HM COURTS & TRIBUNAL SERVICE

Interim Decision / Reasons of a

LEASEHOLD VALUATION TRIBUNAL

of the

Northern Rent Assessment Panel

Property	Various Properties at Pickford Court, Grafton Court, Clifford Court, Bold Street, Old Trafford, Manchester M15
Applicant	Ms. L Rubinstein and Others.
Respondents	Trafford Housing Trust
Case Number	MAN/00BU/LSC/2011/0075
Tribunal	Mr Martin Simpson Mr Jeff Platt

Determination.

- **So far as the non resident long leaseholders are concerned the Section 20 Notices were not given.**
- **Those notices that were given to the resident long leaseholders were defective and did not comply with the Regulations.**
- **THT's application for dispensation in respect of the above is refused.**

Background.

1. This Interim Determination should be read in conjunction with the Directions of 31st October 2011.
2. None of the issues of law, referred to in Recital 3 of those Directions have been pursued by any party. The matter to be determined as a preliminary issue is the question of THT's compliance with the consultation requirements under Section 20 Landlord & Tenant Act 1985 (as amended) and the Regulations made there under.
3. Since the 31 October 2011 the number of Applicants has increased to 8. They fall into 3 categories. They are all long lease holders. Mrs Rubinstein, Mr Wardak, Mr Tang and Mr Sediqi are all resident in their respective flats. During the time in question Mr Kashify has sometimes been resident and has sometimes been living elsewhere. Ms Rice, Ms Gregory and Mr Di Sipo have been, and are, living elsewhere and their flats are tenanted by shorthold tenants who have no direct interest in, and are not party to, these proceedings.
4. There are three broad issues. Were the notices, as required by the Regulations, served by THT upon the long leaseholders? Were those notices compliant with the requirements of the Regulations? If not, should dispensation be granted?
5. None of the Parties have fully complied with the directions of 31 October 2011. THT filed and served a lever arch file setting out its case on the issue of sections 20 and 20ZA. It was no doubt intended that the relevant parts of that file would be incorporated into an agreed bundle. The Parties were, however unable to agree a Hearing bundle. The Applicants took it upon themselves to serve an extensive lever arch file by way of response and as their Hearing Bundle. It was not especially focussed on the issues of Sections 20 and 20ZA and included narrative statements. The Respondents filed and served, by email on the 9th March 2012, a statement in reply in the form of Alex Atkinson's narrative statement and exhibits.

The Hearing.

6. This was held at Panel Offices in Manchester at 10 am on Monday 12th March 2012
7. The Applicants in person were Ms Rice, Ms.Gregory, Ms. Rubinstein Mr Di Sipio and Mr Kashif with Mr Sediqi, Mr Patitucci, Mr. and Mrs Brady and Mr Ward in attendance. Mr R Darbyshire of Counsel represented THT, assisted by Ms. Mia James and Ms. Alex Atkinson with Kathryn Espray, Mike Carfield and Graeme Scott in attendance.

The Respondent's case and evidence.

8. This was set out in Mr Darbyshire's skeleton argument and evidenced by the bundle of documents filed in response to the Directions and Ms Atkinson's statement and exhibits. (upon which she additionally gave oral evidence)
9. Mr Darbyshire helpfully identifies the Statutory framework and Regulations relating to the Consultation process and avers that form of the letters sent complies with those Regulations.
10. The letters of 11th March and 1st June were sent and therefore properly served because they were all sent to the demised premises in addition to any that were sent to the absentee leaseholders own residential addresses. (Section 196 Law of Property Act 1925). After a consideration of the case of *Akorita v 36 Gensing Road Limited* and its application to subsequent cases with very similar facts to the instant case (e.g. *Hippolyte v Maidenbridge Properties Ltd LON/00AL/LSC/2010/0231)* this stance was rightly modified so as to accept that service upon the absentee leaseholder needed to be at their last known residential addresses to be effective. That was not to concede that the respondent needed to show actual receipt by the non resident leaseholders. The usual postal service rules apply.
11. With the possible exception of the letter of 29th June from Sonali Gardens Legal Advice Service (written on behalf of Ms, Rice) not a single document was sent by any Applicant in the form that strictly required THT to respond. There was a plethora of e-mails, but these were not observations to which THT was required to have regard, because they were not sent to the address provided in the letter of 1st June. None the less THT did respond to them, engaging in a time consuming exchange. Despite this THT went well beyond its statutory

obligations, providing expert reports, details of loan schemes, and holding meetings.

12. The applicants' case is diffused and confuses dissatisfaction with the general and broad ranging consultation provide by THT , with THT's strict statutory requirements.
13. Alex Atkinson confirmed the contents of her statement of 9th March 2012 and the exhibits. As Masterplan Lead she had an overview to ensure letters were sent. She kept a file in respect of the non resident long leaseholders on which she retained a copy of the letters sent showing them to be separately addressed to each of the Applicants. They had to be dealt with separately because the 'Northgate' computer program used by THT only recognised property addresses, not other addresses.

The Applicants case and evidence.

14. Ms Gregory averred that she did not receive the 11th March letter. She has had no explanation for the 5 days delay to 16th March. She and others galvanised themselves as soon as they found out about the formal letters. In her case that was the end of April when a problem arose (because of the proposals) with her proposed sale of her flat to her tenant. The 30 days is important. It is a very short time, in any event, for lay people to respond to such proposed major works. The consultation has not been bilateral. The 1st June letter should have been clearer as to whether the quoted amounts were per flat or not.
15. Mr Di Sipio confirmed he went to Italy on 2009 and provided his address to THT. They have communicated with him at that address in respect of many matters including annual service charge demands. He did not receive the 11th (16th) March letter and doubts that it was ever sent. He got the 1st June letter from his tenant, who was usually quite assiduous in passing on mail. He did get a letter saying that other leaseholders wanted to contact him (supplying Ms Rice's contact address). In April he emailed THT as a result of general information obtained via his tenant and from a social gathering when he was on a visit to England. The e-mail response from Alex Atkinson made no reference to the 11th (16th) March letter.
16. Ms Rice said it was 9th May before she was aware of the formal consultation documents. She never received the 11th (16th) March letter (nor many other

general information letters) until she stared to kick up a fuss about non receipt. She missed the opportunity to be involved at a formal level. She would have attended meetings, inspected documents and nominated prospective contactors if she had had the chance.

17. Ms Rubinstein averred that THT were not actively engaged in consultation, but merely going through the motions. As a resident long leaseholder she had received the formal letters of March. June and August.

Our Determination – service of notices.

18. The answer to the first question set out in paragraph 4, above, is, so far as the resident leaseholders are concerned, –Yes, because the notices, by way of letters, were sent to their respective flats and all accept that they received them. That is good service. Mr Kashify also confirms that he received the letter of 11th March 2011 (sent on 16th March 2011), by which time he was probably back at his flat. It is not challenged that the other 3 non resident Applicants (Rice, Gregory, Di Sipo) did not receive the 11th (16th) March letter. Whether the letters are none the less effective as having been given under the Regulations, depends on whether they can be deemed to have been given by reason of the method of service adopted by THT. THT does not have to prove receipt of the notices. It has to show, on the balance of probabilities, that the notices were 'given'. There are no provisions in any of the leases which refer to the service of notices or communications between landlord and leaseholder.

19. In the case of Ms Gregory THT do not now aver that the letter was sent anywhere other than the flat. The records used and helpfully produced as an exhibit to Alex Atkinson's statement show only an address (25 Salvington Gardens) other than the flat from 12 may 2011. Ms Gregory's assertion is that she had supplied her new address (71 Rowlands Rd) when she moved out and sublet her flat many months before the March 11th (16th) letter. She avers that she provided this address to Mia James. She recollects, but does not document, that she received correspondence, possibly even the service charge demand for the period to August 2010, at that address. More pertinently she points to a letter from TH, in response to her complaint that she had not been consulted, stating that the March 2011 letter had been sent to both her flat and her residential address, which THT now aver they did not have. Alex Atkinson says that that was an

unfortunate mistake. We note that if it was a mistake then it was a mistake at a time when the issue of service was, or ought to have been, in sharp focus as a very significant issue.

20. We prefer the evidence of Ms. Gregory on this issue. We do so because Alex Atkinson is dependent on THT's records. Those records are not records kept by her as records of particular relevance to the Masterplan. They were records maintained, in part, by Mia James on a computer system which does not readily cater for the recording and easy retrieval of non resident addresses. It may be that Alex Atkinson was personally unaware if Ms Gregory having notified THT (as is suggested by her undated hand written note endorsed on a copy of the 11th (16th) letter held on her own hard copy file) but we are satisfied that THT had been informed. Such contact has there has been between THT and Ms Gregory appears to be more consistent with Ms Gregory's evidence. THT's letter confirms (albeit said to be mistakenly) that they held her residential address.

21. We accordingly conclude that Ms Gregory was not served with the notice. It cannot be said to have been 'given' in accordance with Paragraph1,(1) of Schedule 1 of the Service Charges (Consultation Requirements) (England) Regulations 2003

22. We are also not satisfied that it is more likely than not that Ms Rice , Mr Di Sipo and Mr Kashify were served at their 'care of' addresses. The reason for our not being satisfied is that we are not satisfied the letter of 11th (16th) March was ever sent. It is clear that special arrangements had to be made between Alex Atkinson and Mia James, because of the inability of the computer system to mail- merge the addresses of the non residents. We accept that Alex Atkinson has a copy of specifically addressed letters on her file kept for her benefit to discharge her function as Masterplan Project Lead. That file was made available over the luncheon adjournment and was not originally part of the Respondents case. We are told that THT do not use Royal Mail but a commercial postal carrier called TNT. We have no evidence of that organisation's service standards, regarding delivery times. We have no evidence of actual posting. We are told that neither Mia James nor Alex Atkinson actually despatched the letters. That is the function of the THT post room. We are told there is no record of posting. Alex Atkinson says in her written statement that 'The letters were sent by first class post.' She was not the person who posted them and she does not explain the basis of her

belief that they were so posted. Indeed she did not seem to be fully aware at the hearing that TNT was used. That information came from Mia James.

23. Given that Mr Di Sipo's address is overseas, in Milan, Italy he makes the very telling point that mere sending by first class would not be possible or appropriate. Something other than the ordinary postal arrangements would be required, yet THT do not anywhere in their evidence advert to those arrangements or evidence them. There is no evidence of the additional postage that would be payable or the weighing of the letter or whether it was sent air mail or overland. Alex Atkinson confirmed that so far as she was aware no assessment was made as to how long it would take any letter, that was posted, to reach Mr. Di Sipo

24. We also find that the chronology of Mr Di Sipio's email traffic is consistent with him enquiring about the works, particularly the kitchens and bathrooms, only as a result of what he gleaned from his tenant and not as a result of receipt of any formal letter. On 15th march, which even on THT's version of the posting of the 11th March letter must have been before it was even posted let alone received, he asked his tenant to enquire about costs. The absence of a reply to the tenant caused Mr Di Sipio to follow it up in April. The letter referred to in those emails must have been the letter of 2nd March inviting leaseholders to an event on the 17th March.

25. We accept that the mere assertion, by a potential recipient, of having not received a letter is not strong evidence that it was not sent. But when 3 or 4 persons, who are all in the same limited category of non residents, make the assertion, and the assertion appears to be valid, it does become prima facia evidence of a failure to send the letters. We say that we find the assertions to be valid not only because Mr Darbyshire rightly conceded that it is not possible for THT to challenge the assertion, but because it is highly unlikely that the intended recipients, especially Ms Rice and Ms Gregory, would have failed to robustly respond if in fact they had received the letter. They have responded robustly to later letters regarding different aspects of consultation.

26. We do not equate non receipt with non despatch (and hence non service). In this case it is, however, part of the evidence that we have evaluated to conclude that, on balance, the letters were not sent.

27. The issue of service of the 'stage 1' letter is not new. It has been a fundamental issue for THT to address from the outset. The nature and extent of the evidence

of posting that they have provided is not sufficient to discharge even the not particularly onerous burden upon them to prove posting. Our findings are against a background of previous and subsequent postal failures where they have had to admit failures of their system when despatch has been asserted, and then found not to have taken place etc.

28. **Our Determination – validity of Notices.**

29. Further we find that the letter dated 11th March 2011 and said to be sent on 16th March, does not comply with the Regulations.

30. The notice must state a "relevant period" within which any responses from tenants must be received. The relevant period is defined as "30 days beginning with the date of the notice." This phrase is ambiguous. It could mean: (i) the date on the notice; (ii) the date it is posted; (iii) the date it is actually received; or (iv) the date it is deemed received (although there is no express provision for deeming service of such a notice). In other contexts (e.g. service of a notice under the Right to Manage provisions: *Muscovite v 75 Worple Road RTM Co Ltd [2010] UKUT 393 (LC); [2011] L&TR 4)*, it has been held that the time that a notice spends in the postal system must be taken into account (e.g. if a notice is posted by first class post, it will be deemed to arrive two days later, and this must be taken into account when setting the date for any response).

31. We have not been offered any explanation as to why a letter dated 11th March was not posted via TNT until 16th March, or why the date of the few letters (on our findings, no more than 10) was not altered to 16th to accurately reflect the true date of despatch. This is a fundamentally important letter in respect of a scheme to which the long leasholders are to be required between them to contribute circa £300,000. Whatever the extent of the non statutory consultation/dissemination of information, this letter was the first step along the road of regulatory compliance.

32. The resident long leaseholders do not, indeed cannot, challenge that the letter was sent on 16th March. There is no evidence of the actual date of receipt. Ms Rubinstein emailed a response on Sunday 20th. It is reasonable to assume that the letters arrived on the 2nd day after posting i.e. Friday 18th March. The 'relevant period' is expressed as ending on 15th April 2011.That is only 28 days after the notice was 'given'. The relevant period in relation to a notice is defined in the Regulations as 'the period of 30 days beginning with the date of the notice'.

33. There are also problems with some aspects of the subsequent notices. The 11th (16th) March letter is very clearly couched in terms of consultation re Long Term agreements under Schedule 1. Mr Darbyshire referred us to Schedule 1. The Stage 2 letter of 1st June 2011 refers to the 'notice of intention issued on 16th March 2011' but is couched in terms of 'proposed works'. That is akin to Schedule 4. Part 2 If it was stage 2 of a Schedule 1 consultation we would have expected a reference to 'summary of proposals'.

34. In any event the letter of 1st June 2011describes the estimated cost of the proposed works (sic) as circa £30,000 plus vat plus admin fee, It does not specify whether this is the total cost or the cost per unit. It is said that it would be obvious that with over 200 dwellings being involved anyone would realise that the £30,000 divided by that number produced a figure below the limit of relevant costs. That assumes knowledge of the detail of the consultation provisions and Regulations. Given that in fact the consultation provisions only apply to about 10 long leaseholders, it would still be open to a long leaseholder with limited knowledge of the statutory provisions to assume, mistakenly, that £30,000 divided by 10 still produces a figure greater than the limit of relevant costs but only, so far as each flat was concerned, at a cost of circa £3000,. There is no indication as to whether the estimated cost includes or excludes the optional bathroom/kitchen replacement. The letter does not indicate a time by which the consultation period in respect of the statements of estimates ends. The subsequent letter of 1stAugust 2011, setting out a Notice of Reasons for awarding a contract to carry out works, avers that the consultation period in respect of the notice of proposals ended on 1st July 2011.

35. The copy, which is attached to Alex Atkinson's statement, of the letter of 1st June and headed ' Statement of estimates in relation to proposed works' does not indicate a time by which the consultation period in respect of the statements of estimates ends. It is signed off by Shelley Fryer. The bundle filed by THT does not contain a copy of that letter but contains a copy of a longer letter signed off by Alex Atkinson. That letter refers to an enclosure of a 'Statement of Estimates' (not exhibited in the bundle). The subsequent letter of 1st August 2011, setting out a Notice of Reasons for awarding a contract to carry out works, avers that the consultation period in respect of the notice of proposals ended on 1st July 2011.

36. We find the documentation as presented to us in what we assume to be a considered away by THT being mindful of the issues, to be less than clear. We cannot assume it would be any clearer to the Applicants.

37. **Our Determination- Dispensation**

38. Section 20ZA of Landlord & Tenant Act 1985 says that the tribunal may make a determination to dispense with all or any of the consultation requirements if satisfied that it is reasonable to do so.

39. We direct ourselves that the proper approach is to establish the nature and extent of the breach of the regulations and to determine the prejudice, if any, that has been caused to the tenants. It is for THT to show, on balance, that there has been no significant prejudice such that it would therefore be reasonable to dispense with the strict regulatory requirements.

40. Mr Darbyshire argues that the relevant period for consultation is short by only 2 days, at the most, in respect of the 11th (16th) March letter. THT were prepared to entertain, informally, representations made outside that period. His skeleton argument does, however, take a strictly technical line in respect of the responses being by email to a not strictly correct address, with the letter from Sonali gardens Legal advice centre being the only valid response to the June 1st letter..

41. He avers that the failure to specify whether the cost of the works set out in the 1st June letter is per flat or overall is of no significance because the figures involved could only lead anyone to recognise that it must be the cost per flat. Any failures by THT should be regarded as merely technical and of no prejudice, when viewed against the background of the extensive number of non regulatory letters, information meetings and wide ranging consultation, in a general, if not strictly regulatory, sense. The requirement is to 'have regard' to representations from the applicants, not to necessarily agree with or implement them. THT have 'had regard' and it is unlikely that there would have been a different outcome even without the regulatory breaches. The long leaseholder complaints arise from the financial consequences to them of the proposed improvement works. They are being opportunistic in attempting to exploit the regulatory breaches.

42. The applicants variously make the point that they would have sought to nominate a contractor from whom estimates could be canvassed, some of them would have become involved at an earlier stage and tried to galvanise others of the group into action, and the failures are against a background, especially so far as

the non resident long leaseholders are concerned, of a failure to communicate in respect of the non regulatory letters, information meetings and general consultation. Such consultation as there has been has been unilateral. THT has 'had regard' only to the extent of paying lip service to such representations as the applicants have had an opportunity to make.

43. We do not determine that it would be reasonable to dispense with the failure to comply with the regulatory requirements.

44. On our findings of fact the stage 1 notice was not given, at all, to at least 3 of the 8 Applicants.

45. It is likely, given that since they found out about the formal notices and the Section 20 requirements they have been very responsive, some of those articulate non residents would have coordinated a group response involving the other long leaseholders. To that extent the obvious prejudice to those who did not receive the 11th (16th) March letter also exacerbates the prejudice suffered by those who received short notice.

46. We accept that both Ms. Rice and Ms Gregory would have sought to inform themselves about the Section 20 process and taken the opportunity to nominate a contactor. This is not mere supposition on our part. We have the example of Ms Rice having nominated a contractor (Waites) in respect of a subsequent consultation for different works. They in fact declined to tender, but it illustrates a willingness of Ms. Rice to nominate when afforded the opportunity, which, in respect of the works the subject of this application, she was denied.

47. The existence of extensive general consultation and information does not of itself relieve THT from the burden of statutory consultation. Informative letters and scheme meetings are laudable, but they are not part of the regulatory scheme and do not alert the long leaseholder to the statutory regime, which alerts them to their rights and to a scheme which, unlike even extensive general consultation, has some sanction and teeth.

48. The statutory time limits and other requirements are very limited. The value of the contract was high (£3million overall). Any reduction in the time available for a long leaseholder to engage with the substantial task of finding a suitable contractor to nominate is a prejudice, as was recognised in *Deajan Investments Ltd v Benson and others [1011]EWCA Civ 38.*

49. The potential amount of each Applicant's share of the cost, to be recovered through the service charge was substantial. It represented a sum, in some cases, twice as great as the Right to Buy price paid by them more than 5 years ago. In other case it represents a sum almost as great as the current market value of the flat in question. With such large sums, and the impact they are likely to have on the long leaseholders, it is especially incumbent upon an organisation such as THT to get the statutory consultation process right. We regard it as self evident that the greater the amount involved then the greater is the potential prejudice.

50. This is a large multi- faceted contract. Some of it is optional. That was not highlighted in the letter of 1st June. It is quite conceivable that there was scope for significant modification to some parts of the proposed works. It is not a case that there was no scope for variations. It was not an all or none proposal. It cannot be said that the applicants have not suffered prejudice because whatever they said or whoever they nominated would have made no difference.

51. It follows from the above that the amount recoverable via the service charges for the work the subject of the letter of 11th (16th) March 2011 is limited to £250 per long leaseholder. The service charges have been challenged, generally, in the application about which a further determination may be required if all or any of the Applicants indicate an intention to so proceed.

52. We therefore direct that the Applicants shall, by 27th April 2012 inform the Tribunal and THT of any continuing challenge to the service charges demanded by setting out a list , item by item and year by year of such challenge and also setting out the amount, if any, for which they contend as a sum reasonably payable.

53. The Tribunal will then give further Directions regarding the disclosure of documentation, the Respondents response, the preparation of a Hearing Bundle and a listing for Final Hearing.

Martin J Simpson.
Tribunal Chairman.
27th March 2012.

HM Courts & Tribunals Service

NORTHERN RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

ON AN APPLICATION UNDER

LANDLORDS & TENANT ACT 1985 – SECTION 27a

Case Number:	MAN/00BU/LSC/2011/0075
Property:	Various Properties at Pickford Court, Grafton Court & Clifford Court, Bold Street, Old Trafford, Manchester M15 4BA .
Applicants:	Ms. L Rubinstein and Others
Respondents:	Trafford Housing Trust
Date of Hearing:	31st October 2012
Tribunal members:	Mr Martin Simpson Chairman Mr Jeff Plat

Determination,

1. A general, all embracing, percentage management charge is not payable under the terms of the Lease. Appropriate management costs are payable in respect of the management element in each head of Service Charge.

2. The amounts of the core Service Charges for each year in issue are reasonably incurred.

3. The Tribunals jurisdiction to raise the issue of payabilty under the terms of the Lease is to be further considered in the light of further representations from the parties.

4. Without prejudice to paragraph 3, the Tribunal will finally determine the issue of payabilty of the CCTV charges in the light of further representations from the parties.

5. The representations under paragraphs 3 & 4 above shall be filed and served by 7th January 2013.

Background.

On 4 August 2011 Ms Rice and six others made an application for the Tribunal to determine the payability and reasonableness of service charges in respect of their flats, which they held of the Respondent, on long leases.

Directions were given on 31st of October 2011, following which a preliminary hearing dealt with the issues surrounding the section 20 notices in respect of the major improvement works. That determination, of 27 March 2012, gave further directions for the determination of the ordinary service charges for the 6 years, the subject of the application, namely 2004/05 through to 2009/10.

The Law conferring jurisdiction on the LVT to deal with these matters is primarily set out on the Landlord & Tenant Act 1985.

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation 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.

During the course of the proceedings Ms Rice withdrew her involvement and Ms Rubinstein became the lead applicant. The current applicants are:-

Ms Rubinstein, Mr Kashify, Mr Sediqi and Mr Wardak (all of Grafton Court) Mr Tang of Pickford Court and Mr Noori of Clifford Court.

Mr Noori applied very recently to become a party. He has not since participated. He has not attended the hearing and has not given any specific instructions to Ms. Rubinstein. We therefore rule that he should be removed as a party, without there being any adjudication in respect of his liabilities. Consequently the Tribunal are now dealing with only Grafton Court and Pickford Court,

The applicants entered into their respective leases on various dates from 7 June 2004 (Ms Rubinstein) to 30 August 2010 (Mr Sediqi). The findings of the Tribunal, therefore, whilst covering all the years, the subject of the original application, will apply to the applicants only in respect of the years for which they have been leaseholders.

The application is for the Tribunal to consider the reasonableness and payability of the service charges in respect of lighting, CCTV, caretaking, management fees, insurance and day-to-day repairs for the six years in question.

The tribunal gave further directions on 21 May 2012 with which the parties have substantially complied.

The leases.

A specimen of two leases has been included in the hearing bundle. The leases of all the applicants are said to be the same so far as the service charge provisions are concerned. The leases were granted by Trafford Borough Council, or are modelled on a standard form used by Trafford Borough Council.

The provisions of the lease are not extensive so far as service charges are concerned.

The tenants are required (by Clause 3.2 in Ms Rubinstein's Lease) to make payment under three headings. They have to pay the amount specified in the first proviso to the First Schedule, namely a reasonable part of the cost incurred in carrying out improvements and repairs, and a reasonable part of the costs (clause 3.3) to the landlord of insuring the building.

The liability in respect of the First Schedule is expressed in terms of the costs of the landlord of keeping all structures or apparatus, over which the tenants have rights, in good repair and working order.

The rights of the tenants over structures or apparatus are expressed in terms of the Housing Act 1985 (Sixth Schedule). They include the right of support, access of light and air, the passage of water and gas and other piped fuel, drainage and disposal of water sewage smoke or fumes, the use and maintenance of cables for supplying electricity or the use of any telephone or the receipt directly or by landline of visual or other wireless transmissions.

More pertinently there is a right of way on foot or with hand propelled vehicles along pathways, passages, entrance hall, stairs and passenger lifts as shall be required for the purpose of ingress to and egress from the property.

There is no specific provision for management charges, nor are there any general clauses allowing for the provision of, and the making of charge for, services more extensive than those fairly narrowly defined, as described above.

The evidence.

The respondent representations and evidence as to the reasonableness of the service charges and their payability are set out in the helpful and detailed statement of Mia James the Leaseholder Lead of Neighbourhood Housing.

She comments on general levels of service charges and deals in some detail with communal grounds maintenance, communal paths, digital TV charges, mechanical facilities, Management Fee, Lighting, caretaking, insurance and day-to-day repairs. So far as the documentation is available, her statement deals with most issues on a year to year basis.

Stephen Questel, the respondents' Repairs Service Technical Manager deals with the procedure and historical analysis of the day-to-day repairs claims.

The applicant's response is set out, not in a statement, but in a 13 page document dated 24th of July 2012, setting out their skeleton argument, responding to the statements of Mia James and Stephen Questel on an item by item basis and concluding with an analysis suggesting that a 50% refund would be appropriate.

The inspection.

This took place at 10 o'clock on the morning of the hearing and was intended by Ms Rubinstein, Mr Sediqi and Mr. Kashify of the applicants and Mr Darbyshire (Counsel for the respondents) with Mr Lee, Ms James and several other employees of THT.

The tribunal members declined to inspect individual flats. The service charge claims, under the terms of the lease, are limited to the services provided to what are generally called 'common parts'. The issue before the tribunal on this application do not extend beyond the common parts. The tribunal had previously resisted an application by Ms Rubinstein to the tribunal to consider evidence of problems that have arisen in her flat because of the alleged inadequacy of safety measures taken in connection with the extensive major works.

The tribunal inspected Grafton Court internally and externally and paid particular attention to the pathways and passages, entrance hall, stairs and lifts, together with the structures and apparatus affected by the rights of the applicants, in common, over those provisions for ingress and egress.

It was noted that the tower blocks and the grounds are currently a major construction site. The tribunal was assisted by the inspection but was mindful that the current situation does not accurately reflect the state of things during the 6 years in question in this application.

The Hearing.

This was held at the tribunal offices New York Street Manchester and immediately following the inspection.

It was attended by Ms Rubinstein, Mr Kashify and Mr Sediqi of the Applicants and Mr Darbyshire for the Respondents with Mr. Lee, Ms James, Mr Questel, Ms Oliver, Ms Qasim and Ms Asprey.

The Determination.

It was agreed with the parties that the Tribunal would take the items addressed in Ms. James' statement as the agenda for consideration of the items of service charge in issue. We would deal with them item by item in principle, without reference to specific years. The same issues apply to all years equally.

The applicants would respond with reference to their document of 24 July 2012 (which although prepared by Ms Rice, who is no longer a party, was a document adopted and endorsed by Ms Rubinstein and the current applicants without demur or addition).

Mr Darbyshire raised, as a preliminary issue, the impact of the decision in *Birmingham v Keddie[2012] UKUT 323 (LC)*, which the Tribunal addressed at the conclusion of the hearing.

Management

This was challenged in principle by the applicants on the basis that there was no provision in the Lease and a previous Tribunal had ruled that management was not recoverable in respect of an identically worded lease. (the Vickers case).

Mr Darbyshire contended that the absence of specific words in the lease was not fatal to the claim for management. It was a matter of construction which should be undertaken in the light of the factual matrix as at the time the leases were signed. There are several large high rise blocks, requiring coordination of services and project management. Ms James' statement indicated that the actual costs of management were greater than the 15% claimed.

The Tribunal drew the attention of the parties to *Norwich City Council v Marshall* (which had not been drawn to the attention of the Tribunal dealing with the Vickers case).

Ms Rubinstein said there was a need for the lease to be clear and specific. Anything with a financial consequence should be spelled out. She felt that the capital that had been paid for each flat to the landlord should be sufficient to fund the landlord's continuing management obligations. She did not contend for a specific figure in the event that we found that some management charge was permitted by the lease. She averred that the charge was too high.

Mr Kashify said that the quality of the management was poor. It was difficult to contact housing management staff and repair jobs were delayed and poorly supervised.

We determine that a blanket management charge is not authorised by the lease. There is a management element to the provision of services which varies with the services in question, the structure of the landlord's organisation and the way in which the services are delivered. It is reasonable to include those specific management costs in the service charge despite the absence of precise wording in the lease about management charges. We advert to the appropriate amount on an item by item basis below.

The blanket charge has been applied to heads of charge included in the service charge demands, which are not challenged by the applicants. These items are the maintenance of Communal Grounds, Paths and Mechanical facilities and the Door Entry System. Ms James deals with these at paragraphs 8, 9 and 11 of her statement.
It is averred by Mr Darbyshire, on the basis of *Birmingham v Keddie* that the Tribunal has no jurisdiction to look at matters that are not challenged. We find it difficult to assess the management element of an item of proposed Service Charge, where the applicant has challenged the management charge in respect of that item, without assessing, firstly, if that item is chargeable at all and, secondly, if it is chargeable whether the amount charged (excluding the management element) is reasonable. Any management charge, on an item which is not chargeable, is an unreasonable management charge, even following the decision in *Norwich City Council v Marshall.*

It may be that in future years THT can produce very precise figures as to these costs of management related to each of the service heads recoverable. Ms. James has done her best in paragraphs 13-18 of her statement, but they are for a limited period only and of very limited scope as they predominantly address the costs of providing a 'leasehold management service' rather than the management element of the costs of service provision. It is not really a question of how many staff are employed, but what management functions they discharge. On the evidence available to us, including the evidence of some, perhaps historic, difficulties with the quality of service delivery overall, and doing the best we can with the limited information, we are not persuaded that a figure in excess of 10% would be the appropriate management element in each of those items.

Lighting
This represents the actual cost of lighting the corridors stairways entrance hall and path ways. For most of the years in question the amount was estimated and then adjusted and reconciled when the actual accounts were subsequently available. The supply is through Haven- a specialist agency supplier for large institutional users such as THT and its predecessor Trafford Council. THT's procurement officer monitors the competitive tendering and 'value for money'.

In their written representations the applicants query the validity of some of the earlier estimates, question why the price variations between the blocks or between years has been so erratic and aver that the cost may include some of THT's own facilities for which the resident should not be responsible.

THT confirm that each block is separately metered and that, in recent times, the accounts have been rendered, not on estimates, but on actual monthly meter readings.

We determine that there is insufficient evidence to establish that the lighting charges are unreasonably incurred. On the basis that the lights were in place when the leases were signed, and the lighting is apparatus that is part of the corridors etc. providing egress and ingress, the cost is one of keeping that apparatus in good working order. We have no evidence of any reasonable alternative figures and accordingly do not find the amount claimed from each leaseholder for each year to be unreasonable.

We do not regard 15% as a reasonable estimate of the management involved in processing these accounts, even when there is added the cost of 'value checking' reviewing, paying and contracting. The amounts involved are large individual accounts (typically between £10.000 and £20.000 per annum) such that a percentage charge produces a disproportionately high figure. We were advised in evidence that the procurement, obtaining value for money supplies etc was included within the services provided by Haven. It, therefore, appears that the management functions discharged by THT are limited to overseeing Haven, checking and paying the invoices. We regard 5% as appropriate.

CCTV

Without prejudice to THT's submissions as to the effect of *Birmingham v Keddie* they aver that the CCTV is within the scope of the Lease. It is structure or apparatus affected by the rights of way over common parts. It was in place at the time the leases were signed. It was operated by Trafford at that time but was taken in house and modernised by THT. A survey of the assured tenants (who also pay a service charge) indicated a high level of satisfaction with the service.

The applicants say that the service is not effective as it does not lead to the successful prosecution of vandals or thugs or the recovery of the cost of damage caused by them. Some of the cameras e.g. in the lift have been out of order for a long time.

The applicants do not contend for a specific figure (beyond their general claim for a 50% refund), but aver that the cost of CCTV is too high.

We determine that the charge for CCTV, if it is payable at all, has not been unreasonably incurred. The system was not of the highest quality for some of the years in question. It was out of commission between August 2011and March 2012, but that is outside the period we are considering. It is difficult to assess its effectiveness because it is impossible to determine what crimes it may have prevented. It is a desirable service in a tower block with a significant turnover of transient tenants. We have no evidence of an alternative cost to justify our determining that the charge, typically a little over £3 per week, is unreasonable. The cost has been reasonably incurred.

The cost is for the service as a whole not merely the system and its maintenance. That cost must include a significant element of management for which it would be unreasonable to make a substantial additional management charge. There will be some overview management, which we assess at 5%.

Caretaking.

This is THT's preferred method of dealing with the obligation to keep the stairs, passageways and lifts etc. in good repair and working order. There is a schedule of works. The service has been restructured by THT to take out a layer of management to reduce costs.

The applicants say that the service is poor but the cost is high. For what they pay the schedule should be more extensive, to provide a better service, or the cost should be less. The scheduled service is not efficiently delivered.

We determine that from our inspection as to the extent of the blocks, it is reasonable to incur the cost of a caretaker. The cost charged to the applicants is for the whole caretaking service, including management. Such was the nature of the construction site that we could not effectively judge the quality of the caretakers' work. There is, in our paperwork, some evidence of complaints, but also evidence of those complaints having been addressed. Having regard also to the nature of the building and the obvious difficulties caused by some tenants or their invitees, it is apparent that the task of keeping on top of the cleaning etc is significant. This is high rise Local Authority nominated housing in which the applicants are striving to maintain standard to which not all of the other, often transient, tenants aspire.

The cost is for the whole caretaking service, not merely the caretaker, and therefore the addition of any further management charge would not be reasonable.

Insurance.

The cost is passed on without commission or addition and is specifically authorised and required by the lease.
The applicants feel that the cover to include a reduced excess and some cover for tenants damage could and should be included.

We determine that at around £85 per annum per tenant the cost is reasonably incurred. It fulfils the landlord's obligations at modest cost.

The amount is not so large as to give a distorted figure if a percentage is used to deal with the cost of managing this item. The cost of dealing with claims processing etc will be greater than , for example, the cost of simply dealing with a similar cost of electricity accounts. 10% would be reasonable.

Day to day Repairs

THT have produced very detailed information. The information has been audited by Mr Questel, and appropriate adjustments made.

The applicants regard having to pay for the repair of damage caused by other tenants or third parties as a grave injustice. Their observations combine their dissatisfaction with the interrelation of CCTV security, the caretaker and the cost of this item

We determine that the cost of day to day repairs is reasonably incurred. In the valuer member's own experience and expertise the amount is well below that which is common and usual for blocks of flats such as these, That assertion was put to the parties to enable them to comment, without demur. This item is totemic rather than financially significant. The annual cost per applicant is between £16 and £20 per annum.

This is a management intensive activity to which the actual cost of the management element probably equates to somewhere between 10% and 15%. We consider15% to be reasonable.

Digital TV charges. We have not dealt with these as they are patently outwith the terms of the lease, are not challenged and appear to be optional. For example, Ms Rubinstein has opted out.

Jurisdictional issues.

Having dealt with the matters that were specifically raised in this application, the Tribunal went on to consider the jurisdictional issue.

The Tribunal asked at various stages of the hearing, for THT to identify where in the Lease there were provisions for the supply of the various services.

Mr Darbyshire averred that such an enquiry was not appropriate. The question of whether the service charges were authorised by the Lease had not been raised by the applicants, therefore, following *Birmingham v Keddie[2012] UKUT 323 (LC),*the LVT has no jurisdiction to raise the issue.

This point of law was raised by Counsel for THT at the hearing. The gist of the decision in *Birmingham v Keddie* was explained to the self representing applicants by the Tribunal. A copy of the Judgement was made available after the lunchtime adjournment.

Relying on *Birmingham v Keddie,* Mr Darbyshire was not in a position to argue the issue as to whether any item of service charge (particularly, in the Tribunals view, the CCTV charges) was within the Lease, because he did not expect that to be an issue.

He averred that issues may be left unchallenged by an applicant for a variety of reasons, about which the LVT was not competent to speculate. In this case the applicants might have not challenged the payabilty of the CCTV (as opposed to the reasonableness of the amount), because they did not want to jeopardise the provision of the service.

He submitted that *Birmingham v Keddie* addressed an issue of importance to Landlords, especially ones such as THT who went to the expense of professional representation to address the issues raised by applicants, only to find themselves ambushed by issues either raised, without jurisdiction, by the LVT or raised by the self representing applicants at the instigation of the LVT. It was unfair to expect respondents to deal with such issues on the hoof.

Ms. Rubinstein replied that the applicants were lay people. They appreciated the way in which throughout this case, and the way in which the Tribunal had shepherded them through the procedural and legal complexities. If there was to be a level playing field the Tribunal should be able to raise matters relevant to a parties' case, especially where that party, unlike THT, cannot afford to pay expensive lawyers to assist them.

Mr Darbyshire responded by pointing out that that was precisely the problem. A landlord such as THT, who had spent significant sums on taking advice and being represented, would be left with a perception that the Tribunal was not even handed, and hence not providing a fair hearing, if it 'shepherded' one side.

Preliminary determination.

Three issues are raised:

- Does the Tribunal have jurisdiction to raise the issue of whether, for example, the CCTV is payable under the terms of the Lease?
- Given that that question was not in issue at the time of earlier Directions and that it was raised at the hearing, how should the parties, in the interests of a fair hearing, be given an opportunity to deal with it?
- In the event that the Tribunal determine that they do have jurisdiction to determine payability under the Lease, how should the parties, in the interests of a fair hearing, be given an opportunity to address the issue as to whether or not, for example, the CCTV is payable under the Lease?

The applicants did not have the opportunity to fully consider *Birmingham v Keddie* at the hearing. The issue was not fully argued. There are conflicting Upper Tribunal decisions. (see *Swanlane Estates v Woods & Ors[LRX/159/2007]*)
Both parties should therefore have permission to file with the Tribunal and serve on the other party, written representation on the issue of jurisdiction as raised in the first question above.

Without prejudice to those representations, the parties should also have permission to file with the Tribunal and serve on the other party written representations as to whether or not the service charges are payable under the terms of the Lease.

We suggest that those latter representations be limited to the CCTV charges. Whether or not we strictly have jurisdiction to determine if the other charges are within the Lease, we are persuaded that they are. We have taken a liberal view of the wording of the Lease so far as other heads of charge are concerned. We have considered the provisions of Schedule 6 Part III of Housing Act 1985 and taken a purposive view of those provisions. The issue of jurisdiction in respect of those heads of charge is therefore otiose. It is our concerns re CCTV with which we need further assistance from the parties. Some form of CCTV was in existence when Trafford Borough Council was Landlord but, in the early years after the transfer to THT, no charge was included in the service charge. It was not until 2007/8 that THT sought to add CCTV to the service charge. There is an issue as to whether CCTV is apparatus affected by the tenants' rights of ingress to and egress from the property.

Martin J Simpson.
Chairman of the Leasehold Valuation Tribunal

HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL.

Properties:	Various Properties at Pickford Court, Grafton Court & Clifford Court, Bold Street, Old Trafford, Manchester M15 4BA.
Applicants:	Mr Kashify and 4 Others
Respondents:	Trafford Housing Trust
Case Number:	MAN/00BU/LSC/2011/0075
Type of Application:	Determination of liability to pay and reasonableness of service charges under Section 27A Landlord and Tenant Act 1985 ("the Act")
The Tribunal:	Mr M. Simpson (Chair) Mr J. Platt
Date of Decision:	23 January 2013

Determination.

1. **None of the parties have made any representations on the issues raised in the headline paragraphs 3,4 & 5 of the Determination dated 31st October 2012.**

2. **The Tribunal does not have jurisdiction to determine the question of payability under the terms of the Lease.**

3. **The charges for each year of challenged service charge in respect of the CCTV are not unreasonable.**

4. **The Landlord's costs of these proceedings shall not be regarded as Relevant Costs to be taken into account in determining the amount of service charge payable by the Applicants.**

5. **The time for applying for leave to Appeal in respect of this Final Decision and the Interim Determination dated 31 October 2012 runs from today.**

The Interim Determination, in the light of which this Final Determination should be read, recognised three outstanding issues:-

- Does the Tribunal have jurisdiction to raise the issue of whether, for example, the CCTV is payable under the terms of the Lease?
- Given that that question was not in issue at the time of earlier Directions and that it was raised at the hearing, how should the parties, in the interests of a fair hearing, be given an opportunity to deal with it?
- In the event that the Tribunal determine that they do have jurisdiction to determine payability under the Lease, how should the parties, in the interests of a fair hearing, be given an opportunity to address the issue as to whether or not, for example, the CCTV is payable under the Lease?

The Tribunal included in paragraphs 3, 4 & 5 of its Determination provision for all parties to make further representations.

None have been received.

The Tribunal is therefore required to finalise its Determination on the basis only of Mr Darbyshire's representations at the hearing and his reliance upon *Birmingham v Keddie*.

In the absence of any other representations, recognising that, although there are conflicting authorities, reliance upon *Birmingham v Keddie* is a tenable proposition, the Tribunal accepts that it would not be appropriate, in this case, to take a contrary view.

In the absence of any evidence to effectively challenge the reasonableness of the CCTV charges, the Tribunal is not able to determine that they are other than reasonably incurred.

Costs.

The Applicants included a Section 20C application in the paper work originally submitted to the Tribunal. The tenants have succeeded on the major issue of the consultation requirements, and, on the ordinary service charge issues, also succeeded in part in their challenge to the all embracing management charges. In those circumstances it would not be just and equitable for the landlord to include the costs of these proceedings as Relevant Costs for the purpose of service charge calculations and demands.

Martin J Simpson
Chairman.