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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Ref: LVT/0071/01/14

In the matter of s.27A and s.20C of the Landlord and Tenant Act 1985

In the matter of 73 Cardiff Road, Llandaff, Cardiff CF5 2AA

Tribunal:	Andrew Sheftel (Chairman) Roger Baynham (Surveyor)
Applicants:	BRYAN JOHN NEWELL CHRISTOPHER JOHNS PAUL CHRISTOPHER JOHN MATTHEWS
Represented by:	Ackland & Co Mr Jenkins (Counsel)
Respondent:	LAWRENCE RICHARD EDMUNDS
Represented by:	Capital Law Mr Sharples (Counsel)

DECISION

The decision in summary

1. For the reasons set out below, the Tribunal determines:

   (1) For the service charge years ending 24 March 2010 and 24 March 2011 nothing is recoverable: the Tribunal disallows the claims in respect of insurance and scaffolding on account of section 20B of the 1985 Act and the accountancy fees on the basis that they were not reasonably incurred contrary to section 19 of the 1985 Act;

(2) For the service charge year ending 24 March 2013, service charges of £120 in respect of accountancy fees and £1,605 in respect of insurance premiums are payable – the Tribunal allows the claims in full;

(3) For the service charge year ending 24 March 2014 , service charges of £120 in respect of accountancy fees and £1,645.12 in respect of insurance premiums are payable – the Tribunal allows the claims in full;

(4) As to section 20C, the Tribunal determines that 75% of the Respondent's costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Background

2. The Tribunal is concerned with applications brought under s.27A of the Landlord and Tenant Act 1985 (the "1985 Act") and section 20C of the 1985 Act.

3. The Applicants are long lessees of (respectively) Flat 1, Flat 2 and Flat 3, 73 Cardiff Road, Llandaff, Cardiff CF5 2AA ("73 Cardiff Road). The Respondent is the freehold owner of 73 Cardiff Road.

4. The present proceedings are part of a long-running dispute between the parties. The Respondent has previously served both a statutory demand and County Court proceedings in respect of sums allegedly owed by the Applicants by way of service charges in respect of 73 Cardiff Road. However, it should be noted that the parties agreed that the Tribunal was not prevented from determining any of the items in issue in these proceedings on the basis of res judicata or issue estoppel, or that they had been subject of a determination by a court contrary to s.27A(4)(d) of the 1985 Act. More recently, the right to manage 73 Cardiff Road was acquired by 73 Cardiff Road RTM Company Limited (of which it is understood the Applicants are members).

5. The Tribunal inspected the premises on 21 October 2014 following which a hearing took place. Both sides have been legally represented during these proceedings and were each represented by counsel at the hearing. The Tribunal heard oral evidence from Christopher Johns and Lawrence Edmunds.

6. The proceedings concern three separate items of expenditure:

(1) Insurance premiums for the years ending 24 March 2010, 24 March 2011, 24 March 2013 and 24 March 2014;

(2) Accountant fees for the same years; and

(3) Scaffolding costs of £7,050 for the year ending 24 March 2011.

Although ground rent was referred to in the Application, this was not pursued and in any event is not within the jurisdiction of the Tribunal.

7. There was no dispute between the parties that the above were all in principle recoverable as service charges under the terms of the lease.

8. The specific bases of the Applicants' challenges are set out in more detail below. However, in summary, the Applicants disputed both whether sums were time-barred contrary to s.20B of the 1985 Act and also whether the costs were reasonably incurred in accordance with s.19. In addition, the Applicants raised a general challenge as to whether any of the sums had been demanded in accordance with the terms of the lease.

9. A number of purported service charge demands have been served by the Respondent. Although the Respondent concedes several were invalid as a matter of law, it relies on demands dated 7 March 2014 or alternatively 14 August 2014. The Applicants accepted at the hearing that the latter satisfied the statutory requirements for a service charge demand.

The law

10. By s.18 of the 1985 Act:

"*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."

11. By s.19 of the 1985 Act:

"*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 provision 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."

12. By s.20B of the 1985 Act:

"(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

The leases

13. The tribunal has been provided with a sample lease.

14. Calculation of the service charge is set out in Schedule 5 as follows:

(1) In this Schedule;

(a) "Accounting Period means the period from the 25th day of March in any year to the 24th March in the following year or such other period (be it of twelve months duration or more or less) as the landlord may from time to time specify in the Landlord's absolute discretion by notice in writing to the Tenant and the words "First Accounting Period" shall be the period commencing on the date hereof and ending on the 24th day of March next

(b) "Service Charge" means such percentage as is attributable to the Demised Premises (as set out in the Sixth Schedule hereto) of the costs of providing the Services set out in the Fourth Schedule

(2) The Service Charge shall be made up and consist of the following sums payable at the time and in the manner indicated

(a) In respect of the First Accounting Period the Tenant shall pay to the Landlord by such instalments and at such times such sum as the Landlord may reasonably determine to be the estimated liability of the Tenant in respect of that Accounting Period

(b) In respect of any Accounting Period the Landlord shall on or about the last day of the proceeding Accounting Period (or as soon thereafter as may be convenient to the Landlord) give to the Tenant notice in writing of the estimated Service Cost for the Accounting Period in question and the estimated Service Charge and the Tenant shall then pay such estimated Service Charge to the Landlord on account of the Service Charge for the Accounting Period in question by equal quarterly payments in advance on the Quarter Days save that where any of the Quarter Days for the Accounting Period in question have elapsed prior to the service of such notice the

Tenant shall within fourteen days of the service of such notice pay to the Landlord a lump sum equal to the proportion of the Estimated Service Charge which would otherwise have been attributable to and payable in advance on any such Quarter Days

(c) Unless prevented by causes beyond the Landlord's control the Landlord shall as soon as possible after the end of each Accounting Period prepare and deliver to the Tenant a statement certified by the landlord's managing agents or accountants of the Service Charge for such Accounting Period and the sum determined by the Landlord to be the Service Charge for such Accounting Period (such statement being conclusive as to the matters contained therein save in the case of manifest error) and the Tenant shall pay to the Landlord any balance shown by such certified statement to be due from the Tenant as being in excess of any sums received by the landlord on account of the Service Charge under the provisions of this Schedule and in the event of any such sums received exceeding the Service charge the Landlord shall retain the amount of the excess on account of any future Service Charge payable by the Tenant to the Landlord under the previsions hereof

(d) If in any Accounting Period the Landlord in the reasonable exercise of the Landlord's discretion desires to pay discharge or incur any costs expenses outgoings or other sums authorised under the provisions of the Fourth Schedule hereto and the money held by the Landlord either in reserve (as authorised by the Fourth Schedule hereto) or on account of the Service Charge shall be insufficient for this purpose as well as for the purpose of paying discharging or incurring the costs expenses outgoings or other sums which the Landlord has anticipated either in the figure referred to in sub-paragraph (a) of this paragraph or the estimated Service Charge referred to in sub-paragraph (b) of this paragraph then the Landlord shall be entitled to demand a further sum or sums on account of Service Charge such sum or sums to be paid to the Landlord within fourteen days of demand

(e) Any omission by the Landlord to include in any Accounting Period any costs expenses outgoings or other sum in respect of the Service and attributable to that Accounting Period shall not preclude the Landlord from including such costs expenses outgoings or other sums in the Service Charge in respect of any subsequent Accounting Period.

15. Schedule 6 to the lease provides that each of the lessees is liable to contribute one third of the costs incurred.

Validity of demands

16. Although, as noted above, the Applicants accept that service charge demands dated 14 August 2014 are valid insofar as they comply with applicable legislative requirements as to form, they dispute that such demands or any earlier purported demands comply with the requirements of the Fifth Schedule. In particular, it was submitted that the Respondent never served an on-account demand and similarly never served a balancing charge demand "as soon as possible after the end of each Accounting Period" as required by paragraph 2(c) of the Fifth Schedule. In this regard, Mr Jenkins submitted

that the procedure is not optional and moreover, serves a practical purpose as it allows the tenants to budget in respect of the anticipated costs.

17. In response, Mr Sharples noted that the Lease does not stipulate for time to be of the essence and moreover, sought to rely on paragraph 2(e), submitting that as a matter of construction, it allows sums omitted from a particular Accounting Period to be included in a subsequent Accounting Period.

18. The Tribunal prefers the Respondent's submissions in this regard. While it is of course correct that service charges must be demanded in accordance with the terms of the relevant lease in order to be contractually recoverable, as a matter of construction, the Tribunal finds: (i) that the provisions of paragraph 2(e) of the Fifth Schedule allow the landlord to include in a service charge demand costs incurred in a previous Accounting Period; (ii) the failure to demand an advance payment in accordance with paragraph 2(b) of the Fifth Schedule does not preclude the landlord making a demand in accordance with paragraph 2(c) – effectively a demand in arrears. The Tribunal would add that, although paragraph 2(e) allows a demand to be made in a later Accounting Period as a matter of contract, this does not in any way impact upon or negate the requirements of section 20B of the 1985 Act.

19. In the circumstances, the Tribunal finds that insofar as the 14 August 2014 demands are valid demands at law (which is not disputed), they are also valid demands in accordance with the terms of the lease.

Insurance charges

Years ending March 2010 – March 2011

20. The Applicants contend that such charges are time-barred and cannot be recovered by virtue of s.20B of the 1985 Act.

21. From the invoices produced to the Tribunal, it appears that the respective costs were incurred in June 2009 and June 2010. As set out above, no valid service charge demand was served until 2014. Accordingly, for such sums to be recoverable, the Tribunal must be satisfied that written notice in accordance with s.20B(2) of the 1985 Act has been served.

22. Section 20B(2) of the 1985 Act was considered in detail in the case of *Brent London Borough Council v Shulem B Association Ltd* [2011] 4 All ER 778, which was referred to the Tribunal by counsel. As to what is required in order to comply with this section, Morgan J stated as follows:

> *55. A written notification under section 20B(2) must state "that those costs had been incurred". "Those costs" refers back to "the relevant costs in question" and this in turn refers back to the costs in question for the purposes of section 20B(1), that is, the costs which the lessor wants to take into account in determining the amount of a service charge but which costs were incurred more than 18 months before a demand for payment of the service charge. Thus, the phrase "that those costs have been incurred" can be expanded so that it reads "that the relevant costs which were incurred more than 18 months before the relevant demand for payment of the service charge have been incurred".*
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> *56. Counsel for the lessee submits that a notice for the purposes of section 20B(2) must state the amount of the costs which the lessor states have been incurred. Counsel for the lessor submits that it is not necessary to state the amount of such costs. He submits that it is sufficient that the notification states that the lessor has carried works or provided relevant services. Put that way, that submission cannot be right. Section 20B(2) does not require the notification to state that work has been done or services have been provided; it requires the lessor to state that costs have been incurred. It may be that Counsel for the lessor would submit that it is sufficient if the lessor states that it has done works or provided services and has incurred costs (unspecified) in relation to those works or services. In my judgment, there are a number of objections to the lessor's submission on this point. The first is based on the language of section 20B(2). As expanded in the way I have described, the subsection appears to require the lessor to identify the costs which have been incurred so that when one comes to apply section 20B(2) to the relevant notification one will be able to say whether the costs, which the lessor wants to take into account in determining the amount of the service charge, were notified to the lessee. A second objection is that if it is clear that a statement that work has been done or services have been provided does not suffice, I do not see that any real purpose is served if the lessor adds the statement that it has incurred unspecified costs in relation to the works or services. The lessee would no doubt assume in any event that the lessor had not obtained the works or services free of any charge.*
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> *57. If the notification for the purposes of section 20B(2) has to state some information as to the amount of the relevant costs, is it sufficient if the lessor states that it does not know what the costs have been but instead states that it knows what it expected the cost to be in advance of the work being done? In my judgment, subsection 2, taken literally, appears to require the lessor to state the costs it has actually incurred. A statement that, in advance of the work, it expected to incur a particular cost does not give the necessary information.*
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> 58. *I have considered what a lessor should do if it knows that it has incurred costs but it is unable to state with precision what the amount of those costs was and it is concerned to serve a notice under section 20B(2) to stop time running against it. In my judgment, there is a clear practical course open to a lessor in such a case. It should specify a figure for costs which the lessor is content to have as a limit on the cost ultimately recoverable. In my judgment, a lessor can err on the side of caution and include a figure which it feels will suffice to enable it to recover in due course its actual costs, when all uncertainty has been removed. If a lessor states that its actual costs were £x that will be a valid notification in writing for the purposes of subsection (2) even though the lessor knows that it may turn out that the costs will be somewhat less than £x. If the lessor wants to ensure that the lessee is not misled by such a notice, it will be open to the lessor to explain that although it is making a clear statement that its costs were £x, it*

hopes that it might be in a position later to state that the actual costs were less than £x. An example might be where the lessor is in dispute with the builder as to the sums payable to the builder. The lessor could properly notify the lessee that the builder is claiming a sum which means that the costs will be £x but the lessor is attempting to negotiate with the builder so that the resulting costs will be less. In such a case, the lessee would not be misled and the lessor would have protected itself by making a statement that the costs it had incurred were £x. In any event, it is my view that if a lessor states that the cost was £x, it satisfies the subsection even in a case where it is not certain as to what the costs will eventually turn out to be. If the lessor states that the costs are £x, and it later puts forward a service charge demand based on a smaller sum, then the statement of the greater amount includes a statement of the lower amount. In the present case, no issue arises as to what the legal result would be if the section 20B(2) notice referred to £x and the lessor later put forward a service charge demand which takes into account a figure which is greater than £x. My view is that the lesser sum of £x does not include the excess over £x so that no notification for the purposes of the subsection was given in relation to the excess.

59. *The second matter which must be stated in a notification under section 20B(2) is that the tenant would subsequently be required under the terms of his lease to contribute to the costs by the payment of a service charge. Taken literally, this does not oblige the lessor to state the resulting amount of the service charge. On this reading, there will be a valid notification for the purposes of the subsection if the lessor notifies the lessee that it has incurred costs of £x on certain service charge matters without telling the lessee what sum the lessee will ultimately be expected to pay. It may be that in some cases, the lessee will know what proportion of the total costs it will have to pay. The lease in question may identify a fixed percentage of service charge costs. However, many leases do not specify a fixed percentage. It would no doubt be of more use to a lessee to be told what sum it will be expected to pay by way of service charge but, in my judgment, the words of section 20B(2) do not clearly so require*

65. *Accordingly, my conclusion as to interpretation of section 20B(2) is that the written notification must state a figure for the costs which have been incurred by the lessor. A notice which so states will be valid for the purpose of subsection (2) even if the costs which the lessor later puts forward in a service charge demand are in a lesser amount. Secondly, the notice for the purposes of subsection (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge. It is not necessary for the notice to tell the lessee what proportion of the cost will be passed on to the lessee nor what the resulting service charge demand will be.*

23. In summary, there must be: (1) written notification stating a figure for the costs which have been incurred; and (2) must tell the lessee that the lessee will subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge – although it need not state what proportion will be passed on to the lessee.

24. To establish compliance with s.20B(2) of the 1985 Act, the Respondent relies on what was in fact a purported s.20 consultation notice prepared by the Respondent's then surveyor, Mr Andrew Ferrier and dated 9 September 2010.

25. The notice was the subject of extensive submissions to the Tribunal. The first page makes reference to various proposed qualifying works and states the total estimated

expenditure to be £212,302.10 plus VAT. No reference is made to insurance. The second page contains a section headed 'Your contribution to the costs' followed by the words "Below is an estimate of the costs attributable to your property based on the total expenditure likely to be incurred. You are not liable for the cost of works to the non-structural internal parts of other flats." This is followed by a table showing 'Breakdown of Estimated Costs'. This lists various items and after VAT at 17.5%, the final two entries are:

"*Ground Rent (2005 to 2010)* *£750*

Insurance Premiums (2005 to (2010) *£11400:00*"

The total estimated cost is put at £247,320.70 and 'Your estimated portion' is £82,431.99.

26. For completeness, it should be noted that the final page invites the making of observations in relation to the proposed works and expenditure.

27. It is not clear how the figure on the first page of £212,302.10 plus VAT and the figure on the second page of £247,320.70 relate to each other. Adding VAT to the first figure and the purported ground rent and service charge costs gives a sum well in excess of the second page total.

28. Similarly, the notice gives a single figure for insurance of £11,400 despite the fact that it apparently covers '2005 to 2010'. Not only is it not broken down for each year or otherwise apportioned in any way, but if divided equally, gives a figure of £2,280, which is different not only from what is now claimed, but also from what appeared in the original demands of £2,250 per year.

29. The question for the Tribunal is whether the reference to insurance premiums within the 9 September 2010 notice is sufficient to satisfy the requirements of s.20B(2) of the 1985 Act in respect of the two premiums for the service charge years ending March 2010 and March 2011, the costs of which were incurred within the 18 months prior to the date of the letter.

30. Mr Jenkins described these figures relating to insurance premiums as being 'hidden' in a notice dealing with something very different and submitted that it did not satisfy s.20B(2) of the 1985 Act. However, Mr Sharples maintained that that this letter did

satisfy the requirements of s.20B(2) with regard to the two insurance premiums in question.

(1) As to whether the notice provided notifies the tenant in writing that the costs have been incurred (and states a figure) – the first part of the requirements identified in *Shulem B* – the following matters are of relevance having regard to the parties' submissions:

(a) On the one hand, as the Applicants noted, the reference to insurance appears in a list of 'estimated costs', i.e. costs that have yet to be incurred. However, the fact that the words 'Insurance Premiums' is followed by the words '2005 to 2010', strongly suggests that the costs have already been incurred, albeit not necessarily for the year 2010 (particularly in light of the undisputed evidence that there had been no service charge demands for many years).

(b) Further, as Mr Sharples submitted, overstating the amount of the costs is not of itself a bar to recovery.

(c) However, it is perhaps of greater significance that no separate figure is given for the two service charge years now claimed:

(i) In *Shulem B*, it was confirmed that no figure need be given for the lessee's actual contribution but a figure must still be given. In *Shulem B*, Morgan J did not have to consider whether this meant a figure for each service charge year and there is nothing expressly in s.20B(2) of the 1985 Act requiring reference to service charge years. However, what s.20B(2) does say is that the lessee must be notified in writing "*within the period of 18 months beginning with the date when the relevant costs in question were incurred…<u>those costs had been incurred</u>* (emphasis added). In the Tribunal's determination, the notice does not do that. Although the notice refers to '2005 to 2010', it does not inform the lessees that costs were incurred at any particular times within that period or indeed in all or any of those particular years. Moreover, it does not say or establish, either expressly or by implication, that any particular costs were incurred in the 18 months prior to the notice.

(ii) To put it another way, insofar as any relevant costs were incurred in the applicable 18-month period, the notice does not make clear that such costs were incurred and gives no clue as to the amount of such costs. To use the language of the 1985 Act, within the period of 18 months beginning with the date when the relevant costs in question were incurred (i.e. the costs of insurance premiums apparently incurred in June 2009 and June 2010), there is nothing in the 9 September 2010 notice as a result of which the lessees have been *notified in writing that <u>those costs had been incurred</u>* (emphasis added) or stipulating a figure in respect of *those* costs.

(iii) Accordingly, the Tribunal finds that the first part of s.20B(2) is not satisfied by the 9 September 2010 letter.

(2) Even if the Tribunal is wrong as to the above, the Respondent also faces a difficulty as to the second part of s.20B(2), i.e. that the notice must tell the lessee that the lessee would subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge.

(a) Mr Jenkins made the point at the hearing that there is nothing in the notice of 9 September 2010 expressly stating that the lessees would be required to contribute *by the payment of a service charge*. He submitted that even if no specific form of words is required by s.20B(2) of the 1985 Act, it would nevertheless not be apparent to a lay person that the costs have been incurred and that the lessee will be required to contribute by payment of a service charge. It is correct that the notice of 9 September 2010 does not use the words 'service charge', although as Mr Sharples pointed out, it does make reference to: the lessee's landlord; the 1985 Act; and estimated costs attributable to the individual property. In other words, he argued, it seems readily apparent that what is being referred to in the document are sums payable to the landlord relating to each flat.

(b) In the Tribunal's view, the notice does not satisfy the second part of s.20B(2) of the 1985 Act. In other words, the notice does not tell the lessee that he would subsequently be required under the terms of his lease to contribute to those costs by the payment of a service charge.

(c) Although the language of s.20B(2) of the 1985 Act refers to a contribution to relevant costs by a lessee in the future, because such costs have been incurred, there is no doubt that the lessee is going to be paying for the relevant costs:

> "…*the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them…"*

Indeed, at paragraph 65 of *Shulem B*, Morgan J uses the phrase that the tenant '*will subsequently be required … to contribute*' (emphasis added). This is to be contrasted with a s.20 consultation notice, where the costs are only a possibility. Within the 9 September 2010 notice, the reference to insurance premiums appears within a list of 'estimated costs' which are 'likely to be incurred'. As this notice purported to be an initial s.20 consultation notice, there was no guarantee that the estimated costs in respect of the proposed works would be incurred and as such it could not be said that the notice made clear that the lessees would be required to contribute to them. The insurance premiums (and ground rent) are not separated or treated differently within the notice from the items of estimated expenditure (other than the reference to a spread of years). In other words, there is nothing in the notice to say that the lessee *would* be required to contribute to the insurance premiums in contrast to the other items where it is only a possibility – they all appear in the Breakdown of Estimated Costs together.

31. For the reasons set out above, the Tribunal is therefore of the view that the Respondent is not entitled to recover the cost of the insurance premiums for the years ending 24 March 2010 or 24 March 2011. The notice of 10 September 2010 does not establish, with respect to the two insurance premiums in question, *"that within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge"*, as required by s.20B(2) of the 1985 Act.

Years ending March 2013 – March 2014

32. According to the copy documents provided to the Tribunal, the relevant costs were incurred on 7 November 2012 and 7 November 2013 respectively.

33. As regards the latter, s.20B(1) is satisfied by virtue of the August 2014 demands. As regards the former, it was accepted that s.20B(2) is satisfied by virtue of the purported demands of March 2014. Accordingly, the principal focus of argument before the Tribunal was as to reasonableness.

Reasonableness

34. For the reasons set out below, subject to one point, the Tribunal allows the costs in full. The one qualification is that the Respondent conceded that the costs payable to the broker (of £240.12 and £200 respectively would not be passed on to the Applicants).

35. As to reasonableness, the legal requirement, which was not disputed by either party, is only that the insurance is obtained in the usual course of business and from a reputable insurer. The landlord is not required to shop around and find the cheapest possible cover.

36. However, the Applicants' position at the hearing boiled down to the submission that the costs were too high, asserting that they are now insuring the building for a considerably smaller sum of approximately £600 per year. The sums claimed by the Respondent in respect of insurance premiums for the two years in question was approximately £1,600 per annum, although it is noticeable that this had actually reduced compared to earlier years: for the years ended 2010 and 2011, it was in excess of £2,000 per year (although for the reasons given below, the Tribunal would have said that the costs were also reasonably incurred for the years 2010 and 2011, had they not been irrecoverable by virtue of s.20B(2) as set out above).

37. The evidence in support of the Applicants' position was somewhat limited. At the hearing, the Applicants sought to rely on a premium apparently taken out in July 2013, for £582.46. However, as Mr Sharples pointed out in his skeleton argument, as this was the only other example provided, it is just as open to question why this premium was so low as opposed to why the Respondent's was higher. Further, in cross examination of Mr Johns, Mr Sharples raised various questions as to the Applicants' policy (including whether it in fact provided buildings cover or merely third party cover), which Mr Johns was unable to answer as he was not the one who had procured the insurance. Rather,

the insurance had apparently been placed by Mr Matthews who was not called to give evidence. After the completion of oral evidence and during the course of submissions, the Applicants attempted to adduce more detailed policy information, albeit only on a smartphone. While the Tribunal were prepared to look at this, the Tribunal was mindful of Mr Sharples points that this purported evidence was produced extremely late in the day and that he did not have opportunity to cross-examine on it. In any event, it proved extremely difficult to discern anything from this electronic copy in relation to the premium.

38. The Tribunal also note that since the close of the hearing and subsequent to the parties providing written submission on section 20C as requested by the Tribunal, the Applicants' solicitors sent further documentation to the Tribunal relating to insurance, under cover of letter dated 12 November 2014, which went beyond what was shown to the Tribunal at the hearing. It was also accompanied by a letter of the same date to the Respondent's solicitors which effectively contained further submissions, going well beyond those made to the Tribunal at the hearing and relating to different issues, and containing matters that were not put to Mr Edmunds in cross-examination and therefore on which he and his legal advisers have had no opportunity to comment. It must also be remembered that these are proceedings where both sides have been legally represented throughout and have had every opportunity to put their case, and it is simply too late to introduce further matters. In the circumstances, there is no way that the Tribunal can make a finding on any such matters now.

39. Moreover, even if the Tribunal accepted the Applicants' argument that they were able to obtain a valid insurance policy satisfying all insuring obligations under the leases for a considerably lesser premium than the Respondent, this does not of itself mean that the premiums obtained by the Respondent were not reasonably incurred. The Respondent had obtained insurance from Aviva, sourced through a broker. It cannot be said that this is not a reputable insurer or that the insurance was not procured in the ordinary course of business and the Tribunal finds that the costs were reasonably incurred.

40. Accordingly, the Tribunal determines that the sums payable in respect of the insurance for the years ending March 2013 and March 2014 are £1,605 and £1,645.12 respectively.

Scaffolding

41. The claim for scaffolding relates to the costs of scaffolding erected at 73 Cardiff Road in September 2010, purportedly in respect of emergency roof repairs. The scaffold was erected in December 2010 and although it apparently remained there until September 2011 no additional costs have been referred to beyond the invoice of 8 December 2010 for £7,050. As regards the substantive works to the roof, the Tribunal has been referred to an invoice for works undertaken to the roof in the amount of £2,702.79, although this is not claimed from the Applicants through the service charge accounts.

42. As to the scaffold costs, the Applicants' stated position at the hearing was that no issue arose under, and they did not seek to rely on, s.20 of the 1985 Act, but instead, they disputed the charges on the basis of both s.20B and s.19 of the 1985 Act. As to the latter the Applicants raised various objections including as to the need for scaffolding or the extent of scaffolding (given that it was erected on three sides of the building) and whether repairs or adequate repairs were in fact carried out.

43. Dealing further with the s.20B issue, the Respondent sought to rely on various documents as being valid notification under s.20B(2) as follows:

    (1) The purported s.20 notice dated 9 September 2010. The Tribunal's finding is that this does not satisfy the requirements of s.20B(2). As noted above, the notice must state that the costs 'have been incurred'. The evidence before the tribunal indicated that the scaffold was erected on or around 15 September 2010 and the Respondent was invoiced for the scaffolding works on 8 December 2010. Both of these events post-date the 9 September 2010 notice. Accordingly, that document did not and could not say that the relevant costs 'had been incurred'. As the Court of Appeal held in *Burr v OM Property Management* [2013] EWCA Civ 479, costs are not incurred on the mere provision of services or supplies (with no distinction being drawn between services or supplies). Rather, costs are incurred on the presentation of an invoice or demand for payment, or on payment.

    (2) Particulars of Claim in County Court proceedings commenced on 5 September 2011, i.e. within 18 months of the date of the invoice. That claim was struck out and no decision was made on the merits. As noted above, it was accepted by the Applicants that no question of issue estoppel or res judicata arose. However, the

Tribunal finds that the Particulars of Claim does not satisfy the requirements of s.20B(2):

(a) The pleading is a simple demand for sums said to be owed already. There is no indication or suggestion in the Particulars of Claim that the lessees would subsequently be liable under the terms of their leases as required by s.20B(2). Rather, pleading is premised on the basis that the alleged liability has already crystallised.

(b) Moreover, the claim for scaffolding costs makes no reference to liability under the terms of the lease. The relevant paragraph 10 of the Particulars of Claim provides:

> "*Further by reason of the Defendant's delay in responding to the Section 20 Notice the Claimant has been forced to erect scaffolding at the property on an emergency basis due to complaints from the occupants of number 71 Llandaff Road that rain water was escaping on to their property. Further due to the Defendant's delay the Claimant has had to undertake necessary work at his own costs.*
>
> *PARTICULARS OF LOSS*
>
> *(i) Scaffolding: Lynn Moss Scaffolding 8th December 2010 £7,050*
>
> (ii) *CCTV/Gate Automation: Eurosec Ltd 9th November 2010 £14,981.25.*"

Further, the claim for scaffolding (and CCTV/Gate Automation) is claimed separately from the sums claimed in respect of the purported s.20 consultation notice. The scaffolding cost is claimed effectively as a damages claim. But in any event cannot be construed as written notice that "*costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.*" The Defence to the claim expressly pleaded that the Particulars of Claim failed to plead the basis on which the Respondent claimed to be entitled to the scaffolding costs. This is arguably tacitly acknowledged by the fact that the Particulars of Claim were subsequently amended to make express reference to the terms of the lease.

(3) At the hearing a further point arose in respect of the Respondent's subsequent amendment to its pleading in the County Court in respect of the scaffolding costs claim, making express reference to the Applicants' obligations under their leases. The amendment was made more than 18 months after the relevant costs had been

incurred but the question was raised as to whether it could nevertheless be brought within s.20B(2) by analogy with the principle that amendments to statements of case are treated as being backdated to the date of the original statement of case. The Tribunal allowed the parties to make written submissions on this 'relate back' issue but the Respondent subsequently conceded that this could not be maintained as a matter of law and therefore does not need to be considered further. In any event, the objection would have remained that Particulars of Claim are predicated on the basis that money is due now. Accordingly, it is hard to see how Particulars of Claim could satisfy s.20B(2) – namely being a notification that costs had been incurred and that a lessee would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

44. For the reasons set out above, the claim in respect of scaffolding charges fails on account of s.20B of the 1985 Act and is therefore not recoverable in its entirety.

45. As a result, the Tribunal is not required to consider the issue by reference to s.19 of the 1985 Act, although it notes briefly that if it were wrong on the s.20B point, it would, on balance and having regard to the evidence before it, have considered that one third of the scaffolding costs to have been reasonably incurred. Although some of the evidence to the Tribunal in relation to the scaffolding and works done was somewhat unclear, the Tribunal derived the following in particular: (i) even if the scaffolding was up for an excessive period of time, the Respondent has not sought to charge the Applicants beyond the initial invoice; and (ii) there was some evidence that there was a need to do some emergency roof work on one side of the building in relation to water spilling on to a neighbouring property. However, (iii) the alleged emergency related to one side of the building and yet scaffolding was placed around three sides; and (iv) although there had been a previous stated intention to carry out roof works generally in the 9 September 2010 notice, and there may have been economic sense in only putting up scaffolding once if more significant works were ultimately going to be done, this essentially never happened and the purported consultation in respect of proposed major works was never completed. The amount of work actually done, on the basis of the value of the only invoice produced, was extremely limited compared to the proposals and figures quoted in the 9 September 2010 notice (referred to at paragraph 25 above). However, as noted above, this issue does not arise in any event due to the Tribunal's determination in relation to s.20B(2).

Accountant's fees

46. The Respondent claims accountant's fees for certifying the service charge years ending 24 March 2010, 24 March 2011, 24 March 2013 and 24 March 2014. As noted above, paragraph 2(c) of Schedule 5 to the Lease requires a certified statement for each Accounting Period.

47. There is no time limit issue in relation to this aspect of the claim as the costs were in fact incurred by the Respondent this year. Rather, the Applicants challenge the costs on the grounds of reasonableness. The Applicants submitted that accountants had previously certified accounts which have now been shown to be wholly inaccurate. However, the Respondent has accepted that he cannot recover those costs (which were higher than those now claimed), but rather only the costs associated with the accounts that are now relied on, albeit only produced in April 2014.

48. With this in mind, the Tribunal considered the sums of £120 for each year to be reasonable in principle and rejects the Applicants' contention that a total sum of £120 for all years would be reasonable. However, in view of the Tribunal's findings that no sums were recoverable in respect of the insurance premiums and scaffolding for the years ending 24 March 2010 and 24 March 2011 because the requirements of s.20B had not been satisfied for those years, the Tribunal concludes that accountancy fees in respect of those two years were not reasonably incurred. Instead, the Tribunal allows two years of accountancy fees for the years ending 24 March 2013 and 24 March 2014, i.e. a total of £240.

Section 20C

49. Section 20C of the 1985 Act provides:

> "*20C (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*
>
> *(2)The application shall be made—*
>
> *(a)in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;*
>
> *(aa)in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;*

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

(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."

50. Pursuant to s.20C of the 1985 Act, the Tribunal may make such order as it considers just and equitable in all the circumstances, albeit guidance as to the exercise of the Tribunal's discretion has been given in a number of cases.

51. In *Tenants of Langford Court v. Doren Ltd*. (LRX/37/2000, Lands Tribunal unreported 2001), HHJ Rich QC provided the following guidance:

"*[28] In my judgment the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.*"

52. In addition, in Schilling v Canary Riverside LRX/26/2005, it was stated by HHJ Rich QC that:

"*weight should be given rather to the degree of success that is the proportionality between the complaints and the determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of the service charges om the one hand and the costs of the dispute on the other hand.*"

53. More recently, additional guidance has been given by HHJ Gerald in *Church Commissioners v. Derdabi* [2010] UKUT 380 (LC):

"*18. In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (i.e. was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account.*

19. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs via the service charge. By parity of reasoning, the landlord should not be prevented from recovering via the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights.

20. However, whether and if so to what extent such an order should be made may depend on many factors. In some cases, "proportionality" will be material. If the reduction is but a

fraction of that sought by the tenant, it may follow that the landlord should only be prevented from recovering the costs of dealing with that fraction. If the tenant succeeds on only one of three issues, it may be that the landlord should only be prevented from recovering his costs of dealing with the successful issues. Sometimes these points will make no difference because it has not cost the landlord any more to deal with the unsuccessful elements of the tenant's claim.

21. In other cases, "conduct" will be relevant: even though the tenant has succeeded and perhaps substantially, has he unnecessarily raised issues with which the landlord has had to deal such that the landlord should not be prevented from recovering any associated costs via the service charge. There will also be cases where "circumstances" may be relevant – such as the landlord being a resident-owned management company with no resources apart from the service charge income.

22. Where the landlord is to be prevented from recovering part only of his costs via the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the costs recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.

23. In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal and taking into account all relevant factors and circumstances including the complexity of the matters in issue and the evidence presented and relied on in respect of them, the time occupied by the tribunal and any other pertinent matters. It will be a rare case where the appropriate percentage is not clear. It is the tribunal seized with resolving the substantive issues which is best placed to determine all of these matters."

54. In *St John's Wood Leases Limited v. O'Neil* [2012] UKUT 374 (LC), he stated that:

"*16. In our judgement, those comments of His Honour Judge Rich QC [quoted above] should not be understood as laying down any sort of principle or rule that no section 20C order should be made where the tenant has succeeded only in showing that the service charge or some part or parts of it are unreasonable (whether by reason of being incurred or their amount) unless there is a finding of something more than that of mere unreasonableness. As was made clear in both Doren and Schilling whether such an order should be made depends on the facts and circumstances of the case and ultimately what is just and equitable in those circumstances.*

17. The only guidance as to the exercise of the section 20C discretion is to apply the statutory test of what is just and equitable in the circumstances. Derdabi was merely intended to give some practical guidance as to how to approach the exercise of the discretion, not to suggest how the discretion should ultimately be exercised not least because every case is fact-specific and there is an infinite variety of factors and circumstances which occur in cases before the LVT. Whilst a simple arithmetical calculation of success may well not give the "correct" answer as to how the section 20C discretion should be exercised, it frequently will although, naturally, the reasons why and the amount by which any service charge expenditure have been disallowed will always be important.

18. By way of illustration only, if items of service charge expenditure were disallowed because the landlord was unable to substantiate the charges by adducing evidence that they had been incurred or paid, it would usually follow that the expenditure should not have been charged in the first place or at any rate pursued, so that it would usually be unjust and inequitable for the landlord to recover his costs of pursuing or defending the claim. If they were disallowed or greatly reduced, not due to an absence of evidence that they had been incurred but because the landlord's evidence as to the reasonableness of the amount charged was most unsatisfactory, it may also be difficult to resist a section 20C application. If the gap between the position of the landlord and tenant is relatively small but the tenant's evidence is on balance preferred

resulting in a small reduction, it may well be less likely that a section 20C order would be made."

55. Both parties filed written detailed submissions following the hearing in relation to section 20C at the Tribunal's request and the Tribunal has had to regard to both of the submissions.

56. The Tribunal does not consider that the proper course, as suggested by the Respondent, would be for any argument as to costs to be left to a later date as a question of reasonableness under s.19 of the 1985 Act. The considerations to be applied by a Tribunal under s.20C are different from those under s.19 and as the Applicants have sought an order under s.20C, it must be considered under the s.20C criteria.

57. Looking at the present proceedings, the Applicants have been largely, although by no means wholly, successful. The Respondent has succeeded in relation to two years of insurance premiums and accountant's fees. However, that is, of course, only a part of the consideration under section 20C.

58. The Applicants' submissions made considerable reference to the Respondent's historic conduct, for example the prior service of a statutory demand, the County Court proceedings and the alleged conduct of the Respondent in relation to the RTM application. However, the Tribunal agrees with the Respondent that such matters cannot be relevant to the present proceedings. In determining what is just and equitable, the Tribunal must have regard to the circumstances surrounding this application. Given that the Respondent has already been the subject of costs sanctions in the County Court, to take that conduct into account now would effectively be to punish the Respondent twice. However, the Tribunal does not agree with the Respondent that these proceedings were precipitate and unnecessary. The 1985 Act gives tenants the right to seek a determination as to payability of service charges and moreover, and in the present case, there is every reason why the Applicants would want to seek such a determination given the history between the parties.

59. As pointed out by the Applicants, the Respondent served many purported service charge demands before eventually complying with the lease and the provision of the 1985 Act. Further, as the Applicants note, the invoices and accounts on which the Respondent relies, were produced after this application had been brought. The Respondent had previously asserted that different amounts were payable. However, it is also true to say that in the Respondent's initial response to this application dated 26 February, 2014, he

conceded that many of the sums previously demanded were not recoverable, including as a result of section 20B of the 1985 Act.

60. Having regard to all the circumstances, the Tribunal concludes that 75% of the Respondent's costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants. For the avoidance of doubt, the Tribunal makes no finding as to whether any such costs would be recoverable as service charges under the terms of the lease.

Dated this 29th day of December 2014

Chairman