10790

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AZ/LSC/2015/0044**
Property	:	**28 Poplar House, Wickham Road, London SE14 1NE**
Applicant	:	**Mr John Margarson**
Representative	:	**In person**
Respondent	:	**The Mayor and Burgesses of the London Borough of Lewisham**
Representative	:	**Mr Christopher Heather (Counsel) Greenwoods Solicitors LLP**
Type of Application	:	**Correction certificate**
Tribunal Member(s)	:	**Mr J Donegan - Tribunal Judge Mr J Barlow JP FRICS – Valuer Member**
Date and venue of Hearing	:	**16 April 2015 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 June 2015**

DECISION

As Chairman of the Tribunal, which decided the above-mentioned case, I hereby correct the errors and clarify the decision dated 09 June 2015 as follows:[1]

1. In paragraph (1), the amount of service charge payable by the Applicant should be **£9,811.48** and not £10,000 as stated.

2. In the final sentence of paragraph 14, the figure of **£9,811.48** should be substituted for £10,000.

3. In paragraph 15, the expiry date of the lease should be **26 November 2114** and not 26 November 2014 as stated.

Name: Tribunal Judge Donegan **Date:** 23 June 2015

[1] Regulation 50 The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

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Respondent	:	**The Mayor and Burgesses of the London Borough of Lewisham**
Representative	:	**Mr Christopher Heather (Counsel) Greenwoods Solicitors LLP**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Mr J Donegan - Tribunal Judge Mr J Barlow JP FRICS – Valuer Member**
Date and venue of Hearing	:	**16 April 2015 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**09 June 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £10,000 is payable by the Applicant in relation to major works undertaken at Poplar House, Wickham Road, London SE4 1NE ("Poplar House") in 2008-10 and invoiced on 10 August 2010.

(2) The application for a refund of tribunal fees is refused.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), as to his liability to contribute to major works undertaken at Poplar House in 2008-10.

2. The application was submitted to the tribunal on 20 January 2015 and concerns Flat 28 Poplar House ("the Flat"). An oral case management hearing took place on 19 February 2015, which was attended by the Applicant and Mr G Cummins (a Housing Delivery Manager for the Respondent). Directions were given at that hearing and a final hearing date of 16 April 2015 was agreed.

3. On 02 April 2015 the Respondent's solicitors wrote to the tribunal requesting a postponement of the final hearing, as their primary witness (Mr Adrian Kelly) and counsel (Mr Christopher Heather) were unavailable on 16 April 2015. That request was refused by the tribunal in a decision dated 02 April 2015. At paragraph 5 of that decision the tribunal stated:

   "The proposed witness can provide a witness statement that can be tendered in evidence even though it will carry less weight if the witness is not available for cross examination"

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

The hearing

5. The Applicant appeared at the hearing in person and the Respondent was represented by Mr Heather.

6. The tribunal members were each supplied with a hearing bundle that contained copies of the application, directions, statements of case, lease, the Respondent's witness statements and various other documents. They were also supplied with Mr Heather's outline submissions on behalf the Respondent.

7. The tribunal heard oral evidence and submissions from the Applicant. The tribunal also heard oral submissions from Mr Heather, on behalf of the Respondent.

8. The Respondent's primary witness, Mr Kelly, was unable to attend the hearing as he was on holiday. The tribunal considered the contents of his statement dated 08 April 2015, which largely dealt with the factual background to the works undertaken at Poplar House and the scope of the works themselves. However it attached limited weight to this statement, given that Mr Kelly did not give oral evidence and there was no opportunity to test his evidence.

9. The Respondent also relied upon a witness summary for Ms Sandra Simpson, which briefly responded to some of the points raised in the Applicant's statement of case. Ms Simpson attended the hearing but was not required to give oral evidence, as the matters raised in her witness summary were uncontroversial.

The background

10. The Respondent is the freehold of Poplar House, which is a 6-storey, local authority, block consisting of 28 flats. Most of the flats are let on secure tenancies but some, including the Flat, have been purchased under the Right to Buy scheme and are now held on long leases. The Applicant is the leaseholder of the Flat, which is on the sixth floor and consists of 3 bedrooms, bathroom, wc, kitchen and sitting room.

11. Photographs of the windows in the Flat were appended to the Respondent's statement of case and included in the hearing bundle. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

12. The Applicant holds a long lease of the Flat. This requires the Respondent to provide services and the Applicant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease are referred to below, where appropriate.

13. The application concerns major works undertaken to the Respondents' housing stock on the Brockley Estate in Lewisham, including Poplar House, as part of a Private Finance Initiative ("PFI"). The PFI Contract was awarded to Regenter B3 Limited, which is a consortium comprising Pinnacle PSG Limited, Equipe Regeneration Limited and Higgins Construction Plc ("Higgins"). Higgins was the subcontractor that undertook the refurbishment works. The Respondent has adopted the Government's Decent Homes Standard in respect of its properties that are let on long leases and have produced its own 'Availability

Standards'. Higgins was obliged to meet these standards when undertaking the refurbishment works.

14. The refurbishment works at Poplar House were undertaken between 2008 and 2010 and a final invoice was issued to the Applicant on 10 August 2010. The total cost of the works was £290,997.40 and the Applicant's 1/28th contribution amounted to £10,392.77. However the sum demanded from him has been capped at £10,000.

The lease

15. The lease was granted by the Respondent ("the Lessor") to Mr Derek Anthony Stafford ("the Lessee") on 17 December 1990 for a term expiring on 26 November 2014. The Applicant is a successor in title of Mr Stafford.

16. By clause 5(1) of the lease, the Lessee covenanted to pay the service charges for the Flat, as set out in part 1 of the 10th schedule.

17. The Demised Premises are defined in the fourth schedule of the lease, as follows:

ALL THAT Flat/Maisonette as referred to in paragraph 7 of the Particulars hereto and situate on the floor or floors of the Building referred to in paragraphs 8 and 6 respectively of the said Particulars shown edged red on the plan attached hereto including all exterior walls and the glass of the windows of the Demised Premises and the doors and door frames the surface of the floors above the joists beams or floor slabs and the surface of the floor of the balcony (if any) and the ceiling of the Flat/Maisonette up to but excluding joists beams or floor slabs to which the ceiling is attached and all walls (save the walls dividing the Demised Premises from any other Flat/Maisonette or from the common halls landings staircases steps and passages in the Building which walls shall be party walls and structures) TOGETHER WITH all fixtures and fittings sanitary apparatus cisterns tanks sewers drains pipes cables wires ducts shafts conduits and heating apparatus (if any) which are in or about any part of the Building and serve exclusively the Demises Premises PROVIDED THAT the Demised Premises shall not include such other parts of the Building forming or intended to form part of the Reserved Property and the premises included or intended to be included in the leases of the adjoining or neighbouring Flats/Maisonettes TOGETHER ALSO WITH the garden ground (if any) enjoyed therewith and also shown edged red on the plan attached hereto

18. The Lessor's covenants are set out in the ninth schedule to the lease and include:

1. *TO maintain in good and substantial repair and condition (and whenever reasonably necessary rebuild re-instate renew and replace all worn or damaged parts) the following: -*

(1) THE main structure of the Building and the Demised Premises including the foundations all exterior and party walls and structures and all walls dividing the Flats/Maisonettes from the common halls staircases landing steps and passages in the Building and the walls bounding the same and window frames and all electrical and other fittings in the Building (but excluding the internal plaster the window glass and electrical and other fittings inside any individual Flat/Maisonette for which the Lessee thereof is responsible under any provisions in this Lease corresponding to Clause 4 of the Seventh Schedule) and all doors therein save such doors as give access to individual Flats/Maisonettes and including all roofs and chimneys and every part of the Building above the level of the top floor ceilings

19. The detailed service charge provisions are set out in part 1 of the tenth schedule to the lease and the contribution formula is to be found at paragraph 5. It includes:

(i) Communal Lighting and Heating

Lighting and heating to corridors staircases landings lifts and motor rooms and general extra lighting where appropriate

.....

(xi) Repairs and Maintenance

All or any part of repair maintenance or making good of structural defects including rebuilding or reinstatement carried out or to be carried out by the Council to the demised premises or to the common parts of the Building or Estate of which the property forms part subject to Paragraph 18 of Schedule 6 of the Housing Act 1985

....

(xiv) Management Costs

The costs of managing the Building or Estate including the costs of managing agents if appointed

The issues

20. In his statement of case the Applicant disputed the following sums that had been invoiced for the major works at Poplar House:

    (i) Replacement windows - £2,025

    (ii) Scaffold - £1,346

    (iii) Electrical Works - £2,544

    (iv) Professional Fees - £1,829

    (v) Management Fees - £945

21. The statement of case also identified a possible set-off claim for losses allegedly suffered by the Applicant, arising from the replacement of the windows in the Flat. He quantified this claim in the sum of £2,154, which he sought to set off against his service charge liability. The directions required the Respondent to address the set-off argument in its statement of case. They also required the Applicant to produce evidence of his losses.

22. The Applicant did not challenge the other items in the final invoice dated 10 August 2010. Further he did not challenge section 20 consultation procedure for the major works or the manner in which these service charges had been demanded.

23. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Replacement windows (£2,015.06) and set-off claim

24. It is convenient to deal with these two issues together. They both relate to the replacement of the original, single-glazed Crittal windows at Poplar House with upvc double-glazed units, as part of the major works. The Applicant's contribution to the cost of this work was £2,015.06, which is slightly lower than the figure of £2,025 referred to in his statement of case.

25. At the hearing, the Applicant accepted that the Respondent is liable to maintain and repair the window frames pursuant to paragraph 1(1) of the ninth schedule to his lease. His primary argument is that the windows did not require repair or replacement and the Respondent can only charge for works that are covered by his lease.

26. In his original statement of case, the Applicant referred to the original windows in the Flat as being 60 years old but "*..as good as the day they left the factory*". He described how he had spent 20 hours painting the windows and knew them to be "*..perfect, hinges catches and everything good*". The Applicant also expressed the opinion that the original windows "*..would have lasted 200+years; where the replacement windows will be lucky to last 40 years*".

27. The Applicant expanded upon his argument in an email to the Respondent dated 23 March 2015 and in his oral evidence. He suggested that there was no proof that the windows at Poplar House required replacement. The Respondent had not produced any schedule of complaints about the windows. The Applicant never complained about the windows. As far as he was aware, there were no complaints from other residents.

28. In his oral evidence, the Applicant stated that he redecorated the original windows approximately 12 months before they were replaced.

29. The Applicant also referred the tribunal to his email to former tenant, Hyde Housing Association Limited ("HHAL"), dated 12 June 2007. This provided details of various works undertaken to the Flat prior to the grant of the tenancy, to satisfy HHAL's exacting requirements. These works included the fitting of window restrainers. The Applicant contends that the subsequent grant of the tenancy to HHAL is evidence that the Flat (including the windows) was in good condition.

30. In his email of 12 June 2007, the Applicant referred to letters from HHAL dated 08 September 2006 and 10 March 2007. In cross-examination he explained that there was an initial inspection of the Flat by HHAL, following which they identified the works required before it would be fit for letting. The Applicant subsequently redecorated the Flat and undertook various works, as outlined in the email. He then granted a tenancy to HHAL, who in turn sublet the Flat. The Applicant did not disclose a copy of the tenancy agreement and could not recall the precise duration. He thought it was for 4 or 5 years.

31. The Applicant also relied upon photographs of the original windows, which had been taken by a representative of the Respondent shortly before they were replaced. He considered that the photographs showed the Crittal frames to be in good order but acknowledged that "*They do look unloved because paint has problems adhering to zinc and the Respondent has obviously been remiss in their maintenance program*".

32. The Applicant also referred to the Respondent's statement of case, which indicated that new windows were required to meet the Decent Homes Standard. He suggested that the windows were replaced to

meet this standard, rather than in compliance with the repairing obligations in the lease.

33. The Applicant's secondary argument was that the replacement windows caused severe condensation in the Flat, due to inadequate ventilation. Prior to the replacement there were two window mounted extractor fans in the Flat; one in the kitchen and one in the bathroom. These were removed with the old windows and were not replaced. The Applicant described the works as having "*..created a watertight box*".

34. The new windows had trickle vents, which the Applicant described as "*feeble and ineffective*".

35. Approximately 6-7 years before the replacement of the windows there were leaks into the Flat, from the roof. In mid April 2009 HHAL reported a severe roof leak to the Applicant. In his email of 23 March 2015, the Applicant stated that the leak was reported "*..a few weeks after the window installation & ventilation removal*".

36. HHAL complained of dripping water in the Flat and the Applicant travelled from his home in Southend to investigate the problem. He found 10-20 water drips and believing them to emanate from the roof, reported the matter to the Respondent on 21 April 2009.

37. It took the Respondent approximately one-month to send a damp specialist around to investigate the problem. During this period, the Applicant was constantly chasing the Respondent. He also visited the Flat on two further occasions to meet with the Respondent's representatives. The damp specialist advised that the dripping water was condensation, rather than leaks from the roof. This was partially caused by the lack of roof insulation above. The Applicant also attributed the condensation to the new windows and the lack of ventilation, as there had no previous problems in the 20 years that he had owned the Flat.

38. In his oral evidence the Applicant described the dripping water as "*horrific*". This was causing mould on the walls and damage to the decorations. HHAL moved their subtenants out, as the condensation rendered the Flat uninhabitable. In cross-examination the Applicant stated that he thought the sub-tenants were a family consisting of two adults and four children.

39. On 20 May 2009, the Applicant sent an email to the Respondent's contractor complaining about the delay. That email referred to an inspection that day by the "*damp engineer*" and the likelihood that it would be over 3 months before remedial works would be undertaken (from the date the problem was reported). It concluded:

"The consultant agreed that internal insulation was required.

As you have said all other flats have external insulation and that is why mine has cold condensation spots.

Also there is not adequate insulation.

There used to be ventilation in the kitchen and bathroom by having ventilation in the windows. When the windows were removed, no provision was made for extra ventilation. The only way I can see out of it is to drill 4 inch ventilation holes in every room. Things need to move very quickly as Hyde Housing want to get the tenant back in quickly.

What can you do??

The matter is urgent.

Thanks"

40. The Applicant sent a further email to the contractor on 26 May 2009, expressing his dissatisfaction with the lack of progress and concluding:

"Part of the problem is the replacement of the windows. I used to have extractors in bathroom and kitchen windows but these were taken out and not replaced

This needs sorting immediately"

41. The Applicant took matters into his own hands. He obtained an estimate of £450 for the cost of installing new extractor fans in the kitchen and bathroom from a Mr T Nixon. Rather than accepting this estimate, he decided to provide his own ventilation. This involved drilling through a wall in the kitchen and installing a high pressure ventilation unit, to expel air. In order to undertake this work, the Applicant hired an industrial drill and diamond bit at a cost of £101.20. The cost of the ventilation unit and wall lining was £17.20. Included in the hearing bundle were copies of the Applicant's credit card statements, showing the payments made for these items. Drilling the hole took him approximately 6 hours, due to the thickness of the wall and the density of the bricks.

42. After the new ventilation unit was installed, the Applicant arranged for the Flat to be dried with dehumidifiers and redecorated. Included in the hearing bundle was a handwritten and undated receipt for this work from a Mr J Lopstre. This was for a sum of £500. Following the redecoration works, HHAL arranged for the subtenants to move back

in. The Applicant relied on his note of an email from HHAL dated 08 April 2015, which read "*Rent was stopped because of repairs. Rent was stopped 1 June to 23 June. The part payment for June, Included in July payment was £215.41*". The Applicant's evidence was that the rent deducted for the period 01 to 23 June 2009 was £604.

43. The Applicant claims that he had to visit the Flat on six separate occasions to in investigate the water drips, meet with the Respondent's representatives, undertake the ventilation works and meeting with the decorator. The round trip from his home in Southend is 100 miles and he claimed £300 for this travel expenses (600 miles @ £0.50 per mile) together with a further £300 for his time, including chasing the Respondent (30 hours @ £10 per hour). There were no documents to prove these losses but the Applicant considered that £10 per hour was a modest sum for his time.

44. The revised amount of the Applicant's set-off claim, as stated at the hearing, was £1,823.40. This is broken down as follows:

Drill and bit hire	£102.20
Ventilation unit and wall lining	£17.20
Redecoration	£500.00
Loss of rent	£604.00
Travel expenses	£300.00
Compensation for lost time	£300.00
	£1,823.40

45. The Respondent contends that it was reasonable to replace the original Crittal windows at Poplar House. It has to make decisions on works of repair based on the block as a whole. The combination of the age of the windows and their poor condition meant they needed to be repaired or replaced. The Respondent reasonably chose to replace them. Copies of the window survey and FENSA certificate for the replacement windows in the Flat were exhibited to Mr Kelly's statement. The date of the FENSA certificate was 09 January 2009.

46. Mr Heather referred to the various photographs of the old windows in the Flat, taken by the Respondent. These showed the exterior of the window frames to be in poor condition and internal mould growth. The photographs had been taken shortly before the windows were replaced and less than 2 years after the interior of the Flat had been redecorated

in 2007. It appears there were problems with condensation before the replacement works. Mr Heather suggested that the condensation in April 2009 was a reoccurrence of the problems that existed before the works.

47. As to the set-off claim, Mr Heather accepted that in principle this might be available on the basis of the Court of Appeal's decision in ***Hanak v Green [1958] 2 QB 9***. However, the Applicant must show a cause of action entitling him to damages. Mr Heather suggested that the tribunal should put itself in the position of a County Court Judge, hearing a damages claim. It was for the Applicant to establish a breach of obligation on the part of the Respondent that gave rise to loss or damage.

48. Mr Heather suggested that the set-off claim had not got "*off the ground*". The Applicant had not identified the obligation that had allegedly been breached by the Respondent or how any breach had led to condensation and mould in the Flat. Further he had not identified the basis for claiming his loss of rent and other consequential losses.

49. Mr Heather referred to an "*evidential void*", which was particularly surprising given the Applicant's allegation that the condensation was "*horrific*". There were no photographs of the alleged damage or expert evidence, identifying the cause of the condensation. The Applicant was unable to establish a causal link between the replacement of the windows or the removal of the ventilation units and the condensation in the Flat. There was no evidence that the Respondent had caused the condensation, which was mere speculation. The fact that there was mould in the Flat before the windows were replaced suggested that there were other causes. For example, the condensation might have been caused by the sub-tenants' lifestyle.

The tribunal's decision

50. The tribunal determines that the amount payable by the Applicant for the replacement windows is £2,015.06.

51. The tribunal dismisses the set-off claim.

Reasons for the tribunal's decision

52. Although the evidence was specific to the Flat, the tribunal considered whether it was reasonable to replace the windows throughout Poplar House.

53. Based on the photographs in the hearing bundle and the age and condition of the original Crittal windows, it was reasonable for the Respondent to replace the windows. The photographs clearly showed

the exterior of the frames to be in poor condition. Further there were clear signs of internal mould, adjacent to the windows. Crittal windows are notoriously hard to maintain and it was reasonable to replace them with double-glazed units, rather than try and repair/redecorate them. The new unit should require far less maintenance than the original windows, which is in the interests of both parties. Further they should increase thermal efficiency in the Flat, which benefits the Applicant and his tenants.

54. Paragraph 1 of the ninth schedule to the lease expressly provides that the Respondent can "*renew*" damaged parts, including window frames. The replacement of the old Crittal windows with the upvc units was a renewal and was entirely reasonable. The units are sealed and include the glass. It was not possible to just replace the original frames with upvc models. It follows that the full cost of replacing the windows can be recovered from the service charge account for Poplar House, notwithstanding that the leaseholders are responsible for the glass in the windows.

55. The Applicant did not challenge the amount charged for the window replacement. Rather he focussed on the need for the replacement and the condensation in the Flat during the spring of 2009. There was no evidence that the new window units were defective or the installation was incorrect. The tribunal is satisfied that the cost of replacing the windows was reasonably incurred.

56. The tribunal dismisses the set-off claim for the reasons put forward by Mr Heather. The onus was on the Applicant to prove his claim, which he singularly failed to do. At the very least he should have provided photographs of the alleged damage to the Flat and evidence of HHAL's complaints. These were notable by their absence.

57. It is also worth recording some of the inconsistencies in the Applicant's set-off claim. He stated that there had been no problems with condensation in the Flat prior to the replacement of the windows, whereas the pre-works photographs clearly showed internal mould adjacent to the windows. These were taken less than two years after the Applicant had redecorated the Flat in 2007. The Applicant suggested that water started to drip in the Flat within a few weeks of the windows being replaced. However the FENSA certificate establishes that the replacement had been completed by 09 January 2009, whereas the first complaint of drips was not until April 2009. Further the credit card statements show that the Applicant paid for the drill hire on 07 May 2009 and received his holding deposit back on 11 May 2009. This suggests that he hired the drill and installed the new ventilation unit in the kitchen almost two weeks before the inspection by the Respondent's damp specialist (on 20 May 2009).

58. For the sake of completeness, any set-off claim in relation to the ventilation units in the original kitchen and bathroom windows is also dismissed. It would not have been possible to fit these units in the new upvc windows. Arguably the Respondent or its contractors should have returned the redundant units to the Applicant, once the windows were replaced. However the Applicant did not put forward any claim for the value of the redundant units, which would have been negligible at best.

Scaffold (£1,346.57)

59. This point can be dealt with very shortly. The Applicant challenged the need for scaffold but not the sum charged. He contended that it was only needed for the replacement of the windows. If the windows did not require replacement then he should not have to pay for the scaffold. In his email of 23 March 2015, he stated *"I entirely agree with respondents...saying if windows were to be changed then scaffolding was necessary"*.

60. In his statement, Mr Kelly suggested that scaffolding was also necessary to comply with health and safety requirements for other external repairs, including work to the flat roof and chimney stacks.

The tribunal's decision

61. The tribunal determines that the amount payable in respect of the scaffold is £1,346.57.

Reasons for the tribunal's decision

62. The tribunal has determined that it was reasonable to replace the windows. It follows that the scaffold was necessary and the scaffolding charge was reasonably incurred. It is unnecessary for the tribunal to go on and consider whether scaffold was required for other external repairs.

Electrical (£2,543.71)

63. This item relates to the upgrading of the original, communal lighting and switch room equipment at Poplar House. The Applicant acknowledged that the Respondent is liable to maintain and repair the electrical fittings, pursuant to paragraph 1 of the ninth schedule to his lease. However he argued that there was nothing wrong with the old lighting or evidence that the fittings required repair. Further he should not have to pay for upgrades.

64. The Respondent relied on a specification from Pinnacle ESP Consulting Mechanical and Electrical Engineers ("Pinnacle") dated June 2008 that

was exhibited to Mr Kelly's statement. The "*Electrical Particular Specification*" was at Part D and provided a full description of these works. Mr Heather referred the tribunal to paragraphs 4.1, 4.2 and 4.4, which set out the purpose of the works. He also referred to an electrical installation certificate from Higgins, dated 23 April 2010.

65. In its statement of case, the Respondent explained that the electrical works were undertaken to comply with its Availability Standards and to comply with current IEE Regulations. In his statement, Mr Kelly made the point that Higgins worked to a fixed price and there was no incentive for them to carry out works unnecessarily.

The tribunal's decision

66. The tribunal determines that the amount payable in respect of the electrical works is £2,543.71.

Reasons for the tribunal's decision

67. The evidence from both sides was very limited. There were no reports, identifying whether these works were necessary. In the absence of such reports, the tribunal had regard to the Respondent's Availability Standards, which require it to "*Maintain safe and modern electrical distribution systems*" and the Pinnacle specification. Based on these documents and the age of the original electrical fittings, the tribunal was satisfied that it was reasonable to renew the communal lighting and switch room equipment. Whilst these were described as "*upgrading*" works, they did amount to repairs.

68. The Applicant did not challenge the cost or the quality of the electrical works. Rather he focussed on the need for the works. The tribunal is satisfied that the charge for these works was reasonably incurred.

Professional fees (24%) and management fee (10%)

69. It is also convenient to deal with these two issues together. The tribunal informed the parties of its decision on these fees at the hearing. The professional fees are in fact fees, preliminaries and subcontractor's overheads and profits. These were originally charged at 26% but were subsequently reduced to 24%. The management fee is claimed under paragraph 5(xvi) of the tenth schedule to the lease.

70. The Applicant challenged these fees in two ways. Firstly he argued that no fees should be payable, as he was not liable to contribute to the window replacement or electrical works. The Respondent's second argument is that the fees charged are too much for the work done. He suggested that arranging the works should have taken no more than one day and that the Respondent's management of the works was poor.

71. In relation to the quality of the management, the Applicant relied on a works order from Higgins dated 07 January 2009, which included the following variation: *"Return to fit leaseholders fan after window replacement – HKI CVI 008/151 (2HRS £50)"*. He pointed out that this work had not been undertaken. The Applicant also relied on the condensation problem in the Flat in the spring of 2009, as evidence of the Respondent's poor management.

72. Mr Heather referred the tribunal to the Upper Tribunal's decision in ***London Borough of Lewisham v Rey-Ordieres and others [2013] UKUT 14 (LC).*** That case also concerned Brockley PFI works but related to different blocks on the Brockley Estate. The Upper Tribunal reduced the professional fees from 26% to 24% and allowed the management fee of 10%. In his outline submissions, Mr Heather pointed out that the Upper Tribunal's decision on these points is binding, as it is superior court of record. Accordingly he argued that the tribunal was bound by the figures allowed in ***Rey-Ordieres***.

73. In relation to the works order, Mr Heather accepted that the window fans had not been replaced. He referred the tribunal to the final account. It appeared that there had been no charge for this variation.

The tribunal's decision

74. The tribunal determines that the amount payable for professional fees is 24% and the amount payable for management fees is 10%.

Reasons for the tribunal's decision

75. The Applicant's first argument falls away, as the tribunal has determined that he has to contribute to the window replacement and the electrical works. In relation to the amount of the charges, the tribunal follows the decision in ***Rey-Ordieres.*** No alternative figures were put forward by the Applicant and he failed to make any convincing argument to justify a reduction in these fees. In relation to the challenge to the management fees, it would not have been possible to fit window fans to the new double-glazed units and it appears that this has not been charged. Further the Applicant has failed to establish that the replacement of the windows caused the condensation in the Flat in the spring of 2009.

Summary

76. The tribunal has determined that the Applicant is liable to pay all of the disputed items in the final invoice dated 10 August 2010. It follows that he is liable to pay the capped amount of the invoice (£10,000) in full.

Application under s.20C and refund of fees

77. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application and hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal refuses this application. The substantive application has been wholly unsuccessful and there is no justification to order a refund.

78. The directions provided that any application for an order under section 20C of the 1985 Act would be dealt with at the hearing. However in the original application form the Applicant indicated that he would not be making a section 20C application. As it transpired, such an application was unnecessary. In his outline submissions, Mr Heather conceded that there is no contractual entitlement in the lease for the Respondent to recover its costs of these proceedings. It follows that none of the Respondent's costs can be passed to the Applicant through any service charge.

Name: Tribunal Judge Donegan **Date:** 09 June 2015

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20C

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

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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