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HM COURTS AND TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Application relating to payability and reasonableness of a service charge under section 27A and section 19 of the Landlord and Tenant Act 1985 ("the Act") and an application under section 20ZA of the Act for dispensation of all or any of the consultation requirements provided for by section 20 of the Act.

The Service Charge Application	
Case number	**BIR/00CW/LIS/2012/0072**
Properties	**Flats 60 and 95, St Cecelias, Okement Drive, Wednesfield, Wolverhampton WV11 1XE**
Applicants	**Janet Fay Ottey & Jermaine Sanderson**
Respondent	**Michael Ryan**
Date of inspection	**21 January 2013**
The Dispensation Application	
Case number	**BIR/00CW/LDC/2013/0002**
Property	**Flats 60 and 95, St Cecelias, Okement Drive, Wednesfield, Wolverhampton WV11 1XE**
Applicants	**Michael Ryan**
Applicant's representative	**Mrs Susan Griffiths**
Respondent	**Janet Fay Ottey & Jermaine Sanderson**
Respondents' representative	**Mr R M Hacking**
Date of hearing	**25 April 2013**
Tribunal	**Mr C J Goodall LLB MBA Chair** **Mr S Berg FRICS**
Date decision issued	10 MAY 2013

Background

1. St Cecelias is a 20 storey block of residential accommodation comprising 119 dwellings in Wolverhampton. It was originally local authority accommodation, but it was purchased by Mr Michael Ryan in the early 1990's. He has refurbished it and has granted long leases of the individual flats in it.

2. Mr Sanderson (at the time of this application being made) was the owner by assignment of Flat 95, which was originally demised by a lease date 4 February 2000 for a term expiring on 31 December 2118, some 105 years hence ("the Lease"). Miss Ottey was, when the application was made, the owner of Flat 60. No copy of her lease has been provided to the Tribunal, but the Tribunal has been told the material clauses of her lease are in identical terms to those of Mr Sanderson's lease. No issue is raised by any party in relation to this and the Tribunal has assumed this is the case.

3. Under the Lease, Miss Ottey and Mr Sanderson have to pay a service charge. Miss Ottey considers that the service charge is too high for the years 2009, 2010, and 2011, and that the budgeted service charge for 2012 is too high, and so she made an application to this Tribunal dated 21 August 2012 for a determination of the payability and reasonableness of the service charges for those years ("the Service Charge Application").

4. In the Service Charge Application, Miss Ottey named Mr Jermaine Sanderson as an interested party, and following an invitation from the Tribunal to do so under Para 5(b) of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, Mr Sanderson applied to join in the application as an applicant, which request was granted by the Tribunal. Mr Sanderson has offered no evidence and has taken no active part in the proceedings.

5. The Tribunal carried out an inspection of St Cecelias on 21 January 2013. No party had requested an oral hearing and the application was therefore to be considered on the basis of the written representations of the parties only. The Tribunal commenced deliberations on the application following the inspection.

6. When deliberating upon the 2011 service charge year, the Tribunal identified substantial expenditure on works required to make St Cecelias compliant with the Regulatory Reform (Fire Safety) Order 2005 ("the Order"). In that year, some £85,994 was spent on general works, which included fire safety works, equating to c£722 per flat on these works alone. There was no evidence that Mr Ryan had consulted with the flat owners at St Cecelias about this expenditure. This seemed to the Tribunal to be a substantive issue that went to the merits of Mr Ryan's claim for service charge.

7. As the potential impact of non-consultation might have had the effect of reducing the service charge bill for 2011 by in the region of 50% (as failure to consult can result in charges for that work being limited to £250 per flat owner), the Tribunal did not feel it was a point that could be ignored. But the Tribunal could obviously not determine this issue without asking the applicants whether it was a point they wished to raise, and giving Mr Ryan an opportunity to make representations. Accordingly, further directions were issued seeking the parties'

representations on the issue of consultation on works required under the Order. When issuing these Directions, the Tribunal drew the party's attention to the recently decided case of *Phillips & Goddard v Francis ([2012] EWHC 3650 Ch).*

8. Miss Ottey responded to the Directions by indicating that consultation was certainly a point she wished the Tribunal to consider. Mr Ryan's response was to issue his own application for dispensation from the requirements for consultation in relation to the 2011 service charge year, under section 20ZA of the Landlord and Tenant Act 1985 ("the Dispensation Application").

9. The Tribunal directed that further statements and documents be exchanged in relation to the Dispensation Application and set it down for a hearing, which took place on 25 April 2013. Mr Ryan was present as was his representative Mrs Griffiths. Miss Ottey was present and Mr Hacking appeared as representative for Miss Ottey and Mr Sanderson.

10. In relation to the Service Charge Application, the Tribunal has taken into account Mrs Ottey's application form and its enclosures and her letters dated 21 November 2012, 3 December 2012, 16 January 2013, and 31 January 2013. From the Respondent's side, the Tribunal has considered the Respondent's statements dated 22 October 2012, 12 November 2012, 10 December 2012, 22 January 2013, and 26 February 2013. The last of these statements also dealt with issues arising in relation to the Dispensation Application.

11. In relation to the Dispensation Application, the Tribunal has considered the application form, Mr Ryan's statement of 26 Feb 2013 and the documents appended, Miss Ottey's statement dated 2 April 2013 and exhibits, Mr Ryan's statement in reply dated 9 April 2013, the witness statement of Elizabeth Hacking dated 10 April 2013, and Mr Ryan's short statement dated 23 April 2013 and of course the evidence and submissions at the hearing.

The Inspection

12. The inspection took place on 21 January 2013. It was attended by Mr Ryan and by Mrs Susan Griffiths, who he employs to assist with the management of St Cecelias. Miss Ottey was unable to be present due to work commitments. Mr Sanderson made himself available at the inspection, but the Tribunal was accompanied on its inspection, as agreed by the parties, only by Mrs Griffiths.

13. St Cecelias is a single tower block of 20 floors (including the ground floor). There are six flats on each of the 2nd to 20th floors (if the ground floor is considered as the first floor), and five flats on the ground floor, making a total of 119 flats. Each flat also has its own small balcony. The ground floor also has an entrance porch, porter's room, bin store, porter's flat and small communal area.

14. There are two lifts both in a central lift shaft, one serving the even numbered floors and the other serving the odd numbered ones. A corridor runs round the outside of the lift shaft on each floor, onto which the front doors of each flat open. The central corridors thus have little

natural light, and they are not heated. There is a central staircase also situated within the central shaft of the building with no natural light or heating.

15. The corridors are painted, with a low level dado rail. On some floor corridors, there are plant pots or a piece of furniture, which the Respondent's representative informed us, had been placed by residents to improve the general ambience of the corridor. The condition of the internal common parts was generally satisfactory and tidy. Miss Ottey says that a special effort had been made to tidy up on the day of our inspection, and there were various notices placed in the lift or pinned to the walls which appeared to be from residents suggesting that the condition of the common parts was better than normal.

16. Externally, St Cecelias is located within a site mainly laid to tarmac for car parking and pathways. There is a very small grassed area. There is a small amount of shrubbery immediately at the entrance into the building. The boundary is a brick wall at the entrance to St Cecelias from Okement Drive, and there is a substantial external metal fence, in good condition, which forms the boundary of the rest of the site. On the day of the inspection, there had been a substantial snow fall, so the condition of the roads and paths could not easily be observed.

The Lease

17. As Miss Ottey has not suggested that the lease prevents Mr Ryan from charging any of the service charges in dispute in this case, only a short summary of the provisions of the lease is included in this decision.

18. Under clause 4 and paragraph 7 of the Seventh Schedule, the lessor covenants to "do all ... acts and things as are set out in the Eighth Schedule".

19. The "acts and things" set out in the Eighth Schedule include repairing, re-building, renewing, re-pointing, improving or otherwise treating, and keeping all parts of St Cecelias that are not demised by the flat leases in good and substantial repair and condition. They also include insurance, costs of management, and accountancy charges for the auditing and certifying of the costs incurred in providing the services. The sums actually expended on the items in the Eighth Schedule are known in the lease as "Lessor's Expenses".

20. The lessee covenants (in clause 3a of the Sixth Schedule) to pay the "Lessee's Proportion" of the Lessor's Expenses. That proportion is defined in para 1 of the Ninth Schedule as 0.84% of the Lessor's Expenses.

21. The Applicant therefore has a liability under the lease to pay 0.84% of the expenses incurred by the Respondent in managing and maintaining St Cecelias in accordance with the terms of the Eighth Schedule.

The Law

22. The powers of the Tribunal to consider service charges are contained in sections 18 to 30 of the Landlord & Tenant Act 1985 (" the Act").

23. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-
    a. The person by whom it is or would be payable
    b. The person to whom it is or would be payable
    c. The amount, which is or would be payable
    d. The date at or by which it is or would be payable; and
    e. The manner in which it is or would be payable

24. In effect, this gives an opportunity for both a proposed budget for service charges to be raised with the Leasehold Valuation Tribunal and a further opportunity for the sums then actually spent, when they are known, to be challenged.

25. Section 19(1) of the Act provides that:

    "Relevant costs shall be taken into account in determining the amount of the 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 and the carrying out of works, only if the services or works are of a reasonable standard:

    and the amount payable shall be limited accordingly."

26. A service charge is only payable if the terms of the lease permit the lessor to charge for the specific service. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the Lease can be recovered as a charge (Gilje v Charlgrove Securities [2002] 1EGLR41).

27. The construction of the lease is a matter of law, whilst the reasonableness of the service charge is a matter of fact. On the question of burden of proof, there is no presumption either way in deciding the reasonableness of a service charge. Essentially the Tribunal will decide reasonableness on the evidence presented to it (Yorkbrook Investments Ltd v Batten [1985] 2EGLR100).

28. In relation to the test of establishing whether a cost was reasonably incurred, in *Forcelux v Sweetman* [2001] 2 EGLR 173, the Lands Tribunal (as it then was) (Mr P R Francis) FRICS said:

    "39. ...The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.

40. But to answer that question, there are, in my judgement, two distinctly separate matters I have to consider. Firstly, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Secondly, whether the amount charged was reasonable in the light of that evidence..."

29. In *Veena v Cheong* [2003] 1 EGLR 175, the Lands Tribunal (Mr P H Clarke FRICS) said:

"103. ...The question is not solely whether costs are 'reasonable' but whether they were 'reasonably incurred', that is to say whether the action taken in incurring the costs and the amount of those costs were both reasonable."

30. The law on the requirement to consult, and a landlord's right to request dispensation from that requirement is contained in section 20 and 20ZA of the Act, the relevant provisions of which are:

Section 20 Limitation of service charges: consultation requirements
(1) Where this section applies to any qualifying works ..., the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.
(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.
(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
(4) ...
(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works ..., the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.
(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises,
...
...
(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
(5) Regulations under subsection (4) may in particular include provision requiring the landlord—
(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
(b) to obtain estimates for proposed works or agreements,
(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.
(6) Regulations under section 20 or this section—
(a) may make provision generally or only in relation to specific cases, and
(b) may make different provision for different purposes.
(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

31. Regulations have been made under these sections, which are the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Consultation Regulations"). At regulation 6 of those regulations, the "appropriate amount" for the purposes of section 20(3) of the Act is set at £250. Regulation 7 and the various schedules to the regulations set out the consultation requirements. Part 2 of Schedule 4 applies to qualifying works for which public notice is not required, which would be the position for the types of works in issue in this case. Broadly, this schedule requires that notice of proposed works, describing them, setting out the reasons for them being required, and inviting observations and the names of people from whom the landlord should seek an estimate of cost, should be given to tenants. The landlord is under a duty to have regard to the tenant's observations. He must endeavour to obtain an estimate from any contractor suggested by the tenants. At least two estimates must be obtained, one of which should be from a person wholly unconnected with the landlord, on which the tenants are entitled to make observations to which the landlord must have regard. When a contract is awarded by the landlord, notice must be given to the tenants with a statement of reasons for awarding that contract. The Tribunal should stress this is only a broad outline, and is no substitute for a detailed consideration of the schedule.

The issues in this case and the Tribunal's determination

32. The Tribunal considers that there are three issues to be considered in this case. Firstly, the specific challenges to specific charges levied with the service charge bills for 2009, 2010, and 2011 and the reasonableness of the budget for 2012. Secondly, whether Mr Ryan should have consulted on the expenditure on works in 2011, and thirdly whether, if so, the Tribunal should grant a dispensation for failure to consult. Each of these will now be considered, with a summary of the evidence and arguments of the parties relating to each issue, and the Tribunals determination in relation to that issue. In considering the application for dispensation, the Tribunal has had the benefit of the evidence and submissions presented at the hearing on 25 April 2013, the key content of which is included in the discussion below.

Specific challenges to the service charges for 2009, 2010, and 2011

33. The service charges levied for these years (per flat) are as follows:

2009	-	£621.70
2010	-	£813.20
2011	-	£1,286.48 (£343.46 of which was taken from Reserve Fund)

34. In her application form and her letters of 21 November 2012 and 3 December 2012, Miss Ottey generally claims that the service charges levied are not good value for money. She raises general complaints, not specifically related to any particular service charge year, about:

- the standard of cleaning in the communal areas,
- whether the cost of a caretaker provides good value,
- the management fees,
- estimated rather than actual electricity charges,
- failure to carry out external clearing and tidying until 2012,
- work being carried out by Mr Ryan's building company, and the possibility that the cost is therefore not competitive, and
- the taking of provisions for future expenditure as they appear to be a savings fund for Mr Ryan.

35. Specific challenges to items charged in the 2009 year are:

a. An electricity charge of £14,710.50.

b. A charge of £218.50 for car park notices and stickers in 2009, which the applicant says have never been used.

c. A charge for a new carpet in 2009 of £1,768.12. Miss Ottey says the carpet is poor quality and the cost seems surprisingly high.

d. Fees for debt collection, which Miss Ottey suggests should be recovered from the individual flat owners.

36. There are no specific charges which Miss Ottey has challenged for the 2010 year. The general issues raised in paragraph 34 above are mentioned.

37. Specific challenges made about the 2011 year are:

    a. The cost of decorating, charged at £8,700.00 is challenged. Miss Ottey claims that only the doors and the walls up to window level were decorated, and that the standard of decoration is poor.

    b. Miss Ottey says she is being charged an underletting fee of £53.02, and she queries the legality of this.

38. Mr Ryan has provided five statements in support of the service charges rendered and copies of the invoices making up the charges for the years in dispute. He defends the charges levied and denies poor quality of work. He gives details of the caretaker's duties and responsibilities, and further information in relation to management expenses. In relation to work carried out by his building company, his contention is that all work is carried out at competitive rates.

39. The Tribunal considered the issues raised by Miss Ottey carefully and perused the invoices submitted by Mr Ryan in support of the service charges for the years in question.

40. In relation to the first general issue of standard of cleaning raised by Miss Ottey in paragraph 34 above, when the Tribunal inspected St Cecelia's, it found the building to be generally clean and tidy. There is however criticism of the standard of cleanliness in the communal areas, supported by photographic evidence. The Tribunal does agree that the photographs show an emergency escape route stairwell that needed cleaning. However, the Tribunal must decide the questions raised in the application on the evidence before it, and there is insufficient evidence available to the Tribunal for it to conclude that the standard of cleaning was so poor, across the whole building, on a consistent basis, that there should be some adjustment of the amounts of service charge levied.

41. The second general issue is whether the cost of the caretaker is reasonable and justifiable. There is a resident caretaker, and the Tribunal considers that the employment of a caretaker at St Cecelias is reasonable, bearing in mind the size of the building and tasks that need to be performed. It noted that Mr Ryan's statement of 10 December 2012 gave detailed evidence of the daily duties of the caretaker and exhibited some of the time sheets and check sheets that the caretaker completes as part of his duties. This evidence is sufficient for the Tribunal to be satisfied that the duties and work given to the caretaker justify his engagement. The amount charged for the caretaker is his salary of £9,558 (2009 figures) plus national insurance, telephone costs and the benefit of a caretakers flat, totalling £16,024 in 2009. The Tribunal considers that his engagement, and the costs incurred, are reasonable and a proper element of the service charge.

42. The Tribunal considered the third general issue of management fees. These are, for the years under consideration:

	S M Properties (inc. VAT)	Ryan Const	Total
2009	14,780.10	3,500.00	18,280.10
2010	15,730.93	4,000.00	19,730.93
2011	16,708.19	(391.37)	16,316.82

43. Mr Ryan's statement of 22 January 2013 provides a fuller explanation of the management charges. He employs a managing agent, S M Properties, who perform administrative tasks including preparing budgets and service charge demands and accounts, bookkeeping and credit control, liaison and meetings with flat owners, correspondence and telephone calls, insurance and risk assessments, statutory certificates, and a 24 hour answering system. From the invoices submitted, it appears, and the Tribunal finds, that in addition to paying the managing agents cost, Mr Ryan also charges a fee for himself (via his building company Ryan Construction Ltd) for visits and general liaison with the caretaker. The two components of this management charge are set out above.

44. The 2011 figures require more explanation. In that year, Mr Ryan had also collected fees from flat owners for underletting their properties totalling £6,191.37. His own charge for that year was £5,800.00, which when added to the S M Properties charge totals £22,508.19. The underletting fees were used to partially discharge this liability, leaving the net sum charged to service charge payers of £16,316.82. The Tribunal notes that the underletting fee was the subject of an application to the Leasehold Valuation Tribunal in 2012 under reference number BIR/00CW/LAC/2012/0010 in which it was determined that the imposition of a fee for underletting was not permitted under the terms of the leases of St Cecelias.

45. The Tribunal considers that there is no reason in principle for management charges not to comprise the two elements identified above, as Mr Ryan, it finds, provides some management to St Cecelias that is additional to that provided by S M Properties. But the overall amount must be reasonable. Using its knowledge and experience of property management, the Tribunal considers that the management charges levied are within the bounds of reasonableness, being, at the highest point, no more that £165.80 per flat per year (including VAT). It notes that increases across the three years in question have been considerably above inflation and the sums levied are now reaching the point whereby further above inflation increases might be difficult for Mr Ryan to justify.

46. On the fourth general issue of electricity charges, the Tribunal notes that although estimated readings were used for service charge years 2009 and 2010, an actual reading for 2011 was used which resulted in there being a charge rather than a refund, so over a longer period it would appear that there has been no disadvantage to the flat owners from estimated electricity accounts, and it is possible there might have been a very slight cash flow advantage. There is no evidence, or any claim by Mrs Ottey, that the tariff is excessive, and the Tribunal finds the electricity charges to be reasonable.

47. The fifth general issue relates to external clearing and tidying. The difficulty for the Tribunal in considering this as part of an application for determination of the reasonableness of a service

charge is that by failing to carry out external clearing and tidying until 2012, Mr Ryan has not incurred any costs which he is seeking to pass on to the service charge payers. The Tribunal does not see therefore how it can make any adjustment of the service charge as a result of this issue.

48. The Tribunal has noted, in relation to the sixth general issue, that various items of building work charged within the service charge are carried out by Mr Ryan's building company, Ryan Construction Ltd. In theory, without competitive quotations Mr Ryan lays himself open to the criticism that he may be submitting invoices for excessive amounts. The Tribunal considers this issue in more detail in its consideration of the Dispensation Application. Within the challenges to the quantum of the service charges however, no specific invoice was brought to the Tribunal's attention as being excessive, and the Tribunal therefore does not find any reason to reduce any of the service charges under this heading.

49. The final general issue relates to service charges, known as provisions, towards future costs. A total provision of £7,200 was charged in 2009. In 2010, £30,000 of provision was charged, and a sum of £2,000 was charged in 2011. The taking of provisions in the service charge accounts is legitimate and is specifically permitted under the Eighth Schedule of the lease. The Tribunal would however wish to draw the attention of the parties to the provisions of section 42 of the Landlord and Tenant Act 1987 requiring that service charges, including sums collected in anticipation of future expenditure, are held in trust for the tenants. The tenants can require that they are provided with an account of the amount held on their behalf, including the sum standing to their credit (section 21 Landlord and Tenant Act 1985).

50. Turning now to the challenges to specific items in the 2009 service charge year, the first of which is electricity. The question of estimated against actual invoices has already been dealt with under paragraph 46 above. St Cecelias is a substantial building with no natural light on the stairwell and two lifts. Mr Ryan also points out that there are 200 light bulbs in the common areas. The Tribunal considers that the electricity charge generally is reasonable.

51. The second specific issue on the 2009 accounts is the cost of parking stickers of £218.50. Mr Ryan's evidence is that only £150.65 was charged to the St Cecelias service charge account. Some stickers, he says, were used which resulted in better compliance with parking requirements. The unused stickers are retained for possible future use. The Tribunal does consider that there is therefore evidence that the stickers were used, and does not find Mr Ryan's explanation to be so unreasonable that it should disallow this charge.

52. On the cost of the carpet of £1,768.12, the Tribunal did not consider that the cost was so unreasonable a sum that it should reduce it. There was no evidence from Ms Ottey suggesting what a reasonable cost would have been.

53. So far as debt collecting fees are concerned, the Lease allows the recovery within the service charge of collection of rents, including the costs of enforcement. Within enforcement proceedings, there may well be a recovery of costs from an individual tenant, and if a contribution is collected, clearly that cost should not also be charged to the service charge. But there is no evidence of the outcome of legal proceedings and thus of whether there may

be double recovery here, and the fees for debt collection are therefore considered by the Tribunal to be reasonable.

54. The 2011 service charge year incorporated a charge for decoration of the common area landings to half height, all walls from floor to ceiling in the stair well and all utility cupboards of £8,700.00. This is challenged by Miss Ottey mainly on the grounds of quality. She says the emulsion paint on the walls ran over onto the skirting boards and the dado borders were peeling. The Tribunal considers that the area which was decorated was substantial and there was no evidence available to it that showed the overall cost was unreasonable for the work undertaken. Whilst there were some minor imperfections in the quality, the overall effect was satisfactory and the Tribunal does not feel that there is a sufficiently strong basis for it to disallow this cost whether in whole or part.

55. The second specific complaint about 2011 by Miss Ottey is to what she describes in her application form as an underletting charge of £53.02. However, there is no underletting charge made by Mr Ryan as part of the 2011 service charge. The sum of £53.02 is the shortfall of income against the expenses incurred. If there is a shortfall, it is payable by the flat owners under paragraph 3(b) of the Ninth Schedule of the Lease.

56. Although included within the submissions for the Dispensation Application, there is also a criticism by Miss Ottey of the standard of the work carried out in 2011 to line the utility cupboards to provide 30 minute fire protection. Miss Ottey's case is that the protective fireboard used was compromised by the way in which it was cut into the existing cupboards. To deal with this point, Mr Ryan provided a statement in the Dispensation Application proceedings dated 23 April 2013 in which he exhibited a report from KGC Ltd (a fire protection company) stating that "where the Fireline board has been "cut out" in areas where the doors close up to the face of the gas/electric/water meter or where pipes obstruct the door from closing – these "cut out" areas have been lined with Envirograf ES/MP900 fire card faced intumescent membrane. ... As a further improvement – Envirograf G10 half hour fire rated intumescent strip 10mm x 2mm has been fitted along side the smoke seal to give fire and smoke protection. ..... In our opinion, with all of these up-grade works, the cupboards would now have a minimum of 30 minutes fire and smoke protection."

57. The Tribunal is satisfied on the basis of this evidence that the work is now at a reasonable standard. Mr Ryan said he had not and would not charge the flat owners for the cost of this upgrading.

58. There is one final issue of standard of work raised by Miss Ottey which relates to white lining carried out in 2011 for which Mr Ryan charged the sum of £1,440 through his building company. Ms Ottey says that work had to be done again in Nov / Dec 2012 after the car park area had been pressure washed so it must have been sub-standard originally. This is disputed by Mr Ryan. He says that the cost of the work in 2011 would have been considerably higher had it been carried out to the standard found on public roads. The Tribunal has no information on the cost of the 2012 work. In the circumstances, the Tribunal finds that there is no adequate evidential basis for it to determine that the 2011 work fell below a reasonable standard.

Reasonableness of the budget for 2012

59. Mr Ryan prepared a budget for 2012 on a "per flat" basis identifying expenditure of £1,030 for 2012. There is nothing in the budget that is considered so unreasonable by the Tribunal that it should be disallowed, particularly as the tenants of St Cecelias will already have incurred the liability to pay the service charge contributions as at the date of this decision. Miss Ottey has not drawn the Tribunal's attention to any specific item of budgeted expenditure which she challenges. The Tribunal therefore determines that the budget estimate for 2012 is reasonable and payable but of course when the final outcome for the 2012 year is known, and details of actual expenditure is provided to the flat owners, nothing precludes them from applying then for a determination of the reasonableness of the actual expenditure for 2012.

Whether consultation was required for 2011 expenditure

60. In the 2011 service charge accounts, expenditure of £85,994.14 is shown for general maintenance and repair (£722.35 per flat). As described in paragraph 6 above, on considering this expenditure in the Service Charge Application, particularly as much of it related to work required to comply with the Order, the Tribunal considered whether there might have been an obligation to consult the flat owners about it. Mrs Ottey has confirmed that this is an issue of concern to her which she wishes the Tribunal to deal with.

61. Mr Ryan's evidence is that in 2010 he was contacted by West Midlands Fire Service regarding fire compliance issues at St Cecelias. He held a meeting with the safety inspector on 9 November 2010 to discuss this, and he was sent a formal letter dated 26 November by West Midlands Fire Service attaching a schedule containing eight pages of their requirements. He was told that failure to comply with the requirements of the schedule would result in an enforcement notice being served.

62. He was also contacted by Wolverhampton City Council who owned three similar blocks of flats nearby, who advised him that they were spending a total of £210,000 on similar works to those required at St Cecelias at their properties. Mr Ryan and Mrs Griffiths subsequently inspected William Bentley Court and observed the work undertaken there to comply with fire regulations.

63. Mr Ryan put up two notices at St Cecelias in March 2011 saying that substantial works to comply with the Order were required. The notices were headed "The Regulatory Reform (Fire Safety) Order 2005". The first notice said "We will shortly be commencing works to bring St Cecelia's up to the fire safety standards required by the above order. This work will be extensive and unfortunately it will take a considerable length of time to bring the building up to the required standard."

64. Works required under the Order cost a total sum of £64,877.60 in 2011 and comprised:

    a. A new emergency lighting system requiring 120 new light units
    b. New signage

c. Upgrading of 140 doors to current fire protection standards by fitting intumescent strips and some seals
d. Fitting of smoke alarms in the communal areas
e. Fire protection of utility cupboards housing the main services riser by lining with fire resistant material

65. At the Dispensation Hearing, Mr Ryan said that he did not consult on the fire safety works because they split down into a number of separate contracts each of which fell below a total of £250 per flat owner so he did not have an obligation to consult. He did however accept that the utility cupboard work (64e above) cost a total of £28,200 which did come over the threshold for consultation.

66. The Tribunal finds that there should have been consultation on the works required under the Order. The notices show this most clearly. The requirements contained in the letter of 26 November 2010 should have been seen as a single set of requirements even though there were constituent elements to them. The flat owners were informed of "works" as a whole. The Tribunal finds that there was a breach of section 20 of the Act and the Consultation Regulations.

67. The case of *Phillips & Goddard v Francis* suggests that all works carried out by a landlord in a single service charge year are aggregated together to establish whether the £250 threshold is exceeded. If so, consultation is required. Prior to this case, many had thought the consultation obligation only applied where a particular works contract exceeded the threshold, rather than all works within a service charge period. The Tribunal wish to make it clear that in its view this is a case where consultation would have been required in any event on the common understanding of the Regulations prior to *Phillips & Goddard v Francis.*

Whether dispensation from consultation should be granted to Mr Ryan

68. As a result of the Tribunal's decision on the need for consultation, consideration is required of Mr Ryan's request for dispensation from consultation. The test, as identified in section 20ZA of the Act (see paragraph 30 above) is whether the Tribunal considers that it is reasonable to dispense with the consultation requirements.

69. Mr Ryan's case for dispensation was that he had looked at the works required in 2011 as separate items and at the time he had not considered there was a need to consult. He accepted now that he should have consulted, which was why he was now applying for dispensation. He said that he felt he has always provided value for money in the works carried out at St Cecelias, and he suggested that the flat owners there have not in fact suffered any disadvantage as a result of failure to consult.

70. In *Daejan Investments Ltd v Benson and others ([2011] UKSC 14)* the Supreme Court considered the basis of the section 20ZA jurisdiction. Giving the majority judgement, Lord Neuberger said, at paragraph 42;

"It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard.

71. At paragraph 44, he said;

"Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements."

72. Paragraphs 46 to 49 contain a discussion on the extent to which a court should consider whether the landlord's breach is a "serious failing" or a "technical, minor, or excusable oversight". Lord Neuberger's conclusion is that this distinction is neither convenient nor sensible, except in relation to the prejudice suffered by the tenants. In paragraph 46, Lord Neuberger makes it clear that a dispensation should not be refused solely because of a serious breach of the consultation requirements.

73. An LVT, however, has power to grant a dispensation "on such terms as it thinks fit – provided of course, that any terms are appropriate in their nature and effect" (Paragraph 54). An example, where an LVT might impose a condition, is if the tenants can establish that works carried out would have cost less, the landlord would have to bear the additional cost as a condition of a dispensation. A further example is requiring the landlord to pay the reasonable costs that a tenant might incur in the landlords dispensation application.

74. In his "overview" section, Lord Neuberger summarises his analysis in paragraph 71 by saying:

"... Insofar as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the Requirements have been satisfied, and they will not be getting something of a windfall."

75. In practical terms, this means (paragraph 73):

"I have in mind that the landlord would have (i) to pay its own costs of making and pursuing an application to the LVT for a section 20(1)(b) dispensation, (ii) to pay the tenants' reasonable costs in connection of investigating and challenging that application, (iii) to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the LVT will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue."

76. At the Dispensation Hearing, Mr Hacking pointed out that Mr Ryan's procurement practice was to obtain a quotation from one contractor, and then, in relation to any work for which Mr Ryan considered Ryan Construction Ltd was competent, he carried out the work via that company. This meant that he was not working to any specification, or clear standard. Mr Ryan pointed out that he always charged less than the amount quoted by the contractor originally asked to quote.

77. Mr Hacking argued that prejudice as a result of failure to consult had been suffered by Miss Ottey as a result of:
    a. quality of work by Ryan Construction being poor, and
    b. the inability of the tenants to engage with a number of independent suppliers who by virtue of competition would have been likely to offer better pricing or better quality than the contractors actually engaged.

78. The specific quality concerns raised related to decorating, the cost of white lining the car park, and the work carried out to insulate the fire cupboards, which have all been considered by the Tribunal under the Service Charge Application (see above) and have either been resolved by Mr Ryan at his cost, or have been rejected by the Tribunal.

79. The loss of opportunity to consider competitive quotations or to suggest alternative contracts is both a relevant and a real prejudice. The Tribunal is unpersuaded that Mr Ryan adequately tested the market before placing contracts for the fire protection work, and is particularly unconvinced by Mr Ryan's suggestion that Mrs Griffiths was able to offer a genuinely independent competitive quotation for installation of fire alarms. By the same token however, Miss Ottey provided no evidence that Mr Ryan's invoices were above market value. Indeed, one of Miss Ottey's major criticisms is that Mr Ryan deliberately undercuts the quotations he obtains to secure the work for his building company. There is therefore no direct evidence available to the Tribunal of specific financial prejudice in the sense that any work has been carried out more expensively than it would have been had statutory consultation taken place.

80. At the hearing of the Dispensation Application, Mr Ryan made an offer to reduce the total service charge costs in the 2011 service year by £7,000. This equates very roughly to slightly more than 10% of the cost of the works required by the Order.

81. Mr Hacking asked for the imposition of a condition on the granting of dispensation that Mr Ryan's total cost of works for 2011 should be reduced by £15,000. He was not able, however, to explain how he reached this figure. He was keen that the Tribunal should reinforce the obligation to consult by making an order that sent a message to Mr Ryan that he must comply with the Consultation Regulations, which he said had been intentionally and conspicuously ignored in this case.

82. The Tribunal considers that it has no legal basis for imposing a condition that reflects the gravity of the failure to consult. Its task is to make an order that reflects the prejudice to the tenants. The Tribunal considers that the fire precaution works carried out in 2011 were essential and reasonably incurred. Mr Ryan's proposal to reduce the cost of these works by

£7,000 to reflect the loss to the tenants of their opportunity to ensure the costs were genuinely competitive and the loss of the opportunity to suggest their own contractors is a reasonable proposal and the Tribunal adopts it.

Determination

83. The Tribunal determines:

    a. that the service charge claimed from Miss Ottey and Mr Sanderson for the 2009 service charge year of £621.70 each is payable.

    b. that the service charge claimed from Miss Ottey and Mr Sanderson for the 2010 service charge year of £813.20 each is payable.

    c. that in 2011 there was a failure to consult as required by section 20 of the Act and the Consultation Requirements on the works required as a result of statutory obligations under the Regulatory Reform (Fire Safety) Order 2005, which totalled at least £64,877.60.

    d. dispensation from consultation is granted under section 20ZA of the Act conditional upon Mr Ryan making a total allowance of £7,000 towards the cost of those works.

    e. that the service charge payable by Miss Ottey and Mr Sanderson for the 2011 service charge year of £1,286.48 each (£343.46 of which was taken from Reserve Fund) should be reduced by £58.80 each to reflect their share of the allowance referred to above, so that their total liability in that year is £1,227.68 each (£343.46 of which has been taken from Reserve Fund).

    f. that the sum claimed for the 2012 service charge year of £1,030 is payable by each of Miss Ottey and Mr Sanderson, but subject to their right, should they wish to pursue it, to challenge the actual service charge bill when final accounts have been produced.

Costs - Section 20C application

84. Miss Ottey has made an application in the Service Charge Application for an order under section 20C of the Act that none of the costs incurred by Mr Ryan should be recoverable under the service charge provisions of the Lease. Except in very limited circumstances, the Tribunal has no power to award costs against a party to proceedings before it. None of those circumstances apply to this application, so there is no direct costs order made by the Tribunal. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge.

85. The discretion given to the Tribunal is to make such order as it considers just and equitable.

86. The Tribunal finds, particularly in relation to the 2011 service charge, that it was entirely reasonable for Miss Ottey to bring these proceedings. The Tribunal considers that the question of consultation, even on the basis of an understanding of the law prior to the case of *Phillips v Francis*, had not been properly addressed by Mr Ryan, to the detriment of the flat owners. On the basis of the law prior to *Daejan v Benson* that would have resulted in an even greater reduction in the service charge than that which has been determined by the Tribunal. It would seem unfair to the Tribunal for Mr Ryan to recover the costs of the Service Charge Application through the lease service charge mechanism.

87. The Tribunal therefore makes an order under section 20C of the Act that none of the costs of the Service Charge Application are to be regarded as relevant costs to taken into account in determining the amount of any service charge payable by Miss Ottey or Mr Sanderson.

Costs – Dispensation Application

88. As has been made clear in *Daejan v Benson*, a landlord should expect to have to pay a tenant's reasonable costs in relation to an application for dispensation under section 20ZA. Mr Hacking however stated that there were no costs incurred for which Miss Ottey or Mr Sanderson sought reimbursement.

89. Mr Ryan indicated at the Dispensation Application hearing that he would not be seeking any of his costs for that case though the service charge. The Tribunal does not doubt this statement in any way, but should any of the Dispensation Application costs be included in a service charge, the applicants in these proceedings and any other flat owner would be entitled to seek a section 20C order in relation to those costs.

Date 16 MAY 2013

C. Goodall

C J Goodall
Chair
Leasehold Valuation Tribunal