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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of Applications under:
Sections 27A (and 19) of the Landlord & Tenant Act 1985 (Service Charges)
Section 20ZA of the Landlord & Tenant Act 1985
(Determination to dispense with the statutory consultation requirements in relation to major works)
and
Section 20C of the Landlord & Tenant Act 1985 (Limitation of costs)

Case No.	**CHI/29UH/LSC/2012/0014**
Property:	**Milestone Buildings** **High Street** **Staplehurst** **Kent** **TN12 0AB**
Between:	
	Mr. D. Mill **Mrs. H. Mill** **Mrs. P. Mitchell** **("the Applicants")**
	And
	Mr. J. Santer **Mrs. S. Santer** **Mr. R. Sawhney** **Mr. G. Broomfield** **("the Respondents")**
Date of Hearing:	**2nd April 2012**
Members of the Tribunal:	**Mr. R. Norman** **Mr. A.G. Johns MA** **Mr. J.N. Cleverton FRICS**
Date Decision Issued:	**30th April 2012**

MILESTONE BUILDINGS, HIGH STREET, STAPLEHURST, KENT TN12 0AB

Decision

1. The Tribunal made the following determinations:

(a) Not to dispense with any of the consultation requirements of Section 20 of the Landlord and Tenant Act 1985 ("the Act") in respect of the works to reinstate Milestone Buildings, High Street, Staplehurst, Kent TN12 0AB ("the subject property") which were carried out in 2011.

(b) It follows from that decision that the only sums liable to be paid as contributions to the cost of the works required to be carried out, not as a result of the fire, but to deal with pre-existing defects ("the uninsured works") in respect of Flats 4, 5 and 6 are:

	£
Flat 4:	250
Flat 5:	250
Flat 6:	250
	750

(c) An order is made under Section 20C of the Act that all or any of the costs incurred or to be incurred by the Mr. D. Mill, Mrs. H. Mill and Mrs. P. Mitchell ("the Applicants") in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mr. J. Santer, Mrs. S. Santer, Mr. R. Sawhney and Mr. G. Broomfield ("the Respondents").

Background

2. The Applicants are the freeholders of the subject property. Mr. and Mrs. Santer are the lessees of Flat 4, Mr. Broomfield is the lessee of Flat 6 and Mr. Sawhney is the lessee of Flat 5 and the Post Office. There are also lessees of the other two shop units.

3. On 14th July 2010 a major fire broke out at the subject property and caused considerable damage to the subject property and to neighbouring properties. When the subject property was stripped out it was found that in addition to the works required as a result of the fire there were the uninsured works which were required and that they needed to be carried out before the works to repair the fire damage could begin. The vast majority of the cost of the reinstatement work was paid for by the insurers but the insurers declined to pay for the uninsured works.

4. The cost of the uninsured works was paid for by the Applicants and they sought to recover that cost from the Respondents.

5. Mr. and Mrs. Santer sought legal advice and pointed out that there had not been compliance with the consultation procedure under Section 20 of the Act and that the sum requested from them was not the correct proportion under the terms of their lease.

6. The Section 20 consultation requirements had not been carried out and applications were made to the Tribunal under Section 20ZA of the Act to dispense with those requirements and for a determination of liability to pay and reasonableness of service charges in respect of the years 2010/2011 and 2011/2012. At the hearing an application was made for an order under Section 20C of the Act for limitation of costs.

7. Directions were issued and documents were received from the Applicants and from Mrs. Santer. Nothing was received from Mr. Sawhney or Mr. Broomfield. A hearing bundle was prepared by the solicitors representing the Applicants and references to page numbers in this decision, unless otherwise stated, are references to pages in the hearing bundle.

Inspection

8. On 2nd April 2012 the Tribunal, in the presence of Mr. Mill, Mr. Armstrong of Counsel representing the Applicants, Mrs. Santer and her mother, Mr. P. Sawhney (the son of Mr. R. Sawnhey) and Mr. Broomfield, inspected the subject property.

9. The subject property is a three storey building with three shop units on the ground floor, Flats 4 and 5 on the first floor and Flat 6 on the second floor. One of the shops is a Post Office and together with a sorting office to the rear is leased along with Flat 5.

10. The Tribunal inspected the exterior of the subject property and the interior of the three flats but, as would be expected bearing in mind the nature of the uninsured works, hardly any of those works could be seen as the works had been completed and had been covered by flooring and decorative finishes.

Hearing

11. The hearing was attended by Mr. Mill, Mrs. Mill, Mrs. Mitchell, Mr. Armstrong Mrs. Santer and members of her family, Mr. Broomfield, Mr. P. Sawnhey and Mr. H. Singh representing Mr. R. Sawhney.

12. It was confirmed that those present had received the hearing bundle.

13. Mr. Armstrong drew attention to the fact that nothing had been received from Mr. Sawhney or Mr. Broomfield and questioned their participation in the hearing. Mr. Singh explained that Mr. Sawnhey was not well and was in India and that a lot had not been served on him. Mr. Singh had received the papers only the week before the hearing. Papers had been sent to Mr. Sawhney's home address by recorded delivery but had not been accepted as he was away. In the week before the hearing Mrs. Sawhney had returned from India and seen Mr. Singh. The Post Office was not the address on the lease and Mr. Sawhney does not work there. Service had not taken place but it was accepted that various attempts had been made. Mr. Singh pointed out that the letter dated 15th August 2011 at p 185 was addressed to Mr. Sawhney at 257 Green Lane but the correct address was 357 Green Lane and it was to that address that the Applicants' statement of

case had been sent on 2nd February 2012 (p 191). Mr. Singh said he was not present to submit evidence or to rely on evidence but to deal with legal points. Mr. Armstrong was concerned that Mr. Sawhney had not complied with the directions and that as a result there was the danger of ambush as it was not known which legal points or other points would be taken. However, as Mrs. Santer had provided a statement of case and the points she was taking were known, Mr. Armstrong and Mr. Singh agreed there was no problem in dealing with those matters. Mr. Broomfield said he had never voiced any objection to anything but when he had received Mrs. Santer's statement of case he had read it carefully and his only real purpose was to see how the Tribunal played out. He had never objected to the cost and had no strong feelings about the applications but having read Mrs. Santer's statement of case he realised that he ought to have looked into how the reinstatement works had been handled and supported her view.

14. Mr. Armstrong referred to the documents contained in the hearing bundle and in particular:
(a) The statements of the Applicants.
(b) The time line at p 133.
(c) The photograph at p 134 which was an example of how everything had been refurbished.
(d) The report of the Alan Baxter Partnership LLP consulting structural engineers ("the Baxter Report") at pp160-165 and stated that Units 1 and 2 referred to therein were not material to these proceedings.
(e) The letter dated 18th December 2010 from the Applicants to Mrs. Santer at p 166 which in the second paragraph informed her that in the aftermath of the fire and following the strip out, problems had come to light that they were unaware existed and that would have to be put right prior to reinstatement. She was asked to make provision for her share of the cost in line with the terms of her lease which was estimated to be approximately £1,864 being 13.11% of £12,000 + VAT. It was also stated in the letter that in order not to hold up the rebuild and to avoid the new VAT regime the Applicants would be paying the whole bill before the end of the year. A part payment was made on 13th December 2010. Enclosed with the letter was a copy of the Baxter Report.
(f) The letter dated 15th August 2011 from the Applicants to Mr. and Mrs. Santer at p 167. In this letter it was stated that they now had a building and the lessees had a nice flat which met all current Building Regulations and that the level of insulation was superb, that to reduce the cost of future maintenance windows, gutters and fascias had been replaced with UPVC and that the Applicants were making no charge for all the work which they had undertaken in managing the works and that the account from the contractors Cutting Edge for all the extra work had been apportioned by them and paid by the Applicants. The Applicants considered that the costs were minimal bearing in mind what had been covered, and rightly so, by the insurers and that the work done would add considerably to the value of the Mr. and Mrs Santer's flat. Also that they had been so lucky with Cutting Edge who had proved themselves to be absolutely top rate builders always pleasant and ever co-operative.
(g) The apportionment at pp 26 and 27. Asked about how the figure for Flat 4 of £1,864 (13.11% of £12,000 + VAT) in the letter at p 166 became £5,859.66 at p 27, Mr.

Armstrong said there was an estimate then a different apportionment and that as shown on p 27 £15,060.24 was being claimed from the Respondents as follows:

	£
Flat 4	5,859.66
Flat 6	2,017.08
Flat 5 and the Post Office	7,183.50
	15,060.24

Asked how, bearing in mind the apportionment (13.11%) at p 166, the figure of £5,859.66 at p 27 had been calculated, Mr. Armstrong said it had been apportioned according to work done and not in relation to rateable values as provided for by the lease. There was no additional work, it was the same work as referred to at p 166, just a different apportionment. The builders had been asked to apportion works as to what had been done. Asked where there was a provision in the lease allowing for apportionment in any way other than by reference to the rateable value of each flat as a proportion of the rateable value of the whole building, Mr. Armstrong referred to the covenant by the lessee contained in Clause 2 (7) of the lease at p 47:

"To pay a contribution in the proportion that the rateable value of the Flat has to the rateable value of the Building (to be settled in the case of any dispute by the Surveyor for the time being of the Landlord whose decision shall be final and binding on the Tenant) for or towards the repair renewal maintenance painting cleansing and mending of all exterior parts of the Building including the roof main structure and foundations basements cellars external and party walls and floors and the boundary walls fire escapes gutters sewers drains passageways roads pavements forecourts gardens yards and other things the use of which is common to the Flat...."

There was no dispute that the uninsured works came within that Clause. Mr. Armstrong sought to argue that the Clause should not be construed so as to limit the surveyor to settling a dispute as to the proportion that the rateable value of the Flat had to the rateable value of the building but could be construed as giving the Applicants' surveyor the right to decide to apportion the costs in a way other than by reference to rateable values, subject to the Tribunal's jurisdiction to override this. Mrs. Santer believed that the Flat 4 percentage of 13.11% was based on rateable values and Mr. Armstrong confirmed that that was correct; the percentages being:

Flat 4 - 13.11%
Flat 5 - 36.20% including the Post Office.
Flat 6 - 11.36%

The Applicants had considered it appropriate to have the proportions payable by the lessees in respect of the uninsured works settled by Mr. Whiteford, a surveyor and he had said that Cutting Edge could do it.

(h) The only documents which could be described as service charge demands were at pp 166, 169 and 170 in respect of Flat 4 with further correspondence at pp 171-176, at pp 177-180 in respect of Flat 6 with further correspondence at pp 181-183 and in respect of Flat 5 at pp 184-188. The reference at p 187 to Donaldson Dunstall professional charges

of £475 + VAT should be just payable in respect of the Post Office and are not service charges.
(i) The statement of Mrs. Fairfax the owner of the neighbouring property (pp 152-154).

15. Mr. Mill gave his evidence in chief and confirmed the contents of his statement at pp 129-132.
(a) Before the fire he and Mrs. Mitchell managed the subject property. No charge was made for administration.
(b) The photographs show the subject property shored up and the damage and at p 133 is the timeline of events. He had consulted various experts. Mr. Bowring of NFU Mutual the insurers, Mr. Boardley BSc MRICS ACILA a loss adjuster and Mr. Whiteford BSc Hons MRICS a chartered building surveyor who in turn recommended and approved by the insurers a specialist building contractor Cutting Edge.
(c) He obtained estimates from various people to do the work and got the scaffolding up in six weeks. The Applicants had to pay the costs of stripping out and sign that they would take responsibility for the scaffolding and the top hat. The Applicants wanted to get on and get the work done. The top hat was to cover the next door property also and was for security and weatherproofing.
(d) The Applicants were under enormous pressure.
(e) The Baxter Report at pp 160-165 from Alan Baxter Partnership LLP was addressed to Harrisons Chartered Surveyors but Mr. Mill did not know their interest in the matter. Mr. Whiteford was acting for the Applicants and he supported the Baxter Report about items that would not be covered by the insurance with NFU.
(f) There was an entry in the timeline at p 133 "04.11.10 Alex Whiteford advised us of uninsured repairs". A copy of a letter dated 4th November 2010 was produced by the Applicants and shown to Respondents and the Tribunal. The letter was from Mr. Whiteford to Mrs. Mitchell. It had not been included in the hearing bundle. The letter stated that with it was enclosed a copy of the Building Regulation Working Drawings and it was stated that Building Regulation Approval would be required prior to reinstatement works commencing as had been previously advised. The letter also stated:

"Also please find attached a separate report produced by the Structural Engineer concerning pre-existing defects to the building which as outlined at our meeting will **not** form part of the insurance scope of works. As agreed I have requested Cutting Edge Ltd to provide you with costings for these works direct for you *(sic)* approval and consideration. ***(Note: these will have to be carried out prior to the insurance structural works being undertaken).***

As discussed Cutting Edge Ltd will also provide you costs for other upgrade works including the rear flat windows to new uPVC.

I will now commence the tender procedure including two panelled contractors from Whiteford Surveying including a third network contractor from Cunningham Lindsey as required by Peter Boardley of Cunningham Lindsey Loss Adjusters. On receipt of the tenders I will forward you a copy of our tender report with recommendations, in order to obtain insurers approval to the reinstatement costs. I anticipate this occurring towards the

end of November 2010. As discussed I would like to be in a position to commence reinstatement works by the week commencing 29th November 2010. This will be subject to receiving Building Regulation approval and insurers approval.

In the interim I see a good opportunity in progressing the works if the above non-insured works could be undertaken between now and the tender return date if feasible."

There is a note on the letter that it was sent to the lessees but it had not been included in the hearing bundle, Mrs. Santer had no recollection of receiving it and Mr. Broomfield was not sure if he had received it. The note is in Mrs. Mill's writing and Mr. Mill understood that the Applicants sent out everything. All was sent out on 15th August 2011.
(g) Having received information about the work not being covered by the insurers Mrs. Mitchell wrote the letter (p 166) and paid the bill in December 2010 (p 21). The Applicants paid all bills as they came in. They did not want to hold up the work.
(h) The 13.11% comes from the rateable values. As rateable values were no longer in existence, a list was obtained from the local council. However, in relation to the uninsured works, the Applicants wanted to make it as fair as possible on the basis of what was spent on each flat. If the rateable value proportions were used Mr. and Mrs. Santer's proportion would come down and the others would go up slightly.
(i) On 19th January 2011 NFU accepted the loss and on 26th January 2011 Mr. Whiteford was asked to forward a full schedule of rebuild to all tenants. On 10th February and 20th February 2011 Mr. Mill had telephoned Mrs. Santer and Mr. Broomfield respectively and agreed chipboard flooring and had said about uninsured losses. There was little contact from the flat owners. The Applicants had catalogues for the lessees to see but they were not collected. On 13th March 2011 he had telephone conversations about the style of doors for Flats 4 and 6.
(j) Questioned about Mr. Whiteford being asked to forward a full schedule of rebuild to all tenants on 26th January 2011, Mr. Mill said that Cutting Edge and Mr. Whiteford were working together and this was in respect of the insured losses not the uninsured works. The Applicants tried to cover themselves so that everybody knew what was going on but the uninsured works were not part of that specification.
(k) An interim payment was made on 13th December 2010 (p 21). At p 22 there is an estimate which includes £5,380 for renewing rotten windows, fascias and soffits in Flat 5 but a much reduced figure for that work plus gutters was negotiated (p25). Also at p 22 there is an estimate of £520 for trunking but this the Applicants did not have done. P 23 shows the final figure paid and p 24 shows a payment for additional uninsured works.
(l) In August 2011 the Applicants asked Cutting Edge for a breakdown and it was received (p 26). The Applicants did not think the rateable value percentages were fair and that it would be fairer to everybody if they paid for the work done to their flats. The legal fees at p 28 relate only to the Post Office. On 15th August 2011 bills were sent out with a letter to explain.
(m) As to consultation, there would have been so little time to speak to anybody at length if the Applicants had got other estimates in. The uninsured works were small in relation to the whole which cost £670,000. Using a number of builders would have been bad practice. Nobody came to the Applicants and said they wanted other estimates. On 18th

December 2010 the Applicants wrote to Mrs. Santer and to Mr. Broomfield and on 16th January 2011 to Mr. Sawhney about the work set out in the Baxter Report. Nobody came back to say it was too much. The lessees were getting a bargain. There was an immense increase in the value of their properties. It was not practical to halt the works and get anybody else in, where would you stop? It would have caused difficulties, the different contractors would have been tripping over each other and there would have been a conflict of interest as to who would be responsible for what. The cost of the uninsured works was a relatively small amount and anything that held up tenants getting back into commercial and residential premises was not good. There was no suggestion that the overall figure or the cost of the works by Cutting Edge were out of line. Nobody said it was too expensive.
(n) He also confirmed the second statement of the Applicants at pp 155-159 and referring to paragraph 2 at p156 pointed out that the subject property had not been painted for 6 or 7 years and that there was a hole in the lead flashing and the gutter valley between the subject property and the next building. Painting and roof repairs were scheduled for 2010 and scaffolding would have been required. Had that work taken place as anticipated the lessees would have faced a bill in excess of that which they were now being asked to pay.

16. Cross-examination of Mr. Mill.
(a) Although there had been a lack of formal consultation in accordance with Section 20 of the Act, the Applicants had kept everybody informed by letter.
(b) The Applicants were not aware of the Section 20 consultation procedure. They are now aware and if they had known would have given the notices. Neither were they advised by the professional people around them. The lessees knew what was going to be done. Although the lessees were sent the Baxter Report, there was no letter asking for comments from the lessees or for the nomination of contractors. Mr. Whiteford dealt with the estimates and Mr. Mill believed there were three but they were for the insured works and were not submitted to the lessees. As to having time to deal with the estimates, Mr. Whiteford did this. The Applicants wanted to get the job completed. If the consultation procedure had been followed he doubted whether the building would now be finished. The scaffolding was put up quickly as it was important to protect the subject property and the listed building next to it. It was impossible to get estimates until the building had been stripped out. The scaffolding was covered by the insurance but the Applicants had to underwrite it. There was not any particularly urgent work not covered by insurance but the work could not start on the insured work until the uninsured works had been done. The strip out was in October or November 2010 and work started 31st January 2011 so there was a period of two or three months to consult the lessees. The work had to be done very quickly and although there was no physical work between November 2010 and January 2011 there was work with the insurers and the architect. Once the strip out was done then work not covered by the insurance was listed in the Baxter Report dated 28th October 2010 and received 29th October 2010 and letters were sent out shortly afterwards. There was time between then and the beginning of the works on 31st January 2011 to send formal notices but the Applicants were not aware of the procedure. It was not unfair on the lessees to have to pay. They had had the value of their properties increased by the insurance works and the uninsured works. The law

provides for the consultation procedure but it is not morally right. The Applicants had paid a total of £19,000 for uninsured works.
(c) Although the Applicants had owned several properties for a long time they did not know of the procedure. They had not had mixed residential and commercial properties before, nobody suggested they needed to give notices and had always been paid before. If the anticipated painting and repair works had proceeded they would have consulted. Mr. Whiteford obtained the estimates but the lessees saw only one estimate and saw nothing until 18th December 2010. The interim payment had been made to save VAT and time. As to the enhanced value of the flats, Mr. Mill suggested that if, before the fire, there had been a survey the lessees would have been told that there were things which needed doing and the insured and uninsured works had improved the flats.
(d) Mr. Mill accepted that the lessees should have been billed on the basis of a proportion of rateable value.
(e) It was six weeks after becoming aware of the uninsured works that the Applicants wrote to the lessees but six weeks is a comparatively short time. The Applicants dealt with it in this way because Cutting Edge were doing the whole job.
(f) It was suggested that if Cutting Edge had known the Applicants were getting competitive quotes their quote may have come down but Mr. Mill said it was not just up to Cutting Edge, there was also Mr. Whiteford and he would have advised if the estimate was too much. The estimates obtained were not for the uninsured works. It was possible that if more estimates had been obtained the Cutting Edge estimate would have come down but there were responsibility problems if employing more than one contractor. The uninsured work needed to be done first and then Cutting Edge could start their work for the insurers but it was better not to mix builders. However no other estimates were obtained so he did not know if the uninsured works could have been done more cheaply.
(g) As to the Applicants not receiving anything from the lessees, Mrs. Santer said they were not aware they had a right to be consulted because they were not informed of that right by the Applicants. When the bill arrived it was so much bigger than expected and that was the only reason it was not paid. She was not sure what she was being billed for: e.g. were oak doors and flooring insured or uninsured? Mr. Mill stated that the Applicants asked for a further breakdown but did not get it. Mrs. Santer said that there was a suggestion that there was a new computer room in Flat 4 but it was the same as before. Mr. Mill said that Cutting Edge had not made it very clear.
(h) Referring to p 27, Mrs. Santer asked why the sums charged against Units 1 and 2 had been written off. Mr Mill said that unlike the Post Office the other two shops were out of action for 18 months and therefore their contribution was waived. Mr. Sawhney stated that although the Post Office had still been open, a lot of business had been lost by being behind scaffolding and plastic sheeting for fourteen months. The other businesses had been given other places to work from but their contribution had been written off.
(i) It was put to Mr. Mill that the fact that a substantial reduction had been negotiated in the cost of replacing windows indicated how much there was to spare on such quotes. Mr. Mill confirmed that the figure quoted by Cutting Edge had been reduced on negotiation.
(j) Mr. Broomfield had no questions in cross-examination but was concerned at how this had come to light. It was unfortunate that it was unclear how the Applicants had arrived

at the figures to be paid. He had made no payments because of reduced means but he was glad it had happened as a recalculation may be required.

17. Mr. Armstrong had no re-examination.

18. Mrs. Mill gave evidence about the letter dated 4th November 2010. She did not remember sending it but wrote on the letter that it had been sent to tenants. She thought she wrote that at the time. Mrs. Santer stated she did not receive it; Mr. Broomfield did not recall it but was not sure.

19. Mrs. Mitchell gave evidence-in-chief and referred to the statement at pp 129 – 132.
(a) As to the letter dated 4th November 2010, all she knew was that she sent out everything relevant.
(b) The interim bill for £10,000 was paid in advance. It came in on 13th December 2010 and was paid shortly after to save VAT and in the interests of the lessees. All that the Applicants did was in the interests of the lessees. She wrote the letters as bills for payment.
(c) It was an utter emergency and the Applicants never charged for their time in dealing with this.

20. Cross-examination of Mrs. Mitchell.
(a) Asked about the work being carried out in a fair and transparent way so that no-one was suspicious and that the best way to do that was to follow the consultation procedure; also that there was no emergency if the Applicants had three months, Mrs. Mitchell stated that the insurers required that too. They would not have paid rent for Mr. and Mrs. Santer for ever. Nobody told the Applicants about the procedure. The emergency in carrying out the uninsured works was that they had to be done first. The Applicants were not people who could leave property there needing work. Mrs. Fairfax next door still had scaffolding round her building at the date of the hearing which was the result of builders not doing what they should do.
(b) Mr. Broomfield said that the insurers and the Applicants dealt with the matter swiftly and the lessees were all very grateful for that but then there were two months when nothing tangible happened. The Applicants could have consulted the lessees but just charged ahead and the lessees were not told about it until later. The work in the case of his flat was faultless. As to problems with separate builders, Cutting Edge employed trades and sub contractors but Mrs. Mitchell pointed out that in that situation that still left Cutting Edge responsible.
(c) It was accepted that the Applicants had managed the works and achieved a good result and Mrs. Mitchell considered that there should be a dispensation simply because the Applicants did not know about the consultation procedure.
(d) It was put to Mrs. Mitchell that when the estimate for the windows was challenged a reduction of £3,000 from £5,380 to £2,380 was obtained which illustrated that when an estimate is challenged a big discount can be achieved. She agreed it was a substantial reduction.

21. Mr. Broomfield stated that it was in his interests to have the work done quickly but that did not mean that he would have ticked the box to say get on with it. Maybe he would have had to pay too much money.

22. Mrs. Santer thanked the Applicants for their time and effort. They got things moving and were supportive of getting her into temporary accommodation but the uninsured works were not an emergency. There had been time for consultation. The greater interest of the lessees would have been to keep costs down. A couple of months would not have made a difference.

23. Mr. Singh made the following submissions:
(a) He referred to the decision of the Court of Appeal (Civil Division) in Daejan Investments Ltd and Benson & Ors 28th January 2011 which he submitted was similar to this case except that the Applicants in this case were not aware of the law. At paragraph 63 he submitted that there were only three grounds for granting a dispensation: emergency work, availability of one specialist contractor and a minor breach of procedure causing no prejudice to the tenants.
(b) He also referred to the appeal in the case of London Borough of Camden and the leaseholders of 37 flats at 30-40 Grafton Way which he submitted was very similar to the present case.
(c) He also referred to the decision of the Leasehold Valuation Tribunal in the case of Pledream Properties Limited and The Lessees of Russell Court. That case was similar in that there was a fire and defects in the building were discovered which Norwich Union would not pay for but the landlord was given the chance to make a Section 20ZA application. He did not know whether such an application had been made.

24. Mr. Armstrong made the following submissions:
(a) He referred also to Daejan and Benson and pointed out that in paragraph 63 it is stated that the three situations are no more than examples and that there is no closed list. He also drew attention to other paragraphs.
(b) Consultation goes a long way to establishing openness and integrity of the landlord. On 18th December 2010 at p 166 a letter was written by the Applicants and in the second paragraph there was a reference to the Baxter Report and the accepted estimate and the work was identified by text and plan. There was a costing of £12,000 + VAT and information that payment of certain sums was likely to be required. While it was not perfect, Mr. Armstrong invited the Tribunal to conclude that the Applicants had acted reasonably throughout in providing information to the lessees and had risked their own money to secure an advantage in VAT in December 2010. The question posed by the legislation was whether it was reasonable to dispense. It could be suggested that the consultation requirements could be a review process and an opportunity to make observations and that was not done. However, had the Applicants given the information necessary for the lessees to make a decision about the works? Mr. Armstrong submitted that they had. Referring to the timeline at p 133, the Applicants had not just sent letters but there had also been telephone discussions in Feb 2011. At no point was there any dissent from the lessees. The surveyor considered the uninsured work had to be done before the insured works. He saw a time frame within which the insured works were to

be done. There was an effect on Mr. Broomfield of being out of the building. Mrs. Santer was also out of the building. It was reasonable for the Applicants to seek to get on with the works. Was there any real indication in 2012 that there would have been a different pricing? There is no evidence it would have been different. But as in Daejan and Benson price is not the only consideration. It is also the need to secure proper supervision of the contract and not to get into disputes which so often arise as to whether one or other of a number of contractors is responsible for defects. Miss Fairfax referred to this. Did the Applicants act reasonably and was it reasonable to dispense with the requirements? Having regard to the level of disclosure in December 2010 Mr. Armstrong submitted it was reasonable and relevant to do so.
(c) As to charging management costs and legal costs Mr. Armstrong submitted that the lease at p 65 provided an example. The Applicants could have delegated their functions.
(d) As to being reasonable, it should be noted that the Applicants had received praise from some of the lessees for the way the Applicants responded to the emergency of the fire and to the finishes obtained. The Applicants had done their best to obtain a good result and had already invested their own money in it. That was a good indication that they wanted a good result. They underwrote the cost of scaffolding so were at risk prior to acceptance of the claim.
(e) It was put to Mr. Armstrong that a paragraph in the letter dated 4th November 2010 indicated that the uninsured works were to be between the date of that letter and the tender return date of the tenders for the main contract. Therefore, at the time the uninsured works were being done the main contract had not been awarded. It was not the case that Cutting Edge had the main contract and were then commissioned to do the uninsured works. Mr. Armstrong confirmed that there were estimates for the main contract but not for uninsured works.

25. Mr. Sawhney considered that his father had been treated second class. The Applicants had talked only with the lessees of Flats 4 and 6. However, Mr. Mill pointed out that Mr. Sawhney had had his kitchen done well in advance and that he wanted walls changing and that he and his son had had meetings with the Applicants and the Applicants had had more meetings with Mr. Sawhney than with anybody else.

Reasons

26. There is no dispute that the Section 20 consultation requirements had not been carried out and therefore the Applicants had applied for a dispensation.

27. The Tribunal considered all the documentary and oral evidence received, the submissions made and the cases referred to the Tribunal and made findings of fact on a balance of probabilities.

28. The Applicants were responding to an emergency in the form of a serious fire. However, once the building was shored up and a top hat was in place there was time to consider how to proceed. No doubt they assumed that the insurers would deal with the complete reinstatement of the building but when the building was stripped out pre-existing defects were found which the insurers refused to cover. It is not entirely clear

exactly when the Applicants first became aware of this. The Baxter Report was dated 28th October 2010 and apparently was received the next day. A few days later the letter dated 4th November 2010 from Mr. Whiteford was received. That referred to an earlier meeting with the Applicants when the position had been outlined. The date of that meeting was not provided but certainly by the date of receipt of that letter the Applicants were aware that there were uninsured works and that they needed to be carried out before the insured works could commence. There is a handwritten note on that letter "Please note. This letter was sent to all tenants together with the Alan Baxter report." However, the evidence as to when the letter was sent, if it was sent at all, was unclear. Although there is an entry in the timeline "04.11.10 Alex Whiteford advised us of uninsured repairs" there is no mention in the timeline of the letter being sent to the lessees, the letter was not included in the hearing bundle, Mrs. Santer did not recall receiving it and Mr. Broomfield was not sure that he had received it. The Tribunal was not satisfied that the letter had been sent to the lessees. Letters were written to Mrs. Santer and to Mr. Broomfield on 18th December 2010 and to Mr. Sawhney on 16th January 2011 enclosing a copy of the Baxter Report. Also enclosed was a copy of "the accepted Estimate to rectify the disclosures". This was not consultation but gave information of something which had been decided without consultation.

29. The Applicants dealt with and paid for or underwrote the cost of shoring up and scaffolding but they were reimbursed by the insurers.

30. The Applicants made a payment towards the uninsured works to avoid the increase in VAT and to avoid delaying the works but they expected to reclaim from the lessees the money paid.

31. Having carried out the emergency works and while the insurers were investigating and estimates were being obtained for the insured works there was the opportunity for the Applicants to consult with the lessees and to obtain competitive estimates for the uninsured works. They did neither. One estimate was obtained and accepted. They were unaware of the consultation requirements and that is why they did not comply with them but that is not an excuse. There was time and opportunity to consult the lessees and the Applicants should have done so. If there was some difficulty in complying, such as a lack of time, they could have applied to a Leasehold Valuation Tribunal for a dispensation and in that way the attention of the lessees would have been drawn to the matter. Such applications can be dealt with expeditiously.

32. In respect of the insured works three estimates were obtained. That was good practice and presumably would have been insisted upon by the insurers who in the end were going to have to pay for the works. To proceed on the basis of just one estimate for the uninsured works was unwise. It may be that the work could have been carried out more cheaply by another contractor. It may be that if other estimates were being obtained Cutting Edge would have reduced their estimate. We will never know because the opportunity to obtain other estimates was not taken. Because there was a lack of consultation the lessees, who in the end were going to be asked to pay for the works, were prejudiced. At pp 22 and 25 there is an example of how non-acceptance of the first

estimate can lead to a reduction in the price quoted. At p 22, the estimate for renewing 7 windows, fascia and soffit was £5,380 but at p 25 the invoice for replacement of windows, fascia, soffit and in addition gutters was £2,380; a reduction of £3,000. We were not told how that reduction had been achieved except that it was by negotiation.

33. It was submitted on behalf of the Applicants:
(a) That they had consulted the lessees. Referring to the timeline at p 133, the Applicants had not just sent letters but there had also been telephone discussions in February 2011, but at that point the contract had already been awarded and work started. By 18th December 2010, the date of the letters to Mrs. Santer and Mr. Broomfield, the estimate had already been accepted.
(b) That if there were more than one contractor they would be tripping over each other and that it was wise to secure proper supervision of the contract and not to get into disputes which so often arise as to whether one or other of a number of contractors is responsible for defects. However in this case that should not have been a problem because the uninsured work was done first and any defects should have been seen before the insured work started. Also, from the letter dated 4th November 2010 the Applicants knew that tenders for the insured works were still to be received and that Mr. Whiteford wanted the uninsured works to proceed during the time tenders were being submitted for the insured works. It was therefore clear that at that stage the contract for the insured works had not been awarded and that this was not a case of Cutting Edge having been awarded the main contract for the insured works and then being instructed to do the uninsured works. Estimates from other contractors could have been obtained and a different contractor could have carried out the uninsured works. As it was, it could have been the case that Cutting Edge carried out the uninsured works and then were not awarded the contract for the insured works. The awarding of the contract for the uninsured works was within the control of the Applicants but for the insured works it was not.
(c) That the lessees had gained because the planned external decoration and some roof repairs would no longer be required and the cost of such work would not fall upon them and that they had gained by the improvement of their flats. They have gained in these ways; mainly as a result of the insured works, but these facts are not relevant to the consultation process.

34. Section 20ZA of the Act provides that a Leasehold Valuation Tribunal may make a determination to dispense with all or any of the consultation requirements in relation to any qualifying works if satisfied that it is reasonable to dispense with the requirements. We came to the conclusion that we were not so satisfied and therefore could not make a determination to dispense with all or any of the consultation requirements. Hence the liability for the cost of the uninsured works in respect of Flats 4, 5 and 6 is limited to £250 each. By the application under Section 27A the Tribunal was asked to consider service charges for the years 2010/2011 and 2011/2012. At the hearing the only service charges disputed were those in relation to the cost of the uninsured works.

35. The construction of Clause 2(7) of the leases was raised. An example is at p 47. Mr. Armstrong sought to argue that the Clause should not be construed so as to limit the

surveyor to settling a dispute as to the proportion that the rateable value of the Flat had to the rateable value of the building but could be construed as giving the Applicants' surveyor the right to decide to apportion the costs in a way other than by reference to rateable values, subject to the Tribunal's jurisdiction to override this. The Tribunal found that the limited construction was correct and during the hearing Mr. Mill accepted that contributions claimed under that Clause had to be made on the basis of the proportion that the rateable value of the Flat had to the rateable value of the building.

36. It should be mentioned also that the documents which were produced as service charge demands did not comply with Section 21B of the Act and the Service Charges (Summary of Rights and Obligations, and Transitional Provision)(England) Regulations 2007.

37. There is before us an application for an order under Section 20C of the Act. We find that it is just and equitable in the circumstances to make such an order. The reasons for this are:
(a) The need for the application arose because the Applicants had failed to carry out the consultation requirements.
(b) The Respondents were justified in contesting these proceedings to clarify the position and the Tribunal was not satisfied that the dispensation sought by the Applicants should be granted.

Signed

R. Norman

Chairman