11275

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

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| **Case Reference** | : | **MAN/00FF/LSC/2015/0026** |
| **Property** | : | **13 Merchant Exchange, Skeldergate, York YO1 6LT** |
| **Applicants** | : | **Merchant Exchange Management Company Ltd.** |
| **Representative** | : | **JH Watson Property Management Ltd.**<br>**Mr Nicholas Warren – Associate Director**<br>**Mr Ian Omant – Chief Surveyor** |
| **Respondent** | : | **Mr Peter Bucklitsch and Mrs Rosalyn Bucklitsch** |
| **Representative** | : | **Mr Bucklitsch - in person** |
| **Type of Application** | : | **Landlord and Tenant Act 1985, s.27A, s.19 – service charges**<br>**Commonhold and Leasehold Reform Act 2002, Sch. 11, para 5 – administration charges** |
| **Tribunal Members** | : | **Professor Caroline Hunter**<br>**Ms Jenny Jacobs** |
| **Date and venue of Hearing** | : | **15 July 2015** |
| **Date of Decision** | : | **7 December 2015** |

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**DECISION**

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## Summary Decision

1. The Tribunal finds that:
    a. The lease requires the applicant to provide certified accounts and estimates based on those accounts. The requirement to provide certified accounts is a condition precedent in the lease. The requirement has not been met.
    b. This failure does not absolve the respondents from their obligation to pay the service charges. An estoppel has arisen and the respondents have waived any right to resile from the position that has been adopted for the last 11 years.
    c. Accordingly the service charges are payable by the respondents
    d. The administration charges claimed by the applicant are recoverable under the terms of the lease and are reasonable.
    e. Service charges to the years 2013 – 2015 are reasonable.
    f. No order pursuant to s.20C of the Landlord and Tenant Act 1985 is made.

## Application

2. On 11 February 2015, Merchant Exchange Management Co Ltd. ("the applicant") issued two applications against Mrs and Mrs Bucklitsch ("the respondents"). One application related to the reasonableness of service charges and was made under the Landlord and Tenant Act 1985, s.27A. The other related to administration charges and was made under the Commonhold and Leasehold Reform Act 2002, Schedule 11, para. 5. In both cases it was alleged that there were arrears of relevant charges payable by the respondents to the applicant for the years ending 24 December 2014 and 24 December 2015, and that the service and administration charges were reasonable.

3. Directions were issued on 18 March 2015 and in accordance with those directions the applicant served a statement of case. The respondents' reply and a further statement in reply from the applicant have also been filed.

4. A hearing was held on 15 July 2015. For reasons that will be explained further below (para. 10) the Tribunal did not carry out an inspection of the property. Neither party had legal representation and many of the arguments relating to the interpretation of the lease by the respondents were made for the first time at the hearing.

5. After the hearing the Tribunal members considered that some of the arguments made by the respondents raised further legal issues. The Tribunal decided that these issues should be dealt with by further written submissions. The parties complied with the directions to submit their statements by 23 August, 2015. The respondents also raised in their covering letter a further issue which had been raised in the hearing, i.e. the current wording of section 21 of the Landlord and Tenant Act 1985. They asked for further time to respond to this further issue. For the reasons given in further directions given on 26 October 2015 the Tribunal did not allow this further time.

6. After the parties complied with the directions in August, the Tribunal was made aware of a decision of the Upper Tribunal (Lands Chamber): *Clacy v Sanchez* [2015] UKUT 0387 (LC). The Tribunal considered this decision very pertinent to the issues we had to decide. In order to consider this question fairly further directions were issued on 26 October 2015. The respondents complied with those directions on 6 November, 2015. The applicant chose not to make any further representations. The delay in the directions being sent to the parties was due to illness in the Judge.

7. The substance of the further submissions is dealt with below.

**Background**

8. The applicant in this case is the landlord of the Merchant Exchange building ("the building") on Skeldergate in central York which it holds under a head lease from Helmsley Securities Ltd. (and others). The applicant is a leaseholder owned management company. The respondents are the leaseholders of apartment 13, and are shareholders in the applicant.

9. This application is not the first between the parties. On 14 June 2014 the Tribunal consisting of Mrs J.E. Oliver (judge) and Ms J.A. Jacobs (surveyor) issued a decision in relation to both service charges and administration charges in relation to the years December 24, 2006 – December 24, 2012 (MAN/00FF/LSC/2013/0127) ("the 2014 decision"). As in this case, it was the landlord applicant who initiated the proceedings because of arrears, initially in the county court and on transfer in the Tribunal. Many of the same issues that are raised in the current application were also raised in those proceedings. In relation to the service charges the Tribunal determined that they were reasonable, save that a small sum from 2008 was irrecoverable because of a failure to consult in accordance with the Landlord and Tenant Act 1985, s.20.

10. It will be noted that Ms Jacobs is also sitting as a Tribunal member in the current application. She had the opportunity to inspect the premises just over 12 months ago. There was nothing in the current application to indicate that the physical situation of the building had changed, accordingly it was not considered necessary to re-inspect the building. We adopt the description of the building set out in the 2014 decision (paras. 11-13).

11. It should also be noted that the Tribunal refused in the 2014 decision to make any order for costs against either party. Further, although no application had been made under section 20C of the Landlord and Tenant Act 1985 the Tribunal determined, that had such an application been made, it would have been refused.

12. The respondents did seek to appeal the 2014 decision but the application for permission to appeal was refused primarily because it was made out of time and there was no good reason for the delay.

## The lease

13. The service charge provisions are outlined in the 2014 decision at paras. 14 and 15. However given the arguments that have been made before this Tribunal, it is important to set out some of the provisions in more detail.

14. By Clause 3 ("Tenant's covenants"): "The Tenant hereby covenants with the Landlord that the Tenant will observe and perform the obligations set out in Schedule 6". Schedule 6 sets out the tenant's covenants.

15. Para 16 provides for the payment of an administration charge:

> "16 The Tenant shall pay all costs and expenses (including solicitor's costs and surveyor's fees) incurred by the Landlord incidental to the preparation and service of any notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of that Act or any statutory modification thereof and relating to the Premises or arising from any breach of the Tenant's obligations in this lease even though forfeiture may be avoided otherwise than by relief granted by the court."

16. Paragraph 22 makes provision for the Tenant to pay for the Landlord's costs of carrying out the services provided under Schedule 7. Paragraphs 23 and 24 provide for the mechanics of payment:

> "23 The Tenant shall on the date of this lease and thereafter on each quarter day (namely 25 March, 24 June, 29 September and 25 December) during the Term pay to the Landlord on account of the Tenant's obligations under paragraph 22 of this Schedule an advance amounting to:
>
> 23.1 for the period for the date of this lease to [*sic*]
>
> 23.2 one quarter of the proportionate amount (as certified in accordance with paragraph 12 of Schedule 7) due from or payable by the Tenant to the Landlord for the accounting period to which the most recent notice under paragraph 13 of Schedule 7 relates
>
> 24 The Tenant shall within 21 day after the service by the Landlord on the Tenant of a notice in writing stating the proportionate amount (certified in accordance with paragraph 13 of Schedule 7 and due from the Tenant to the Landlord pursuant to paragraph 22 of this Schedule for the accounting period to which the notice relates) pay to the Landlord (or be entitled to receive a credit to his account from the Landlord) the balance by which that proportionate amount respectively exceeds or falls short of the total sums paid by the Tenant to the Landlord pursuant to paragraph 23 during that period"

17. Two comments may be made about this provision. Firstly it seems likely that it was intended that paragraph 23.1 was intended to be completed with some reference to a date at the end of the first or second year of the lease and make provision for a fixed amount of payment for that time period. This was clearly overlooked and the term was not completed. Secondly the references to paragraphs 12 and 13 in Schedule 7 are clearly wrong and should be references to paragraphs 13 and 14.

18. Schedule 7 sets of the landlord's obligations. It provides:

"11.1 The landlord shall so far as it considers practicable equalise the amount from year to year of its costs and expenses incurred in carrying out its obligations under this Schedule by charging against such costs and expenses in each year and carrying a reserve fund or funds and in subsequent years expending such sums as it considers reasonable by way of provision for depreciation or for further expenses liabilities and payments whether certain or contingent and whether obligatory or discretionary.

11.2 ....

12 The landlord shall keep proper books of accounts of all costs and expenses incurred by it in carrying out its obligations under the Schedule or otherwise in relation to Merchant Exchange except in paying the rent reserved by the Head Lease and an account shall be taken on 31 December 2004 and on 31 December in every subsequent year during the Term and at the end of the Term of the amount of those costs and expenses incurred since the commencement of the Term (or since the date of the last preceding account as the case may be) after deducting interest received (if any) on cash in hand

13 The account referred to in paragraph 11 *[sic]* shall be prepared and audited by a competent accountant who shall certify the total amount of the said costs and expenses (including the audit fee of the account) for the period to which the account relates and the proportionate amount due from the Tenant to the Landlord pursuant to paragraph 22 of Schedule 6

14 The Landlord shall within 2 months of the date to which the account is taken serve on the Tenant a notice in writing stating the total and proportionate amount specified by and certified by the accountant PROVIDED that all the covenants and obligations of the Landlord contained in or arising under this Schedule are subject to and conditional upon the same matters as are specified in the last paragraph of the Schedule 4"

19. Paragraph 15 set out a number of circumstances where "The Tenant shall be entitled to object to the service charge".

20. The final paragraph of Schedule 4 (Rights included in the demise) provides:

"9 The rights and benefits specified in this Schedule are subject to and conditional upon the Tenant being the registered holder of the share in the Landlord at the time the right is exercised and contributing and paying the Tenant's share of the Landlord's expenses in accordance with the covenants contained in Schedule 6 and to such reasonable rules and regulations or the common enjoyment of them as the Landlord may from time to time prescribe"

## The law

21. The applicable statutory provisions are set out in the Appendix of this decision. In summary, the applicant alleges the service charges are payable under the lease and the Landlord and Tenant Act 1985 (the 1985 Act), and the same for the administration charges under the Commonhold and Leasehold Reform Act 2002, Schedule 11 (the 2002 Act). In effect we are being asked to decide whether the service charges are payable under the lease at all (1985 Act, s.27A) and whether they are reasonable both in being incurred and in relation to the standard provided (1985 Act, s.19). In relation to the administration charges we must decide if the charges are payable at all (2002 Act, Sch. 11, para. 5) and whether they are reasonable (2002 Act. Sch. 11, para. 2).

## The matters in dispute

22. The matters in dispute can be divided between those relating to administration charges and those relating to service charges. Each will be dealt with in turn. Before we turn to these disputes we shall dealt with the submissions of the respondents that the Tribunal would not have raised further "legal hurdles", given the "impression of bias on the part of the Tribunal" (first respondent's further written representation, 6 November 2015, para.5).

23. We acknowledge that the Tribunal should not "take it upon itself to identify issues which are no concern to the parties and then reach a decision on issues they have not been asked..."(per H.H. Judge Gerald, *Birmingham CC v Keddie* [2012] UKUT 323 (LC). However, our starting point has been the argument of the respondents as to the proper meaning of the lease. This was only raised by the first respondent for the first time as the hearing. As is apparent from the reasons of this decision this raised difficult questions of law, not all of them were clear to the Tribunal during the hearing. As noted, neither of the parties were represented by lawyers at the hearing. On considering the issues, in particular the fact that the meaning of the lease had not been raised in the 2014 decision, we took the view they were germane to the decision we had the make.

24. It would have been wrong for us to decide those issues or consider the decision of the Upper Tribunal in *Clacy v Sanchez,* without giving the parties the opportunity to give their arguments of these questions. As H.H. Judge Robinson said in *Sadd v Brown* [2012] UKUT 438 (LC): "As the Court of Appeal recently confirmed in *Thinc Group v Armstrong* [2012] EWCA Civ 1227, for a court or tribunal to determine a dispute on the basis of a case not put forward by a party or not raised by the court or tribunal is unfair and not permissible, see paragraphs 50 & 51."

25. The parties have been given the opportunity to respond to the issues. No unfair or impermissible decisions have been made.

*Administration Charges*

26. There are two questions which arise from the administration charges. The first relates to whether they are recoverable at all. The administration charges amounted on 9 June 2015 to some £5664.82. In part they arise due to the attempted recovery of service charge arrears prior to the 2014 decision and the resulting costs of issuing proceedings in that case and the case itself. However since that date the respondents have continued to fail to pay in full both the administration charges and service charges demanded. Accordingly further administration charges, including the costs of this application, have continued to mount.

27. The applicant relies on clause 16 of Schedule 6 to the lease to assert that these sums are recoverable. Mr Warren argued that clause 16 enables the landlord to recover costs which have arisen due to arrears of service charges and ground rents in three circumstances.
    a. Firstly he argued that the issuing of the county court proceedings and the 2014 hearing were "incidental to the preparation and service of any notice under s.146 of the Law of Property Act 1925."
    b. Secondly the costs since the 2014 proceedings were in "contemplation of proceedings under Section 146." He argued that this case was different from that in *Barrett v Robinson* [2014] UKUT 0322 (LC). In *Barrett* the landlord's costs of an application to the Tribunal made by the tenant under the Landlord and Tenant Act 1985, s.19 were held not to be recoverable under a clause by which the tenant covenanted to pay "all reasonable costs charges and expenses....incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court." Given that the application to the Tribunal was made by the tenant it could not be shown that the landlord had in fact contemplated the service of a statutory notice when the expenditure was incurred. In this case Mr Warren argued the action was taken by the landlord and there was plenty of evidence in various letters that there was such an intent.
    c. Finally Mr Warren argued that the clause in this lease provides for recovery outside the auspices of any s.146 proceedings, as it provides for recovery additionally "arising from any breach of the Tenant's obligations in this lease." He pointed to the use of the word "or" in the paragraph as indicating that this is a standalone basis of recovery.

28. Mr Bucklitsch had not had the opportunity to read the decision in *Barrett*, but this was provided over an extended lunch adjournment. Following this, he did not dispute their recoverability under paragraph 16. Rather he sought to make a different argument: that there had never been any arrears of service charges, either before the 2014 decision or now, because the service charges had never been demanded in accordance with the lease. Accordingly if there were no arrears of service charges, there could not be any arrears of administration charges.

29. This argument relied on two different elements. First he argued that the lease makes no provision for payments on account based on estimates. This was based on his interpretation of paragraph 23 of Schedule 6. He argued that the practice of the applicant was to provide estimates on which payments in advance were claimed, but in fact para. 23(2) refers to amounts being quarterly payments based on certified amounts from the previous year.

30. Secondly he argued that the accounts as produced were not audited and certified by a competent accountant. Mr Warren produced after the lunch-time adjournment the accounts produced for the applicant company. These indicated that while produced by a competent accountant (Mr Bucklitsch did not contest this), they were specifically stated to be "unaudited." This was because as a small company the accounts are not required to be formally audited under the Companies Act 2006 (s.381 and following sections). A statement is produced by the managing agents for the end of the year, which sets out the expenditure and the amount of shortfall. The statement finishes by stating "We hereby certify that our Clients Accounts are audited in accordance with the Royal Institution of Chartered Surveyors rules and regulations."

31. Mr Bucklitsch also made a further point in relation to the Landlord and Tenant Act 1985, s.21 and a failure to comply with the requirements of that section to provide regular statements of account. However he relied on the version of the section as substituted by the Commonhold and Leasehold Reform Act 2002, s.152, which has never been brought into force (as was set out in our directions on 26 October 2015). The still current version of the 1985 Act only applies where a summary of relevant costs is requested. This was pointed out to Mr Bucklitsch by the Tribunal and it was established that no such request had been made.

32. Mr Warren asserted that the lease did permit recovery of payments on account, but did concede that there had not been auditing and certification as exactly provided for by the lease. He said that in any event this only affected sums in excess of those demanded properly on account and that it would not affect the fact that there were arrears and that administration costs were therefore incurred.

33. The first decision the Tribunal must make is as to the meaning of the lease. This is not straight forward. The lease was not completed; as set out in para.16 above, it would seem that a first amount for an advance would have been set, the advance then set based on certified amount of later years. Mr Warren for the applicants in his statement of 21 August 2015 set out what happens in practice to the accounts. Put shortly, the accounts are prepared by an Associate Director of the managers (JH Watson Property Management Ltd.) employed by the applicant, who is a part-qualified ACCA accountant. Once the accounts have been checked and made up-to-date by him, they are sent to the Directors of the applicant. All leaseholders are also sent a Period End Statement. The accounts are then sent to Morrell Middleton, a firm of certified accountants who prepare a consolidated set of management company accounts. They do not certify the service accounts separately.

34. From the evidence put in front of us it seems that the service charges are *not* accounted for in the way that the lease provides for. That means we must decide if the accounting clause is a condition precedent. In the recent decision of *Clacy v Sanchez* [2015] UKUT 0387 (LC) the Upper Tribunal set out the many decisions where the courts have had to consider lease provisions regarding certification of accounts. In more recent times decisions have been against finding such clauses as condition precedents – see *Clacy,* and *Warrior Quay Management Co Ltd v Joachim* [2008] LRX/42/2006 (Lands Tribunal).

35. Nevertheless, we find it is a condition precedent. Our decision is based on the particular words of the lease, in particular paragraphs 22 to 24 of Schedule 6. Unlike the lease in *Clacy* the terms do not provide from the service charges to be paid "without any deduction". Further Schedule 7, para. 15 sets out a number of occasions when the tenant "shall not be entitled to object to the service charge." This does not cover a failure to provide proper accounts.

36. However, in our view, this does not absolve the respondents from their obligation to pay the service charges. This was the second argument made in *Clacy,* where the Upper Tribunal found that an estoppel had arisen. It is worth quoting that decision at length:

> 34. The doctrine may therefore apply where the party against whom the estoppel by convention has been raised made no representation or promise. In the present case it is said that the assumption made by the Appellants for some 19 years was that there was no requirement to obtain certification before making demand either because the Lessor was acting under the first of the options in the relevant clause of the Standard Lease Provisions, or the lessees did not require them to do so. It would therefore, so it is submitted, be unjust to allow the lessees to resile from the course of conduct that certification would not be required, and they ought to be precluded from doing so. The Appellants have suffered detriment, and the Respondents would be unjustly enriched if they did not have to pay for the benefits which they had willingly accepted.
>
> 35. An alternative basis for the Appellants' submissions is that by the conduct of the Respondents, and their predecessors in title, in not requiring certification but accepting demands and paying demands, the lessees have waived any rights to resile from that position and to insist that certification was a pre-condition of their liability.
>
> 36. Having regard to these various submissions made in relation to the second issue, in my judgment, either there has been a course of conduct which constitutes an equitable estoppel by precluding the Respondents from seeking to assert that there should now be a certification process in accordance with the terms of the Standard Lease Provisions, or the Respondents have waived any right to resile from the position that has been adopted throughout the period of 19 years or so both by themselves and their predecessors in title.

37. In this case there was not clear "meeting with previous lessees where it had been agreed that certification was not required" as there was in *Clacy*. But the decision in *Clacy* demonstrates no representation or promise is required. The respondents have been tenants for 11 years. They have never, until now, complained about the ways the accounts have been put together. They are shareholders in the applicant company. Thus Mr Bucklitsch was at the AGM of the Company on 11 December 2014. He raised issues including the water rates. The final accounts for 31 December 2013 were adopted unanimously. (See the Minutes included in our bundle at tag 4(b)). Furthermore when he did seek to question the service charges in the 2014 decision no issue about the accounts was raised.

38. To use the words of H.H. Judge Cousins in *Clacy,* the respondents "have waived any right to resile from the position that has been adopted" for the last 11 years.

39. The final issue on recoverability that has been canvassed is whether it is an abuse for the respondents to raise the issue of the lease now taken that they could have done in the 2014 decision. Given our decision that an estoppel has arisen, we do not have to decide this argument and have decided not to address it.

40. Even if recoverable, it is possible to challenge the reasonableness of the amounts of the charges under para. 2 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (set out in full in the appendix below). Mr Warren asserted at the hearing that the costs were in accordance with those set out in their credit control policy. Costs are inevitable if service charges are not paid. The largest element was for the 2014 case. All the work was done by the agents, without lawyers. It was not unreasonable for two staff to attend. Mr Bucklitsch did not point to any particular charges that he considered unreasonable. In our view the administration charges were reasonable.

*Service charges*

41. The arguments raised by Mr Bucklitsch as to the payability of the service charges under the lease applies to later years charges as it does to the earlier charges. Given our decision on those, it follows that we decide that the recent service charges are payable. That leaves the question of their reasonableness. The application was as to the service charges in 2014 and 2015 (based on estimates). Mr Bucklitsch essentially raised the same matters on the reasonableness of the service charges as had been raised in the 2014 decision. His challenge related to the years 2013 and 2014. Mr Bucklitsch made a general point about the service charges in total being out of control. The facts that the applicant, in both charging amounts to the reserve fund and in the actual costs exceeding the estimates each year, were said to illustrate this.

42. At the hearing Mr Bucklitsch pursued issues about five particular items of expenditure, all of which had been raised in the 2014 decision. However as these were for subsequent years he was perfectly entitled to ask the Tribunal to consider again whether they were reasonable sums in accordance with the Landlord and Tenant Act 1985, s.19 (set out in detail in the Appendix). This Tribunal is not bound by the findings of the previous Tribunal, although as will be set out below, Mr Warren for the applicant did essentially adopt the same position as the Tribunal and we therefore had to consider whether to depart from it.

43. *Cleaning of Common Parts and Windows.* The costs for cleaning in 2014 was £4717.56, with the respondents' contribution £198.85. The costs for window cleaning in 2014 were £2511.34, with the respondents' contribution £105.85. The arguments made by Mr Bucklitsch were the same as in the 2014 decision, including the same independent quotations from alterative providers. We noted that the cost has been held for several years and that the applicants have agreed to re-tender the common parts and window cleaning year from the 2015/2016 year. In the 2014 decision the Tribunal decided (para. 93) that:

> "the charges for cleaning were reasonable. The Respondents had obtained an alternative quote but the Tribunal was not satisfied that this was a directly comparable quote. It was clear from the documentation that the quote had been given in order to obtain work. The Tribunal accepted that the development is maintained to a high standard and that a cheaper quote may not necessarily be in the leaseholders' best interests."

We cannot see any reason to change that decision and we find the costs reasonable.

44. *Garage Doors Costs.* Mr Bucklitsch pointed to a lack of transparency about the costs of general repairs. The costs of the electric garages doors were accounted for under this head. All the invoices were provided for the hearing. Nonetheless he did not point to any particular invoices which were unreasonable. As with the 2014 decision he argued that it would be cheaper to replace them. Mr Omant in his statement in reply and in the hearing set out the work he has done with the contactors to alter the way in which the doors may be operated. We see no reason the doubt his view that the problems largely arise as a result of misuse by leaseholders and sub-tenants of the property. The on-going costs are because of the nature of the users and we accept that the costs are a reasonable response to them.

45. *Lighting.* The cost of the light fittings was raised in the 2014 decision. The argument of the respondents set out on paragraphs 50 -52 of the 2014 decision has not changed. Since the 2014 decision the applicant has undertaken a programme of works to change all lights within the courtyard and the internal common areas, with lights in the car park and also the entrance from Bridge Street as and when they fail. The Tribunal sees no reason to disagree with the 2014 decision at para. 92 that the Tribunal "did not consider the applicant's current programme of replacement to be unreasonable and for this reason determined the charges for electricity and the maintenance of the fittings/bulbs to be reasonable."

46. *Reserve Fund Contributions.* Mr Omant in his statement in reply dealt with how the Directors have decided to raise and use the reserve fund. They are doing this in the light of the comments of Tribunal in the 2014 decision. Mr Bucklitsch at the hearing did not object to the fund being raised. He objected to it being "raided" for recurring costs. In our view there is no evidence it was used it this way. We find that the reserve fund is kept and used reasonably.

47. *Water Charges.* Mr Bucklitsch's argument about the water charges in essence turns on whether in fact the residential occupiers for the building are paying for the water supplied to the commercial restaurant situated in the building. He conceded that if this was not the case, the charges were reasonable. The reason he was concerned, despite assurances to the contrary, that the supply may not be separate was due to a spike in the charges in 2012 and an on-going raised level since refurbishment works to the restaurant.

48. Mr Omant explained that he thought the spike occurred due to an undetected leak. However he was willing to carry what would be a simple disconnection test in order to satisfy Mr Bucklitsch as to whether the supplies were separate. If it was found that the supplies were not separate an undertaking was given to provide an appropriate credit to the leaseholders. Accordingly the Tribunal agreed to adjourn this element of Mr Bucklitsch's claim for him and Mr Omant to find a mutually agreeable time for the test to be carried out. Either party may apply in writing to the Tribunal to this matter to be determined should agreement not be reached.

49. Mr Bucklitsch has not raised this issue further. Mr Warren in his further statement of 21 August 2015 states that further enquiries of Yorkshire Water have been made. These shows that both commercial properties have separate accounts. In the light of this, we find the water charges are reasonable.

**Costs**

50. The respondents made an application for an order pursuant to s.20C of the 1985 Act, on the basis the charges were excessive. Given our decision, we find no basis to make such an order.

51. This is the second case brought by the applicant when the respondents have subsequently challenged the service and administration charges. In both cases they preferred to withhold their charges. As we have made clear in this decision, doing so will potentially trigger further administration charges under the lease. If they want to prevent this happening in the future they should be proactive. They can challenge the service charges to the Tribunal without potential administration charges it they continue pay the service charges which they dispute.

## Appendix – relevant legislation

*1. Landlord and Tenant Act 1985*

Section 18
(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

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

Section 19
(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and 13
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A
(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the Tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration
agreement to which the Tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20C
(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, the First-tier Tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(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;
(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

*2. Commonhold and Leasehold Reform Act 2002, Schedule 11*

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

Paragraph 5.
(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Sub-paragraph (1) applies whether or not any payment has been made.
(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).