *Gilje -v- Charlegrove Securities*

Limited [2002] 1 EGLR 41. The Tribunal has had regard to *Cadogan -v-27/29 Sloane Gardens LRA/9/2005* in which it was said that the approach in *Gilje* does not –

> '...permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose, and the context may justify a "liberal" meaning.'

55. The relevant provision in the Leases is clear and unambiguous. It is not a general catch-all, but is limited to management expenses not specifically mentioned. In that context, the Tribunal finds that a reasonably well-informed prospective lessee with the benefit of legal advice (and the Applicants all instructed solicitors to act in the acquisition of their interest) would be aware that bank charges were potential management expenses.

56. The limitation of recovery to the months of November and December 2013 is rejected for the reasons given in paragraph 47 above.

(e) (iii) Building insurance

57. The Applicant has challenged the reasonableness of the service charges relating to the insurance premiums on the basis that it should be limited to 2/12ths of the budgeted figure, that is, for the months of November and December 2013. The challenge is rejected for the reasons given in paragraph 47 above. The Applicants have had the benefit of the insurance from the acquisition of their interests (and arguably from the dates on which contracts were exchanged). The insurance renewal date was 1 October 2013 which post-dated the acquisition dates.

(e) (iv) Cleaning communal areas

58. The Applicants have challenged the reasonableness of the charges for cleaning communal areas on the bases that the costs are unreasonable and that there is no evidence of the work being carried out in some instances.

59. The Tribunal has already found that the costs for the work are reasonable – see paragraphs 44 to 46 above. However, the Tribunal accepts the Applicants' contention that there is not sufficient evidence to demonstrate that the works were carried out as claimed. There is no schedule of the works carried out for the period in question and the only supporting documentation provided by the Respondents comprises two invoices, both with general, uncosted narratives and total charges of £288.00 for November 2013 and £360.00 for December 2013, neither of which has any information upon which to base an assessment of the extent of the work claimed to have been undertaken.

60. The Tribunal recognises that that these circumstances disadvantage the Respondent quite considerably, but can see no sustainable reason to assist by proceeding by way of making assumptions or drawing inferences which are not evidence-based. In *Schilling & Others -v- Canary Riverside Development PTD Limited (LRX/26/2005 LRX/31/2005 LRX/47/2005),* it was held that the burden of proof was upon an applicant, although His Honour Judge Michael Rich QC went on to say that

> 'In civil cases, where the standard of proof is only the balance of probabilities, the burden matters only where either there is no evidence or,

in the very unusual circumstance that, having heard all the evidence, the tribunal is unable to make up its mind.'

61. Having regard to the absence of any evidence at all that the communal area cleaning services were actually commissioned and undertaken or as to any breakdown of the costs involved, either by way of reference to particular services or unit costs, the Tribunal have concluded that the services charges demanded by the Applicant for the period in question could not be found to be reasonable.

62. It is reasonably likely that some services were provided in the period in question, but there is no reliable documentary evidence as to the nature, extent or costs of such services. The Tribunal has not, therefore, made any decision as to what might have been reasonable charges for such period.

63. The Tribunal has disallowed the communal area cleaning costs in their entirety.

(e) (v) Management fees

64. The Applicants have challenged the reasonableness of the management fees and suggested that they should be reduced to £250.00, being 2/12ths of the annual estimated charge. The Tribunal notes that the invoice for the management fee for the period in question discloses no unexpected activity or indication that it relates to any provision over and above the discharge of obligations under the Management Agreement. There is no reason in principle to reject the Applicants' challenge.

65. Moreover, the Tribunal observe that the Managing Agent has not discharged the whole of the obligations for which the management fee is intended to provide remuneration. In particular, the Managing Agent has not provided for the provision of services on a competitive basis and has not kept adequate accounts (see paragraphs 31 to 35 and 48 to 51 above). In these circumstances, the Tribunal find that the full extent of the management services envisaged by the Management Agreement has not been met. There is a significant and unacceptable shortfall in management delivery of the services for which charges are made. The Tribunal orders that the management fee for the period in question be reduced by a further £50.00, the net amount being £200.00.

(e) (vi) Risk assessments

66. The Applicants have challenged the fire and health and safety risk assessment charges on the basis that neither needed to be undertaken as previous assessments had been made relatively recently. The Tribunal accepts the rationale for the Applicants' challenges, but also accepts the evidence that neither the Respondent nor the Managing Agent was aware of the previous assessments. In those circumstances, it was reasonable for the assessments to be undertaken and the costs are properly and reasonably included in the service charges.

67. The Tribunal would observe, however, that any future assessments would have to be based on an objective examination of the need for such assessments to be undertaken and the commission of the assessments should be supported by sustainable reasons for their necessity.

68. The Respondent and the Managing Agent now have the most recent risk assessments and those which were commissioned before their involvement with the Building. The contents of those assessments should be taken into account when determining the need for future assessments.

(e) (vii) Repair provision

69. The Applicants have challenged the reasonableness of the charges made for repair works on two bases: by suggesting that the costs should be limited to 2/12ths of the estimated expenditure, being the number of months (November and December 2013) referred to in the demand; or, in the alternative, that, because the total cost exceeded the threshold which triggered the consultation requirements for qualifying works under Section 20 of the Landlord and Tenant Act 1985, the costs were limited to £250.00 per leaseholder.

70. The limitation of recovery to the months of November and December 2013 is rejected for the reasons given in paragraph 47 above.

71. In relation to the alternative basis of challenge, the Applicants rely on *Phillips and Others -v- Francis and Another [2012] EWHC 3550 (Ch).* In that case it was held that -

72. 'As the contributions are payable on an annual basis then the limit is applied to the proportion of the qualifying works carried out in that year. Under this legislation there is no "triviality threshold" in relation to qualifying works; all the qualifying works must be entered into the calculation unless the landlord is prepared to carry any excess cost himself.'

73. The Chancellor went on to say (at paragraphs 36 and 37) –

> '...such a construction conforms more closely to the ongoing works of repair and maintenance likely to be necessary on an estate in multiple occupation. They are unlikely to be identified as parts of a complete set of works which can be costed at the outset. In the normal way they will be carried out as and when required. The need for some limitation on an obligation to contribute is at least as necessary with sporadic works of that nature as with a redevelopment plan conceived and carried out as a whole.
>
> ...all [of the qualifying works] should be brought into the account for computing the contribution and then applying the limit...'

74. The Tribunal finds that all of the works of maintenance and repair included in the service charge for the period in question, including the £42.00 for electrical works (which were challenged on a separate basis by the Applicants), were qualifying works and that their cost exceeded the threshold for consultation, that is, a contribution of £250.00 per tenant. There was no application to the Tribunal under Section 20ZA of the Act for a dispensation in respect of the consultation arrangements and the Tribunal cannot, in any event, see good reason for granting a dispensation. The recoverable cost must, therefore, be limited to £2650.00 per leaseholder.

75. The Tribunal orders that the service charge for repairs, including the electrical works, be reduced from £6,164.00 to £3,000.00.

(e) Service Charges for the year ending 31 December 2014

76. The Applicants have challenged the reasonableness of a number of aspects of the service charges for the year ending 31 December 2014. The Tribunal finds that it would be inappropriate and premature to consider the challenges in detail at this stage because the charges are based on estimates of expenditure.

77. The Tribunal has already found for the reasons given in paragraphs 44 and 45 above that the comparable costs provided by the Applicants are of little value in assessing the reasonableness of costs. Moreover, The Tribunal is aware from their own experience and knowledge that the estimated service charges for the Property are not substantially different from those of other, similar developments in the immediate area or in the wider area of the Tribunal's Northern Region. The Tribunal finds that the estimates of expenditure produced by the Respondent are reasonable and that, on that basis, the due proportions are payable by the Applicants on the due dates.

78. An objective assessment of the actual expenditure can only realistically be made when the accounts for the year are finalised and any adjustments duly made. The Tribunal would expect to see those final accounts prepared, and supported by relevant material, as mentioned in the Tribunal's general findings recorded above, particularly those contained in paragraphs 31 to 38 and 41 to 46, and to have had regard to the Tribunal's express findings in relation to the service charges for the period from 15 November to 31 December 2014. Any new provision, such as the CCTV provision, should be supported by an objective assessment of need taking account of all relevant issues, including the views of the leaseholders and the residential occupiers.

79. It is open to any party to make a fresh application to the Tribunal if they are not satisfied with the outturn accounts or any subsequent action or inaction by other parties.

(f) Administration Charges

80. The Tribunal has found, for the reasons given in paragraphs 21 to 23 above that the various service charge demands levied by the Respondent are not payable by the Applicants. It follows that the administration charges levied in respect of action to recover those charges are also not payable.

81. The Tribunal also finds that the Applicants were justified in withholding payment of the service charges because they were given inadequate information upon which to assess the reasonableness of the service charges – see paragraphs 42 to 43 above. In those circumstances, the Tribunal find that the administration charges are not payable in any circumstances, including action by the Respondent to remedy the defective service charge notices.

COSTS

82. The Tribunal has power to award costs and/or reimburse fees under Rule 13 of The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provides, insofar as it is material to the present case:

> '(1) The Tribunal may make an order in respect of costs only –

... (b) If a person has acted unreasonably in bringing, defending or conducting proceedings in –

... (ii) A residential property case...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or any part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.'

83. Applications for the award of costs were made by both parties. The Tribunal has determined that, on the basis of the evidence at the time of the Determination, there was no circumstance or particular in which any of the parties had acted unreasonably. The Tribunal concluded that it would not be appropriate or proportionate to award costs to either party.

84. The Tribunal found that the need for the proceedings could have been avoided if the Respondent and the Managing Agent had secured management of the Property in accordance with the Management Agreement and made sufficient information available to the Applicants to enable them fully to assess the reasonableness of the service charges. The Tribunal have decided, therefore, to make an order for the reimbursement by ther Respondent to the Lead Applicant of the application fee of £125.00 and the hearing fee of £190.00.

85. The Applicants requested that an order be made under section 20C of the Landlord and Tenant Act 1985 that the costs incurred, or to be incurred, by the Respondent in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants. For the same reasons recorded in the previous paragraph, the Tribunal have determined that it would be reasonable or proportionate to make an order.

POSTSCRIPT

86. After the hearing, the Lead Applicant sent further documents to the Tribunal. They were received after the Tribunal had made their decisions on the applications but before this determination had been settled by the Tribunal members. It was decided that, as the decisions had already been made and the Respondent had not had an opportunity to comment on the documents, they should not be taken onto account.

87. In reaching this decision, regard has been had to *Ladd -v- Marshall [1954] EWCA Civ1.* There was nothing on the face of the documents or in the Lead Applicant's covering email which suggested that their contents would have an important influence on the result of the case.