

Y TRIBIWNLYS EIDDO PRESWYL  
RESIDENTIAL PROPERTY TRIBUNAL  
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0043/01/15

In the Matter of 6 Coopers Court, The Old Brewery Quarter, Caroline Street, Cardiff, CF10 1FN

In the matter of an Application under Section 27A and 20C and Schedule 11 Commonhold and Leasehold Reform Act 2002

Applicant: Countryside Residential (South West) Limited

Respondent: Mrs Paula Jayne Luke

Tribunal: Richard Payne LLB M Phil  
John Singleton  
Juliet Playfair

Hearing date: 27<sup>th</sup> January 2016

Upon hearing Counsel for the Applicant Mr Bradshaw, and the Respondent in person.

**IT IS ORDERED;**

**That the amount for service charges owed by the Respondent for 2009-2013 is £8003.19 and the amount for administration charges is £560. The total amount owing is £8563.19. The Respondent's application for an order under section 20C is refused. The matter is to be returned to the County Court.**

**DECISION**

**BACKGROUND**

1. The Applicant is the Landlord in respect of residential apartments at The Old Brewery Quarter in St Mary's Street, Cardiff. On 30<sup>th</sup> July 2004 the Respondent became the leasehold owner of 6 Coopers Court, The Old Brewery Quarter, Caroline Street, Cardiff, CF10 1FN ('the property'). At that time, the residential apartments in the Old Brewery Quarter ('OBQ') were being managed by City Living but they ceased to do so on 29<sup>th</sup> February 2008 when management was taken over by Orchard Block Management Services Limited ("Orchard Block"). The Respondent's lease was originally between Countryside Residential (South West) Limited and Eamon Thompson, dated 10<sup>th</sup> November 2003 for a term of 198 years expiring on 25<sup>th</sup> July

2201. The lease contains clauses in relation to the tenant's obligation to pay service and administration charges.

2. By an Order dated 13<sup>th</sup> January 2015 the Bridgend County Court transferred proceedings number A32YJ449 to the tribunal to determine the service and administration charges. On 4<sup>th</sup> February 2014 the Applicant had issued County Court Proceedings against the Respondent described as "a simple debt claim issued to recover charges due from the Respondent under contractual terms of the lease"<sup>1</sup>. On 6<sup>th</sup> February 2014 the Respondent Mrs Paula Luke submitted a defence to the County Court disputing Service Charges and complaining that when Orchard Block took over in late February 2008 the fees were increased by over 300% to £1,595 and again the following year. The Defence alleges that there was no maintenance of the property carried out and there had been damage to the building which had not been properly repaired.
3. The Particulars of Claim in the County Court dated 29<sup>th</sup> January 2014 sought arrears of service and administration charges in the sum of £15,550.44 and alleged that the Respondent had failed to pay the Service Charges properly due and invoiced in respect of the periods from 25<sup>th</sup> December 2004 to 31<sup>st</sup> December 2013, ground rent properly due and invoiced in respect of the period 1<sup>st</sup> January 2006 to 31<sup>st</sup> December 2013 and insurance properly due and invoiced in respect of the period 25<sup>th</sup> December 2004 to 29<sup>th</sup> February 2008. As a direct result of non payment of the charges due the Applicant had also incurred administration charges.
4. The tribunal gave directions and held a pre hearing review on 15<sup>th</sup> July 2015 following which the matter was prepared for hearing. We are required to determine the reasonable service and administration charges between the years 2009 to 2013 inclusive.

## **INSPECTION**

5. On 27<sup>th</sup> January 2016 the tribunal accompanied by Mr John Socha, Director of Orchard Block Management Services Ltd, and Mr Bradshaw, Counsel for the Applicant, inspected The Brewery Quarter in Cardiff and the property. The Respondent and her husband joined the inspection although were not present at the outset.
6. The residential part of the Old Brewery Quarter comprises four different sets of apartments with separate entrances. These are The Hop House which has 6 flats that are entered via St Mary's Street Cardiff, The Malthouse Apartments numbered 1 to 12 which has an entrance between La Tasca and Nandos restaurants within The Brewery Quarter, Coopers Court which comprises flats numbered 1 to 12 and is entered via Caroline Street, and Dray Court which likewise has flats numbered 1 to 12. There are 42 flats in total in the Old Brewery Quarter apartments.

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<sup>1</sup> See Paragraph 2 of the statement of John Socha of the Applicant at Page 2 of the hearing bundle.

7. We inspected the common parts in all of these four blocks. We noted the mobile phone entry system in The Hop House and that the hallway and common parts were smart, carpeted and had a lift. We noted when entering Coopers Court that there was an electromagnetic door. It did not yield to any 4 digit number (as had been suggested by the Respondent) but required the code to affect entry. At level 3 of Coopers Court we visually inspected the roof and saw the ventilation machinery that serves the restaurants below. We could also see the air conditioning units, aerials and satellite dishes on the roof of Coopers Court. In Coopers Court we noted that there was evidence of a leak over a cupboard in the corridor which leads to flats 8 and 12 and we noted that the electric cupboards and all meters were upon the corridor with flats 3 to 7. There was some staining to the ceiling tiles on the corridor from the water leak in 2013. With regard to the subject property, flat number 6 looks out towards and over Caroline Street. The Respondents drew our attention to the wooden flooring in the property. We noted that the lift in Coopers Court was working and the fire alarm panel was at the basement level upon entry.
8. We also inspected The Malthouse Apartments noting that there appeared to be a leak on the fourth level near flats 11 and 12 and we examined Dray Court. In the basement of Dray Court is the rubbish and bin store area for all of the flats in the four separate blocks. As there is communal access to the rubbish store, accordingly there are number locks at each level of Dray Court for security purposes. We also noted the water tank and pump house which serves Dray Court and The Malthouse in the basement opposite the bin store. We inspected the common areas and corridors throughout the development.
9. Coopers Court is situated in the centre of Cardiff. Caroline Street, from which one enters Coopers Court, is known locally as "Chip Alley". There are two fish and chip bars directly opposite the entrance to Coopers Court. Caroline Street is now pedestrianised and is very often extremely busy. For example, at weekends on Friday and Saturday evenings, upon occasions of home international rugby matches and so forth. Caroline Street is often full of people in the early hours of the morning. It is thus not a quiet location but this would be clear to anyone with knowledge of Cardiff and/or upon an inspection of the surrounding area.
10. The Brewery Quarter itself is upon the site of the old Brains Brewery and has a walk through area connecting St Mary's Street with Caroline Street. At ground floor level there are a number of restaurants and 'The Yard' public house.

## **THE HEARING**

11. Mr Bradshaw indicated that the Applicant had accepted that certain sums were no longer claimable owing to limitation issues and therefore the sum sought was little short of £11,000 in Service Charges and costs. He stated that before the current management company Orchard Block had taken over the lease, the building was in a parlous state and Service Charges were in arrears. They had been uncollected and were unrealistically low. This resulted in a lack of money to undertake maintenance upon the buildings. He said that Orchard Block had over the last 7 years turned the buildings around and the Applicant submitted that realistic management fees have

been charged for this work. Without money in the bank previously it was difficult to undertake the work. The majority of tenants are now up to date with the management fees and Service Charges. He submitted that Mrs Luke the Respondent in this case, has a clear obligation in the lease, which is to pay Service Charge and management fees which is not conditional upon work being done. He described the Respondent as being in very serious arrears of Service Charges which had built up and that arrears can cause serious problems in managing and maintaining the building. Further, to be in substantial arrears is unfair upon the other tenants who pay the Service Charges.

12. Mr Bradshaw stated that the figure at the date of the hearing was £8,592 plus interest and his instructing Solicitors had given an estimate of the costs and he believed that an estimate of the grand total owed by the Respondent including the Service Charge and costs would be around £22,000.
13. The Respondent has throughout indicated that she purchased the property upon the understanding that the annual maintenance fee was £530.25 and this was to include the buildings insurance. The Respondent had also been assured that such amount took into account the restaurants occupying the Brewery Quarter who would be contributing to and paying the majority of the upkeep in the charges. The Respondent has always maintained that her solicitor told her this not a salesperson. The Applicant says that in any event any suggestion made by solicitors could not have bound the landlord.
14. The Applicant also included and prepared very detailed bundles for the hearing, which included numerous invoices which the Applicant says, allow the Respondent to see the costs that have been incurred, and to see that the amount of £530.25 per annum that she claims to be her contribution would be unreasonable and disproportionate. It is also part of the Applicant's case that the Respondent has benefitted from the insurance by the head landlord to which everyone has to contribute. There was a serious water leak in the building previously which was paid for by the head landlord's insurance.
15. Mr Socha for the Applicant was able to confirm that the damage to the Respondents floor in relation to the water leak that took place in late 2013,<sup>2</sup> resulted in the floor being replaced on 17 July 2014 at a cost of £2364.75 and that this amount had been recovered from the insurance company. It was only the £250 excess that was taken from the Service Charge and Mr Socha pointed out that the Respondent had had the benefit of the insurance of the site in respect of which she had made no contribution for the year in question.
16. Mrs Luke accepted that she thought the costs of the remedial work following the water leak had been paid for through the Service Charge, but accepted that she had been mistaken and that the costs had been recovered from the insurance company.

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<sup>2</sup> Paragraph 29 of Mr Socha's statement, page 1395, File 4 of the hearing bundle.

17. With regard to the costs of work in the Respondent's own flat following the water leak and the replacement of a wooden floor, (which was viewed upon the inspection by the tribunal), the Respondents say they are experienced in doing up property and they consider that £600 for a real oak floor would have been reasonable. She contrasted this with the cost of £2364.75 claimed under the insurance. However, Mr Socha explained that workmen have to get there before 10 am, different arrangements have to be made for them to get into the street because of the location to unload things etc, and they had put matters to tender. However, the tribunal does not consider these issues to be of central importance given that the monies were recovered in any event from an insurance policy and did not form part of the Service Charge that we have to consider.
18. The Applicants had prepared a Scott Schedule for the matters in dispute. The Applicant had conceded, for example that the Service Charge owing from 1<sup>st</sup> January 2008 to 31<sup>st</sup> December 2008 of £1,595, was beyond the limitation date and therefore they no longer sought to enforce the same or seek a determination in relation to this. Therefore, it was Service Charges from 1<sup>st</sup> January 2009 that formed the subject matter of the application.

#### **REASONABLENESS OF THE SERVICE CHARGES.**

19. The amount sought for 2009 was £1,656 and interest of £380 at the contractual rate specified in the lease. The Service Charge statement of account for this period was at page 13 of the hearing bundle. This was the first full year for which Orchard Block were managing the apartments. The total expenditure was £78,292 according to the statement of account. The Applicants made the point that if this is divided by the number of apartments, namely 42, this produces £1,864 not far off £2,000 Service Charge per apartment. If the amount of £530.25 contended for by the Respondent was the annual Service Charge then this would bring in £22,260, which it can be seen, is a very considerable shortfall from the actual costs of running the Old Brewery Quarter apartments.
20. The Respondent then stated that these costs were not unreasonable. She said she knew the price would go up, but again maintained that she had been advised by her solicitor upon completion about the likely management fees and Service Charges. She said that her solicitor had also given her specific advice about the restaurants contributing to the Service Charges and her solicitor had worked matters out at a price per square footage. The Respondent said this advice was given to her in writing and that her solicitor was very competent and therefore it made sense to the Respondent. The Respondent did not however produce the written advice from her solicitor.
21. The tribunal drew the Applicant's attention to the Service Charge statement of account for the OBQ apartments for 1<sup>st</sup> January 2013 to 31<sup>st</sup> December 2013<sup>3</sup>. There is a heading "Superior Landlords Service Charge" and amounts are included for the four preceding years of 2008 to 2012 inclusive, the fee for 2009 being £5,490.

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<sup>3</sup> Page 31 of the hearing bundle.

22. Mr Socha said that the Superior Landlord's charge is currently paid to Rydells TPS who are based in Manchester, and they arrange the insurance within the lease. The cost of insurance and the Superior Landlord's Service Charge comes to Orchard Block to be included within the Service Charges.
23. Mr Socha confirmed that there is no provision in the lease for billing other users of the building, for example the restaurant owners and so forth, to contribute towards the Service Charge and he believed this would have been apparent to any competent solicitor. Mr Socha said that if there is a Superior Landlord then they would handle everything to do with the shops, pest control and so forth and that would be billed straight back to the commercial users. Mr Socha indicated that he found it hard to believe that Mrs Luke had been told what she had and he commented that he usually advises people not to purchase residential apartments on top of commercial property.
24. Mr Bradshaw drew the tribunal's attention to clause 7.5 of the lease whereby under clause 7 "Agreements and Declarations" the landlord and the tenant agree and declare that:-

**7.5 "Representations and exclusion of warranty as to use"**

*"The Tenant acknowledges that this Lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the Landlord and nothing contained in this Lease shall be deemed to constitute or imply any warranty by the Landlord that the Premises are authorised under the Planning Acts or otherwise for use for any specific purpose"*<sup>4</sup>.

25. Mr Bradshaw pointed out that, although he did not doubt what Mrs Luke was saying about the advice that she had been given, that it was incorrect, and that Mrs Luke's Solicitor was not an agent of the landlord.
26. The 8<sup>th</sup> schedule of the lease related to the Service Charge and at Part 3 of the 8<sup>th</sup> Schedule<sup>5</sup> the "Service Charge proportion" was defined as being *"one forty - second(1/42) or such other fair and reasonable proportion to be determined by the landlords' surveyor whose decision.... should be conclusive."*
27. The tribunal's attention was also drawn to the 8<sup>th</sup> Schedule, part 2, "Expenditure" relating to all costs and expenses incurred by the landlord in or incidental to the management of the block and the provision of services to it including at paragraph 8.3, *"Paying any Service Charge, insurance, rent or equivalent payments payable under any Superior Lease or any variation of it or arrangements substituted for it"*.

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<sup>4</sup> Page 112 of the hearing bundle.

<sup>5</sup> Page 150 of the hearing bundle.

28. Mr Bradshaw then stated that he understood the Respondent;
- a. was not quibbling any more with the running costs of the building and the reasonableness of the Service Charges for the same,
  - b. and she had accepted the principle of the division of the Service Charge and that 1/42 was the proportion that she was responsible for,
  - c. and that she understood there was no other fund to subsidise the costs.
29. **Mrs Luke confirmed that she could see that the costs were reasonable for the years in question and made it clear that she was not going to challenge the reasonableness of the costs claimed in the Service Charge accounts. She did accept the proportion payable of 1/42.**
30. Mrs Luke also accepted the Applicant's contention about the obligation to pay the Service Charge in accordance with the terms of the lease. In other words, Mrs Luke's understanding that she was to pay around £500 per year for the Service Charge because she had been told this in good faith by her legal advisers, was incorrect and did not provide a reason for Mrs Luke not to pay the Service Charge in accordance with the lease. Since Mrs Luke accepted that her understanding of the situation was legally incorrect, the tribunal was not required to make a formal determination upon the same, however we confirm that the Applicant's submissions upon Mrs Luke's liability to pay the Service Charge in accordance with the lease are correct.
31. However although this undoubtedly truncated the length of time that the tribunal required to hear the matter and all of the evidence, the tribunal still has to be satisfied as to those matters under Section 27A of the Landlord and Tenant Act 1985, namely the determination as to whether a service charge is payable and if it is, the person to whom it is payable, the amount which is payable, the date by which it is payable and the manner in which it is payable.
32. There were evidential matters that remained outstanding at the date of the hearing, for example in relation to the head lease and the reconciliation of invoices within the hearing bundle and as to whether they were properly service charge items. This was not clear and so further directions were given for the Applicant to file copies of the head lease from the freeholder to Countryside Properties, the intermediate lease from Countryside Properties to Countryside Residential and for full details of the service charges charged by the superior landlord for the services charge years 2009 to 2013 inclusive together with supporting documentation. The tribunal also gave directions that further information should be provided upon the enforceability of the service charges under the lease and details on costs and any application in relation to costs under Section 20C of the Landlord and Tenant Act 1985.

33. The tribunal further ordered that updated schedules in relation to each of the service charge years in question from 2009 to 2013 should be provided by the Applicant and the Respondent cooperating with each other, including a breakdown of the amount claimed by reference to invoices supplied in the hearing bundle and to provide any missing invoices where appropriate.
34. Regrettably although the parties purported to comply with these additional directions, upon the tribunal's analysis, the Applicant had failed to properly correlate the costs claimed to the invoices and therefore the tribunal was obliged to undertake this reconciliation exercise which was a matter for the parties to have undertaken.
35. Accordingly notwithstanding that the Respondent did not maintain her challenge to the reasonableness of the Service Charges being claimed and that she accepted the 1/42 proportionate payment under the lease, that was not the end of the matter. There were other issues upon which the tribunal had to be satisfied before being able to come to a final decision.

#### **The Service Charge Machinery Within The Lease**

36. The Eighth Schedule to the lease is headed 'Service Charge' and appeared at Page 41 of the lease onwards<sup>6</sup>. Part 1 of the Schedule defines services, Part 2 'Expenditure' is defined as 'All costs and expenses incurred by the Landlord in or incidental to the operation and the management of the Block and the provision of services to it including:' and there was then listed all of the various categories of Expenditure including, under outgoings at Paragraph 8, 8.3 "Paying any service charge, insurance rent or equivalent payments payable under any Superior Lease or any variation of it or arrangements substituted for it."
37. Part 3 of Schedule 8 is headed "Calculation and Payment of Service Charge and defines "Service Charge statement" as "... a certificate given by Landlord's Surveyor of the Service Charge for a Service Charge Period, including a summary of the Expenditure included in the calculation of that Service Charge."
38. It is worth setting out further what the lease says in this schedule and at Part 3 as follows;

*"2. The Service Charge payable by the Tenant will be, in respect of each Service Charge Period, the Service Charge Proportion of the Expenditure paid or incurred in that Service Charge Period (subject as mentioned below). The Service Charge for the Service Charge Periods current at the beginning and end of the Term respectively will be apportioned on a daily basis.*

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<sup>6</sup> Page 145 of the hearing bundle.



3. If the Landlord so requires the Service Charge may include such part of any items of Expenditure of a recurring nature, whenever paid or incurred whether before or during the Term and including reasonable provision for anticipated expenditure, as the Landlord's Surveyor determines to be a reasonable allocation to the relevant Service Charge Period.

4. The Landlord may at any time notify the Tenant of a reasonable estimate of the Expenditure and of the Service Charge for a Service Charge Period and may from time to time revise that estimate.

5. The Tenant will pay to the Landlord by equal instalments on the Quarter Days during each Service Charge Period the estimated Service Charge notified to the Tenant for that Service Charge Period or, if no estimated Service Charge has been notified to the Tenant, the Tenant will pay quarterly instalments of estimated Service Charge at the rate last payable by the Tenant in respect of a previous Service Charge Period....

6. If after the beginning of a Service Charge Period the Landlord notifies the Tenant of any estimate or revised estimate of Expenditure and of Service Charge for that Service Charge Period, then the Tenant will pay to the Landlord within five (5) Working Days of demand the difference between the amount already paid by the Tenant for that Service Charge Period and the amount which would have been paid if such estimate or revised estimate had been notified to it before the beginning of the relevant Service Charge Period.

7. If during any Service Charge Period the Landlord reasonably incurs any large and exceptional item of Expenditure then the Landlord may demand, by way of an additional payment on account of Service Charge (and instead of a payment under **paragraph 6** of this part of this Schedule), the Service Charge Proportion of the whole of that item of Expenditure and the Tenant will pay such amount to the Landlord within ten (10) Working Days of demand or by such later date as may be specified in the demand.

8. As soon as practical after the end of each Service Charge Period the Landlord will supply to the Tenant the Service Charge Statement for that Service Charge Period which will (in the absence of manifest error) be conclusive of the matter stated in it for the purposes of this Lease.

9. If for any Service Charge Period the Service Charge exceeds the Interim Payments, the Tenant will pay the difference to the Landlord within ten (10) Working Days of receipt of the Service Charge Statement.

10. If for any Service Charge Period the Service Charge is less than the Interim Payments, the overpayment will be credited to the Tenant against the next

*payment of estimated Service Charge or (following the end of the Term) paid to the Tenant within ten (10) Working Days of issue of the Service Charge Statement.*

*11. If any Expenditure is omitted from the calculation of the Service Charge in the Service Charge Statement for a Service Charge Period that Expenditure may be included in the calculation of Service Charge for a subsequent Service Charge Period.*

*12. For a period of one month after delivery of the Service Charge Statement to the Tenant, the Landlord will make available any accounts, receipts, invoices and calculations evidencing the Expenditure and the calculation of the Service Charge for inspection by the Tenant at the offices of the Landlord or its managing agents during normal business hours by appointment.”*

39. The Tribunal asked Mr Bradshaw about the practical effect of the foregoing paragraphs and in particular the mandatory requirement in clause 8 for the Landlord to supply the Service Charge Statement as soon as practical after the end of each Service Charge Period. Was the preparation of the Service Charge Statement as defined in the Eighth Schedule a condition precedent to the recovery of the Service Charge?
40. Mr Bradshaw submitted that clause 8 was not a condition precedent and had it been intended to be it would have been placed before clauses 4 and 5 and would have been referred to in clause 5. Mr Bradshaw said that clauses 8, 9 and 10 allow the tidying up of the accounts in this way and clause 10 shows the Landlord is obliged to credit any overpayments to the tenant.
41. Mr Bradshaw referred to Clause 5.1 of the Sixth Schedule, the Landlord’s Covenants, namely the provision of services<sup>7</sup> where the Landlord’s obligation to provide services was subject to payment of the Service Charge, and the Landlord was to use reasonable endeavours to provide the services. Mr Bradshaw therefore said that it was necessary to first get the service charges in for the Landlord to be able to spend the money. The service charge has a forward looking element. The liability for the tenants to pay is created by the estimate of the service charge expenditure and if this was not so then the Landlord would only be able to demand payment of service charges upon matters already spent. He said that would make it very difficult for the management company to manage the building. He stated that this explained Part 3 of Schedule 8, the liability to pay upon the tenant’s part is created by the service of the estimate not the certification of the Service Charge Statement. The service charge estimates will already have been provided supported by budgets, and

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<sup>7</sup> Page 139 of the hearing bundle.

accounts would have been provided. Mr Bradshaw also pointed out that it had not been suggested that Mrs Luke had been prejudiced by this and in terms of the construction of the lease, that it was clauses 4 and 5 of Part 3 of Schedule 8 (above) concerning the estimate and the demand for the service charge, which creates the Tenant's liability.

#### **The Head Lease and Superior Landlord's Service Charge.**

42. The Applicant provided further written submissions in a statement from Philip McLachlan of the Applicant's solicitors dated 11 February 2016 which essentially repeated the oral submissions made by Mr Bradshaw. Exhibited to this statement were documents described as "certification for the service charge statements". These were undated documents that related to the service charge years from 1 January to 31 December for the years 2009 to 2013 inclusive. They were worded "In respect of the Service Charge Statement attached hereto for the [appropriate year] We Hereby Certify that such service charge statement accurately reflects the service charge expenditure for that year." They were all signed by Mr Socha.
43. The Applicant also subsequently provided office copy entries with the freeholder's title showing that as at 30 May 2013 the freeholder is St James's Place UK PLC. They also provided the office copy entries for the leasehold title of Countryside Residential (South West) Limited ("Countryside Residential") showing that the term was from 22<sup>nd</sup> August 2003 to 3<sup>rd</sup> August 2021, and the head lease which was dated 22<sup>nd</sup> of August 2003 between the original freeholder Countryside Properties PLC and the leaseholder Countryside Residential. This included the Tenant's covenants in the Fifth Schedule, which are to pay: the rent, the service charges in the manner stipulated in the Eighth Schedule, and the insurance rent within 10 working days of demand. Part 3 of the Eighth Schedule was in the same terms as the tenants' leases as set out in paragraph 38 above.
44. At the hearing there were no details or accounts in relation to the superior landlord's service charge. However these were subsequently supplied by the Applicant's solicitors. In relation to the years 2009 to 2014 inclusive there were provided what was described as a "certificate" for the Old Brewery Quarter which contained details of Schedule 2, the Commercial Service Charge and Schedule 3 described as "Structural and Shared Communal Areas". These documents all contained the following statement: "The above statement of costs for the year ending 31<sup>st</sup> of December [2009 to 2014 as appropriate] has been prepared from the books of RiddellTPS Ltd and records the true costs of providing the services to the property." They also said "Signed by the Landlord's Surveyor" and there followed a signature.
45. The Applicant's solicitors also provided what was described as an "Occupier Statement" for each service charge year in relation to the proportion of the

freeholder's service charges payable by Countryside Residential. These clearly recorded that in relation to Schedule 2, the commercial service charge, (that is, the charges relating to the businesses and non-residential services) that nothing was payable. This demonstrated that the residential tenant's were not being asked to contribute to the commercial properties common costs. In relation to schedule 3 the annual totals were provided and the proportion of 33.26% was calculated. The resulting figure would be the amount of the freeholder service charge that would then appear in the service charge accounts and be subject to the further 1/42 apportionment with the rest of the service charges.

46. In the service charge statement of account for the service charge year ending 31<sup>st</sup> of December 2013<sup>8</sup> there is an entry for "Superior Landlord Service Charge" and figures are given not only for 2013 but for the four previous years 2008, 2009, 2011 and 2012. However these figures do not correspond with the figures in the "Occupier Statements" provided by RiddellTPS. For example, notwithstanding that the year 2008 is not under consideration, the amount demanded upon account for this year was £5490 and the apportioned total due was £2123.89. However in the 2013 statement of account the figure for 2008 is recorded as being £1372. For 2009, the amount demanded upon account was £5490 and the apportioned total was £4640 yet the 2013 figure for 2009 records the amount demanded upon account, namely £5490. For 2011 the figure recorded in the 2013 service charge statement of account is £11,897. The occupier statement records the amount demanded upon account in 2011 as being £5700 and the apportioned total due as being £4083.14. For 2012, the superior landlord service charge recorded in the 2013 statement of account is £1425. The occupier statement describes £5700 being demanded upon account for 2012 and the apportioned total as being £2923.42. Likewise the 2013 figure is £5700 in the service charge statement of account which is the same as the amount demanded upon account in the occupier statement. However the apportioned total due is £3885.61.

47. The year 2010 is not included in the 2013 service charge statement under the heading "Superior Landlord Service Charge", however in the service charge accounts for the period ended 31<sup>st</sup> of December 2010 there is an entry for the superior landlord service charge for £1372.<sup>9</sup> The Occupier Statement for the landlord's service charge for 2010 records the amount demanded upon account as being £5490 and the apportioned total due as being £4756.68. Clearly therefore the figures are inconsistent and the tribunal could not be satisfied that the amount of the superior landlord service charge being charged to the tenants was correct.

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<sup>8</sup> Page 31 of the hearing bundle.

<sup>9</sup> Page 17 of the hearing bundle.

### **Reserve Fund.**

48. The tribunal also noted that within the annual service charge statement of accounts there were amounts recorded for contribution to Reserve Funds. For example in 2009<sup>10</sup> this was £8900, and the reserve fund was stated to be £19,629.<sup>11</sup> In 2010 the contributions were £5840<sup>12</sup> and the reserve funds were £25,469.<sup>13</sup> There were similar figures for each service charge year, culminating in the contributions to the reserve funds for the year ending 31<sup>st</sup> of December 2013 being £1000<sup>14</sup> and the net assets, namely the reserve fund total being £27,776.<sup>15</sup>

### **Decision on Service Charge lease machinery, Superior Landlord's Charge and Reserve Fund.**

49. We accept Mr Bradshaw's submissions that clause 8 of Part 3 of Schedule Eight<sup>16</sup> is not a condition precedent and relates to the demanding of the monies on account of service charges to be paid and therefore that the demands for payments on account of the service charges have been validly made. However, we are concerned at the inaccuracy of the figures relating to the Superior Landlord's service charge and indeed the treatment of the monies that have been applied towards the Reserve Fund.

50. Within the lease there does not appear to be any mechanism for the maintenance of a reserve fund. Part 3 of Schedule 8 states as follows;

*“ 10. If for any Service Charge Period the Service Charge is less than the Interim Payments, the overpayment will be credited to the Tenant against the next payment of estimated Service Charge or (following the end of the Term) paid to the Tenant within ten (10) Working Days of issue of the Service Charge Statement. “*

51. There is no evidence before us that this clause has been complied with. Firstly, there does not appear to have been any crediting of overpayments to the tenants with the result that the amount attributed to the reserve funds has increased every year, and secondly, the lease machinery with regard to the service charge statement (requiring

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<sup>10</sup> Page 13 of the bundle.

<sup>11</sup> Page 14 of the bundle.

<sup>12</sup> Page 17 of the bundle.

<sup>13</sup> Page 18 of the bundle.

<sup>14</sup> Page 31 of the hearing bundle.

<sup>15</sup> Page 33 of the bundle.

<sup>16</sup> See paragraph 38 above.

certification by a surveyor) has not been followed. The Applicant's solicitor Philip McLachlan did supply further evidence upon this point in his statement dated 11<sup>th</sup> February 2016 which exhibited what were described as certification of the service charge statements as set out in paragraph 38 above. These comprised, for the service charge years in question, 2009-2013, an undated statement signed by Mr Socha that said "We Hereby Certify that such Service Charge Statement accurately reflects the Service Charge Expenditure for that year." The suspicion remains that these were prepared as a result of the tribunal's directions since they had not previously been included in the hearing bundles. There was no evidence that they had been prepared contemporaneously with the service charge accounts for the relevant years.

52. Mr McLachlan noted however that "*... the Applicant cannot confirm that the same have been served upon the Defendant, as discussed during the hearing of the 27<sup>th</sup> January 2016.*" Mr McLachlan goes on to say that "*..the absence of the service of the Service Charge Statement could be seen to prevent the Applicant from raising an invoice for any shortfall at the end of each Service Charge Period. However, the Applicant avers that it has not issued any demand for the shortfall. There has never been a surplus to be refunded to the leaseholders due to the fact that insufficient funds have been collected to fully fund the services required.*"
53. This last sentence appears to be at odds with the increasing reserve fund every year indicating that there were apparently excess funds received from the service charge payers each year. Mr McLachlan uses the term 'refunded' but it appears that there has been neither a crediting of surplus funds to the tenants nor a crediting to them against the next year's service charge demands. Delivery of the properly prepared and certified service charge statement is important because it triggers the tenant's right to seek inspection of accounts, receipts, invoices and calculations at the landlord's offices within one month of such service.<sup>17</sup>
54. Although we find that the service charge amounts have been properly demanded on account, we also find that the Applicant lacks authority under the lease to establish a reserve fund and that there was no evidence before us to demonstrate that tenants had been properly credited for overpayments in any of the given service charge years. The Applicant is to ensure that tenants are properly credited for these overpayments.

#### **Decision on the reasonable amounts of the service charges per year.**

55. In response to the tribunal's additional directions of 27 January 2016, the Applicant's solicitors provided schedules for each service charge year itemising different

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<sup>17</sup> Eight Schedule, Part 3, clause 12.

categories, the page numbers in the hearing bundle where invoices could be found and then providing subtotals for the different categories leading up to a final total for each service charge year. The tribunal has analysed the entirety of the evidence supplied. Not all of these invoices relate to matters properly chargeable to the tenants including the Respondent. Following the tribunal's thorough analysis and reconciliation of the invoices and documentation with the amounts properly chargeable to the Respondent, the resulting figures are as follows;

	Totals Claimed by Applicant	Claimed by Applicant from Respondent	Allowed by RPT	Chargeable to Respondent, as Assessed by RPT
2009	£69,718.00	£1,659.95	£84,199.30	£2,004.75
2010	£60,508.00	£1,440.67	£64,287.06	£1,530.64
2011	£55,430.00	£1,319.76	£63,558.98	£1,513.31
2012	£57,169.00	£1,361.17	£67,694.87	£1,611.78
2013	£112,589.00	£2,680.69	£69,773.64	£1,661.28
<b>Totals</b>	<b>£355,414.00</b>	<b>£8,462.24</b>	<b>£349,513.85</b>	<b>£8,321.76</b>
<b>Less, Superior Landlord's Contribution to Electricity<sup>18</sup> Revised</b>			<b>-£13,380.00</b>	
<b>Total</b>	<b>£355,414.00</b>	<b>£8,462.24</b>	<b>£336,133.85</b>	<b>£8,003.19</b>

56. It would not be appropriate for reasons of space for this decision to detail all of the tribunal's calculations, although a couple of examples will suffice to demonstrate the unreliability of the Applicant's figures. Upon a thorough analysis of the invoices contained in the hearing bundles with the costs claimed, it is clear that the Applicant failed to properly correlate the costs to the invoices. The Applicant should have listed invoices with figures against them and totalled them according to the heads of claim. This was not done. The Applicant failed, particularly in respect of the superior Landlord's service charge, to include and reconcile the actual cost instead of the advance payments which have been clearly credited in the annual occupiers' statements.

57. By way of further example, in respect of the electricity costs, it is difficult to see how the Applicant has arrived at its totals. It may be that they have double counted in

<sup>18</sup> See page 32 of the bundle, as recorded in the service charge statement of account for 2013.

some instances, adding some of the advance payments to the actual invoices. The correct calculation can be arrived at by adding the invoices for the years in question.

58. There are further examples of unreliability in the figures, whereby the Applicant failed to add in insurance for 2009 in the schedule provided following the post hearing directions. However an invoice for that is included in the original submissions. Further, the Applicant has failed to total correctly the 2010 water demands to their detriment. In the tribunal's opinion it is correct to add these in to the amounts owing as they are evidenced by invoices within the hearing bundle. Therefore it can be seen that the unreliability of the Applicant's original figures has resulted in some instances in further amounts being added to the service charge owing as well as reductions of the amounts claimed.
59. **This tribunal therefore finds and orders that the amount of service charge payable by the Respondent for 2009 is £2004.75, for 2010 is £1530.64, for 2011 is £1513.31, for 2012 is £1611.78, and for 2013 is £1661.28 totalling £8321.76 altogether. The superior landlord's contribution to electricity is £13,380. This divided by 42 equals £318.57. Once credit is given to the leaseholders for this amount then the total payable by the Respondent is £8321.76 - £318.57, namely £8003.19.**

#### **Administration charges.**

60. Mr Bradshaw confirmed that the sum of £560 was sought in administration charges, namely £110 in connection with the outstanding service charges for 2009, £130 in connection with the outstanding service charges for 2010, £150 in relation to the outstanding service charges for 2011 and £170 in relation to the outstanding service charges owing for 2012.<sup>19</sup> it was explained that the applicant did not charge per letter but the sums reflected the time spent on administration. Mr Bradshaw submitted that this was an average of £140 per year or approximately one hour of a junior solicitor's time. He said that in fact Mr Socha had spent longer than that.
61. Mr Bradshaw relied upon clause 28.5 in the 5<sup>th</sup> Schedule to the lease. Clause 28 is headed "Landlord's costs" and imposes an obligation upon the tenant

*"To pay all reasonable costs, charges, fees and expenses including reasonable solicitor's costs and surveyors fees properly incurred by the Landlord:-*

*28.5 in connection with any breach or non-observance by the Tenant of its obligations hereunder (whether or not the Landlord pursues such matters by proceedings in the Court)."*

62. Mrs Luke in her written evidence against the payment of administration charges had accused the Applicant of plucking figures out of the air, adding them to her bill and

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<sup>19</sup> As itemised in the service charge demand at page 78 of the hearing bundle dated 29th of April 2013.



not giving her any service. She had again referred to the photographic evidence that she had of the years that the building had been neglected and maintenance was not being carried out. She had argued that the value of her investment had gone down as a result. She said in oral evidence that she did not think that these charges had been dealt with reasonably and that she might have received standard letters. However she conceded that she had received emails from Mr Socha and that it was reasonable for him to chase her up about unpaid service charges.

63. Mr Bradshaw submitted that the additional administration charges involved in dealing with Mrs Luke were not covered under the general management charges under which many other tasks were undertaken. He also submitted that the other tenants who had paid their charges upon time should not have to pay for the additional management time taken up dealing with the Respondent. He accepted that Mrs Luke genuinely believed that she was in the right but that there are many people who hold such views even when time proves them to be incorrect. He stated that if a tenant believed that they were being wrongfully charged then their correct course of action was to make the payments and then to challenge them, and if necessary to exercise their right to apply to a tribunal. Mrs Luke said that she was not aware of the rights that she had but then accepted that she had received the demands which included the notice with the summary of tenants' rights and obligations.

64. **The tribunal finds that the administration charges of £560 claimed by the applicant between 2009 and 2012 were reasonably incurred and reasonable in amount.** There was ample evidence within the hearing bundle of correspondence between Mr Socha and Mrs Luke and there were numerous queries and matters that Mrs Luke had raised over time. The tribunal was satisfied upon the evidence that Mr Socha had spent time dealing with these matters, that the administration charges are properly chargeable under the lease and that, given the approach that Mrs Luke had taken to the payment of service charges, that in reality Mr Socha had no option other than to spend additional time dealing with Mrs Luke. It was reasonable for that time to be charged and the tribunal agrees with Mr Bradshaw's submission that overall the charges equate to around an hour of a junior solicitor's time per year. The tribunal has no doubt that in reality Mr Socha would have spent more than an hour in each of the years in question dealing with Mrs Luke and her failure to pay service charges.

#### **Application under section 20 C.**

65. Section 20 C (1) of the Landlord and Tenant Act 1985 states that;

*"a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal,.....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.”*

The application in the case of proceedings before a leasehold valuation tribunal is to be made to the tribunal before which the proceedings are taking place and the tribunal may make such an order on the application as it considers just and equitable in the circumstances.<sup>20</sup>

66. By an email of 23 February 2016 to the tribunal and to the Applicant’s solicitors, the Respondent made a section 20 C application. The respondents submitted that she felt that the costs should not be put upon her as the applicants had failed to provide any proper paperwork to her and that “I feel if the information had been correctly given to me during the appropriate timescale then matters could have been resolved and now I find I have been given a bundle of information all at one time and the information looks not to be accurate. In the huge bundle there are hosts of inaccuracies with the service charge and it appears that the 42 apartments are indeed paying for the lighting for the Piazza which is the commercial lighting for the Brewery Quarter – this is still ongoing as is various bills for the commercial premises that are being charged to us and also various bills that should be charged to tenants and not to the service charge. All these inaccuracies have greatly added to the huge legal bill and I also note from the bundle that a template letter had been prepared in 2008 stating that they were starting legal proceedings against everyone the first week of January 2009 – why was this not done in 2009 as stated? If people had the opportunity to go to court in January 2009 as per the letter then costs would be minimal.” The Respondent also pointed out that she had tried to keep her costs as low as possible because she only ever wanted a fair hearing and she had not been in a position to employ a barrister or solicitor to represent her.

67. The applicant responded to Mrs Luke’s submissions by a witness statement prepared by Charlotte Collins solicitor dated 16 March 2016. This stated that the applicant believed that the respondent may be confused as to the nature of a section 20 C application as she appeared to be resisting a costs order being made against her personally rather than the costs being placed with the service charge for the development. The statement further submits that the costs which the applicant will be seeking against the respondent in her personal capacity are contractual costs which fall under the terms of her lease. The statement further points out that when the applicant’s solicitors were first instructed, respondent had failed to make any payment for services for 4 years despite continuing to receive the benefit of services funded by other leaseholders during that period.

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<sup>20</sup> Section 20C (2)(b) and (3).

68. The Applicant's solicitor further points out that several letters before action were sent to the Respondent before a claim was issued and no response was received to any of these letters when matters could have been resolved at a time when costs were very low. She states that the first contact from the Respondent was when she filed her defence to the County Court claim. Further the solicitor submits that as a result of the Respondent's failure to pay service charges for 4 years or to respond to pre-action correspondence, the Applicant was forced to bring a claim against the Respondent so as not to prejudice other leaseholders. It had no choice but to pursue the claim and incur the expenses of preparing its case and attending the tribunal. The Applicant submits that an order under section 20 C must be just and equitable and there is no just and equitable reason why the Applicant should be prevented from seeking its costs through the service charge in the event that such costs are not recovered in whole or part from the Respondent.
69. Having carefully considered all representations upon this matter and the totality of the evidence, the tribunal considers that it **would not be just and equitable to make an order under section 20 C**. However we draw the attention of the parties to our observations below which may assist when the costs are determined.
70. The Applicant's solicitors provided a summary of costs incurred and to be incurred in both the County Court and LVT proceedings, dated 11 February 2016. The grand total of the same was £13,992.85. However, these included costs in relation to the County Court proceedings which are a matter for the County Court to determine. In relation to the LVT costs, these are bracketed with the costs in relation to agreeing to set aside the County Court judgement and consent to the case being transferred to the LVT. It is not clear how much of this time was spent upon the procedural County Court steps.
71. Of course the costs of these tribunal proceedings have been incurred in the service charge years that will expire on 31<sup>st</sup> December 2015 and 2016 and so will fall to be considered when the service charge accounts for those years are completed. However, as an aid to the County Court and to any future determination of the reasonableness of the tribunal costs, we consider that Counsel's fees for the pre-trial review of £960 and of £1500 for the hearing of 27<sup>th</sup> January 2016 (presumably plus vat) are reasonable in view of the amount of work involved.
72. We have considered other amounts claimed in the schedule which includes 150 units or 15 hours estimated for a Grade D fee earner in complying with the remainder of the tribunal's directions of 27<sup>th</sup> January 2016. Since, as we have found, the directions were not complied with in that the information supplied was inaccurate necessitating further work on the tribunal's part, we advise that 75 units or seven and a half hours work at Grade D would be reasonable.

73. We also note that 68.7 hours at Grade D are claimed (£6526.50 plus vat) and 1.6 hours at Grade C (£192 plus vat) for 'Costs incurred following receipt of the Defendant's application to set Judgment aside'. Certain of these costs will be County Court costs over which this tribunal has no jurisdiction; however, we consider that the amount claimed for the preparatory steps for the LVT to be excessive. We accept that there are four lever arch files that comprise the bundles and that there was a significant amount of paperwork to deal with, however we consider that a reasonable amount of time for the LVT preparation would be 350 units or 35 hours at Grade D. The Grade C time is reasonable. The calculations and claims for the service charge by the Applicant's solicitors did not match the evidence that they themselves supplied and there is likely to have been non fee earning administrative time included in the times for bundle preparation. The 35 hours would be sufficient time to deal with the steps outlined in the narrative accompanying the schedule of costs.
74. It would not be appropriate to make an order under section 20C because the Respondent had paid nothing in this case for a number of years. We agree that the Applicant had no realistic alternative but to take action initially in Court and then in the LVT to recover such charges from the Respondent. The Applicant and the management company are charged with managing the building and providing the services under the lease that need to be funded. The Respondent was for many years withholding payment of the service charges wrongly under the misapprehension that they had been unlawfully increased from the amount that she had been paying upon completion of her flat purchase. The Respondent, although corresponding with the management company about her grievances, did not at any stage seek to apply to the tribunal for a determination as to reasonableness herself. At the tribunal, the Respondent, upon examination of the evidence, accepted that the service charges demanded were reasonable in amount and had been reasonably incurred and in fact she has benefited by reason of the Applicant declining to pursue earlier service charges against her by reason of limitation.
- 75. In summary therefore the tribunal finds that, as per paragraph 59 that the amount for service charges owed by the Respondent for 2009-2013 is £8003.19 and the amount for administration charges is £560. The total amount owing is £8563.19. The Respondent's application for an order under section 20C is refused. The matter is to be returned to the County Court.**

DATED this 20th day of July 2016



Richard Payne LLB M Phil  
CHAIRMAN