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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00CN/LSC/2012/0056**

Property : **12 Windsor View (Block A), Bartley Green,
Birmingham B32 4DB**

Applicant : **Mrs C E Arthurs - Payne**

Respondent : **Holding and Management (Midlands) Ltd
(The Maintenance Trustee)**

**Represented by Mr. D Christensen
(Exclusive Property Management Ltd)**

Date of Application : **10th December 2012**

Date of Order from County Court: **14th November 2012**

Type of Application : **Section 27A, 20C, 20B and 21B of the Landlord
and Tenant Act 1985 (The Act).**

Tribunal : **R. T. Brown FRICS
Mr P J Hawksworth**

Date and venue of : **5th September 2013**

Hearing : **First-tier Tribunal (Property Chamber), Priory
Court, Bull Street, Birmingham.**

Dated : **26 NOV 2013**

DECISION ON SUBSTANTIVE ISSUES

DECISION

1. The Tribunal determines that the following sums are reasonable payable for each service charge year:
2003 £7,395.13
2004 £7,588.13
2005 £7,791.25
2006 £8,676.75
2007 £8,673.30
2008 £8,106.20
2009 £8,143.25
2010 £7,481.05
2011 £8,823.73
2012 £8,916.40
2013 £10,900.21 – (subject to paragraph 127 below)
2. The lessee of Flat 12 is liable to pay 1/20 of the above sums.
3. Section 20B. The Tribunal determines there are irrecoverable shortfalls in the years: 2004 (£69.91), 2005 (£586.24) and 2007 (£685.11).
4. Section 21B. That notices of Rights and Obligations under the provisions of section 21B have not been served, and until such time as correct demands are issued no monies are from the Applicant for demands issued after the 1st October 2007.
5. Section 20C. The Tribunal makes an order that in so far as the costs of these proceedings may be recoverable under the Lease and Trust Deed they are not recoverable.

REASONS FOR DECISION

The Application and Introduction

1. This decision follows the issue of the Tribunal's Preliminary Decision issued on the 4th July 2013.
2. This matter is transferred to the Leasehold Valuation Tribunal by Order of Deputy District Judge Wooderson in the following terms: *The matter be transferred to the Birmingham Leasehold Valuation Tribunal.....for directions and final hearing*'.
3. This decision and the Preliminary Decision will be returned to the County Court.
4. The Applicant seeks a determination of the maintenance charge incurred in the service charge years ending 25th March 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013 (budget).
5. Issues under Section 20B and 21B of the Act.
6. An application is also made under section 20C of the Act that the costs of these proceedings may not be recovered by way of the service charge provisions of the lease.

7. There is no application under the provisions of paragraph 9 of the Leasehold Valuation Tribunal (Fees) Regulations 2003 now Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
8. The Freeholder, Hall and Tawse Ltd is not a party to this application, although the Tribunal is advised that the Freehold Company and Holding and Management (Midlands) Ltd (the Respondent) and Exclusive Property Management (EPM) have common shareholders. EPM are the appointed managing agents.
9. In Directions Order No 2 the parties were invited to make further submissions on the substantive issues in so far as they had not already done so in following Directions Order No 1.
10. Further Directions were issued (orally) at the hearing requiring the Respondent to produce the 'revised' service charge accounts for the years 2003 to 2008, the accounts for 2013, the insurance brokers' review of the insurance together with the annual premiums and reinstatement values for the years in dispute. The Applicant being given a further 14 days to comment on those documents. Following which the Tribunal reconvened in private to make its determination.
11. It is not in dispute that a service charges is payable for the services provided under the Lease and Deed of Trust.

The Property and the Tribunal's inspection

12. The members of the Tribunal inspected the property on the 1st May 2013 in the presence of the Applicant and her counsel Mr S Clegg. The Respondent was not represented
13. The property comprises a ground floor flat in a block of six constructed in traditional brick and tile in the mid 1980s.
14. On the site there are 2 blocks of 6 maisonettes and 1 block of 8 flats. There open grassed areas surrounding the site and car parking.

The Law

15. The relevant law is set out below:

Landlord and Tenant Act 1985

Section 18 Meaning of "service charge" and "relevant costs"

- (1) *In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-*
 - (a) *which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or the landlord's costs of management, and*
 - (b) *the whole or part of which varies or may vary according to the relevant costs*
- (2) *The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters for which the service charge is payable.*
- (3) *for this purpose*

- (a) costs includes overheads and
- (b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period

Section 19 Limitation of service charges: reasonableness

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
 - (a) only to the extent that they are reasonably incurred; and
 - (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20C Limitation of service charges: costs of proceedings

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
 - (c) in the case of proceedings before the Lands Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Section 27A Liability to pay service charges: jurisdiction

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to-
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and

(e) the manner in which it is payable.

- (2) *Subsection (1) applies whether or not any payment has been made.*
- (3) *An application may also be made to the appropriate tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and if it would, as to-*
 - (a) the person by whom it would be payable,*
 - (b) the person to whom it would be payable,*
 - (c) the amount which would be payable,*
 - (d) the date at or by which it would be payable, and*
 - (e) the manner in which it would be payable.*

Section 20B Limitation of service charges: time limit on making demands.

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)) , the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Commonhold and Leasehold reform Act 2002

153 Notice to accompany demands for service charges

After section 21A of the **1985 Act** (inserted by section 152) insert—

21B Notice to accompany demands for service charges

- (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
- (2) The Secretary of State 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 a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
- (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.
- (5) Regulations under subsection (2) may make different provision for different purposes.
- (6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."

The Lease and Deed of Trust

16. The Tribunal was provided with a copy of the Lease dated 28th September 1984 and the Deed of Trust dated 30th May 1984.
17. The arrangement is that under the Lease the lessee covenants to pay for the services which are performed under the Deed of Trust by the Maintenance Trustee.
18. The relevant parts of the Lease are the Maintenance Trustees' covenants set out in Clause 5 of the Lease.

The Deed of Trust ("the Trust Deed")

19. Paragraph 3.1:

'If at any time the Maintenance Trustees shall consider that it would be in the general interest of the Lessees so to do the Maintenance Trustee shall have power to treat as deleted from the First Schedule any of the matters specified therein which in the opinion of the Maintenance Trustee shall have become impractical obsolete unnecessary or excessively costly provided that in deciding whether or not to treat any such matter as so deleted the Maintenance Trustees shall consider the views and the wishes of the majority of the Lessees'.

20. The First Schedule is headed Purposes for which the Maintenance Fund is to be applied. Part 1 Appointment of Surveyor Clause 1:

'Appointing and paying the remuneration of the Surveyor to manage the Building and its curtilage and to collect the rents and any maintenance contribution.....'

The Lease

21. Clause 5.1(a): *apply the Maintenance Fund for and carry out the purposes specified in the First Schedule to the Trust Deed.....*

The Hearing

22. The hearing was held in Birmingham at the Hearing Rooms of the First-tier Tribunal (Property Chamber) (Residential Property) in Birmingham.
23. Mrs Arthurs-Payne (formerly Ms Arthurs) appeared in person.
24. For the Respondent Mr. D Christensen legal advisor to Exclusive Property Management Limited and Ms P Rolland of Exclusive Property Management Ltd.

The Applicant's Case

25. The Applicant seeks determination of the following matters:
 - (1) The power of the Maintenance Trustee not to appoint a surveyor in accordance with the First Schedule to the Trust Deed and instead to appoint managing agents who are not Chartered Surveyors.
 - (2) The reasonableness of the cost and standard of the service provided for the years ending 31st March 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013.
 - (3) Payability under section 20B of the Act and following the failure to serve notice under section 21B of the Act.

- (4) An order under section 20C of the Act preventing the Respondent recovering the costs of these proceedings by way of the service charge provisions in the Lease and Trust Deed.

The Surveyor

26. The Applicant's case is that the Surveyor must be a member of the Royal Institution of Chartered Surveyors (RICS). EPM are not Chartered Surveyors nor are they recognised by the RICS they are in effect an extension of the Respondent created to undertake the Maintenance Trustee's role on behalf of the Respondent.
27. Paragraph 2 of the First Schedule to the Trust Deed states that the Maintenance Fund may be applied to carry out the works specified '*at such times and in such manner as the surveyor shall consider appropriate in the interests of good property management*'.
28. It being admitted that no Surveyor has been appointed the works specified have not been carried out in accordance with the Trust Deed. These works include management of repairs, maintenance and gardening. It follows these costs have not been properly incurred.
29. Had the Surveyor been appointed the development would have been managed to avoid it getting into the state it was in prior to the commencement of these proceedings. The windows would have been addressed, transparent accounts produced, properly constituted demands raised.
30. There has never been any consultation with Lessees about dispensing with any of the matters in the First Schedule. The Respondent's suggestion that they did not seek the views of lessees because it '*is unlikely that they would object to substantial costs savings*' is not borne out by the facts. There is no proof of any substantial saving, in fact, the Applicant argues costs have increased.
31. There is no authority for the Maintenance Trustee to set up a separate company to undertake its role and then charge for it. The effect is that the lessees pay twice at a rate far above the fixed level of remuneration due to the Maintenance Trustee.

The Service Charges

32. The Tribunal was in some difficulty in respect of the years 2003 to 2006 because the Respondent (or its agent) had destroyed the invoices relevant to costs incurred during those years.
33. The parties had helpfully (in accordance with Directions) produced a Scott Schedule summarising their respective positions. The Tribunal considered this part of the application by referring to the Schedule and asking each party to comment. Essentially the arguments about each part of the service are similar (save where otherwise stated) and the Applicant's case is summarised below.

Gardening

34. The cost was excessive for all the years in dispute. For some of the years in dispute, the Applicant had been a student and had regularly been at the property during the day. The grass was not cut more than twice per year and tenants undertook much work themselves. Such work as was done was to a poor standard. The Applicant revised her

original estimate of a reasonable charge from £250.00 to £400.00 to £500.00 based on a charge of £12.00 per hour (2013 rates). The argument was the same for all years except 2008 and 2009 when no gardening was in fact undertaken. In support of this contention photographs were provided.

Building Repairs

35. The Applicant's concern related to repairs charged but not she submits actually undertaken. As a student she was at home a lot of the time and had never seen work being undertaken.
36. 2003: for window repairs, Insurance excess, roof tiles, solicitor's costs and key cutting.
37. 2004: No fence repairs were undertaken. Cut off and replace padlock - No padlocked gate on site. Replace lamps – No communal lamps on site. Repairs to gate – There is no gate. Roof tiles – No work carried out to roof.
38. 2005: No communal TV to Flat Block. Various works not identified. No work undertaken to slabs and posts.
39. 2006: Various works not identified, No fence repairs undertaken, No hole in road repaired. Roof leak- Roof repairs appear in every year but Applicant not aware of any repairs being undertaken.
40. 2007: Replace broken fence boards - Applicant does not recall this work and Block C does not benefit. Security cameras for the benefit of Block C only. Parking signs- Only 1 erected and cost excessive could have been purchased from B and Q for £10.00 to £15.00. Replace car park bollard adjacent Block C serves no useful purpose- Council apparently responsible for damage why cost not recovered?
41. 2008: Clean manhole - no evidence this work undertaken. Light bulbs should be charged to Block C.
42. 2009: Light repairs relate to Block C. Window repairs concede this is payable.
43. 2010: No breakdown provided.
44. 2011: Various works not identified.
45. 2012: Fencing replacement does not benefit Block A.
46. 2013: All items considered excessive save for those conceded: replacement ridge tile, replacement gutter brackets and gutter works.
47. Following the further Directions issued at the hearing the Applicant made written challenges by way of an addition to the Scott Schedule to all the costs on the same basis as previous years. The costs are excessive for the works carried out.

Window Cleaning

48. The Applicant's argument is that windows only cleaned twice per year and the cost is excessive should be in the region of £330.00-£400.00. Further costs fluctuate over the years.

Building Insurance

49. The Applicant accepts liability to pay but is unclear as to whether or not the contents are included, what property the reviews cover, the amount of cover and the insurers appear to be commercial rather than residential.

Reserve Fund Contribution

50. After seeing accounts and hearing the Respondents comment this point is conceded.

Audit

51. The Applicant alleges the accounts have not been audited and therefore there is no liability in any year.

Trustee Fee

52. The fee does not appear to have been calculated in accordance with the Trust Deed and Lease.

Management and Administration Fee

53. There is no liability to pay, as the Maintenance Trustee is paid 15% of the cost of services provided to for administering those services. In the alternative, if those fees are found to be justified, the amount is excessive and consultation with commercial property surveyors suggests a fee of 12% is reasonable.

Section 20B of the Act

54. The Applicant alleges that those costs incurred more than 18 months before a demand was raised are not due and payable, in particular, demands raised before November 2009.

Section 21B of the Act

55. The Applicant alleges that in respect of the demands she received for all years subsequent to the introduction of section 21B, no summary of Rights and Obligations was provided. In support of this she produced copies of those invoices.

Section 20C of the Act

56. The Applicant seeks an order that the costs of these proceedings are not recoverable by way of the service charge on the grounds that these proceedings have not been brought maliciously or unreasonably and evidence presented to the Tribunal shows that the Applicant has had significant difficulty in obtaining information from the Respondent.

Schedule 12 to the Commonhold and Leasehold Reform Act 2002

57. The Applicant has incurred some £900.00 plus VAT in costs and lost earnings in bringing these proceedings and seeks a contribution from the Respondent.

The Respondent's Reply

The Surveyor

58. Mr Christiansen explained that, whilst the Trust Deed does allow for the appointment of a Surveyor, clause 3.1 of the Trust Deed allows the Maintenance Trustee to dispense with the Surveyor if it considers it is unnecessary. The view taken was that to reduce costs (but not as an overriding aim) a separate managing agent should be appointed to carry out day to day management instead of an RICS qualified surveyor. In recognition of this the full Maintenance Trustee fee is not charged. The Lessees were not consulted

on the basis that they would be unlikely to object to an action which would produce a substantial saving in service charge costs.

59. EPM is employed by Holding and Management Ltd (the Maintenance Trustee). Whilst the two companies are separate there are common shareholdings in the Companies the Tribunal was told.
60. Questioned by the Tribunal Mr Christiansen explained that when the development was set up a Chartered Surveyor (Mr B Tonkin) employed by Holding and Management Ltd was actively involved in managing the development. After Mr Tonkin left, Midlands Property Management were appointed but that company was subsequently liquidated and the management was transferred to EPM in about 2007/2008. Mr Christiansen could not remember if any employees of those companies were Chartered Surveyors.

The Service Charges

61. Ms Rolland explained she had been employed by EPM since 2012 in the role of office based maintenance person. There were 8 employees of the company each of whom had separate roles but none of whom had individual responsibility for any one of the 86 developments managed by the company. Latterly a "Property Inspector" had been appointed whose job it was to inspect developments on a regular basis and report to the office based staff on actions to be taken.
62. Ms Rolland explained that she had taken the information in the Scott Schedule from the files in the office

Gardening

63. Ms Rolland could not comment on the destroyed invoices but records for 2008 and 2009 showed that contractors had invoiced for gardening work carried every month save for 2 occasions in 2008 when the grass was too wet.
64. From 2008 the contract was based on a fortnightly visit from March to October inclusive and a monthly visit from November to February inclusive. Invoices were produced for all of these years.

Building Repairs

65. 2003: Ms Rolland suggests that the insurance excess was attributable to common areas; it would not be recoverable from an individual Lessee but would be charged to the service charge as a whole. The cost of key cutting at £4.79 is conceded.
66. 2004: Ms Rolland submits that she cannot identify the gate, the replacement lamps are not security lights but maybe a bollard light.
67. 2005: Ms Rolland concedes the cost of TV aerial repair.
68. 2006: No comments from the Respondent save as to rely on accounts.
69. 2007: The fencing repairs and security cameras should be an equal split between all lessees. The signs were erected following complaints from residents about cars being parked not belonging to residents. Bollard – No evidence that the Council actually damaged the bollard.

70. 2008: Unblocking of drain related to the communal drain reported by No 16 but no evidence of who was responsible. Light bulbs conceded Block C charge.
71. 2009: Light bulbs conceded.
72. 2010: All building repairs conceded as recoverable from Block C (the flats).
73. 2011: These works relate to rotten posts in porch and damaged/missing brickwork and is an equal split between all lessees.
74. 2012: Fencing repairs - the location on the invoice is incorrect but the work was carried out along with repairs to 2 No. down pipes- cost split equally between all lessees.
75. 2013: The Respondent's reply to the challenges was, in summary that the work was of a reasonable standard and at reasonable cost.

Window Cleaning

76. Ms Rolland cannot give detail of the number of times the property was cleaned per year for the years for which there are no accounts.
77. From 2007 onwards the costs appear reasonable. The company hold the relevant licences and windows are cleaned 6 times per year.

Building Insurance

78. For the period 2003 to 2009 the insurance premium was paid as per the demand. In 2009 a review was carried out and a revaluation for insurance purposes was prepared by Questgate (the cost of which was met by insurers). From 2009 onwards the premium and the cover was revised and paid as per the demand.

Reserve Fund Contribution

79. The Respondent demonstrated from the accounts how the money had been held and brought forward each year. Where there had been a shortfall in the amount demanded the shortfall was drawn down from reserves rather than charged to Lessees. Where there was an overpayment, this had been credited to the Reserve Fund and not refunded to Lessees.

Audit

80. The audit fee is conceded for all years up to 2009 after which the accounts were independently signed off by the accountants and the fee for those years is properly incurred.

Trustee Fees

81. 15% on actual expenditure excluding Management and Administration Fee and VAT thereon (Third Schedule to the Lease paragraph 2(b)). The Maintenance Trustee has consistently charged less than entitled to in order to be reasonable.

Management and Administration Fee

82. These charges are properly recoverable under the Lease and Trust Deed and regarded as being well within current parameters even if the Trustee fee is factored in.

2013

83. Following the further Directions issued at the hearing the Respondent completed the Scott Schedule for 2013 and maintained that all costs had been properly and reasonable incurred.

Sections 20B, 21B and 20C of the Act

84. The Respondent's representative stated that the Respondent had done as good a job as was possible at moderate cost to the lessees in the circumstances. The Respondent recognised that it had not been able to give as much information as the Applicant would have liked but it had done its best and submitted that it should not be penalised in any way. Overall, the Respondent had done its best to reduce costs borne by the lessees and it was noteworthy that none of the other lessees or occupants of the development had complained. On the Section 20B point, the Respondent's representative said that invoices would have been sent to the Applicant's home address and that no post, enclosing those invoices was ever returned.

The Tribunal's Deliberations

85. The Tribunal considered all the relevant written evidence presented summarised above in its deliberations.
86. The Tribunal is concerned that no one individual has responsibility at EPM for the overall management of the development.
87. The Tribunal noted that Ms Rolland had only been employed by EPM since 2012 and accordingly her evidence in respect of the previous years is limited to the information she put to the Tribunal from the records held by the Respondent.
88. The Tribunal has concerns over the accuracy of the accounts and the decision to destroy invoices and then to revisit the records (presumably without invoices) and produce revised accounts for all years which are signed by Mr Christiansen and all dated on between the 9th and 12th of September 2013. The Tribunal concluded that the earlier sets of accounts should be ignored (save for the question of section 21B below). The Schedule below sets out those accounts and the Tribunal's decision as to reasonableness of cost.
89. Accordingly, it is those accounts, and not the accounts, in the original submissions which the Tribunal considered as the starting point for its determination.
90. The relationship between the Trust Deed and the Lease works but the Tribunal has concerns that the two companies have common shareholders which then begs the question as to the independence of the Maintenance Trustee.
91. The Tribunal found Ms Rolland a straightforward and credible witness but, as stated above, she has only been employed by the Respondent since 2012 and cannot speak with first-hand knowledge of the earlier years. There was no convincing or conclusive evidence adduced by the Respondent of a proper procurement and checking system being in place until the current system, as outlined by Ms Rolland was introduced.
92. From 2007 the Scott Schedule says the work is 'deemed' competitive although no supporting explanation is given or comparable or alternative quotes provided to support this statement.

93. Overall it is self evident to the Tribunal that the management has been less than satisfactory both in terms of actually maintaining the property (although the Applicant acknowledges that more recently the management has improved) and the accounting procedures which apparently required revising for the years 2003 to 2010. The Tribunal finds there are mathematical errors in the Respondents' accounts for 2005 and 2010.
94. The destruction of invoices relating to the years 2003 to 2008 is in the Tribunal's view a serious management failure. The Maintenance Trustee holds the service charge funds in Trust for the Lessees and is required to account for its spending. Such funds should of course be held in appropriate bank account in accordance with section 42 of the Landlord and Tenant Act 1987.
95. These matters lead the Tribunal to the inevitable conclusion that there are accounting and management irregularities however the jurisdiction of the Tribunal is establish, so far as is possible, on the evidence before it:
- A) If work was carried out was it of a reasonable standard?
- B) Was the cost reasonable?

The Surveyor

96. The Tribunal is asked to determine whether or not the development should be managed by a surveyor in accordance the 1st Schedule to the Trust Deed. In this respect it was common ground between the parties that no surveyor (as defined by 1.12 of the Trust Deed a Chartered Surveyor) had been appointed for the years in dispute and further that clause 3.1 gave the Management Trustee the power to dispense with the need for a surveyor.
97. The Applicant in this respect stated that the clause requires the Management Trustee 'to consider the views and wishes of the majority of lessees' It is admitted by the Respondent that there was no consultation in accordance with Part 1 of the 1st Schedule to the Trust Deed.
98. In this respect the Tribunal does not have the power to determine whether or not a surveyor should have been appointed as this is a contractual issue not falling to be determined under this application and any action for a declaration that a surveyor be appointed would fall for the courts to decide. The Tribunal has the jurisdiction (see below) to determine whether or not the combined management costs of the Management Trustee and the Admin and Management Charges were reasonable and whether or not the services had been provided to a reasonable standard.

The Service Charges

99. The Applicant accepts that service charge is payable under the Lease.
100. A breakdown of the amounts determined is given in the Schedule below.

Gardening

101. The Tribunal is in some difficulty with regard to the earlier years, however, doing the best it can with the limited evidence before it, the Tribunal determines that the costs as charged for the years in dispute are not unreasonable and so determines.

Building Repairs

102. The Applicant's allegations that repairs were not carried are unsupported (save for the windows which have been the subject of a County Court decision and are not, therefore, within the Tribunal's jurisdiction or indeed, within the scope of the matter before it).
103. Given the lack of definitive evidence the Tribunal, as a matter of judgement relying on the knowledge and experience of its members determines that the amounts charged for all years are reasonable save for those matters admitted by the Respondents. Those amounts are reflected in the Tribunals schedule below.

Window Cleaning

104. Doing the best it can with the limited evidence before it, the Tribunal determines that the costs as charged for the years are not unreasonable, save for 2004, when the rise is unreasonable and unsubstantiated. For 2004, again doing the best it can, the Tribunal interpolates between 2003 and 2005 to arrive at figure of £822.50.

Building Insurance

105. A review was undertaken in 2006 by brokers Oval Insurance Brokers but unfortunately, no information as to the breakdown per property was available.
106. The insurance review undertaken for EPM in 2010, 2011 and 2012 appears to be a comprehensive review encompassing all the properties within the company's management. Unfortunately those reviews do not provide the Tribunal with a breakdown per property. However from the Questgate revaluation in 2009 the Tribunal was able to establish the recommended reinstatement value was for 2009 £980,000.00
107. The Tribunal has extracted from the invoices and summaries of cover available the sum insured and the premiums as paid. It appears that in respect of Windsor there is no cover for contents.
108. The Tribunal's determination is to confirm the premiums for the years 2003, 2011, 2012 and 2013. It is self evident from the 2009 valuation, that historically, the building has been significantly over-insured with unreasonable premiums resulting for the years 2004 to 2009. The Tribunal, doing the best it can with the limited information provided by the Respondent determines the premium at £1680.36 for each of those years. The Tribunal appreciates that this figure cannot be 100% accurate, however, sufficient information in relation to the insurance market in the relevant years has not been provided to enable the Tribunal to calculate a more accurate figure reflecting the true reinstatement value and movements in the insurance market over that period.
109. The Tribunal set out below a table showing the premiums and levels of cover and its determination:

Year	Insured Value	Premium	Revaluation	Tribunal
2003	No information	£1,630.00		£ 1,630.00

2004	No information	£1,750.00		£ 1,680.36
2005	No information	£1,850.00		£ 1,680.36
2006	No information	£1,975.00		£ 1,680.36
2007	£ 1,177,798.00	£1,818.02		£ 1,680.36
2008	£ 1,236,668.00	£1,759.51		£ 1,680.36
2009	£ 1,300,996.00	£2,055.90		£ 1,680.36
2010	£ 1,300,996.00	£2,230.75	£ 980,000.00	£ 1,680.36
2011	£ 980,000.00	£1,680.36		£ 1,680.36
2012	£ 1,053,500.00	£1,823.60		£ 1,823.60
2013	£ 1,089,319.00	£1,975.76		£ 1,975.76

Reserve Fund Contribution

110. On the evidence before it, the Tribunal concluded that the contributions (equating to approximately £100.00 per unit for all years) are, if anything modest, and accordingly, they are determined to be reasonable for all years. In any event, they are conceded by the Applicant for all the years in dispute.

Audit

111. The Applicant conceded the audit fees for all years except 2010, 2011, 2012 and 2013. The Respondent says that the audit for these years was independently signed off and, therefore, that the fees are recoverable. However, the subsequent revised certificates are signed off (except for the draft in 2013 which are unsigned) by Mr Christiansen and variously dated between the 11th, 12th and September 2013 and, which we conclude is an error, in respect of 2006 and 2007 9th November 2013. These accounts could give rise to doubts as to the independence and arms-length nature of the certification process. However the requirements of the Lease Third Schedule paragraph 5 are that: 'A certificate signed by the surveyor as to the amount of the annual maintenance provision.....shall be conclusive.....'. The Tribunal concludes that whilst a full external audit is desirable it is not a requirement of either the Lease or Trust Deed. The Respondent having conceded fees for the certificates in the years up to 2009 the Tribunal determines that neither audit nor certificate fees are recoverable in the succeeding years.
112. The Tribunal noted errors in calculation for the year 2010. Those errors are corrected on the Tribunal's schedule below.

Trustee Fees and Management and Administration Fee

113. The Tribunal scrutinised these costs together to determine whether or not, for the years in dispute, these combined costs were reasonable for the cost of managing the development.
114. The Tribunal was given little evidence to support the level of fees charged, save for the comment by the Applicant in respect of commercial premises that a fee of 10% is

appropriate. The Tribunal is reluctant to determine fees on this basis because it is not in line with current practice nor the RICS Service Charges Residential Management Code (approved under the provisions of section 887 of the Leasehold Reform, Housing and Urban Development Act 1993). Further, such a method does not truly reflect the time and effort (or lack thereof) put into management but simply assesses the fee on the basis of the more spent on behalf of lessees the greater the remuneration to the manager which is not in the view of this Tribunal equitable.

115. As a matter of judgement based on the knowledge and experience of its members, the Tribunal concluded that the combined charges of the Management Trustee and the Administration and Management were reasonable for the service provided. The appointment of an appropriately qualified firm of managing agents would have almost certainly resulted in a charge considerably higher than that actually charged. In part because such a firm would have to comply with the Management Code which includes minimum insurance standards, competitive tendering of works, supervision of service contractors (cleaners, window cleaners, gardeners), health and safety requirements and a long term maintenance plan and regular site visits.

2013

116. The Tribunal considered the draft figures provided by the Respondent and the comments of the parties. The Applicant fails to satisfy the Tribunal that on a test of the balance of probability any of the charges incurred are unreasonable. Provided those figures are confirmed (or lower) in the final accounts the Tribunal determines them to be reasonable.

Section 20B of the Act

117. The Tribunal is asked by the Respondent to adopt the revised certificates of account provided with their submission. For each year those accounts are dated 11th September 2013. The question for the Tribunal in the years where a shortfall is identified, is do the accounts then provided give in effect notice of the shortfall in compliance with section 20B(2)?
118. The determination of the Tribunal on this point is that, as admitted by the Respondent, the accounts dated 11th September are the valid certificates for the purpose of this determination.
119. The procedure of the Maintenance Trustee was not to demand a shortfall but merely to draw the money down from the reserve fund without giving the lessees any particular notice that this had been done.
120. It follows therefore that the Respondent seeks to recover shortfalls for the years ending 2003 (£103.54), 2004 (£678.55), 2005 (£965.88 amended), 2006 (£381.00), 2007 (£1,037.77), 2009 (£223.88), 2010 (£498.86), 2011 (£44.13).
121. The Tribunal's determination, a breakdown of which is shown in the table below revises those shortfalls. The irrecoverable amounts are now: 2004 (£69.91), 2005 (£586.24) and 2007 (£685.11).
122. For the avoidance of doubt, following the Tribunal's determination, there are no shortfalls in the years 2003, 2006, 2008, 2009, 2010, 2011 and 2012.

123. For the year ending 31st March 2013 there is only an undated draft certificate showing a substantial shortfall of £1,470.21. Such a shortfall is only recoverable if notice is given in the proper form within 18 months of the 31st March 2013. The Tribunal's view is that the draft accounts give notice, for the purposes of section 20B of the Act, of a shortfall not exceeding that amount. The Tribunal's determination shows a slightly smaller shortfall of £1,356.21.

Section 21B of the Act

124. As regards the Notice of Rights and Obligations to accompany demands with effect from 1st October 2007, such notice must accompany a demand for service charge. Failure to give such notice means that until such notice is given there is no liability on the part of the lessee to pay.
125. Ms Rolland explained the office procedure in so far as the demands and notice were printed separately and then merged by hand and placed in the envelope for posting. The evidence of the Applicant is that on no occasion since the 1st October 2007 did she receive a demand with a notice containing the required summary of rights. The Tribunal again noted that Ms Rolland has only been in post since 2012.
126. On a test of the balance of probability the Tribunal prefers the Applicant's evidence and finds and determines that the notices were not enclosed and, therefore, until such time as demands, including the notice, are issued they are not payable. However demands issued without such notice are valid for the purpose of notifying the lessees of the amount due in compliance with section 20B (2) of the Act.

Section 20C of the Act

127. The Tribunal concluded that the Applicant was justified in bringing the action. Accordingly, it is appropriate that an Order is made under section 20C preventing the Respondent, so far as provision is contained for recovering any costs of these proceedings by way of the service charge provisions in the Lease and Trust Deed.

Schedule 12 to the Commonhold and Leasehold Reform Act 2002

128. The Tribunal considered this claim which now falls under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
129. Under Rule 13(1)(b) of the above Rules, the Tribunal may only make an order for costs 'if a person has acted unreasonably in bringing, defending or conducting proceedings in –(iii) a residential property case'
130. In considering whether an order should or should not be made the Tribunal refers to the guidance given in the case of *Ridehalgh v Horsefield and Another (1994) EWCA*, when it was stated by the then Master of the Rolls as under:

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct

permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgement but it is not unreasonable"

It is clear from *Ridehalgh* that the threshold to be crossed before an order for costs is justified is very high indeed before tribunals and it is the conduct of the case that is the key issue and further guidance to tribunals on how to identify unreasonable conduct is contained in the recent case of *Sud v London Borough of Ealing (2103) EWCA* when it was stated at paragraph 75:

"In the context of the present case, the tribunal needed to consider whether the claimant's conduct of the proceedings was unreasonable and, if it so concluded, it was necessary for the court to identify the particular unreasonable conduct, along with its effect. This is not a process that entails a detailed or minute assessment, but instead the court should adopt a broad brush approach, against the background of the totality of the present circumstances."

131. Applying the guidance set out above, and after reviewing how the case was conducted, the Tribunal does not find that the Respondent has acted unreasonably and accordingly, no order for costs is made.

Tribunal's Conclusions

132. A schedule giving the full detail of the Tribunal's determination is given in the table below:

Group 1 only	2003		2004		2005	
Item	L/L	F-tT	L/L	F-tT	L/L	F-tT
Gardening	1,143.00	1,143.00	1,131.32	1,131.32	1,417.00	1,417.00
Building Repairs	471.92	0.00	573.86	573.86	753.13	753.13
Window Cleaning	658.00	658.00	1,151.50	822.50	987.00	987.00
Building Insurance	1,630.00	1,630.00	1,750.00	1,680.36	1,850.00	1,680.36
Reserve Contribution	1,000.00	1,000.00	900.00	900.00	900.00	900.00
Audit Fees	210.00	0.00	210.00	0.00	210.00	0.00
Trustee Fees	672.00	672.00	675.00	675.00	690.00	690.00
Health and Safety	0.00	0.00	0.00	0.00	0.00	0.00
Sundries	0.00	0.00	0.00	0.00	0.00	0.00
Admin and Management	1,825.00	1,825.00	1,875.00	1,875.00	1,950.00	1,950.00
VAT on Management	0.00	0.00	0.00	0.00	0.00	0.00
TOTAL	7,609.92	6,928.00	8,266.68	7,658.04	8,757.13	8,377.49
Charges as Estimate	7,506.38	7,506.38	7,588.13	7,588.13	7,791.25	7,791.25
Shortfall	103.54	0.00	678.55	69.91	965.88	586.24
Recoverable		7,395.13		7,588.13		7,791.25

Group 1 only	2006		2007		2008	
Item	L/L	F-tT	L/L	F-tT	L/L	F-tT
Gardening	1,343.00	1,343.00	1,322.00	1,322.00	1,472.00	1,472.00
Building Repairs	760.00	760.00	1,115.00	1,115.00	209.26	143.26
Window Cleaning	904.75	904.75	904.75	904.75	599.28	599.28
Building Insurance	1,975.00	1,680.36	1,818.02	1,680.36	1,759.51	1,680.36
Reserve Contribution	1,100.00	1,100.00	1,100.00	1,100.00	1,100.00	1,100.00
Audit Fees	215.00	0.00	215.00	0.00	100.00	0.00
Trustee Fees	750.00	750.00	749.55	749.55	749.55	749.55
Health and Safety	0.00	0.00	0.00	0.00	0.00	0.00
Sundries	0.00	0.00	125.00	125.00	0.00	0.00
Admin and Management	2,010.00	2,010.00	2,010.00	2,010.00	2,010.00	2,010.00
VAT on Management	0.00	0.00	351.75	351.75	351.75	351.75
TOTAL	9,057.75	8,548.11	9,711.07	9,358.41	8,351.35	8,106.20
Charges as Estimate	8,676.75	8,676.75	8,673.30	8,673.30	8,386.30	8,386.30
Shortfall	381.00	0.00	1,037.77	685.11	0.00	0.00
Recoverable		8,676.75		8,673.30		8,106.20

Group 1 only	2009		2010		2011	
Item	L/L	F-tT	L/L	F-tT	L/L	F-tT
Gardening	1,580.00	1,580.00	1,626.00	1,626.00	1,630.00	1,630.00
Building Repairs	235.39	0.00	0.00	0.00	223.25	223.2
Window Cleaning	595.02	595.02	590.76	590.76	603.52	603.5
Building Insurance	2,055.90	1,680.36	2,230.75	1,680.36	1,680.36	1,680.3
Reserve Contribution	1,100.00	1,100.00	1,100.00	1,100.00	1,183.00	1,183.0
Audit Fees	100.00	0.00	100.00	0.00	107.00	
Trustee Fees	749.55	749.55	749.55	749.55	806.00	806.0
Health and Safety	0.00	0.00	0.00	0.00	0.00	0.0
Sundries	0.00	0.00	0.00	0.00	0.00	0.0
Admin and Management	2,090.00	2,090.00	1,500.00	1,500.00	2,248.00	2,248.0
VAT on Management	348.32	348.32	234.38	234.38	449.60	449.6
TOTAL	8,854.18	8,143.25	8,131.44	7,481.05	8,930.73	8,823.7
Charges as Estimate	8,630.30	8,630.30	8,630.30	8,630.30	8,886.60	8,886.6
Shortfall	223.88	0.00	-498.86	0.00	44.13	0.0
Recoverable		8,143.25		7,481.05		8,823.7

Group 1 only	2012		2013		Draft
Item	L/L	F-tT	L/L draft	F-tT	
Gardening	1,628.00	1,628.00	1,552.00	1,552.00	
Building Repairs	157.20	157.20	1,640.60	1,640.60	
Window Cleaning	621.00	621.00	637.20	637.20	
Building Insurance	1,823.60	1,823.60	1,975.26	1,975.26	
Reserve Contribution	1,183.00	1,183.00	1,242.00	1,242.00	
Audit Fees	114.00	0.00	114.00	0.00	
Trustee Fees	806.00	806.00	984.65	984.65	
Health and Safety	0.00	0.00	0.00	0.00	
Sundries	0.00	0.00	36.50	36.50	
Admin and Management	2,248.00	2,248.00	2,360.00	2,360.00	
VAT on Management	449.60	449.60	472.00	472.00	
TOTAL	9,030.40	8,916.40	11,014.21	10,900.21	
Charges as Estimate	9,090.00	9,090.00	9,544.00	9,544.00	
Shortfall	0.00	0.00	1,470.21	1,356.21	
Recoverable		8,916.40		10,900.21	

Appeal Provisions

133. If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (regulation 52 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rule 2013.

Robert T Brown

Chairman

Dated.....

26 NOV 2013