10806

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LSC/2014/0028**
Property	:	**Princes Court, 88 Brompton Road, London SW3 1ES**
Applicant	:	**Dr Y Tienaz and members of the Princes Court Leaseholders Association**
Representative	:	**Mr S Unsdorfer FRIPM of Parkgate Aspen Property Management**
Respondent	:	**Itemtrump Limited**
Representative	:	**Mr J Fieldsend - Counsel** **Mr T Darwall-Smith of Sandrove Brahams, Managing Agents** **Mrs F Docherty of James Andrew Residential Limited**
Type of Application	:	**Determination of service charges under Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	:	**Tribunal Judge Dutton** **Mr C Gowman MCIEH MCMI BSc** **Miss S Wilby**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 28th and 29th July 2014**
Date of Decision	:	**8th September 2014**

DECISION

DECISION

(1) The Tribunal makes the determinations in the matter as set out in the Findings section below.

(2) The Tribunal determines to make an order under Section 20C of the Landlord & Tenant Act 1985 (the Act) preventing the landlord from recovering 25% of its costs in these proceedings.

BACKGROUND

1. On 20th December 2013 Dr Tienaz and the members of the Princes Court Leaseholders Association as set out on Schedule A to the application, commenced a claim for a determination as to the liability to pay and the reasonableness of service charges pursuant to Section 19 and 27A of the Act. The service charge years to be considered were those ending 31st December 2007 through to 31st December 2014. The application also sought an order under Section 20C of the Act. For each year in question there were a number of items that were disputed. However, by Directions issued by the Tribunal on 6th February 2014, it was agreed that a meeting would take place between Mr Unsdorfer acting for the Applicants and the representatives of the Respondents who were represented by Lewis Silkin LLP Solicitors. It seems that matters progressed because on 30th June 2014 a Scott Schedule was prepared by the Applicants which set out those items that remained in issue.

2. For the years 2007 onwards, there was a certain repetition of items. For most years in question, if not all, there were challenges made to staff and security costs, electricity, management fees and management office expenses and contributions towards the reserve fund shown as "major works provision." In addition in certain years there was challenge to general maintenance and repair costs, health and safety costs and drainage, maintenance and repair. In the year 2013 a challenge was made to the insurance premium and also in that year legal fees and in respect of the budget costs challenges were made generally but these to an extent resolved themselves as the matter progressed before us.

3. Prior to the Hearing we received two bundles of documents running to some 600 plus pages and also had the benefit of inspecting the property in the afternoon of the first day.

4. We were told that there were three lease types and although each appeared to contain different percentage contributions towards service charges, the question of these contributions was not in issue. One of the main areas of concern was the distribution of expense between the residential and commercial elements in the building.

5. At the Hearing, which started on 28th July 2014, we heard from the present House Manager for Princes Court, a Mr Ahmed El Gogary. Before we recount his evidence, however, it is perhaps more convenient to deal with the Inspection we undertook in the afternoon of 28th July.

INSPECTION

6. The subject premises are a substantial ten storey block, comprising 91 residential units from the second floor upwards. The ground and first floor contained commercial units and also occupied parts of the basement. These units, had, in part, use of a service way which afforded access to some of the commercial units for deliveries and limited residents car parking.

7. The main entrance to the residential properties was of a high standard including a security desk and security staff who monitor the property by some 20 CCTV cameras which overlooked both the front of the premises, certain parts of the residential accommodation and the rear access way and parking area. There were two passenger lifts as well as a goods lift. The goods lift apparently served both the commercial and residential premises but the two passenger lifts were used for the residential occupiers only.

8. We inspected the roof of the building which housed 18 antenna used for mobile phone purposes. The surface was in fair condition, evidencing some patch repairs. We understand that Vodafone had a small building on the roof for that purpose. On each residential floor we were told that there were two dustbin areas one of which also gave access to the goods lift and in the basement we viewed the plant rooms. This included the boiler room and cold water supply room all which appeared to be in good and tidy order.

9. The access way to the premises was via an electric shutter which can only be opened, we were told, by the security officers and a gate which could be opened by any of the commercial units. There were, we understand, four car parking spaces in this area with the potential to perhaps increase that number by a small amount.

10. The rear elevation of the building appeared to be in better order than the front elevation which overlooked Harrods. Whilst we were at the property we also saw Mr El Gogary's office which housed a security CCTV console and had windows which overlooked the rear access.

HEARING

11. The Hearing started on 28th July with evidence being given by Mr El Gogary, the House Manager who has been in that position for some 15 years. He provided a witness statement which set out his daily functions which we understand had been drawn up in consultation with the present managing agents, Sandrove Brahams. Asked how his time was split between the commercial and residential properties, he said initially that it was difficult to say how many hours he spent either looking after residential or commercial issues. He told us that he had responsibility for looking after the car park and keeping it clear for delivery, particularly to the restaurants. He said that he worked flexible hours but that he was on call 24 hours a day, seven days a week and sometimes had to work at night. The security officers would contact him if there was a problem and he looked after the property for the landlord. When cross examined as to the time spent, he thought that it was perhaps a 40 or 50% split between commercial and residential. He told us that it was not his responsibility to fix matters if they were anything other than minor but instead to report them so that suitably qualified workmen could carry out whatever was needed. He did not, for example, decide whether any particular item related to residential or commercial issues, that, he said, being the responsibility of the

managing agents who visited the property on a regular basis. Within the enclosures to the witness statement by Mr Darwall-Smith was a document headed Duties of Princes Court Estate Manager. This, Mr El Gogary told us, was the primary document which covered his responsibilities rather than the matters which were set out in his witness statement. He told us that if there was an emergency that arose then he may well contact the contractors direct, but if not, that was left to the managing agents for them to deal with. He was at pains to impress upon us that the evidence he gave was honest and accurate.

12. At the conclusion of Mr El Gogary's evidence, as we have indicated above, we adjourned to inspect the property. Before we did so, however, Mr Unsdorfer confirmed that the items in issue were as set out on the Scott Schedule within the bundle and that although it appears to be accepted that the service charges cause a recovery in excess of 100% of the expense, it is agreed that that balance is put into the reserve fund and accordingly there was no issue between the parties on this matter.

13. The Hearing reconvened on the morning of 29th July and we received evidence from Mr Darwall-Smith, a director of the present managing agents, Sandrove Brahams. He had provided a lengthy witness statement and nothing is served if we go into great detail recounting that which was said in writing and is available for both parties.

14. There were a couple of changes that he made, in particular with regard to staffing costs where he accepted that in the year ending 2013, the split between residential and commercial tenants was 75% for residential and 25% for commercial. When asked what he thought of the evidence of Mr El Gogary he told us that he did not think that there was a 40-50% split between commercial and residential and that certainly did not accord with his understanding of the work arrangements. His 75/25% split of staff costs was based on his consideration of the works that were undertaken and by reference to the floor areas.

15. Dealing with other specific matters, in respect of security he told us that he went to the premises most weeks and sometimes twice a week and usually called to see Mr El Gogary. It was put to him that the number of CCTV cameras that dealt purely with the residential accommodation, of which, it was said there was seven out of twenty, was not indicative of the amount of work that was done providing security for the residential part. He did concede that the costs of the CCTV system might be biased against the residential leaseholders. He accepted that it was a subjective split and that a 10% allowance which had been made since his company has taken over the management was perhaps at the bottom end of the scale. It was noted that under the management of the previous agents that this head of expense been split 95% residential and 5% commercial.

16. He accepted that the telephone masts installed in on the roof were clearly of benefit to the landlord and that he would expect that if he were a telephone supplier utilising the roof there would be some form of security to ensure that those aerials were free from any form of physical interference. He told us that the commercial leases merely provided for those tenants to pay a reasonable amount in respect of service charges.

17. He then turned to the question of insurance and as he indicated in his witness statement neither his company nor the Respondent took any commission in relation to the placing of insurance. He told us that the split between residential and commercial was determined by the insurers and that in his time at the property all claims that had been made related to the residential use although there had been damage to a shop. He was asked why the commission rate appeared to have increased and whether this had impacted on the level of the insurance premium. To answer this he took us to a number of emails with the brokers which appeared to indicate that the market was regularly tested. Of particular relevance was an email dated 24th July 2013 from a Mr Paul Brett of Penshurst Insurance, which highlighted the attempts that had been made to place insurance with a number of companies who had declined to quote, particularly as there had been a fairly substantial claim for water leaks in 2012.

18. On the question of electricity he was referred to a report from Asset Integrated Services Limited which was to be found in the bundle at page 197. Apparently this had not been seen by Mr Darwall-Smith or the Respondents before proceedings. This appeared to indicate that car park lighting appeared to cause the greater amount of cost compared to other matters in respect of general electricity use. It was suggested that the car park lighting was on permanently. The maker of the report did not attend before us but it did cause Mr Darwall-Smith to indicate that he had no objection to the Applicants' suggested split allocating 15% of the electricity cost to the commercial premises with the balance to the residential.

19. A specific cost in respect of legal fees was challenged in the year 2013. This related to, we were told, costs incurred in respect of a Right to Manage claim which was not pursued by the Right to Manage company. Although we did not see the bill we were told that it was £1,343.70. It was suggested by Mr Unsdorfer that this was not a service charge expense and that the other legal costs should be allocated to those leases where costs were recoverable or should be recovered from the defaulting leaseholder. He then moved on to dealing with management office expenses and confirmed that if Mr El Gogary were not in employment as the House Manager it would be necessary to employ somebody else to deal with the work. He accepted that it was conceivable that 25% of the office expenses could be put to commercial expenses in line with the way he had attributed staffing costs in 2013.

20. For the year 2014, which were estimated costs in any event, it was put to him that a number of items of expenditure, for example environmental issues, health and safety, water hygiene etc, should be split on a fairer basis, indeed Mr Unsdorfer considered that an 80/20 split was more reasonable for a number of these items of expenditure. Mr Darwall-Smith confirmed that where he had determined certain apportionments, for example in staffing costs and electricity, those would continue to be applied for the year 2014 which seemed to largely assuage Mr Unsdorfer's concerns about these estimated costs.

21. Following Mr Darwall-Smith we heard from Mrs Fiona Docherty who was the Property Manager in 2012 but a director of James Andrew Residential Limited, which was the managing agent for the property from 2007 until replaced by Sandrove Brahams in 2013. She had prepared a lengthy witness statement with a number of exhibits and gave us information as to the title of the property and the

layout of the commercial and residential units. She told us that the building was difficult to manage.

22. For the earlier years from 2007-2011 she had been able to retrieve from storage the majority of the accounting documentation save that there was a paucity of information for the year 2008. She accepted that her evidence, save for the year 2012 when she had hands on management, had been taken from these documents. It appears that the previous manager was now not available (Mr Dastur) and that therefore her evidence had to be read on the basis that it was not, save for 2012, first hand.

23. We noted all that was set out in her witness statement. She was asked about Mr El Gogary and his involvement. She was of the view that the list of responsibilities contained in the bundle and in his witness statement exceeded those that he undertook whilst he was fulfilling the role on behalf of James Andrew Residential Limited (JARL). Her view was that he had a more extensive role in dealing with residential matters.

24. In questioning from Mr Unsdorfer, she told him that during her period of 'hands on management' of some nine months, she only had three commercial property issues, a leak, the fitting out of a café and masonry fall from the residential property. In 2012 she had allocated the costs to the commercial elements in respect of security at 6% and staffing costs at 21%. Asked about the security she thought that with hindsight a 10% allocation to the commercial was fairer. When asked whether she had any reason to believe that the allocation of staffing at 21% could not have remained for all years she was unable to provide a response. She did, however, think that staffing costs at 5% were too low.

25. On the question of electricity, as with Mr Darwall-Smith, she had not seen the Asset Integrated report until these proceedings were commenced but she had no particular issue with the suggestion that the electricity should be attributed 15% to the commercial premises. As to drainage, she said that in her period of management there had been no problems with the drainage from the commercial units although she accepted that keeping the drains free running would benefit the commercial premises. The question of repairs and the attributing of liability were discussed. It was put to her that an 80/20 split with the residential paying the 80% was a general principle of fairness with regard to repairs with which she did not disagree. She did, however, say that while she thought an 80/20 split was satisfactory if, however, there was clear evidence that the charge related specifically to commercial or residential premises, then they should be allocated accordingly.

26. In respect of the management fees, she confirmed that in her opinion the percentage charge of 9% was not in accordance with good practice. Indeed, in a letter written to Mr Darwall-Smith by her on 17th September 2013, she said as follows: "*Furthermore when I took over the management of Princes Court from my predecessor Barham Dastur I did write to the client, Itemtrump Limited, at that time stating that a fee based on percentage of the outgoing was not favourable to the residents and asked if they would consider entering into a fixed fee. The client at that time refused.*" Her view was that £450 per unit plus VAT was reasonable on the basis that it was not an easy block to manage. There were certain "political undertones" and she thought that the present management fee of

£321 was too low. She thought a figure of around £475, excluding VAT would be reasonable. This was, however, on the basis that Mr El Gogary would be undertaking the same chores as he was when she was involved and not on the extended terms which he now appeared to operate. She also accepted that there had been an error in the management fee for the year 2008 when it should have been £47,674 plus VAT and not £53,198.06.

27. Asked about the percentage allocations, she told us that these were carried forward from previous years but her view now was that she thought a 10% liability to the commercial for security was fair and that the staffing costs should be perhaps split 20% for commercial and 80% for residential. She was comfortable with a 15% attribution to the commercial premises for electricity and that a general 80/20 split for general repairs and maintenance was reasonable unless they were specific expenses. Insofar as management was concerned she said that in the year 2007 a reasonable figure would have been £400 rising to £475 by the year 2012 plus VAT.

28. That concluded the live evidence. We had no witnesses on behalf of the Applicants but merely heard from Mr Unsdorfer on the various issues raised both by way of cross examination of Mr Darwall-Smith and Mrs Docherty and the comments set out in the Scott Schedule. By way of recap, however, Mr Unsdorfer said the following percentages should be applied: -

- In respect of security he thought a division making the commercial element responsible for 12½% of the cost was fair.
- For staffing he thought for the earlier years a 20% responsibility for commercial premises was reasonable but that for 2013 that should be 25%.
- He accepted a division of 80% for residential and 20% for commercial in respect of repairs, health and safety and other issues, unless it could be shown that the expense related solely either to residential or commercial premises.
- He argued for a 15% allocation to the residential expense for electricity.
- Insofar as management was concerned, he was happy with the present costs and had provided what he considered to be a comparable at Knightsbridge Court showing substantially lower management rates than had been charged in the earlier years.
- There then followed a general review of the matters by reference to the Scott Schedule. Mr Fieldsend reminded us that what is 'reasonable' may itself vary. There is a range and if the cost fell within that range, then it was reasonable. For example, with staffing in previous years it had been between 17 and 18%. Mrs Docherty said 20% was reasonable but so was 17 to 18%. Insofar as security was concerned, he accepted that 3% was not within the range but if the percentage figure should be 10% then 6 to 7% was. He was prepared to agree for the 2013 period onwards that the office expenses should be the same as staffing costs insofar as allocation was concerned and in that year and onwards 25% had been allocated to commercial premises both for the office expenses and staffing costs.

29. It was accepted that only one lease appeared to enable the recovery of legal fees. There was a specific charge in respect of accounting matters where extra charge had been levied by the accountants for improving the accounting system which he said was recoverable under the lease, although Mr Unsdorfer maintained that these were not expenses that were service charges in any event.

30. On the question of management fees Mr Fieldsend's submission was that whether a percentage was utilised to achieve the management fee in the earlier years or a fixed fee were used, the figure would be, on the basis of Mrs Docherty's evidence, pretty much as was charged. He did, however, accept that the management office expenses should follow the percentage allocation of staffing costs.

31. At the conclusion of the Hearing we agreed that we would accept certain additional written representations dealing with the percentage apportionments between residential and commercial premises in the hope that some would be agreed and whether there were specific invoices which could be clearly allocated either to the residential or commercial element. It was accepted that in reality there was nothing for us to consider in respect of the budgeted year to 2014. Mr Unsdorfer told us that as two of the leases made no provision for the recovery of costs Section 20C did not apply to those but that in any event the Applicants had been perfectly reasonable in making the claim and to use the protection of the legislation to resolve the issues.

32. Mr Fieldsend accepted that if the lease did not enable the recovery of the costs than that was the end of the argument. However, he pointed out that there had been a significant change from the items included in the application and those actually set out in the Scott Schedule. He reminded us also that there was in reality no evidence put before the Tribunal on behalf of the Applicant and that this was not a case where the landlord was reluctant to engage but indeed had gone out if its way to provide information. No positive case was put by the Applicants and no residential leaseholder had attended to support the case.

THE LAW

33. The law applicable to this application is set out in the schedule annexed.

POST HEARING SUBMISSIONS BY THE PARTIES

34. We received a document which included both the Respondents' comments on various matters and, helpfully, the replies made by the Applicants. We have noted all that has been said and have borne the various concessions and arguments in mind when reaching our findings which are as set out below.

FINDINGS

35. This is a somewhat unusual case. We say unusual in that the evidence produced by the Applicants was limited to the statement and oral evidence given by Mr El Gogary and allegations raised both in correspondence and more particularly in the Scott Schedule presented to us by Mr Unsdorfer. None of the leaseholders had provided a witness statement or attended the hearing to give live evidence.

36. Thankfully the Respondents had engaged in the process and had provided, as best they can, evidence relating to the service charges which go back to 2007. At that time the present managing agents were not involved and we are grateful to Mrs Docherty for the effort that she has put into obtaining documents from storage, providing a witness statement explaining how those costs were dealt with and attending the Hearing to give live evidence. It has to be noted, however, that Mrs Docherty did not take on the personal management of the building until 2012 and

accordingly any evidence that she can give is restricted to the documents which she has been able to recover.

37. In the period 2007 to 2011 we were required to deal with the following items:-

- Staff and security costs
- Electricity
- Professional fees in 2009
- Management fees and expenses
- Reserve fund
- General repairs and maintenance 2009
- Health and safety 2011.

38. **We will deal firstly with staff and security costs**. The evidence we received from Mrs Docherty is that insofar as **security costs** are concerned, these varied considerably over the years. In the year 2009/10 as little as 2½% was allocated to commercial elements and for the years before then only 5%. It rose to 7% in 2011 and dropped back to 6% in 2012. Mr Darwall-Smith had dealt with the apportionment for security on a 10% liability for commercial and 90% for residential for the year 2013. However, in answer to questions from Mr Unsdorfer he conceded that 10% was probably at the bottom of the scale. He said it was subjective.

39. We accept Mr Fieldsend's argument that the question of the percentages to be applied is by reference to range. Both Mr Darwall-Smith and Mrs Docherty conceded that 10% was within the range for which the commercial element should contribute towards the security costs. Although Mrs Unsdorfer sought to claim 12½% it seems to us that with both Mr Darwall-Smith and Mrs Docherty accepting a **10% apportionment**, and this being consistent with our own views on the evidence before us, **this is the appropriate percentage for us to accept for each of the years that were in dispute in relation to security costs.**

40. Insofar as the **staffing costs** were concerned, in the year 2013 Mr Darwall-Smith had apportioned these 75% for residential and 25% for commercial. Mrs Docherty, in the year when she had hands on management, allocated staffing costs at 21% to the commercial tenants. In the later submissions it is conceded by the Respondents that the allocation to the commercial tenants in 2007 and 2008 was not reasonable. It is submitted that the rates applied in 2009, 2010, 2011 and 2012 were reasonable and were within a range and we accordingly should not interfere with them. This is, of course, also on the basis that for 2013 Mr Darwall-Smith has allowed a 25% allocation for commercial contributions to staffing costs, which is not challenged by the Applicants. Doing the best we can and bearing in mind that we accept that these percentages should fall within a range it seems to us that **the years 2007 and 2008 they are too low. For those two years they are assessed at 18% which is an approximate average of the costs from the period 2009 to 2012. Otherwise, for the other years the allocations as provided for shall stand.**

41. Insofar as **office management expenses** are concerned, those should be allocated on the **same percentage split** as is now determined in relation to the staffing costs for each of the years.

42. We turn then to the question of **management.** It seems to us that the block is well managed. Mr El Gogary gave evidence as to the tasks that he undertook on behalf of the managing agents and although we are not persuaded by his suggestion that he spent between 40 and 50% of his time on the commercial tenants, having heard from Mr Darwell-Smith and Mrs Docherty on this point, there is no doubt that he provides a good service to the residential users and is and was part of the management team for the building. The Applicants do not challenge the management costs for 2013 or 2014 at £321 plus VAT. For the years 2007 to 2012 we accept Mrs Docherty's evidence that the management fees should be dealt with on a fixed basis. We have referred to her letter to the present managing agents on this point. (see para 26 above). She told us that although the block was difficult to manage and that she was not uncomfortable with the fees that were charged on a percentage basis she did think that the management should start at about £400 per unit plus VAT rising to £475 per unit plus VAT in 2012. We thought Mrs Dougherty a compelling and honest witness and accept her evidence. **Accordingly we determine that the management fees for the years 2007 to 2012 should be as follows**:

- For the year 2007 - £400 plus VAT for each unit.
- For the year 2008 - £415 plus VAT for each unit.
- For the year 2009 - £430 plus VAT for each unit.
- For the year 2010 - £445 plus VAT for each unit.
- For the year 2011 - £460 plus VAT for each unit.
- For the year 2012 - £475 plus VAT for each unit.

The reason we have not reduced the management charges to the levels now being levied by Sandrove Brahams is that they are different managing agents and it would appear that Mr El Gogary appears to be doing some additional tasks which he did not do when Mrs Docherty was managing. It seems to us that the fact that another agent may be able to undertake the works on a cheaper basis does not mean that the earlier years were wrong. We have evidence that the building is difficult to manage, is in a high profile location and not the 'run of the mill' building for management purposes. We are therefore content that the sums we have determined reasonably reflect the fees for managing the residential element.

43. We now move on the question of electricity. Mr Darwall-Smith in his evidence to us thought that a 15% allowance for the commercial property was not unreasonable and Mrs Docherty also accepted that as being a reasonable sum. 10% had been conceded in any event. **We find, therefore, that a 15% allowance in respect of the commercial element is a fair way of distributing the electricity costs for the common parts of the building.**

44. Another challenge raised by Mr Unsdorfer for this period 2007 to 2011 inclusive was the **reserve fund** contribution. In truth we did not really understand his challenge. The monies paid will be offset against the leaseholders' liabilities. Given the nature of the property it is reasonable for there to be a fund created and one would not expect the landlord to make contributions towards a reserve fund. Nor would we expect the landlord to seek contributions from the commercial tenants who do not presumably have leases the length of those for which the residential tenants have the benefit. In those circumstances the challenges to the reserve fund seem to us to be misplaced **and we do not propose to interfere with the allocation of costs that has occurred in the years in dispute.**

45. A specific challenge was made to **professional fees** relating to an accountancy charge. The invoice from H W Fisher and Company dated 30th March 2007 was in the sum of £6,754.61 representing £5,695 as "*additional costs incurred in sorting out the accounting system and advising the amounts due to the landlord.*" In an email from a Mr Paul Bebber with Jeremy Gray (with a copy to Mr Dastur and Mr Aziz) he said as follows "*This required my intervention to provide you with yet more information and additional backing as well having to visit you at your offices to discuss cash flow and how to handle the debt repayment. I also had to carry out further reconciliations to provide you with what you required.*" The letter then went on to say "*These costs are in my view chargeable as part of the service charge as they relate to assisting you in your duties as managing agents.*"

46. Despite what is said by Mr Bebber it seems to us that these are not costs that should be met by the leaseholders. Given the fairly high level of management fees that were being sought, and which we have allowed, it seems to us that resolving the managing agent's duties and discussing cash flow and debt repayment is a cost that should not be passed to the leaseholders. It is debateable as to whether it is recoverable under the terms of the lease but in any event our finding is that this is not a charge the leaseholders should be required to pay **and the sum of £6,754.61 should be removed from the service charge for the year 2007.**

47. A challenge was made to **general repairs and maintenance** expenses in the year 2009. The item under challenge was two payments to Alban for emergency repairs in the sum of £25,760. It was suggested that the landlord should bear 30% of these costs by Mr Unsdorfer in the Scott Schedule. However, he was prepared to accept that the general maintenance repairs should be divided on an 80/20 split and this has been accepted by the Respondents in their post Hearing submission. **Accordingly, there needs to be a 20% adjustment to the £25,760 which we are told gives £20,608 thus giving a credit to the residential** units which needs to be factored into the accounts for the year in question. In 2010 a challenge was also made to a sum of £29,022 in respect of works to the roof. The Respondents, again in the post Hearing submission, accepted that this should be apportioned on an 80/20 split and that **accordingly the sum chargeable to the leaseholders reduces to £23,217.60.**

48. Another specific item was **health and safety in 2011** in the sum of £10,053. Again the Respondents in their post Hearing submission have accepted that this should be dealt with on an 80/20 split. However, Mrs Docherty in her witness statement confirmed that an element of this expense had already been split between the residential and commercial on a 69/31% division. **Accordingly, this leaves the balance of £5,058 for which there appears to have been no apportionment but which the Respondents now accept should be dealt with on an 80/20 split which reduces the liability of the leaseholders from £5,058 to £4,046.40**. We believe that this deals with the years 2007 to 2011.

49. For 2012, the period when Mrs Docherty could give direct evidence there is uncertainty as to the allocation related to **drainage costs** in the sum of £12,893. It was said by Mrs Docherty that during this year when she was directly involved in the management of the building there were no claims made by the commercial

tenants. We did note from the annual statement that there appeared to be a monthly call out of £881.25 but no challenge was made to this, nor evidence given to us as what this item represented. We have been told what the drainage system is and there appeared to be no contract for service. The only actual evidence we had on this issue was from Mrs Docherty who specifically said that these costs did not relate to the commercial element. In those circumstances in the absence of any other evidence before us we must **conclude that this sum is allowed in full.**

50. **A further challenge in the year 2012 was made to general maintenance and repair costs in particular it seems scaffold hire and survey.** There was also an invoice from CJS Decorations for £5,364 which Mr Unsdorfer did not challenge. He also told us that in respect of the Eye-pro Limited cost the sum £6,048 was correct and this had already been apportioned on an 80/20 split. Accordingly, although he says in his post Hearing submission that the challenge was not withdrawn, that is not the note that we have. As we understand it, the scaffolding and other matters related to defective masonry which clearly is of danger to any users of the premises and indeed anybody passing on the street below. In our mind we cannot see that the commercial elements can avoid a responsibility in contributing towards those costs. **Accordingly although the Respondents accept that the charge in respect of the scaffolding of £13,800 should be apportioned 80/20 it seems to us that the other two charges of £3,840 and £2,614 should also be similarly allocated, although it is noted that in respect of the invoice for £2,614 this has already been divided on an 80/20 basis and indeed Mr Unsdorfer in his post Hearing submission withdrew the challenge to that element. Of the invoice for £3,840 it appears that 9% of this has already been apportioned to the commercial tenants. For the sake of consistency there needs to be a further 11% adjustment which is accepted by the Respondents thus reducing this invoice to £3,417.60.**

51. We then turn to **health and safety issues**, the total charge for which is £16,843. In Mrs Docherty's witness statement she says that the commercial tenants have already made a contribution of 9% towards this cost. She then broke down the various elements to show how this expense had been accumulated and that the bulk of these items of expenditure appeared to relate to residential matters. There were one or two items that perhaps could fall within the commercial basis but the 9% suggested by Mrs Docherty seemed to cover such things as the testing of the goods lift, possibly the St Johns Ambulance training and other bits that might have flowed into the commercial element. **Accordingly, we do not propose to make any changes to the health and safety allocation for 2012. It is, however, noted that a cost related to treatment of the works of water supply should be allocated on an 80/20 split. This invoice was £4,763.70 and accordingly that should be reduced to £3,810.40.**

52. Insofar as the 2014 element is concerned, the health and safety costs have been budgeted with an 8% contribution to the commercial tenants. This is a budgeted figure only and we do not propose to interfere with that allocation. No doubt the managing agents will review the actual costs when they are known and it may well be that they would need to be amended and perhaps fall within the 80/20 split that has been used previously for other items including health and safety. It might be that a more specific time recording system could be trialled to ascertain the split

between residential and commercial elements. We are satisfied that a 75/25 split for the office costs is reasonable. Although Mr Unsdorfer in his post Hearing submission refers to the evidence of Mr El Gogary, for our part we believe that he was between 'a rock and a hard place'. We had noted the letter from the Applicants pinned to the notice board in reception indicating that his job may be at risk and no doubt this played upon his mind when he was giving evidence to us and certainly he was concerned as to his position and what he was being asked to comment upon. We do not propose to interfere with the 75/25 split.

53. There were also a couple of other matters that we should touch upon. This relates to **the insurance** and legal fees in 2013. Insofar as the insurance is concerned, it seems to us quite clear on the evidence before us that the landlord had attempted to get as many quotes as possible. The property has a history of claims and any commission paid between the insurer and the broker, is not of relevance so far as the residential leaseholders are concerned. It appears clear that the broker undertakes works for the commission that he receives and in those circumstances we are not persuaded that the premium is excessive. **It therefore stands as claimed.**

54. The other matter is the question of **legal fees** in the sum of £1,343.70 in respect of works undertaken by the landlord following a discontinued RTM application. It seems to us that the costs involved in this are covered by Sections 88 and89 of the Commonhold and Leasehold Reform Act 2002. **They are not in our view a service charge issue but recoverable from the members of the RTM Company.**

55. It is not possible for us to give any findings on the other costs that are set out for this period which appears to total £10,360. However, it is noted that only one of the leases has any provision for costs to be recovered and accordingly there is a limited ability for the landlord to deal with these items of expenditure. Those leaseholders who have no obligation to pay the cost should not be required to do so as a service charge.

56. Finally, we deal with the Section 20C issue. Mr Unsdorfer has had limited success. He called no evidence from the Applicants other than Mr El Gogary and we are satisfied that the Respondents acted reasonably and proportionately in responding to the issues that were raised. We do not, however, think that the Respondent should be entitled to recover the totality of their costs as there certainly had been some issues with regard to apportionments, although no challenge is made to the reasonableness of the actual costs. In those circumstances we think a just and equitable solution is to allow the Respondents to recover 75% of their costs and accordingly we make an order under Section 20C that 25% of the costs are not recoverable as a service charge. This may be something of a pyrrhic victory for Respondents given the terms of the leases.

57. Mr Fieldsend suggested at the conclusion of the Hearing that we might like to deal with the specific apportionments of these costs between the individual Applicants. That is not a task that we propose to undertake. We do not have the information to do so and it seems unreasonable to utilise taxpayers' money for us to attempt to undertake that course of action. Instead we hope we have made clear in our Decision those elements of costs that need to be varied. It is, therefore, for the parties to review the service charges for each of the years and to determine which

of the Applicants may have been a leaseholder at the time and is therefore entitled to some form of credit. We suspect that at the end of the day, given that there are 91 flats for which these charges need to be apportioned, the costs benefits for individual leaseholders are not going to be that great. We hope, however, it will set some form of precedent for the future so that there is no need for the matter to be referred again to this Tribunal.

Judge: *Andrew Dutton*

A A Dutton

Date: 8th September 2014