12400

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AW/LDC/2017/0087**
Property	:	**58-59 Hyde Park Gate, London SW7 5ED**
Applicant	:	**58/59 Hyde Park Gate Residents Association Limited**
Respondents	:	**The leaseholders of the Property as per the application**
Type of application	:	**To dispense with the requirement to consult leaseholders about major works**
Tribunal members	:	**Judge P Korn** **Mr D Jagger MRICS**
Date of decision	:	**18th September 2017**

DECISION

Decision of the tribunal

(1) The tribunal dispenses with the consultation requirements in respect of the qualifying works which are the subject of this application to the extent that they have not already been complied with.

(2) No cost applications have been made.

The application

1. The Applicant seeks dispensation under section 20ZA of the Landlord and Tenant Act 1985 ("**the 1985 Act**") from the consultation requirements imposed on the landlord by section 20 of the 1985 Act in relation to certain qualifying works, to the extent that those requirements have not already been complied with.

2. The Property is a residential apartment block comprising 25 apartments on 9 floors. The application concerns works to the lift, including (a) supplying and installing a new microprocessor control panel, new shaft limit switches and a shaft encoder absolute positioning system and (b) fitting new PVC flatform trailing flexes and rewiring where required.

Paper determination

3. In its application the Applicant stated that it would be content with a paper determination if the tribunal considered it appropriate. In its directions the tribunal allocated the case to the paper track (i.e. without an oral hearing) but noted that any party had the right to request an oral hearing. No party has requested an oral hearing and therefore this matter is being dealt with on the papers alone.

Applicant's case

4. The Applicant states that residents are currently without a lift, that there are elderly residents who are unable to use the stairs to gain access to their flat and that the Property is on 9 floors. A section 20 notice of intention was served on all leaseholders on 21st June 2017.

Responses from the Respondents

5. None of the Respondents has written to the tribunal in support of the application for dispensation, but equally none of the Respondents has opposed the application or made any other representations.

The relevant legal provisions

6. Under Section 20(1) of the 1985 Act, in relation to any qualifying works *"the relevant contributions of tenants are limited ... unless the consultation requirements have been either (a) complied with ... or (b) dispensed with ... by ... the appropriate tribunal".*

7. Under Section 20ZA(1) of the 1985 Act *"where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works..., the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements".*

Tribunal's decision

8. The tribunal notes that the notice of intention was served on 21st June 2017. The Applicant's stated rationale for applying for dispensation is that there was no functioning lift and that elderly residents could not use the stairs. In principle, that is a good reason for treating the works as urgent, although we note that the Applicant's case is somewhat light on detail. The Applicant does not state why, if the notice of intention was served as long ago as 21st June 2017, it was not possible to follow up with a notice of estimates. In addition, the Applicant does not even state whether the works have been completed, although we assume that they have been.

9. Nevertheless, the Applicant has confirmed in writing that the Respondents have been served with notice of this application, and none of them has written to the tribunal to oppose the application. In addition, the application itself is dated 17th July 2017, and it is consistent with the respective dates of the notice of intention and the application to the tribunal that the Applicant acted reasonably in taking the view as at the date of the application that the needs of the elderly residents of the Property made it inappropriate to delay the works by carrying out the remainder of the consultation process in full.

10. In our view, whilst the Applicant should have provided more information in support of its application, the need to have a functioning lift for the benefit of elderly residents of a 9 floor block constitutes sufficient justification for the Applicant's decision not to complete the consultation process on the facts of the case as we understand them.

11. Therefore, we are satisfied in this case that it is reasonable to dispense with the formal consultation requirements in respect of the qualifying works which are the subject of this application to the extent that they have not already been complied with.

12. For the avoidance of doubt, this determination is confined to the issue of consultation and does not constitute a decision on the reasonableness of the cost of the works. Therefore, it is still open to leaseholders to challenge the reasonableness of the cost itself if they wish to do so.

Name: Judge P Korn **Date:** 18th September 2017

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

12401

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**LON/00AU/LSC/2017/0115**
Property	:	**Flats A, B and C, 321 Upper Street, London, N1 2XQ**
Applicants	:	**(1) Ms Meeae Dienemann (Flat A)** **(2) Miss Eglantine Sicat (Flat B)** **(3) Mr Ian Amstad (Flat C)** **("the tenants")**
Representative	:	**In Person**
Respondent	:	**321 Upper Street Limited** **("the landlord")**
Representative	:	**Fry & Co, managing agents**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charge**
Tribunal Members	:	**(1) Judge Amran Vance** **(2) Mrs A Flynn, MA MRICS**
Date and venue of hearing	:	**21 August 2017 at 10 Alfred Place, London, WC1E 7LR**
Date of Decision	:	**18 September 2017**

DECISION

Decisions of the tribunal

1. The tribunal determines that the following amounts are payable by the Respondents, by way of service charge, in accordance with their apportioned contributions under the terms of their respective leases:

	2009/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17
Cleaning	£300	-	£160	£1,290	£1,345	£1,275	£845
Managing Agents Fees	£375 per flat plus VAT	£310 per flat plus VAT	£320 per flat plus VAT	£330 per flat plus VAT	£340 per flat plus VAT	£350 per flat plus VAT	£360 per flat plus VAT
Accountancy	-	-	£900	£1,338	£1,320	£1,260	£1,302
Reserve Fund	£1,875	£1,500	£5,000	£5,000	£5,000	£5,000	£5,000
Repairs and maintenance	-	-	-	-	-	£1,000	-

2. We make an order under section 20C of the Landlord and Tenant Act 1985 so that the respondent may not pass any of its costs incurred in connection with these proceedings through the service charge.

Background

3. The applicants seek determinations pursuant to s.27A of the Landlord and Tenant Act 1985 (the "1985 Act") as to the amount of service charge payable by them in respect of their leasehold interests at 321 Upper Street, London, N1 2XQ ("the Building") for the service charge years 2009/10 to 2016/17 inclusive.

4. The Building is a four-storey Victorian terraced house that was originally converted into two flats, Flats A and B, together with a commercial unit on the ground floor. In 2006, a further flat, Flat C, was created to the rear of the ground commercial unit which is currently occupied by letting agents. The common parts of the Building are modest, consisting of a ground floor entrance hall and two flights of stairs leading to the upper flats. There are no front or rear gardens. There is a small open entrance lobby before entering the common parts of the Building.

5. The applicants issued these proceedings against Fry & Co on the basis that it was both the landlord and managing agent of the Building. However, the proper respondent is the freehold owner of the Building, 321 Upper Street Limited and at the hearing of this application we directed that 321 Upper Street Limited was to be substituted as respondent in the place of Fry & Co, who manage the Building on behalf of the respondent. The applicants' misunderstanding is understandable as Mr Richard Fry is a director of both Fry & Co and the respondent company.

6. Ms Dienemann is the long lessee of Flat A and holds her interest under the terms of a lease dated 16 August 2007, made between (1) the respondent and (2) Ashley James Edwards. Miss Sicat is the long lessee of Flat B and holds her interest under the terms of a lease that is also dated 16 August 2007, and which was entered into by the same parties who executed the lease of Flat A. Mr Amstad is the long lessee of Flat C and holds his interest under the terms of a lease dated 24 November 2006 made between (1)the respondent and (2) Larkfield Investments Limited.

7. The long leases held by the applicants require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the leases will be referred to below, where appropriate. The three leases are in materially identical terms although, as referred to below, the tenants' liability to contribute towards service charge costs incurred by the landlords is in differing percentage shares.

8. A case management hearing took place on 25 April 2007 which was attended by Mr Amstad alone. Directions were made on the same date.

9. An attempted mediation, under the tribunal's mediation service, took place on 16 June 2017, but was unsuccessful.

10. The relevant legal provisions are set out in the second Appendix to this decision.

The Hearing

11. Mr Amstad and Ms Dienemann attended the hearing. Mr Amstad confirmed that he had authority to represent Ms Sicat. Mr Richard Fry attended on behalf of the respondent along with the property manager of the Building, Ms Egisto and Mr Turner who was responsible for the provision of cleaning services to the Building.

12. Mr Fry confirmed that the respondent appointed his company to manage the Building on 25 December 2009 and that prior to that date, the original lessee of the upper floor flats, Mr Ashley Edwards, who was

also a director of the freehold company, managed the Building himself. Mr Amstad and Ms Dienemann stated that they purchased their flats in June 2009 and September 2009 respectively.

13. During the course of the hearing the tenants dropped challenges relating to the costs of: (a) insuring the Building; (b) a surveyor's fee in the sum of £432 incurred in the 2012/13 service charge year; (c) a sum of £436.30 incurred in the 2016/17 service charge year in respect of; and (d) costs incurred in carrying out health and safety inspections.

14. This left the following costs in dispute:

    (a) cleaning (for all service charge years in dispute);

    (b) managing agent's fees (for all service charge years in dispute);

    (c) accountancy costs (for all service charge years in dispute);

    (d) reserve fund contributions (for all service charge years in dispute); and

    (e) a repairs and maintenance cost of £1,000 incurred in the 2015/16 service charge year.

15. The costs incurred, as reflected in the annual service charge accounts, are set out in the table below. The costs in dispute for the 2009/10 and 2010/11 service charge years are identified as relating to the 2009/11 service charge year because the first set of accounts prepared after Fry and Co took over management was for a 15-month period.

	2009/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17
Cleaning	£300	-	£160	£1,290	£1,345	£1,275	£1,056
Managing Agents Fees	£1,890	£2,000	£2,100	£2,231	£2,315	£2,385	£2,457
Accountancy	-	-	£900	£1,338	£1,320	£1,260	£1,302
Reserve Fund	£1,875	£1,500	£5,000	£5,000	£5,000	£5,000	£5,000
Repairs and maintenance	-	-	-	-	-	£1,000	-

16. At the start of the hearing Mr Fry pointed out that when preparing hearing bundle the applicants had amended their original statement of case dated 27 June 2017. In an email to the tribunal dated 18 August 2017 he stated that he had not had the opportunity to consider the additional points made and asked the tribunal to disregard the revised statement. He stated that if we did not agree that he wished the hearing to be adjourned.

17. We did not consider it proportionate to postpone the hearing and allowed the applicants to rely upon their amended statement and the additional documents they had attached to that statement. The applicants amended their statement to address points raised by the respondent in its statement of case. Unusually, the tribunal's directions did not provide for the applicants to be entitled to serve a reply to the landlord's statement of case, which is our usual practice. Given that the respondent had been in possession of the hearing bundle, and the amended statement of case, since 28 July 2017 we considered the respondent had sufficient time between that date and the hearing to properly consider the additional documentation received and that it would not have been in accordance with the tribunal's overriding objective to deal with cases fairly and justly to exclude this material. Moreover, Mr Fry had highlighted the additional material included in applicants' amended statement of case and we did not consider the new material made any substantive difference to the applicants' case as originally advanced. We did not consider the respondent would be prejudiced if this material was included in evidence.

Cleaning

The Applicants' Case

18. Throughout the service charge years in dispute, cleaning services have been provided by Mr Keith Turner, at the request of Fry & Co. The applicants' position was Mr Turner's costs were excessive in amount and that his cleaning was of a poor standard. They also disputed that Mr Turner visited the Building twice a month as claimed.

19. The applicants pointed out that in an email dated 23 November 2010, Fry & Co had conceded that cleaning services had been suspended as there were insufficient funds in the service charge account. Their position was that despite Fry & Co stating in an email dated 25 February 2014, that the cleaning contract had resumed in early 2013, none of the tenants had seen the cleaner visiting the Building until the beginning of 2016. Mr Amstad argued that, at present, Mr Turner's visits were sporadic and that he sometimes skipped a week or two.

20. The applicants' also contended that when Mr Turner visited the Building, he only attended for about ten minutes and not the two hours recorded in his invoices. Mr Amstad informed us that in February 2017,

he was awake at 3.45 am when Mr Turner switched on a light in the ground floor hallway. He heard him sweeping and mopping and then, about 10 minutes later, the light was turned off. He said that on occasions he has set his alarm for 3.30am and has seen the light come on for about 3 to 4 minutes.

21. Furthermore, the applicants considered a two-hour attendance was unnecessary given the small size of the communal areas. They also argued that Mr Turner's cleaning was superficial and that all he did was sweep away any leaves that may have entered the hallway. They contended that he made no attempt to clean the deeply soiled walls, window sills and skirting boards where dirt had become entrenched. In their view, quarterly charges of £35 for cleaning the two communal windows were excessive as the windows would each take only a few minutes to clean.

22. The applicants contended that they had brought the poor cleaning service to the attention of Fry & Co on several occasions but no action was taken to rectify the situation.

23. As to the costs being excessive in amount, Mr Amstad submitted that an increase from £70 per month in October 2010 to £99 per month in March 2017, equated to a 41% increase whereas the Consumer Price Index for the same period measured inflation at 13%.

24. We asked Mr Amstad if he had obtained alternative quotes for cleaning the Building. He had not, but said that he had asked his own cleaner who said that she would charge £10 per hour to do so, using her own cleaning materials. He suggested that weekly cleaning was appropriate and that it would take his cleaning lady about 20 to 30 minutes per visit. As she lived nearby there would be no parking or travel costs. He therefore suggested that a figure of £40 per month would be reasonable, plus the cost of extras such as replacement light bulbs.

The Respondent's Case

25. Mr Fry's evidence was that his company engaged Mr Turner to clean 14 properties and that no other complaints had been made about his charges or failure to attend premises He considered his charges to be reasonable for the service provided.

26. Mr Turner provided a short witness statement and gave oral evidence at the hearing. In his witness statement, he states that has provided a general cleaning service to the common parts of the Building continuously since 2010, apart from a period between April 2012 to December 2012 when he was asked not to do so because of lack of service charge funds. He also states that in his visits he had not seen

any of the residents apart from one occasion when a resident asked who he was.

27. In oral evidence, he stated that he visits the Building twice a month, arriving at between about 4 am to 5 am to carry out quiet cleaning. This involved dusting, sweeping and cleaning surfaces, including sweeping and mopping the linoleum floor in the entrance lobby. He said that he also cleaned the area outside the entrance door, including sweeping the front door mat and, often, cleaning up where passing members of the public had urinated or vomited by the front door. The Building, he said, is situated in an area with many bars and restaurants nearby. He also checks and redirects junk mail and replaces light bulbs as required. He said his colleague then visits the Building later in the day to vacuum the carpets in the communal areas.

28. He told us that, in total, he spends about 90 minutes at the Building on each visit and that his colleague spends about 30 minutes vacuuming the carpets.

29. Mr Turner confirmed that the figures stated in his invoices included his time spent travelling to and from the Building, as well as the costs of his cleaning materials and any parking costs.

30. He pointed out that the common areas had not been decorated for many years. This, he said, made his job more difficult and meant that it was hard to maintain the common areas to a high standard. There were, he said, gaps in skirting boards, bicycle cuff marks on the walls and tears in the laminate flooring in the lobby.

Decision and Reasons

31. In 2010 Mr Turner charged £70 per month, rising to £80 per month when cleaning services resumed in February 2013, £90 per month in June 2014 and £99 per month in February 2017. Minimal costs were incurred for cleaning in the service charge years prior to the 2013/14 service charge year because the service was suspended due to lack of funds in the service charge account. He also charged separately for quarterly cleaning of the communal windows in the sum of £30 in July 2013, rising to £35 in January 2015

32. We consider the costs incurred for Mr Turner's cleaning services to be reasonable, provided that his work was carried out to a reasonable standard. We accept that the communal parts are small but the sum of £40 per month suggested by Mr Amstad is, in our view, completely unrealistic for the costs of a commercial cleaning contractor. His suggested figure, in our view, does not properly take into account the costs of travel, equipment, materials and parking costs.

33. When giving evidence, Mr Turner was obviously aggrieved at the suggestion that he was fabricating the amount of time he spent at the Building. To us, he came across as an honest witness. We accept as true, and as supported by his contemporaneous invoices, that he visits the Building twice a month and that he carries out the tasks he referred to in his evidence. In our view, it is not unrealistic that Mr Turner would spend 90 minutes in doing so, although the time spent does seem on the high side.

34. We place limited evidential weight on Mr Amstad's evidence regarding the occasions on which he has noticed the hallway light being turned off and on because this does not indicate how much time Mr Turner spent cleaning the external area and the lobby area. In addition, this was not a point raised in the applicant's statement of case or by way of witness evidence so is was not a point the respondent could have addressed in its evidence prior to the hearing. We also place limited weight on two documents described as witness statements, but not verified by a statement of truth, made by Louise Amstad, Mr Amstad's wife and Josephine Amstad, their daughter, dated 18 July and 24 July respectively. We do so because neither were present at the hearing and therefore unavailable for cross-exmination.

35. Although Mr Amstad suggested that cleaning up vomit and urine is something that Mr Turner would only have to do about once a year we accept Mr Turner's evidence that it is much more frequent than that. The tribunal is aware from its own knowledge that Upper Street is a busy and popular part of Islington with many bars and restaurants located near to the property. We see no reason to doubt Mr Turner's evidence on this point.

36. In any event, how much time Mr Turner spends at the Building is irrelevant as he does not invoice on an hourly rate basis. What is relevant is not how long he takes to do the job but whether the costs incurred are reasonable for the service provided and whether the work is carried out to a reasonable standard.

37. We accept that in 2010, costs of £70 per month for two visits per month was reasonable. We also consider the subsequent increases to be reasonable. In our view, Mr Amstad's reference to the CPI index is of limited relevance. That index tracks changes in the price level of consumer goods and services purchased by households. What is relevant here is the market price for commercial cleaning services. We do not consider there is evidence before us to suggest that the costs incurred are out of line with market norms. No alternative quotes for such services were provided by the applicants and we do not consider Mr Amstad's reference to a conversation with his personal domestic cleaner to be useful evidence as to what a commercial cleaning service would charge.

38. We also accept that Mr Turner's oral evidence that his colleague attends to vacuum the carpets after Mr Turner has left. Mr Amstad suggested that the carpets were never vacuumed and are very dirty. He suggested that rather than being vacuumed the carpets were, instead, swept by Mr Turner because none of the tenants had heard vacuuming taking place when they were working from home. However, Mr Amstad also said that until the tribunal hearing he had been unaware that it was being asserted that a second person was involved in cleaning the property. That being so, we do not consider there is evidence before us to rebut Mr Turner's evidence.

39. We now turn to the question of whether the cleaning carried out by Mr Turner was carried out to a reasonable standard. In our view, the evidence before us is insufficient to establish that cleaning was not carried out to a proper standard except for the 2016/17 service charge year. For the current year we have been provided with copies of photographs taken by the applicants in January 2017 and July 2017 which show that the tops of the skirting board in the hallway to be dusty. The July 2017 photographs also show the presence of large cobwebs in the lobby area. These issues, in our determination, warrant a 20% reduction in the costs incurred for the 2016/17 service charge year on the basis that the costs as claimed are unreasonable having regard to the standard of service provided by Mr Turner.

40. We are not persuaded that this was the case prior to the current service charge year. If the quality of cleaning in the Building was as poor as the applicants' were claiming then we would have expected evidence of regular complaints to Fry & Co. When we asked Mr Amstad if complaints were made after 5 February 2013 about the standard of cleaning he said that emails had been sent to Fry & Co but that these had not been included in the hearing bundle. There is an email exchange in February 2014, in which Fry & Co responded to emails from Ms Dienemann confirming that cleaning services were being provided to the Building. However, the emails do not evidence complaints made about the standard of cleaning.

41. The photographs supplied by the applicants show well-worn carpets and heavily scuffed walls. The communal areas need redecoration and give a poor visual impression. However, the photographs to not indicate inadequate a poor cleaning standards aside from the presence of dust on the skirting boards and the cobwebs in the lobby.

Managing Agents Fees

The Applicants' Case

42. The applicants contended that these costs were manifestly excessive for managing property of this size and nature. They argued that this was, in part, a result of the relationship between the respondent and Fry & Co

not being at arms-length given that Mr Fry is a director of both the managing agents and the respondent landlord. They also argued that a poor management service had been provided.

43. In their statement of case the applicants recorded that they had contacted six different managing agents who had quoted fees of between £150 to £200 per unit, per annum for managing this type of property. They relied upon written quotations from Moreland Estate Management ("Moreland") in the sum of £900 per annum plus VAT, and from Prime Property (Prime") who quoted £800 per year including VAT as evidence that the costs incurred were unreasonable. They had also obtained a quote from Dexters, an estate agency with 28 offices located in central London, who indicated that their minimum fee for managing a property of the size of the Building was £375 per flat, per annum.

44. As to the service provided, they argued that Fry & Co had repeatedly failed to provide them with requested information, including a copy of the management agreement entered into with the respondent, which was only provided six years after it was first requested. They also submitted that Fry & Co had been unreasonably slow to respond to maintenance calls and had failed to refurbish the Building despite the existence of a reserve fund set up for this purpose.

45. Mr Amstad also argued that the managing agents had failed to provide an adequate security lock on the entrance door to the Building, even after an intruder broke through the front door of the Building on 19 October 2016, and attempted to break into his flat. He notified Fry & Co of the break in but contended that they did not address the issue until after a further break in occurred on 29 October 2016, when entry was gained to Ms Dienemann's flat and valuables stolen. Fry & Co then installed a metal bar to prevent the front door being opened with a credit card but Mr Amstad argued that this was inadequate. A contractor he approached suggested that the installation of an electronic lock would make the door more secure, but Fry & Co, unreasonably in Mr Amstad's view, rejected that option.

46. In addition, the applicants submitted that service charge estimates and accounts were not provided in a timely manner. By way of example, they said that the accounts for the period ending March 2016, were only provided in May 2017. They also suggested that Fry & Co had failed to properly respond to queries they had made concerning the estimates and the accounts. It was their case that instead of addressing their concerns Fry & co had acted aggressively, instituting county court proceedings to recover unpaid service charges. Those proceedings were dismissed in February 2013 because they had been instituted by a company other than the respondent.

The Respondent's Case

47. Mr Fry argued that the management contract between his company and the respondent was compliant with Association of Residential Managing Agents requirements and therefore at arms-length. He submitted that his company managed properties all over London including large blocks of flats and smaller properties and that they use the same contract for all these properties. He believed his fees to be competitive, with the average management fee across his portfolio amounting to £430 per unit per annum.

48. He explained that Fry & Co's usual minimum fee for managing any one property was £3,500 plus VAT per annum, but that they have charged less than this for managing the Building. He considered the fees charged compared favourably to three other 4-flat buildings that they manage for which their annual fees are £4,164, £2,308 and £2,546, all plus VAT.

49. Mr Fry disputed the assertions made regarding the quality of management services provided. He suggested that his ability to provide services had been hampered by the service charge account being continually short of funds, which was the reason why cleaning services had been suspended from time to time. With regard to the break-ins, Mr Fry argued that his company had acted quickly in obtaining quotes to repair the door and that the decision to fit the metal bar was a reasonable one, with no break-ins occurring since it was fitted. He accepted that this should be a simple property to manage but the multiple queries raised by the tenants had made it more difficult to do so.

Decision and Reasons

50. We are not persuaded that there is evidence that management costs have been artificially inflated because Mr Fry is a director of both the respondent company and the managing agents. However, we agree with the applicants that the costs incurred are excessive for the management of a converted Victorian terraced house consisting of only four residential flats and with no communal areas other than the small entrance lobby, hallway and stairs.

51. The services provided by Fry & Co as set out its management agreement are broadly the same as those included in the quotes the applicants obtained from Moreland and Prime. Mr Amstad explained that he had provided these companies with details of the size of the flats in the Building, the amenities present, the size of the communal areas and the managements services needed. He said he was unable to provide them with a copy of the management agreement because despite requests this had not been provided until recently. We are satisfied that this information was provided, as asserted, and that it would have been sufficient for the agents contacted to provide the alternative quotes

included in the hearing bundle which we accept constitute useful comparative evidence.

52. We have had regard to Moreland's quote of £900 per annum plus VAT and Prime's quote of £800 per year including VAT and Dexters' minimum fee for managing a property of £1,500 per Building. Weighing up this evidence, in our expert opinion, a reasonable management fee is £300 plus VAT per flat for the 2009/11 service charge year, increasing by £10 each year to take into account inflation and increased expenses. We consider the evidence provided by the applicants indicates that the fees charged by Fry & Co are significantly in excess of the market norm. No evidence to the contrary was provided by Mr Fry and the evidence provided by the applicants accords with our experience as an expert tribunal. We do not consider the examples given by Mr Fry as to what his firm charges other landlords to be useful evidence because these relate to the costs of managing other buildings and not the Building. Nor were we provided with any details of the buildings themselves other than the number of flats in one of the properties.

53. We determine the costs that it is reasonable for the applicants to pay to per flat are as follows:

2009/11	300 plus VAT
2011/12	310 plus VAT
2012/13	320 plus VAT
2013/14	330 plus VAT
2014/15	340 plus VAT
2015/16	350 plus VAT
2016/17	360 plus VAT

54. As the 2009/11 service charge year reflects a 15-month period the amount payable is £375 plus VAT.

55. Mr Fry referred to an earlier decision of the First-tier tribunal in LON/00AU/LSC/2015/0518, relating to the neighbouring property, at 322 Upper Street, London N1 in which, he said, the tribunal had determined that Fry & Co's management fees were reasonable in amount. That decision was not referred to in the respondent's statement of case and nor was a copy was provided to us or to the applicants. The decision is not binding on us and we attach no weight

to it given that a copy of the decision was not before us and also because the decision in that case would have turned on its own facts.

56. We have had regard to the applicants' complaints of inadequate management services being provided and reviewed the emails included in the hearing bundle. On balance, we are not satisfied that the evidence warrants a further reduction in the amount payable by the applicants. Appropriate action seems to have been taken to deal with the break-ins within a reasonable time scale. Whilst there is evidence of some delay in responding to requests for information made by the tenants, emails also show Fry & Co responding to several queries. It is also clear from the service charge accounts that there have been periods when the residential tenants have been in substantial service charge arrears and in those circumstances, it is not unreasonable for the respondent or its agents to institute court proceedings to recover these arrears. There does not, in our view, appear to have been unreasonable delay in preparing service charge accounts or providing service charge estimates and the relevant leases do not provide for time to be of the essence for the production of either document.

Accountancy Costs

The Applicants' Case

57. The applicants contended that the costs incurred were unreasonable for a property with only four residential tenants and no complexities other than the existence of a reserve fund. They argued that for the service charge year 2012/13 onwards an unnecessary level of complexity had been included in the accounts whereby costs were allocated to three categories, namely, external, internal and general expenditure. They had been advised by Dexters that there is no statutory requirement for audited accounts for a building with only four flats and that a straightforward set of service charge accounts would usually cost around £300.

58. They also query why these accounts were prepared by an external firm of accountants when Fry & Co's management agreement dated 20 December 2009 provided for them to keep accounts and records, to make returns of income and expenditure as the client may require, and to provide facilities for the client's accountants to audit the service charge account.

The Respondent's Case

59. Mr Fry's position was that it was good practice for the accounts to be independently certified by external accountants and that the costs incurred reflected market rates. He also said that preparation of the

service charge accounts was complicated by fact that the apportionment of service charge contributions varied between the flats.

Decision and Reasons

60. At clause 4.5 of the leases the landlord covenants to pay all professional costs fees and expenses in for the auditing of incurred expenditure as mentioned in the Third Schedule. The Third Schedule relates to computation of the annual service charge and, at paragraph 3, requires the landlord, as soon as practicable after the end of each accounting period, to procure that a qualified accountant of its managing agents certify actual service charge costs incurred together with reserve fund expenditure.

61. Paragraph 3 of the Third Schedule therefore obliges the landlord to obtain accounts certified by a qualified accountant. This is not the same as requiring audited accounts and that is not what the respondent has done. Although the leases envisage certified accounts being provided by the landlord's managing agents this does not, in our view, prohibit the landlord from engaging the services of external accountants. In our view, it was not unreasonable for the respondent to do so given that the following complexities:

    (a) movements on the reserve fund need to be accounted for;

    (b) the individual tenant's service charge contributions are in different apportioned shares:

        (i) Ms Dienemann's lease provides, at clause 3.22(c) for her to pay 10% of the costs of insurance, 30% of the landlord's costs of complying with its obligations at clause 4.2(b) of the lease relating to external parts of the Building and 33% of the remaining service charge expenditure recoverable by the landlord under clause 4.2(a) relating to the common parts and 4.2(c), (d), (e) and (f) as well as clauses 4.3, 4.4 and 4.5 of her lease;

        (ii) Miss Sicat's lease provides at clause 3.22(c) for her to pay 30% of the costs of insurance, 40% of the landlord's costs of complying with its obligations at clause 4.2(b) of the lease relating to external parts of the Building and 33% of the remaining service charge expenditure recoverable by the landlord under clause 4.2(a) relating to the common parts and 4.2(c), (d), (e) and (f) as well as clauses 4.3, 4.4 and 4.5 of her lease;

        (iii) Mr Amstad's lease provides, at cause 3.22(c) for him to pay 30% of the costs of insurance and 34% of the

remaining service charge expenditure recoverable by the landlord under clauses 4.2, 4.3, 4.4 and 4.5 of his lease.

62. It is clear that the service charge apportionments for the various heads of expenditure do not add up to 100%. It appears that this is due to inadequate provision being made when the lease for the ground floor flat was granted in 2006, following the construction of that flat.

63. To address this, the respondent has adopted a different method of apportionment to that provided for in the relevant leases. As shown in the service charge budgets included in the hearing bundle, charges have been apportioned as follows:

Property	External	Internal	General
Flat C	0%	34%	30%
Commercial	40%	0%	30%
Flat A	20%	33%	10%
Flat B	40%	33%	30%
Totals	100%	100%	100%

64. This appears to have been a practical arrangement agreed between the respondent and the applicants and the arrangement was not challenged by the applicants who have not raised the issue of apportionment.

65. It follows that the accountants had to reflect this arrangement when preparing the annual accounts and we do not, therefore, accept the applicants' argument that the accounts were unnecessarily complicated.

66. Whilst we accept that the fees for the provision of the accounts are high, we do not consider that the evidence available to us is sufficient to establish that they are outside the market norm for accounts of this degree of complexity. The figure of £300 suggested by Dexters is not a like for like quote. It was for the preparation of simple service charge accounts unlike this scenario where we have three residential tenants with differing service charge contributions together with a commercial lessee. Although Mr Amstad indicated that Dexters were provided with a with a copy of a lease, there is no suggestion in their email to Ms Dienemann that they had reviewed the provisions of that lease, nor that they were provided with all three leases held by the applicants, nor a copy of the annual service charge accounts. We do not therefore

consider their email to constitute helpful evidence that the accountancy costs incurred were unreasonable and, in our view as an expert tribunal, they are not so high as to be excessive.

Reserve Fund

The Applicants' Case

67. There were two aspects to the applicants' case regarding the reserve fund contributions that had been demanded from them. Firstly, they asserted that the applicant had transferred sums from the reserve fund account and paid them into the service charge account. This, they said, was improper because reserve fund monies were held in trust and should be ring-fenced. They also considered that there were irregularities in the way the reserve fund have been managed that were not explained in the annual accounts.

68. Secondly, they argued that the amounts that had been demanded from them towards reserve fund contributions were excessive and that no clear explanation had been provided as to why their contributions had increased from £1,500 per annum to £5,000 per annum for the last five years. Although they agreed that a Notice of Intention to carry out redecoration works in the communal areas was sent to the tenants in August 2015, no remedial work was ever carried out.

The Respondent's Case

69. The respondent's position was that it had, over the years, attempted to build up a reserve fund in order to carry our periodic repairs to the Building. Mr Fry acknowledged that sums had been transferred from the reserve fund to the service charge account. This, he said, was to meet essential expenditure that could not be paid from the service charge account because tenants were often in service charge arrears. His intention was to repay the 'loans' that had been taken from the reserve fund account when service charge arrears were paid. It was strongly denied that any funds had been misappropriated.

70. Mr Fry referred to a five-year Planned Preventative Maintenance programme drafted by chartered surveyors, Cirpo, that indicated that expenditure of about £61,000 plus VAT and fees was required at the Building. This, in his submission, justified the contributions demanded. He acknowledged that this programme had been requested for the purposes of this tribunal hearing but that prior to that request he had been aware of the likely costs for required remedial works.

71. He also argued that it was important to have a reserve fund to deal with unexpected issues that may arise such as major roof repairs or drainage issues.

72. As to the planned major works in 2015, he said that these did not proceed because of a dispute with the tenants.

Decision and Reasons

73. Paragraph 2.2 of the Third Schedule of the leases entitles the landlord to demand an appropriate amount as a reserve for or towards :

"

(a) the contingency of unforeseen expenditure on the matters in clause 4 aforesaid and

(b) those of such matters as are likely to give rise to expenditure after such relevant Accounting period including (without prejudice to the generality of the foregoing) the redecoration of the Common Parts and the overhaul and replacement of any plant or machinery. The said amount to be computed in such manner as to ensure so far as is reasonably foreseeable that the service Charge Estimates shall not unduly fluctuate from year to year."

74. As explained to the parties at the hearing we did not consider we had jurisdiction to determine whether or not there has been misuse by the respondent of sums demanded from the applicants by way of reserve fund contributions. It is clear from the decision of the Upper Tribunal in *Solitaire Property Management v Holden* [2012] UKUT 86 (LC) that the First-Tier Tribunal has no jurisdiction to embark upon a breach of trust inquiry in relation to a reserve fund in circumstances where such inquiry was not necessary to decide a question arising under section 27A as to how much was payable by a tenant by way of service charge in any particular service charge year.

75. No such inquiry is necessary in order to determine the applicants' service charge liability for the service charge years in dispute in these applications and this tribunal therefore has no jurisdiction to determine whether or not there has been a misuse of the reserve fund, If the applicants wish to pursue such an argument before the county court (who does have the appropriate jurisdiction) then that is a matter for them although they may wish to seek legal advice before doing so.

76. Despite this finding as to jurisdiction, it appears clear to us that the sums held in the reserve fund are held on a statutory trust imposed by s.42 of the 1987 Act (which arises in respect of service charges paid by tenants of dwellings). As such, the purposes for which such monies can be expended will be limited by the terms of the trust. Whether or not the terms of that trust have been breached is not a question that is within this tribunal's jurisdiction for the reasons stated above.

77. The applicants did not dispute that the lease entitled the respondent to demand a contribution towards a reserve fund. Our task, therefore, is to determine whether the amounts demanded from the applicants are payable by them. There challenge was that the amounts demanded were excessive.

78. We disagree. In our view, the amounts demanded are not unreasonable as a contribution towards the type of expenditure envisaged in paragraph 2.2 of the Third Schedule to the leases, namely, unforeseen potential expenditure such as roof and drainage works as well as the likely future expenditure envisaged in Cirpo's maintenance programme. We reach that conclusion having regard to the age of the building and the fact that no external or internal redecoration have been carried out since at least 2009. It was part of the applicants' case that the Building is badly in need of redecoration and that this is the case is evident from the photographs provided.

79. We are concerned that the respondent did not have a written maintenance programme until obtaining one from Cirpro for the purposes of this hearing. We are also concerned that despite demanding the sum of £5,000 from the tenants for the last five years the reserve fund balance was only £28,428. However, it is clear from the service charge accounts that some of the tenants of the Building have been in substantial arrears with their reserve fund contributions from year to year. We hope that following receipt of this determination the parties can agree a way forward that involves agreement to repay outstanding service charge arrears and for the long overdue redecoration works to proceed. If the respondent fails to carry out such works then the tenants may, of course, pursue a fresh application to this tribunal challenging future reserve fund demands. Such an application may be looked on sympathetically given the substantial sums demanded over the last five years and the lack of any major works by the respondent.

Repairs and maintenance

The Applicants' Case

80. These costs related to a £1,000 excess that the respondent had to pay in respect of an insurance claim following a flood that affected the basement of the Building.

81. In their amended statement of case the applicants' simply refer to their challenge being that repairs to the commercial property should have been covered through insurance. At the hearing, Mr Amstad advanced the challenge that the applicants should not have to contribute towards these costs because the basement was used by the commercial tenant.

The Respondent's Case

82. Mr Fry stated that these costs related to a major flood that arose due to a blockage in the drains to the Building which resulted in an insurance claim in the sum of £3,802 and that the subsequent £1,000 excess was properly apportioned amongst all the tenants of the Building, including

the commercial tenants. He stated that this flooding affected both the Building and 322 Upper Street and that the cost of remedial works to the drains was split between both properties.

Decision and Reasons

83. We do not know if the basement is within the demise of the commercial unit. However, it appears from the invoice from PlumbJet, the contractors who carried out this work on 25 November 2015 and from a subsequent email from Fry & Co to Plumbjet dated 24 November 2015, requesting bi-annual drain maintenance, that that this flood occurred as a result of a problem affecting the drains to the Building. As such, we consider the cost is payable by the applicants in their apportioned shares because even though the flooding may have affected the basement alone. This is because work to the drains is expenditure in respect of the external parts of the Building as provided for in clause 2.2(b) of the relevant leases.

Application under Section 20C and reimbursement of fees

84. The applicants sought an order under section 20C of the Landlord & Tenant Act 1985 Act that none of the costs of the respondent incurred in connection with these proceedings should be regarded as relevant costs in determining the amount of service charge payable by the applicants.

85. Mr Fry conceded that the terms of the lease do not allow the landlord to recover such costs through the service charge and he did not oppose the making of an order under section 20C. We therefore make such an order.

Name: Amran Vance **Date:** 18 September 2017

ANNEX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Annex 2 Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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
   (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.