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HM COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Application relating to payability and reasonableness of a service charge under the Landlord and Tenant Act 1985

Case number	**BIR/00CN/LIS/2012/0057**
Property	**Apartment 103, 2 Masshouse Plaza, Moor Street, Birmingham B5 5JF**
Applicants	**Masshouse Block HI Ltd, Masshouse Residential Block HI Ltd, Masshouse Management Ltd**
Applicants' representative	**Braemar Estates (Residential) Ltd**
Respondent	**Peter Frederick David Moffatt and Carol Moffatt**
Date of inspection	**19 March 2013**
Date of hearing	**19 & 20 March 2013**
Tribunal	**Mr C J Goodall, LLB, MBA Chair** **Mr R Brown, FRICS** **Mr N Wint, BSC (HONS), ACIArb, FRICS**
Date decision issued	18 JUN 2013

Background

1. Mr Peter Moffatt and Mrs Carol Moffatt ("the Respondents") are the owners of a leasehold interest in Apartment 103, 2 Masshouse Plaza, Moor St, Birmingham B5 5JF ("the Apartment"). They bought the apartment on 11 December 2006. Their interest is for a term of 150 years less 9 days, under a lease from and including 8 December 2003 ("the Lease"). The expiry date is therefore midnight on 28 November 2153.

2. The lessor is Masshouse Developments Ltd. There are three more companies referred to in the lease who are intended to have management responsibilities, called Masshouse Block HI Ltd ("MB Ltd"), Masshouse Residential Block HI Ltd ("MRB Ltd"), Masshouse Management Ltd ("MM Ltd"). The lease contains obligations upon the Respondents to pay ground rent and service charges for the Apartment.

3. The Apartment is one of 173 apartments in a building known as Block HI, Masshouse Plaza, Moor St, Birmingham ("Block HI"). There is also, now a second block known as Block M on the Masshouse Plaza ("Block M"), though this block only opened in about March 2012. The blocks are part of a development described in this decision as the Masshouse development.

4. Management of Block HI and now Block M is currently contracted to Braemar Estates (Residential) Ltd ("Braemar"). They took over management on 4 January 2010 from former managers LivingCity.

5. A dispute has arisen between the Respondents and Braemar about the charges that have been levied upon the Respondents. MRB therefore commenced proceedings for the amount they claim is due from the Respondents in the sum of £1,592.87 plus interest and costs, in the Banbury County Court on 19 January 2012. On 5 July 2012, the York County Court (to whom the proceedings had been transferred) made an order transferring the proceedings to the LVT in the following terms:

   "The Claim and Counterclaim in this action and any costs and duplication of charges arising from claim 0ZA02443 between Masshouse Management Ltd and the Defendant shall be referred to the Leasehold Valuation Tribunal for determination including the costs of this application."

6. The Applicants have also submitted an application form to the LVT for a determination of the service charges due from the Respondents for the service charge years ending on 31 March 2010, 2011, 2012, and 2013.

7. This decision is the determination of that application and the Tribunal's decision on the matters transferred to it by the York County Court.

The structure of the leases

8. There are complex lease arrangements in place. The arrangements are apparently that Masshouse Developments Ltd, the landlords (who are themselves tenants of Birmingham City Council), granted an underlease of Block HI, Masshouse Plaza to MB Ltd (though no copy of this lease has been provided to the Tribunal), and MB Ltd then granted a sub-underlease to MRB Ltd, a copy of which has been provided to the Tribunal. The sub-underlease expires on 4 December 2153, and it is therefore an overriding lease. It demises to MRB Ltd the residential units at Block HI, and under it the Respondents are therefore now the tenants of MRB Ltd. MRB Ltd has an obligation to comply with certain covenants to its landlords and to pass on certain of the sums collected under the service charge to those superior landlords. The Tribunal has not been provided with any copy of any lease granted to or by MM Ltd.

9. The complex lease arrangements have limited significance for this case, because the terms of the Lease itself set out the payments the Respondents must pay. The Lease obliges the Respondents to pay various rents under clause 4. Firstly, the principal rent, which is £195 per annum, rising every 10 years of the term of the Lease by inflation, measured against the Retail Prices Index. Secondly, there is an insurance rent, under clause 4(b)(i) and 5(e) of the Lease, which is payable to MB Ltd. Thirdly, a service charge is to be paid under clause 4(b)(ii) and clause 13 to MRB Ltd.

10. The service charge itself is broken down into three components, which are an Estate Service Charge, a Residential Service Charge, and a Structural Service Charge (sometimes called structural and shared services). The proportions of each of these the Respondents pay are set out in the Lease and are:

Estate Service Charge	0.28%
Residential Service Charge	0.33%
Structural and Shared Service Charge	0.28%

but presumably for accuracy, so that exactly 100% of the service charge is recovered, the calculations are made to four decimal places so that 0.2761% and 0.3291% are used instead of the lease percentages.

11. The Tribunal understands that the three management companies are each to play differing roles in providing these services. MM Ltd are responsible for the estate services, MRB Ltd are responsible for the residential services, and MB Ltd are responsible for the structural services.

12. From 2011/12 onwards, the percentage proportion charged to the tenants for the structural and shared service charge changed. This charge is for the costs incurred by MB Ltd in providing the services set out in Part 3 of Schedule 1 of the Lease, which in summary are the costs of maintaining and repairing the structure of the Block. The ground floor of the Block contains commercial units which between them contribute 16.11% of these costs. A decision was taken that the service charge accounts would be easier to present and

understand if the residential tenants remaining contribution of 83.89% of the costs was apportioned between them so that 100% of that 83.89% was shown as recovered. This means that in the accounts, the Respondents will from the 2011/12 year on be charged 0.33% of 83.89% of the structural and shared costs, rather than 0.28% of 100% of those costs. This was not challenged by the Respondents, but in any event it has no real impact upon the actual amounts charged; merely the presentation.

13. Clause 13 of the Lease contains the arrangements for payment of the service charge. All service charge payments are to be paid to MRB Ltd (unless it directs otherwise), even though they may actually be services that MM Ltd or MB Ltd provide or are entitled to collect. The Respondents are to pay their service charge to MRB Ltd by equal quarterly payments in advance, together with any additional sum that MRB Ltd may properly and reasonably require if it is required to provide services, and sums held on account are insufficient.

14. MRB Ltd is required to keep proper books of account and as soon as reasonably practicable after the end of each service charge year it is to prepare and provide to the Respondents a statement showing the total costs, the proportion of them payable by the Respondents, the sums paid in advance by the Respondents, and the balance due therefore either from or to the Respondents. Any balance due is to be paid by the Respondents and balance paid in excess is to be credited to the future advance payments due from the Respondents (see clause 13(d)).

15. The service charge year runs from 1 April to 31 March, though there is a power for MRB Ltd to vary this. There is also a power for MRB Ltd to vary the proportions of service charge which the Respondents pay to ensure that the costs are apportioned fairly and reasonably between each tenant and any other tenants and other occupiers of the building.

16. Clause 13(h) provides:

    "The Service Costs may include the costs of any managing agents or [MRB Ltd] own management fee where [MRB Ltd] undertakes the management and provision of the Services itself but these costs may not exceed 10% of the Service Costs (excluding the management fee)."

17. In Schedule 1 of the Lease the actual services which are to be provided under the three headings of Estate, Residential, and Structural are set out. The issues in this case have not focussed on whether any service charged for is covered by the schedules in the Lease, and it is therefore not necessary to set these out in detail.

Inspection

18. The inspection took place on the morning of 19 March 2013. The Applicant was represented by Mr Ian Eaton, Senior Property Manager from Braemar, and Mr Robert Dean, the Braemar Area Manager. Mr Chris O'Reilly, the Building Manager, also attended the inspection. The Respondents were unable to be present.

19. The Masshouse development occupies a prominent position in a substantially redeveloped area of the City of Birmingham. Block HI is bounded on the southern side of the whole development site by Masshouse Lane, and it contains 14 storeys of mixed studio apartments, and one and two bedroom flats. The site slopes so there are two underground / semi underground car park floors which extend underneath both Block HI and Block M. Vehicular access is gained from the southern side of the Block at Masshouse Lane.

20. The main entrance to the flats is at ground floor level on the northern side of Block HI. There is a restricted access door entry system with swipe card / speaker access only. Apart from the entrance to the flats, the ground floor comprises commercial retail units the majority of which are now let. The flats entrance leads into a small entrance hall off which are post boxes for each flat, two lifts serving the flats, and a building managers office. That office is the site for security camera monitors, and the electronic control systems for the fire alarm system and the door entry system.

21. There is an electricity meter cupboard in the entrance hall which the Tribunal was advised contains the meter for the supply of electricity to the common parts, lifts, lights in the residential communal areas, the car park, and the lift AOV system. Individual flats have their own separate electricity supply and meters.

22. The entrance hall leads to the stairway for the residential floors, which can also be accessed via two passenger lifts. The layout in each floor is fairly standard. There is a common hall way which leads to an internal corridor on each, off which are the front doors to the flats. Floors 1 – 8 each have 14 apartments, floors 9 – 12 have 13, floor 13 has 5, and floor 14 has 4, making a total of 173 flats. Electric heaters are provided for the common hallways, but the Tribunal was told these have been disconnected.

23. The block is fitted with a fire protection system including fire detectors in the corridors and an automatic opening vent system on each floor. There is also a rubbish disposal system via bin chutes the outlets for which are situated in each corridor.

24. On the underground levels are the two floors of car parking spaces providing 201 car parking spaces for both Block HI and Block M. The Tribunal understands that the Respondents have no car parking space within their demise, nor any right to use one.

Law

The Law of service charges

25. The powers of the Tribunal to consider service charges are contained in sections 18 to 30 of the Landlord & Tenant Act 1985 (" the Act").

26. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

a. The person by whom it is or would be payable
b. The person to whom it is or would be payable
c. The amount, which is or would be payable
d. The date at or by which it is or would be payable; and
e. The manner in which it is or would be payable

27. In effect, this gives an opportunity for both a proposed budget for service charges to be raised with the Leasehold Valuation Tribunal and a further opportunity for the sums then actually spent, when they are known, to be challenged.

28. Section 19(1) of the Act provides that:

"Relevant costs shall be taken into account in determining the amount of the service charge payable for a period –

(a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services and the carrying out of works, only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly."

29. A service charge is only payable if the terms of the lease permit the lessor to charge for the specific service. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (*Gilje v Charlgrove Securities [2002] 1EGLR41*).

30. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (*Yorkbrook Investments Ltd v Batten [1985] 2EGLR100).*

31. In relation to the test for establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

"39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements

of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence..."

32. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

"103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

33. And further clarification of the meaning of "reasonably incurred" has recently been provided by the Upper Tribunal in *London Borough of Lewisham v Luis Rey-Ordieres and others([2013] UKUT 014)* which said (at para 43):

"...there are two criteria that must be satisfied before the relevant costs can be said to have been reasonably incurred:

(i) the works to which the costs relate must have been reasonably necessary; and

(ii) the costs incurred in carrying out the works must have been reasonable in amount."

The Law on consultation requirements

34. The law on the requirement to consult, and a landlord's right to request dispensation from that requirement is contained in section 20 and 20ZA of the Act, the relevant provisions of which are:

Section 20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) ...

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement
(a) if relevant costs 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 20ZA Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—
...
"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of a landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying agreement-
(a) if it is an agreement of a description prescribed by regulations
(b) in any other circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—
(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—
(a) may make provision generally or only in relation to specific cases, and
(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

35. Regulations have been made under these sections, which are the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations") (as amended).

36. Paragraph 3 of the Consultation Regulations provides:

3.— Agreements that are not qualifying long term agreements
(1) An agreement is not a qualifying long term agreement
(a) if it is a contract of employment; or

37. Paragraph 4 of the Consultation Regulations provides:

4.— Application of section 20 to qualifying long term agreements
(1) Section 20 shall apply to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100.

(2) In paragraph (1), "accounting period" means the period–
(a) beginning with the relevant date, and
(b) ending with the date that falls twelve months after the relevant date.

(3) [In] the case of the first accounting period, the relevant date is–
(a) if the relevant accounts are made up for periods of twelve months, the date on which the period that includes the date on which these Regulations come into force ends, or
(b) if the accounts are not so made up, the date on which these Regulations come into force.

(3A) ...

(4) In the case of subsequent accounting periods, the relevant date is the date immediately following the end of the previous accounting period.

38. Regulation 5 of the Consultation Regulations provides that the consultation requirements in relation to qualifying long term agreements to which section 20 applies, are the requirements specified in Schedule 1. There is no need to set these requirements out in this decision.

The Law on administration charges

39. The Tribunal's jurisdiction to consider an administration charge is derived from Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the Act"), the relevant parts of which provide as follows:

1 (1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

...

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

...

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

...

4 (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

5 (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Sub-paragraph (1) applies whether or not any payment has been made.
(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

Issues in this case

40. The Applicants have claimed service charge payments from the Respondents for Apartment 103 in the following sums:

2009/10 service charge	£729.38
2010/11 service charge	£810.09
2011/12 service charge	£672.62
2012/13 service charge (budget)	£614.28

41. These sums are said to be the Respondents share (in accordance with the lease apportionment set out in paragraph 10 above) of the total service charge costs incurred. A detailed breakdown of the headings for these overall charges is set out in Appendix 1 to this decision.

42. In addition, the Applicants have claimed ground rent, insurance premiums, and various administration and legal costs for alleged failure to pay, as set out below.

43. These proceedings have come about because in January 2012, MRB Ltd commenced proceedings, as described in paragraph 5 above, to recover what they said were arrears of service charges, ground rent, insurance premiums, and administration charges said to be due in the sum of £1,592.87 plus interest and costs ("County Court Claim 2"). The sum claimed in County Court Claim 2 does not include the 2012/13 service charge year and is made up as follows:

2009/10 year	£
Arrears of service charge	95.52
Ground rent	195.00
2010/11 year	
Admin fee	58.75
Arrears of service charge	376.00
2011/12 year	
Insurance	106.17

Arrears of service charge	447.43
Legal costs	314.00
Total	1,592.87

44. By the time these proceedings came to be heard, the Applicants' claim differed from the amount they claimed in County Court Claim 2. Alleged arrears of service charge for 2010/11 and 2011/12 are now said to be reduced, but the Applicants have added alleged arrears of service charge and insurance premium for 2012/13. In these proceedings they claim:

2009/10 year	£
Arrears of service charge	95.52
Ground rent	195.00
2010/11 year	
Arrears of service charge	326.00
2011/12 year	
Arrears of service charge	180.40
Insurance rent	106.17
2012/13 year	
Arrears of service charge	208.00
Insurance rent	153.38
Total	1,264.47

45. Despite Braemar saying in their written case to the Tribunal that the previous paragraph sets out the amount they claim from the Respondents, during the course of the hearing of the case it became their position that they also still claim a further sum of £314 being what they describe as "legal costs" in the 2011/12 service charge year. This sum is included in County Court Claim 2. This is not claimed as part of the service charge, but if it falls within the definition of an "administration charge", the Tribunal can consider whether it is payable. County Court Claim 2 also contains a second claim for an administration fee of £58.75 for the 2010/11 year. At the hearing of this case, Braemar stated that they no longer pursued that particular charge.

46. The Respondents say they do not owe anything to the Applicants. In their Defence to County Court Claim 2, they deny the amounts claimed are due, broadly on the grounds that are summarised in sub-paragraphs c and e below. In their response in this case, they have expanded their reasons, which can be summarised as:

a. In relation to the specific charges made for the service charge years in dispute, the Respondents challenge the amounts charged for security costs, the costs of engaging a building manager, the management fees, and the estate service charges.

b. In addition to direct challenges to the amounts charged, the Respondents also claim that the security costs, the building manager cost, and the management fees are all services that were contracted out to a third party under a qualifying long term agreement, and that the Applicant failed to consult properly under the Service Charge (Consultation Requirement) (England) Regulations 2003 ("the Consultation Regulations") so that the maximum charge legally due is limited to the sum of £100.

c. The Applicants are said to owe money to the Respondents which they say should be set-off against any sums the Respondents might owe to the Applicants. The reason the Respondents say the Applicants owe them money arises from a failed attempt by MM Ltd to sue the Respondents for alleged arrears under the Lease in 2010. That claim (under reference number 0ZA02443) ("County Court Claim 1") was discontinued by MM Ltd and the Respondents say that as a result, under CPR Rule 38.6, MM Ltd is liable for their costs.

d. Some elements of County Court Claim 2 were also included in County Court Claim 1. The Respondents say the Applicants are not allowed to recommence proceedings for the same sums a second time without leave of the court under CPR 38.7. The amount which the Respondents say cannot be pursued without leave is variously a figure between £371.27 and £620.25.

e. The methodology used for calculating the alleged arrears of service charge is not accepted. The Respondents say that a reconciliation of what has been demanded, what has been paid, and therefore what balance is now due is required. Their case is that a proper account would produce different figures from those claimed by the Applicants. In particular, the Respondents say they have not been given credit for the payments they have made.

47. The Tribunal also has to determine whether the legal costs claimed by the Applicants in the sum of £314 are subject to its jurisdiction and if so whether they are payable (see para 45).

Hearing, evidence, and the Tribunal's conclusions

48. The hearing of this application took place over two days on 19 and 20 March 2013. The Applicant's case was presented by Mr Eaton for Braemar. Mr Dean also attended and made representations. The Respondents were represented by the first respondent, Mr Moffatt. Mrs Moffatt, the second respondent, was in attendance. At the conclusion of the hearing, the parties were invited to make further written submissions relating to the two cases of *Paddington Walk Management Ltd v The Governors of Peabody Trust* and *Phillips & Goddard v Francis* that had been raised by the parties during the course of the hearing. Braemar did so by letter dated 9 April 2013, and the Respondents by email also dated 9 April 2013. After initial deliberations, the Tribunal raised further queries of the Applicants by letter dated 15 April 2013 to which Braemar responded by letter of 25 April 2013. The

Tribunal has considered all the documents and evidence presented at the hearing and these further responses identified in reaching its conclusions in this case.

49. At the outset of the hearing, Mr Moffatt confirmed that none of the charges for ground rent or insurance rent were disputed by the Respondents.

50. In this decision, the Tribunal will consider each of the issues raised by the Respondents, and which are summarised in paragraph 46 above; will set out the evidence and submissions of the parties in relation to these issues, and will give the Tribunal's determination in relation to each issue.

51. However, at the outset, the Tribunal has decided to take a slightly different approach to the 2012/13 claim than it has to the other three years in issue (see *Plantation Wharf Management Co Ltd v Dennis Arthur Jackson and Pauline Irving [2011] UKUT 488)*. The 2012/13 claim is for a service charge payment of £614.28 based on a budget. This is a sum that, using its knowledge and expertise, the Tribunal would find it very difficult to criticise as a budget figure. It is a reasonable service charge sum for an apartment in the centre of Birmingham of the standard of Block HI. Bearing in mind that the date of this decision is some months after the end of the 2012/13 year, it would be much more sensible for the Tribunal to approve the budget and allow any issues arising when the actual figures are produced to be resolved then. However, as a result of decisions made further on in this decision, the management fee contained in the budget for 2012/13 will have to be recalculated anyway when final accounts are issued. Accordingly, the Tribunal finds that the sum of £614.28 is due from the Respondents in respect of budgeted service charges for 2012/13, as set out in Appendix 1. The rest of this decision will deal with the actual outcome for 2009/10, 2010/11, and 2011/12.

(a) challenges to specific items in each of the service charge years

52. As identified in para 46(a), there are four items included within the service charge which are disputed by the Respondents, being (1) the amounts charged for security costs, (2) the costs of engaging a building manager, (3) the management fees, and (4) the estate service charges. Each is now considered.

Security costs

53. In the years in dispute, the total costs for Block HI charged for this item were:

	(£)
2009/10	41,496.37
2010/11	40,658.74
2011/12	57,342.70*

*At the hearing, Braemar clarified that the Estate Services Charge for 2011/12 onwards included security guarding costs, which had previously been part of the Residential Service Charge. The breakdown of the Estate Services Charge for 2011/12, totalling £57,342.70, was provided in Appendix D of Braemar's letter of 25 April 2013.

54. The Respondents' grounds for challenging these items are firstly that the procurement of security did not solve the underlying problem of management of anti-social behaviour and so is not reasonably incurred. Secondly they argue that the service was over specified and too expensive in 2009/10, 2010/11, and 2011/12. This argument relies on the fact that in 2012/13 Block M came under management and from that point onwards the security cost was shared with Block M. There was no overall increase in the amount paid for security so Block HI tenants were only charged approximately half of the cost from that year onwards, and therefore, it is argued, they must have been paying too much before.

55. Mr Eaton said there had been a considerable problem with anti-social behaviour at Masshouse. He had been involved with the management of Masshouse for some years before Braemar took over management, as he had been an employee of the previous managers, LivingCity. There had been acts of vandalism, complaints of noise, damage to common parts, and parties on corridors. Mr Moffatt's evidence confirmed there had been a consultation exercise in April 2008 to consider adding a single night porter between 19.00 and 04.00 hours Monday to Friday and 12.00 to 04.00 hours at weekends.

56. To deal with this management issue, Mr Eaton said that after consulting with apartment owners, a security guarding company, Premier Group Services based in Digbeth, Birmingham had been engaged to provide security at Masshouse probably at some point in 2008/09. Out of hours patrols were provided, with a comprehensive patrol at 7am. Any incidents are logged in a log book. He said that he believed that as a result of placing the contract with Premier, behavioural and anti-social problems at Masshouse had reduced. The Tribunal examined a log book of incidents showed approximately 20 incidents in an average week.

57. Mr Moffatt asked Mr Eaton to justify the cost of the security guarding contract. He suggested the contract hours of approximately 53 hours per week, at say £8 per hour, should result in a charge of approximately £22,000 per annum, and anything exceeding that sum was overcharging. Mr Eaton and Mr Dean disagreed with Mr Moffatt's figures saying that the costs of supervision, security industry registration, sickness cover, holidays, overtime, contractors profit and training and supervision needed to be added in. They said a cost of £12/13 per hour was a competitive rate.

58. Mr Moffatt strongly criticised the cost of the security provided. He pointed out that he had a small flat and the security cost seemed to him to be disproportionate. The cost had fallen significantly in recent years because the cost was now shared with Block M, and the figures now being achieved should have been adequate for the period 2009 – 2012. He also criticised the lack of consultation and the absence of any tenant representative involved in the decision about the security contract.

59. After the first hearing day, the Tribunal requested the Applicant to provide further evidence of the reasonableness of the cost of the security contract. The Applicant supplied evidence showing the process it engaged in when retendering the service in 2011. The Tribunal is

satisfied that that process was a thorough and a professional process designed to produce the best service at the lowest cost.

60. The Tribunal's task is to assess whether the Applicant has taken a reasonable decision to incur the cost of security guarding, and if so, whether the cost incurred is reasonable and the service provided of a reasonable standard. There is specific evidence of anti-social behaviour at the Block which needed to be dealt with. The Tribunal considers that the decision to engage a security company to provide the service described above was a reasonable decision. The Tribunal accepts the evidence of Mr Eaton and Mr Dean to the effect that a reasonable cost per hour for security services is in the region of £12/13. For a 53 hour week, and adding VAT, this results in a charge for 2009/10 and 2010/11 similar to the actual amounts charged as shown in paragraph 53 above. The Tribunal therefore determines that (subject to the consultation issue discussed below) the cost of providing security for those years is reasonable.

61. For 2011/12, however, the Tribunal are not able to understand why the cost, averaging about £41,000pa for 2009/10 to 2010/11 suddenly increases to over £57,000. No evidence was presented to the Tribunal by the Applicant to show a reason for this, and the Tribunal therefore determines that the sum allowed for security costs in 2011/12 is £41,000.

62. It is the case that the security cost has reduced in 2012/13 because the cost is shared between Block HI and Block M. It does not follow though that because a cost reduces as a result of economies of scale, the initial higher costs were unreasonable. Until 2012, the Applicants were not in a position to arrange for the security costs to be shared, and yet the Tribunal considers it was still reasonable for security to be provided in those earlier years.

The costs of engaging a building manager

63. The overall charges were:

	(£)
2009/10	34,965.36
2010/11	35,718.68
2011/12	19,509.00*

*now shared with Block M and contained in the structural and shared services accounts for MB Ltd. This figure is the total cost for Block HI but the way this is presented in the accounts is to require the residential units to contribute 83.89% though they then have to pay a higher percentage of those costs than the Lease requires.

64. The Respondents have two issues with these costs. The first is that there was no necessity for the costs to be as high in the first two years referred to, demonstrated by the fact that the cost has fallen in the last two years with no obvious loss of services. The second issue is whether this cost is boosted by a profit element charged by Braemar, who employ the building manager directly. It is claimed that the profit element (if any) is effectively a hidden management cost and should not be included within the service charge accounts as part of the cost of employment of the building manager.

65. At the hearing, Mr Eaton said that Mr O'Reilly had been engaged as building manager for Block HI by the previous managers, LivingCity, from at least 2006. Braemar had employed him as building manager when they took over the management contract on 4 January 2010, though from the letter of 28 April 2013, it appears he actually came across to Braemar in February 2010. His hours of work are 8am to 6pm from Monday to Friday, and he is available for weekend calls or night attendance if he is called out. Mr O'Reilly's costs comprise salary and employers NIC.

66. When questioned further by Mr Moffatt, Mr Eaton confirmed that Braemar also charge a profit element and VAT for supplying the services of Mr O'Reilly. Braemar invoice for that cost to the company responsible who include it in the appropriate category of service charge.

67. In relation to the cost of Mr O'Reilly's services, Mr Eaton said this has fallen during the period from 1 April 2009 to the present day for two reasons. Firstly, for the 2011/12 year, Braemar carried out a restructuring of their building management provision in Birmingham. They also manage another block in Birmingham called Beetham Tower, and Mr O'Reilly's role expanded to become "Birmingham City Centre Manager", looking after both Masshouse Block HI and Beetham Tower. Secondly, because of the coming on stream of Block M in about March 2012, the cost of managing Block HI became shared with Block M, so that the part of his cost which is borne by Masshouse is shared between both blocks in the ratio 50.88%/49.16% from the 2012/13 year onwards. Because the expanded role left Mr O'Reilly stretched, additional caretaking services are being purchased from a company called Hi-Clean, which are shown in the 2012/13 budget.

68. On day two of the hearing, Braemar produced a schedule of staffing cost showing that for the 2010/11 year, Mr O'Reilly's salary was £22,000. However, the total invoiced cost was £35,702, so that the recovery ratio for Braemar was 1.62 times the direct salary cost. For 2011/12, in his expanded role, Mr O'Reilly's salary increased to £27,000. Braemar's total charge increased to £45,000, which they sought to recover by apportioning that sum across all the buildings under Mr O'Reilly's management.

69. The Tribunal is entirely satisfied that the engagement of a building manager is justified. The Block is a large building of 173 residential units, with additional commercial units, a car park, and the adjoining Block M (from 2012). From a management perspective, it is difficult to conceive that the residents queries, supervision of contracts, monitoring of security, reporting, equipment checks and other jobs that have to be carried out at such a building could be undertaken other than by an on-site manager. It is reasonable for the reasonable cost of a building manager to be incurred, and this cost is recoverable through the service charge, and particularly through paragraph 11 of Part 1 and paragraph 30 of Part 2 of Schedule 1 of the Lease.

70. However, the Tribunal considers it unreasonable for either the Applicants or Braemar to add a profit element to the service charge on top of the actual cost of Mr O'Reilly's

services. The Lease allows recovery of the proper and reasonable expenditure incurred by the Residential Landlord (which is MRB Ltd) in providing the Residential Services. The expenditure incurred in the employment by Braemar of Mr O'Reilly, is his salary and benefits, plus employers NIC, plus any VAT that has to be paid in law. It does not include an additional on-cost. Such an additional cost is in reality a management cost or profit rather than an expense.

71. The Tribunal requested Braemar to provide further details of its profit element for this item, which were supplied in their letter dated 25 April 2013. For each year, Braemar explain that they charge Mr O'Reilly's salary, national insurance contributions, and a sum described as "payroll", to which they then add VAT. The sum produced by this process is less than the sum charged in the service charge accounts, and Braemar have described the difference as their profit.

72. An example of the approach Braemar say has been used is the 2009/10 year. They say Mr O'Reilly's salary was £22,000, his NIC was £3,036 (which is 13.8% of the total salary), and the payroll charge was £3,379.86, totalling £28,415.86. VAT on that total, at 17.5% would have been £4,972.77, giving an overall total of £33,388.63. The actual charge for the year was £34,956.36, giving a difference between cost and charge of £1,576.73. However, in their submission, Braemar give the profit as £1,084.10.

73. The Tribunal does not agree that this is the correct approach, nor does it accept the figures given. Firstly, it seems to the Tribunal that the employers NIC figure given is overstated. Employers NIC is payable as a percentage of salary above a threshold. In 2009/10, the percentage was 12.8%, and the threshold was £110 per week. Secondly, no explanation has been given to explain what is meant by "payroll". Conceivably it might be a benefits package, but no evidence has been given of this. Alternatively, it might be the cost of administering the payroll payments, but if so it seems very considerably in excess of a reasonable amount for one employee. Thirdly, the difference between Braemar's calculation of their profit and the figures calculated by the Tribunal give cause for concern. The Tribunal finds the amount that should be allowed within the service charge for the building manager are his direct salary, employers NIC, and VAT on the total of that sum. There should be no profit element. Doing the best it can with the information provided, the Tribunal has calculated what it considers is the reasonable cost of the building manager for 2009/10 – 2011/12. The calculations are set out in Appendix 2 and are based on the following assumptions:

- Mr O'Reilly's salary was £22,000 from 1 April 2009 until 31 May 2010. At that point it rose to £22,885 until 1 April 2011. On that date, due to promotion, it rose to £27,000.
- For 2009/10 and 2010/11, 100% of Mr O'Reilly's salary is chargeable to the service charge. For 2011/12, only 53% is chargeable because he also took responsibility for Beetham Tower. The percentage allowed is a straight apportionment between the two properties relating to the number of units in each (153/173).
- Employers national insurance is charged at 12.8% (until 6 April 2011) and then at 13.8% of earnings above the secondary threshold of £110 for 2009/10 and 2010/11 and £136 per week for 2011/12

- VAT is at 17.5% until 1 January 2011 and then at 20%
- For 2011/12, as this cost is now within the structural and shared services, only 83.89% of the total should be allowed (see paragraph 12 above)

74. The Tribunal determines that the Applicant is entitled to charge the following sums for the services of a building manager in the years in dispute:

	£
2009/10	28,298.51
2010/11	29,431.72
2011/12	15,872.86

Managing agent's fees

75. The management fees, charged through the structural and shared service charge, for the years in dispute are:

	£
2009/10	35,053.32
2010/11	34,846.89
2011/12	29,500.00

76. The grounds for this challenge are firstly that the management costs are too high for the service provided. The second issue is whether the overall costs are limited by clause 13(h) of the Lease.

77. Mr Eaton said that Braemar had been appointed as managing agents for the residential and structural services provided to Masshouse by MB Ltd and MBR Ltd on 4 January 2010. They were not instructed to manage the estate services until 1 April 2012.

78. Braemar's fees were to be for providing usual managing agents services as set out in the schedule to the Lease, and to include health and safety, management of staff, and making sure the property appeared looked after. The cost was, for 2009/10, £202.62 per apartment on a straight division between all apartments, equating to about £170 plus VAT, though it would appear this is apportioned unequally under the leases of the apartments. Braemar had been appointed, Mr Eaton said, as they had an existing relationship with the developer, and there had not been a competitive tendering exercise leading to their appointment. They manage a number of other blocks, including a number in Birmingham.

79. In his final oral submissions, Mr Eaton said that Braemar had been managing agents for Masshouse only since January 2010, and during that period they had done a good management job. They had ensured health & safety compliance, had reduced anti-social behaviour, had ensured that the building was sufficiently attractive that good rents were achievable by leaseholders choosing to let their apartments, and their management charges were fair and reasonable.

80. Subject to the clause 13(h) issue, the Tribunal considers that the overall management fees which are being charged by Braemar are reasonable and within the range of charges usually and reasonably charged by a managing agent to reflect the work involved.

81. The second issue is the effect of clause 13(h) of the Lease which is set out again here for ease of reference.

"The Service Costs may include the costs of any managing agents or [MRB Ltds's] own management fee where [MRB Ltd] undertakes the management and provision of the Services itself but these costs may not exceed 10% of the Service Costs (excluding the management fee)."

82. At the hearing, the Tribunal asked the parties for their views on the interpretation and application of this clause. As this issue had not been raised in the pre-hearing documentation, the Tribunal also gave the parties the opportunity to make further written submissions on the point.

83. Braemar submitted that the 10% restriction upon the total management fee contained in clause 13(h) only applied where the residential landlord undertakes the provision of the services itself, so that the correct interpretation of the clause is shown by re-expressing it as follows:

"The Service Costs may include:
(i) the costs of any managing agents or
(ii) [MRB Ltd] own management fee where [MRB Ltd] undertakes the management and provision of the Services itself but these costs may not exceed 10% of the Service Costs (excluding the management fee)."

84. It is said by Braemar that this is clearly the correct interpretation of the clause on the wording used, but that if it is unclear, it must be interpreted by ascertaining what the reasonable person (with the relevant background information and experience at the time the lease was granted) would have understood the parties to mean. If there are two possible constructions, the one which is consistent with business sense should be preferred.

85. The Respondents argue that the 10% cap applies to whichever body undertakes the management of the Block, whether it be a managing agent, or the management company itself. They say that a cap makes sense as it protects the Leaseholders from excessive re-charges of managing agency costs on top of Service Costs.

86. The Tribunal considers that the meaning of the clause is quite clear and requires no recourse to principles of interpretation in the event of lack of clarity. The Tribunal cannot accept the interpretation suggested by Braemar on behalf of the Applicants. The phrase "but these costs" in line 3 of the clause clearly relates to the costs whether they are incurred by a managing agent or by MRB Ltd itself. There is therefore a limitation on the total amount of the management costs of 10% of the overall service charge, which has to

be calculated before a management fee is added, whether the management is provided by an agent or by MRB Ltd itself.

87. The Tribunal's decision on this issue does not mean that Braemar are not entitled to charge their client MRB Ltd the amount they have agreed, or contracted, to pay under the management contracts. It does however mean that MRB Ltd are not entitled to recharge this sum in full to the apartment owners.

88. The management costs that may be included in the service charge accounts for Block HI, the detail of which is shown in Appendix 1, are as a result of this determination the following sums:

	£
2009/10	16,875.54
2010/11	19,448.74
2011/12	17,064.44

These sums are exclusive of VAT (see clause 4(d) of the Lease), which therefore also needs to be added to the management fee.

Estate service charge

89. In each year in dispute, a proportion of the service charge has constituted the estate services charge. The amounts are:

	£
2009/10	32,055.00
2010/11	32,055.00
2011/12	57,343.00

90. Mr Eaton said the responsibility for estate services lay with MM Ltd. Braemar were not acting as agents in relation to the estate services until March 2012 and they had no control over this element of the service charge until then. Mr Eaton was not aware of any expenditure on estate services in 2009/10 and 2010/11, despite the sums of £32,055 (on the basis of 25p per square foot) having been charged to the leaseholders for each of those years. So far as he was aware, there had never been a reconciliation of the estate service charge sums collected. He acknowledged that any sums collected should have been placed in a trust account if they had not been spent, and he said that these sums were in a trust account. He was asked by the Tribunal to provide evidence that the monies were so safeguarded at the end of the first day of the hearing. On the second day, he told the Tribunal that it had not been possible to obtain a copy of the bank account that contained these monies.

91. For the 2011/12 year, Mr Eaton said that the charge made for estate services of £52,342.70 included the cost of the security contract, which had been moved from the residential service charge, as it was now a cost shared with Block M and therefore fell into the category of estate services.

92. Subsequently to the hearing, the Tribunal requested Braemar to provide a breakdown of the 2011/12 estate services charge by providing the invoices to support that charge. In its letter of reply to this request dated 25 April 2013, Braemar provided supporting evidence to show that £57,343.00 was incurred by MM Ltd in that year. This expense was for the cost of security guarding and has already been considered in this decision under paragraph 61 above. The Tribunal only allowed £41,000 of that expenditure.

93. The Tribunal is disturbed that no evidence of any expenditure under the heading of estate services for 2009/10 and 2010/11 has been provided at all. No expenditure has been incurred in 2011/12 apart from the security guarding cost which of course was not previously a constituent element of estate services. Further, Braemar, who are acting as agents for MB Ltd, MBR Ltd and MM Ltd and would and should therefore have been able to ascertain the position from their clients, have failed to provide any evidence that any sums collected and unspent under this heading are safeguarded for the service charge payers. To make matters worse, the audited accounts for 2010/11 and 2011/12 contain a certificate by the reporting accountants (who describe themselves as Chartered Accountants) that the accounts show a "fair summary of expenditure incurred on behalf of the tenants being sufficiently supported by invoices and other documents which have been produced to us." The owners of the apartments in Block HI are entitled to know on what their money has been spent, or if it was not spent, where it is.

94. On the basis of the evidence presented, the Tribunal finds that no costs have been incurred in 2009/10 and 2010/11 under the heading of estate services. If no cost has been incurred, and no account can be provided of the whereabouts of money collected, the sums requested are not payable as part of the service charge. Therefore the Tribunal determines that no contribution is payable by the Respondents towards the estate services for 2009/10 and 2010/11. The 2011/12 position has already been dealt with under paragraphs 61 and 92 above.

(b) failure to consult on entering into the security, the building manager, and the management fees contracts

The security contract

95. In relation to the security contract, Mr Eaton gave evidence conceding that when LivingCity were managers, they had failed in a minor respect to comply with the Consultation Requirements when entering into a security guarding contract with Premier in April 2008.

96. At the beginning of Braemar's own management period, a security contract had been placed as soon as they were appointed with Premier. Copies of this and subsequent purchase orders from Braemar for security were provided to the Tribunal. The first is dated 4 January 2010, which is the date that Braemar took over management of Block HI, and the order instructs Premier as follows:

"Following our takeover from the previous managing agent we would like you to provide security Guarding to the development known as Masshouse Block HI until the year end which is 31 March 2010."

97. There is then a second purchase order from Braemar to Premier dated 1 April 2010 for security guarding to Masshouse Block HI for a period of 11 months and 3 weeks.

98. A third purchase order dated 18 March 2011, again for security guarding of Masshouse Block HI has been provided, but this time the contractor is not Premier but a company called OCS Group UK Ltd. The contract period is said to be 11 months and 3 weeks. But in fact, as evidence provided by Braemar on the second day of the hearing establishes, during the period from about 28 March 2011 until 16 June 2011, Braemar was conducting a detailed retendering exercise for security services to six blocks of flats under its management. Invitations to tender were sent out on 28 March. The deadline for receipt of tenders was 15 April. There were various meetings and interviews with tenderers held in May 2011. Detailed contract negotiations and finalisation of the specification then took place, resulting in a contract being placed with OCS (evidenced by a purchase order dated 16 June 2011 provided by Braemar only on the second day of the hearing) for security services to be provided to Masshouse Block HI for a period of 11 months 21 days with a start date still to be agreed, for a price of £37,047.00 exclusive of VAT. It is difficult to understand why, if OCS were already operating the contract under the agreement dated 18 March 2011, the start date, as at 16 June 2011, was still to be agreed, or why OCS should feel the need to involve themselves in a competitive tendering exercise during March – June for a contract that had already been awarded.

99. The contract with OCS to provide security for Masshouse did not however last the course, as the fourth purchase order for security services provided to Masshouse, dated 13 February 2012, had reverted to Premier, and was again a contract for 11 months and 3 weeks.

The Building Managers contract

100. Mr O'Reilly, the building manager, is employed directly by Braemar as described in paragraph 65 above. The Tribunal has not been provided with his contract of employment, but it does have a job description. Mr O'Reilly's role has changed at various times over the four years under consideration in this decision. From 1 April 2011, he received a promotion and became Estate Manager for Braemar's Birmingham sites.

The Management contract

101. In their second bundle of documents, Braemar disclosed their management contracts. There are four. The first is a contract dated 4 January 2010 between MB Ltd, MRB Ltd, and Braemar. It is for a fixed term from 4 Jan to 31 March 2010, though it provides for an annual fee of £31,500 plus VAT. The second contract is dated 1 April 2010. It is between the same parties as the first contract and describes in the recitals the "re-appointment" of Braemar as agent for a fixed term, from 1 April 2010, for a period of 11 months and 30

days. Strangely, there is a right to terminate the agreement on giving three months notice, so the term would appear to be determinable within the fixed term. The fixed fee is £31,500 per annum plus VAT. The third and fourth agreements are in virtually identical terms to the second agreement, save for their dates and fees. The third agreement is dated 1 April 2011 (though the date of the signatures is 6 April 2011). The fourth agreement is dated 1 April 2012 (signatures 2 April 2012) but the fee for 2012 increased to £34,500 plus VAT.

The Tribunals determination on the consultation issue

102. Dealing firstly with Mr O'Reilly's contract, the Respondents put their case in their written submissions by saying that the consultation process has not been followed for the contracting in of the building manager from Braemar in and around January – March 2010. The Tribunal finds that Mr O'Reilly's employment with LivingCity was transferred to Braemar when they took over the management of Block HI, or alternatively, at that point he was directly engaged by them as an employee. That transfer or engagement is not, and could never have been, subject to the consultation requirements. Firstly, it was not an agreement by or on behalf of the landlord – rather it was a direct engagement by the manager. Secondly, it was a contract of employment, which cannot be a qualifying long term agreement. The Tribunal therefore finds, in relation to Mr O'Reilly's move to the direct employment of Braemar, that there is no obligation to consult and no consequence therefore arises from having failed to do so.

103. In relation to the other two contracts, section 20(1) of the Act says that a tenant's contribution towards the charges arising from a qualifying long term agreement are limited unless there has been consultation. The Respondents claim that the contracts described above should have been consulted upon, and failure to do so limits the amounts that can be charged.

104. Section 20ZA defines a qualifying long term agreement as "an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months."

105. Braemar have referred the Tribunal to the case of *Paddington Walk Management Ltd v The Governors of Peabody Trust [2009 WL 5641212]* a County Court decision of Her Honour Judge Marshall QC. In this case, the court looked at the definition of a qualifying long term agreement in the context of an agreement for an initial term of 12 months but thereafter to continue subject to three months notice on either side. Judge Marshall said:

> "48. In my judgement an agreement for a year certain and then from year to year to continue subject to not being terminated is not "an agreement for a term of more that 12 months" (emphasis added) within the meaning of the statute. ... In other words, the structure of the Act is that the definition of qualifying long term agreement is to apply to a contract in which the tenants would definitely have to contribute in respect of a period of more than 12 months."

106. The point at which it has to be determined whether a landlord (or its agent on its behalf) is entering into a qualifying long term agreement is the point of entering into the contract. That

follows from the definition contained in section 20ZA; when a contract is entered into, might it be a contract for a term of more than twelve months. The evidence which is summarised above shows that none of the two categories of contract now being considered were contracts which, at the point they were signed or placed, were to last for a period of more than 12 months. The security contracts and the management contracts used the curious device of being for less than 12 months, leaving a period during the year when there was no security or contracted management. This is very odd, and the Tribunal doubts that the paperwork truly reflected reality. But in the absence of evidence that in reality the contracts, at the time they were placed, were definitely contracts for longer than twelve months, the Tribunal determines that there was no obligation upon Braemar or the Applicants to consult on any of the contracts which Braemar entered into said to be subject to that obligation by the Respondents.

107. The Respondents argued that the case of *Phillips & Goddard v Francis 2012 EWHC 3650 (Ch)* applied and that it was authority to support a decision that the sum recoverable as a result of failure to consult should be limited to £100. The Tribunal has found that there is no legal basis for requiring the Applicants to consult, and therefore this case does not assist. In any event, *Philips v Francis* on its facts concerned failure to consult about qualifying works, rather than qualifying long term agreements.

108. There is though the question of the failure of LivingCity (on behalf of the Applicants) to consult on the contract for security guarding entered into between LivingCity and Premier in April 2008. Braemar admitted at the hearing that the technical requirements for consultation had not been fully complied with by LivingCity (and thereby that this was a qualifying long term agreement). The Tribunal finds that, as there is clear evidence that Braemar regarded it as important to confirm that contract the moment they commenced as managers in January 2010 (see para 96 above), the contract was still in existence at the point of their appointment. The Tribunal has not been provided with a copy of the contract between LivingCity and Premier, despite the Applicants having been required by the Tribunal Procedural Chair to do so. Doing the best it can on the limited evidence therefore available, the Tribunal considers, on the balance of probabilities, that the LivingCity contract with Premier was a qualifying long term agreement, that there was failure to consult on it, and that therefore during its currency, the Respondents contribution is limited to £100 in each accounting period. The Tribunal has to make an assessment of when that contract would truly have come to an end, so that the limitation on the cost would have ended, and determines that the contract would have endured, but for the appointment of Braemar at least until the end of the 2009/10 year, and therefore limits the cost to the Respondents in that year of the security contract to £100. The amount claimed from the Respondents during 2009/10 for security guarding is their share (0.3291%) of £41,496.37, amounting to £136.56. The Tribunal therefore makes an allowance to the Respondents in that year of £36.56, which is shown in Appendix 1.

c&d the County Court issues

109. The Respondents claim that they are entitled to set off against anything they owe to the Applicants against their costs of the discontinued County Court Claim 1, and that County

Court Claim 2 is deficient in that sums are claimed within it that have already been the subject of a claim, so that leave is required under CPR 38.7.

110. The jurisdiction of this Tribunal has been set out above. Under section 27A of the Act, the Tribunal may consider whether a service charge is payable. This gives the Tribunal, in theory, a wide discretion to consider a number of issues that may impinge upon the payability of a service charge, including, by way of example, whether a service charge is increased as a result of a landlords historic breach of a repairing covenant, or whether there might be a claim for loss of health or loss of amenity arising from breach of a repairing covenant. (see *Canary Riverside Pte v Schilling (LRX/65/2005 reported 16 December 2005) and Continental Property Ventures Inc v White (2006 1EGLR 85)*). It might be possible, in theory, even to stretch this principle so that the county court issues in this case could be considered by the Tribunal, though this has not been tested and the Tribunal doubts whether it would be right.

111. However, the Tribunal has been encouraged by the Upper Tribunal to be restrained in exercising jurisdiction beyond the express service charge issues raised in a case. Where matters are more appropriately determined by court procedures and by judges rather than by specialist tribunals, they should be so. The County Court issues are fairly and squarely within the jurisdiction of the County Court, and the Tribunal has no experience of determining these issues. It has no hesitation in declining to determine them. This decision will be sent by the Tribunal to the County Court that has referred the case to it, which will then be able to deal with all outstanding issues that remain, including costs.

e Calculation of the amount owing by the Respondents

112. Braemar has produced what it describes as a Tenant Statement in support of the amount it claims is owed by the Respondents. The Respondents have criticised this statement as inadequate to show the sum they now owe (if anything). The Tribunal entirely agrees with the Respondents as:
    a. the Tenant Statement contains no running balance;
    b. it seems to charge net sums rather than gross sums set against a receipt;
    c. according to the Respondents it has not recorded all payments they have made;
    d. despite the provision of a 2009/10 brought forward total from LivingCity, the opening position of the Respondents on the commencement of Braemar's management is very unclear;
    e. it has recorded some, but not all insurance premiums (3 are shown for a 4 year period)
    f. it terminates in August 2012 and so does not cover the whole period considered in this case
    g. It is extremely difficult to reconcile with the claims now made by the Applicants, summarised in paragraphs 43 and 44 above, which themselves are also difficult to reconcile.

113. However, this finding has no effect upon the payability of any service charges, ground rent, and insurance charges that are properly invoiced to the Respondents. Braemar's

statements could undoubtedly be much clearer and easier to understand. At the same time, Mr Moffatt has demonstrated that he is more than capable of preparing his own balance, and it may well be in his interest to do so, for if he actually runs his account with Braemar in debit, it will not be surprising if proceedings are commenced to try and resolve the position. Mr Moffatt should also note clause 4(b) of the Lease which excludes any right of set-off in relation to service charges.

The administration charge of £314

114. Paragraph 39 above has set out the law on administration charges. The Tribunal is satisfied that the Applicants' claim for £314 is an administration charge, as it is clearly covered by paragraph (c) and/or (d) of paragraph 1(1) of Schedule 11. It is clearly also variable as it is not an amount set out in the lease or calculated in accordance with a formula set out in the Lease. The Tribunal has jurisdiction to determine whether it is reasonable and to disallow it if not.

115. The administration charge may also be withheld if the demand has not been accompanied by the required notice of rights and obligations (paragraph 4 to Schedule 11 of the Commonhold and Leasehold Reform Act 2002). The Respondents deny that any such notice has been received, and Braemar have not provided the Tribunal with any evidence of compliance. In any event, at the point that the Applicants or Braemar levied this charge, it was clear that the Respondents had serious issues about the service charge. The Tribunal has agreed with some of them, and has also formed the view that Braemar would not have seriously engaged with the Respondents issues by January 2012, which was the point when it appears these charges were levied. The Tribunal also notes that in its written statement of case prepared for these proceedings, Braemar did not claim that this charge was still due. In these circumstances, and bearing in mind the Tribunal has to make a judgement about reasonableness, it determines that it was not reasonable to apply this administration charge to the Respondents, and accordingly it is not payable.

The impact of this decision upon County Court claim 2

116. For the reasons set out in paragraph 112, the global amount owing from the Respondents to the Applicants (if any) is unclear. As this application has to return to the County Court, the Tribunal take the view that final resolution of the balance payable by the Respondents (as this decision has found that some service charges are due) is a matter to be resolved in the County Court. The constituent elements of County Court claim 2 are ground rent and insurance (which the Respondents say are not in dispute in any event), service charges which have been determined by this decision, and administration charges which have also been resolved in this decision. This leaves interest and costs, which are either contractual claims or alternatively are properly resolved in the County Court in any event.

Costs

117. Braemar applied for an order that the Respondents should pay costs of this Application. Normally, proceedings before the Leasehold Valuation Tribunal are costs free. There is,

however, a power for the Tribunal to make a costs order, limited to the sum of £500, should a party have "acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings" (see paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002).

118. The Tribunal rejects the Applicants request for a costs order against the Respondents. The Respondents are entitled to raise issues relating to the service charges levied against them. In some respects the Respondents have succeeded before this Tribunal and in some they have failed. But on balance the Tribunal considers that the issues raised by them have been substantive issues, properly and reasonably raised, and thus there is no basis for finding that the acts of the Respondents fall within the terms of paragraph 10 of Schedule 12 of the 2002 Act.

119. The Respondents have made an application for an order under section 20C of the Act that none of the costs incurred by the Applicants should be recoverable under the service charge provisions of the Lease. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal.

120. The discretion given to the Tribunal is to make such order as it considers just and equitable.

121. The Tribunal finds that in relation to security charges, management fees and estate services, the Respondents had an entirely justifiable case. The Respondents have not succeeded on every point, but the Tribunal take the view that it would have been difficult for them to succeed on any point without the proceedings, and that it would not be right for the Applicants or Braemar to recover any costs from the Respondents through the service charge for these proceedings.

122. The Tribunal therefore makes an order under section 20C of the Act that none of the costs of the Application are to be regarded as relevant costs to taken into account in determining the amount of any service charge payable by the Respondents.

Summary

123. Appendix 1 to this decision sets out the service charges claimed by the Applicants for each year in dispute adjusted as a result of the decisions made by the Tribunal. As shown in that Appendix, the Tribunal determines that the amount of service charge payable by the Respondents for each year in dispute is:

	£
2009/10	552.21
2010/11	680.80
2011/12	604.41
2012/13	614.27

124. The Tribunal determines that the administration charge of £314 charged within County Court Claim 2 and described therein as legal costs is not payable.

125. The Tribunal declines to determine liability and/or quantum of the Respondents claim for costs arising from the discontinuance of County Court Claim 1. This issue is referred back to the County Court.

126. The Tribunal declines to determine whether the Applicants are entitled to pursue elements of County Court Claim 2 on the grounds that leave has not been granted under CPR38.7. This issue is referred back to the County Court.

Date 18 JUN 2013

C. Goodall

C J Goodall
Chair
Leasehold Valuation Tribunal

Appendix 1
Accounts 2009/10 - 2012/13

Item	Actual	%	Tenant	Actual	Tenant	Actual	Tenant	Budget	Tenant
Residential Service Charge	**31/03/2010**			**31/03/2011**		**31/03/2012**		**31/03/2013**	
Cleaning	21,546.89			24,492.06		27,526.09		20,445.00	
Window Cleaning	7,380.00			8,030.00		7,440.00		6,720.00	
Water Hygiene	2,698.00			2,755.86		2,434.80		2,778.00	
Communal electricity	22,678.42			31,102.36		23,566.11		30,000.00	
Insurance settlement	0.00			250.00		350.00		0.00	
Lift Maintenance	7,874.73			9,768.33		12,092.37		7,500.00	
Lift engineering Inspection	0.00			0.00		756.00		803.00	
Lift Telephone	489.86			478.37		311.19		500.00	
Legal Fees	0.00			3,413.70		332.25		500.00	
On Line Tenant Access	0.00			1,038.00		519.00		1,038.00	
Security Staff	41,498.37	136.5648		40,868.74		0.00		0.00	
Fresh Water Pump	0.00			944.44		2,102.54		1,539.00	
Smoke Vents	0.00			1,146.93		0.00		1,800.00	
Door Entry System	1,523.18			0.00		488.33		1,200.00	
TV/Satellite System	129.26			0.00		1,897.87		363.00	
Emergency Lighting	257.62			693.84		900.00		1,200.00	
General Repairs and Maintenance	621.30			2,827.31		12,076.83		3,700.00	
Pest Control	0.00			0.00		0.00		960.00	
Electrical Works	275.55			0.00		0.00		0.00	
Miscelaneous Expenses	0.00			1,129.74		180.00		1,500.00	
Out of Hours Emergency	862.50			0.00		259.00		1,038.00	
Sinking Fund Reserve	5,000.00			5,875.00		0.00		7,376.00	
	112,811.68			134,594.68		93,242.38		90,949.00	
Key fobs Credit	120.00			868.00		450.00		0.00	
Interest on late payment Credit	0.00			0.00		188.00		0.00	
Security Staff Credit	0.00			0.00		0.01		0.00	
Total credits	0.00			0.00		518.01		0.00	
Sub Total	**112,691.68**			**133,726.68**		**92,624.37**		**90,949.00**	
Management 10%	11,269.17			13,373.67		9,262.44			
VAT thereon 20%	2,253.83			2,674.73		1,852.49			
Total	**126,214.68**	**0.3291%**	**415.37**	**149,785.88**	**492.94**	**103,739.29**	**341.41**	**90,949.00**	**299.31**
Structural and Shared									
Cleaning	3,557.40			4,221.14		3553		3,387.06	
Lift Maintenance	0.00			0.00		2089		534.09	
Insurance settlement	350.00			0.00		490		0	
Management Fees	0.00			0.00		0		24,747.56	
Accountants fees	1,200.00			1,200.00		-38		419.45	
Health and Safety	1,843.13			4,436.99		406		1,232.49	
Building Manager	26,298.61			29,431.72		15873		14,960.39	
Management Office Overhead	1,750.51			1,136.20		944		616.59	
Fire Alarm	1,902.14			3,620.30		2807		1,600.90	
CCTV System	126.50			0.00		2148		838.90	
Fire Equipment maintenace	0.00			726.40		122		419.45	
General Repairs and Maintenance	0.00			1,886.49		80		0.00	
Electrical Works	0.00			258.50		0		0.00	
Pest Control	372.00			756.00		562		0.00	
Miscellaneous Expenses	673.47			150.00		454		0.00	
Sinking Fund Reserve	16,000.00			12,925.00		76		2,448.79	
Non recoverable VAT	0.00			0.00		7463		10,060.30	
Sub Total	**56,073.86**			**60,750.74**		**37,016**		**61,253.96**	
Management 10%	5,607.37			6,075.07		3,702			
VAT thereon 20%	1,121.47			1,215.01		740			
Total	**62,802.50**	**0.2761%**	**173.40**	**68,040.83**	**187.86**	**41,458**	**0.3291%**	**136.44**	**61,253.96**	**201.59**
Estate Service Charge									
Garden and Grounds Maintenance	0.00			0.00		0.00		1,831.88	
Management Fees	0.00			0.00		0.00		3,052.80	
Security Staff	0.00			0.00		41,000.00		24,422.40	
Caretaker	0.00			0.00		0.00		10,990.08	
General Repairs and Maintenance	0.00			0.00		0.00		763.20	
Sub Total	0.00			0.00		41,000.00		41,060.16	
Management 10%	0.00			0.00		4,100.00			
VAT thereon 20%	0.00			0.00		740.33			
Total	**0.00**	**0.2761%**	**0.00**	**0.00**	**0.00**	**45,840.33**	**126.57**	**41,060.16**	**113.37**
Total Recoverable Service Charge	**189,017.18**		**588.77**	**217,826.91**	**680.80**	**191,038.18**	**604.41**	**193,263.12**	**614.27**
Less respondents reduction for lack of consultation			**36.56**						
Total			**552.21**						

Appendix 2
Manager costs allowed

	2009/10	2010/11	2011/12
Salary	22,000.00	22,737.50	27,000.00
Deduct earnings below secondary threshold	5,720.00	5,720.00	7,072.00
Salary subject to Employers NIC	16,280.00	17,017.50	19,928.00
Employers NIC	2,083.84	2,178.24	2,750.06
Total salary plus Employers NIC	24,083.84	24,915.74	29,750.06
VAT	4,214.67	4,515.98	5,950.01
Total	28,298.51	29,431.72	35,700.08
Adjust for percentage			
Percentage salary allowed	100.00	100.00	53.00
Adjusted figure	28,298.51	29,431.72	18,921.04
Adjust for 2011/12 change to 83.89%			83.89%
Building manager cost allowed	28,298.51	29,431.72	15,872.86