102/14

FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00ML/LIS/2014/0015**
Property	:	**4B Hova Villas, Hove, East Sussex, BN3 3DF**
Applicants	:	**Mr Geoffrey Bennett and Ms Sheila West**
Representative	:	**In person**
Respondent	:	**Mr John Booth**
Representative	:	**In person**
Type of Application	:	**1) Liability to pay service charges** **2) To dispense with the requirements to consult lessees about major works**
Tribunal Members	:	**Judge N Jutton and Mr Nigel Robinson FRICS**
Date	:	**14 August 2014**
Venue of Hearing	:	**Court 1, Brighton County Court, William Street, Brighton, BN2 0RF**
Date of Decision	:	**28 August 2014**

DECISION

---

1 **Introduction**

2 The Applicants Geoffrey Bennett and Sheila West are the lessees of Flat 4B Hova Villas, Hove, East Sussex, BN3 3DF. Their lease is dated 7 March 1973 and made between Janet Caroline Jose (1) and Seymour John Ledbury (2) (the Lease) (which lease refers to 'Flat 2' but which is now known as Flat 4B)

3 The Respondent is the current lessor of 4 Hova Villas and is also the lessee of the other two flats in the building (the ground floor flat and the first floor flat).

4 The Applicants apply pursuant to section 27A of the Landlord & Tenant Act 1985 (the 1985 Act) to determine liability to pay and the reasonableness of service charges and for an Order pursuant to section 20C of the 1985 Act that the Respondent's costs incurred 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 the Applicants.

5 Directions were made by the Tribunal on 29 April 2014 which identified the issues to be determined as:

- Service charges for the service charge years 2011, 2012 and 2013 and estimated service charges for the year 2014 (each year ending on 31 December).
- Whether an order should be made under section 20C of the 1985 Act.
- Whether an order should be made for reimbursement of the application/hearing fees.

6 The Respondent has made an application pursuant to section 20ZA of the 1985 Act to dispense with the consultation requirements required by section 20 of the 1985 Act in relation to certain works of repair to the roof of the property. Directions were made in relation to that application on 20 May 2014 which determined that the two matters would be determined at the same time.

7 Both sets of directions made provision for the filing and service of statements of case and documents.

8 **Documents**

9 The documents before the Tribunal were:

- A bundle of 191 documents (the pages were not numbered but the individual documents were) comprising application forms, directions, schedules of items in dispute, statements of case, copy leases of the basement, ground floor and first floor flats, accounts, invoices, bank statements, extracts from the RICS Service Charge Residential Management Code 2009, extracts from advisory notes published by the Association of Residential Managing Agents, correspondence and emails between the parties and other documents.

- Document headed 'Respondent's Further Responses to Applicants' Responses'.

- Further correspondence and documents submitted to the Tribunal following preparation of the bundle.

10 **The Inspection**

11 The Tribunal attended at the property on the morning of 14 August 2014. Present were Mr Bennett and Mr and Mrs Booth. The building is believed to have been constructed in the mid 19th century. It was originally a single dwelling, now divided into three residential flats. It is semi-detached with a concrete tiled roof and rendered walls. It is divided into 3 flats: the basement flat; ground floor flat; and first floor flat. The Tribunal first inspected the basement flat. This is the Applicants' flat. Mr Bennett pointed out evidence of damp patches and historic damp patches in the north-west corner of the living room. He referred to a cold water feed pipe the other side of the wall in the kitchen. He also referred the Tribunal to a second damp patch in the living room on the western wall. The rear basement terrace was inspected and Mr Bennett pointed out a crack in the soil pipe but agreed that was not within the schedule of items in dispute. He pointed out the replacement guttering and the rear chimney which had been rendered.

12 The Tribunal then was taken to the side door on the north wall to the ground floor flat and the stairs leading to it. The Tribunal was shown a fillet of cement at the base of the wall and between the walls and the steps. The Tribunal was shown the door and the door surround including the metal upstand at the base of the door and the area below the sill of the door.

13 The Tribunal was then taken into the ground floor flat and Mr Bennett pointed out evidence of areas of damp on the north wall just to the east of the door and in an adjacent meter cupboard. The Tribunal was shown a WC off the hall where Mr Booth explained that the box work had historically been removed to investigate a possible leak and then replaced. The Tribunal was shown the kitchen and the boiler cupboard with a replacement boiler. The Tribunal was then taken to the first floor flat and the roof to the rear extension of the building was inspected

through a window from a rear bedroom. Mr Booth explained that the window frames in the flat had been replaced with timber framed double sash windows. The Tribunal was referred to what appeared to be rendering to the chimney in the rear roof, new guttering and flashing.

14 The Law

15 The statutory provisions relevant to the Applicants' application are to be found in sections 18, 19, 20C and 27A of the 1985 Act. They provide as follows:

18 (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose –

(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

19 (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise

27A (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable,

(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which –

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

5 But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

20C (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the First-Tier Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made –.....

(b)(a) in the case of proceedings before the First-Tier Tribunal, to the Tribunal.

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

16 The statutory provisions relevant to the Respondent's application for dispensation of the consultation requirements provided for by section 20 of the 1985 Act are as follows:

Section 20 of the 1985 Act provides as follows:

"20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with either sub-section (6) or (7) (or both) unless the consultation requirements have been either –

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

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

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

(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 sub-section (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 sub-section, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contributions 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 of the 1985 Act provides:

"(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements".

17 **The Lease**

18 Document 19 in the bundle (reference to document numbers in this Decision are references to documents in the bundle) was a copy of the Applicant's lease of the basement flat. It provides as follows:

- The lease is dated 7 March 1973. The recitals provide that it is intended to demise leases of the other flats in the building upon *"terms similar in all respects ... to those contained herein"* - the other leases are the lease of the ground floor flat which is dated 29 October 1998 and of the first floor flat which is dated 11 July 1975.

- The flat demised is described in the first schedule which describes the flat as that shown coloured pink on the plan and is stated to include:

  "(a) the external plastered coverings and plasterwork of the walls other than the outside walls of the Building bounding the Flat and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors frames and window frames) and the glass fitted in such window frames; and

  (b) the plastered coverings and plasterwork of the walls and partitions lying within the Flat and the doors and door frames fitted in such walls and partitions; and

  (c) the plastered coverings and plasterwork of the ceilings and the surfaces of the floors including the whole of the floorboards and supporting joists (if any); and

  (d) all conduits which are laid in any part of the Building and serve exclusively the Flat; and

  (e) all fixtures and fittings in or about the Flat and not hereafter expressly excluded from this demise BUT not including:-
  (i) any part or parts of the Building (other than any conduits expressly included in this demise) lying above the said surfaces of the ceilings or below the said floor surfaces;
  (ii) any of the main timbers and joists of the Building or any of the walls or partitions therein (whether internal or external) except to such of the plastered surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise;
  (iii) any conduits in the Building which do not serve the Flat exclusively ..."

19 By clause 3(4) the lessee covenants to pay the interim charge and the maintenance charge as provided for in the 5th schedule. The 5th schedule defines the accounting period for the purposes of service charges as ending on 31 December in each year. It defines the maintenance charge as 33.5% of the *"total expenditure"* which expression is defined as the expenditure incurred by the lessor in carrying out his or her obligations under clause 4(5) and *"any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing managing agents and (b) the cost of any accountant or surveyor employed to determine the total expenditure and the amount payable by the tenant hereunder".*

20 There is provision for an interim charge as a payment on account to be paid by the lessor in advance on 24 June and 25 December in each year.

21 Clause 4(5) sets out a covenant on the part of the lessor to

"(a) to maintain and keep in good and substantial repair and condition:
(i) the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main drains, gutters and rainwater pipes (other than those included in this demise or in the demise of any other flat in the building);
(ii) all such gas and water mains and pipes drains wastewater and sewerage ducts and electric cables and wires as may by virtue of the terms of this lease be enjoyed or used by the tenant in common with the owners or tenants of the other flats in the Building;
(iii) the common parts;
(iv) the boundary walls and fences of the Building;
(v) all other parts of the Building not included in the foregoing sub-paragraphs (i) to (v) and not included in this demise or the demise of any other flat or part of the Building;

(b) ...to paint the whole of the outside ...

(c) to insure and keep insured the Building ...

(d) to pay and to charge any rates ...

(e) ... to employ ... maintenance staff gardeners cleaners ...

(f) (i) to employ ... managing agents ...
(ii) to employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may in the opinion of the lessor be necessary or desirable for the proper maintenance safety and administration of the Building;

(g) to maintain ... a rented communal television aerial ...

(h) without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as the lessor may in her absolute discretion consider necessary or advisable for the property maintenance safety amenity and administration of the Building;

(i) to set aside ... money ... to meet future costs.

22 **The Issues**

23 At the start of the hearing, the Tribunal indicated that it understood that certain service charge items in dispute related to more than one financial year. That it would be convenient to address the items in dispute not by reference to financial years per se, but by reference to the nature/type of charge that was in dispute. That such an approach, which would still allow all items in dispute to be addressed but might help to avoid an element of duplication. The Tribunal suggested that the areas to be addressed could be broken down as follows:

1) Major works to the roof in the sum of £1685 in the year ending 31 December 2011. It was this matter to which the Respondent's application for dispensation under section 20ZA related.

2) Legal fees claimed in the year ending 31 December 2011 for £215.50.

3) A number of items that relate directly or indirectly, on the Applicants case, to the ingress of damp suffered by the Applicants' flat including fees for investigating the cause of the damp.

4) What are described as 'handling/management fees' sought by the Respondent for the years ending 31 December 2011, 2012 and 2013.

5) Accountancy fees for the years ending 31 December 2011, 2012 and 2013.

6) The costs of repairs to the rear roof in the sum of £441 in the year ending 31 December 2013.

24 The parties agreed that they were content to proceed on that basis.

25 The Tribunal referred the parties to that part of the application which referred to estimated service charges for the year ending 31 December 2014. It was pointed out that there appeared to be no documents relating to that at all in the bundle. Upon being questioned by the Tribunal, Mr Booth confirmed that no service charge demands had been sent out for the year ending 31 December 2014. The Tribunal explained to the parties that in the absence of any service charge demands for that year that it was not in a position to address issues relating to payability and reasonableness of service charges for that year.

26 Mr Bennett referred to a letter that he had sent to the Tribunal dated 13 August 2014 and to Mr Booth that was in the form of a request that the Tribunal make a direction that the Respondent provide disclosure of certain further documents. Mr Bennett asked if the Tribunal would make an Order for disclosure for these documents to be produced by Mr Booth after the hearing. The Tribunal stated that its case management powers including the making of directions were exercised for the purpose of governing the conduct and disposal of

proceedings. The case was now before the Tribunal for hearing. The application was made too late in the day and in any event the Tribunal did not feel it appropriate bearing in mind its case management powers to make a direction that would take effect after the conclusion of the proceedings. Accordingly the Tribunal declined to make the direction requested.

27 The Tribunal explained to the parties that it had read all of the papers that it had received and that it would have regard and take into account all submissions made by both parties in those papers. That in reaching its decision, it would have regard accordingly not just to representations made by the parties before the Tribunal at the hearing but also to those written submissions.

28 **Major Works to the Roof £1685 Year ending 31 December 2011.**

29 **The Applicants' Case**

30 Mr Bennett said that originally the understanding was that there was to be a complete replacement of the roof. That although he understood that Mr Booth contended that quotations for the work had been sent to him, they had not he said been received. That he had had some concerns in relation to the appropriateness of the proposed work. This was in December 2010. He said that he next heard from Mr Booth in March 2011 with copies of some quotations. He analysed these. He had some queries in relation to them. He then discovered that the work had already been done. It was unclear to him what precisely had been done. That he has asked the Respondent to produce an itemised invoice which had not been forthcoming.

31 He pointed that there were several copies of an invoice from the contractor in the bundle (documents 25, 26, 28, 29, 30 and 31). That these initially purported to break the amount charged by the contractor down net of VAT. The total figure was £1685, the net of VAT figure expressed as £1434 with VAT at £250.95. However subsequently the documents made no reference to VAT and were just for a total of £1685. He said if the contractor was not VAT registered, then VAT should not have been charged. Presumably the correct figure charged therefore was the figure which was expressed as net of VAT, £1434.

32 There was no evidence Mr Bennett said that the works had been properly commissioned. No evidence that a surveyor had been consulted. Nothing to show that the works had been properly directed, controlled, supervised or that there had been effective cost control. That it had been suggested by the Respondent that payment be made to the contractor in cash because that was cheaper. Mr Bennett could not understand how that could be the case. There was no evidence of proof of payment. In the event it was clear from the inspection that

the entire roof had not been stripped. He accepted that at the inspection it was possible to see rendering work to the chimney, works to the flashing and felt flashing above the gutter.

33 The difficulty he said was that the estimates that had been produced eventually by the Respondent were very difficult to compare. They appeared to be for different work. There was no clear breakdown, no doubt because there was no specification of work. That made it impossible to judge whether or not any particular estimate was best value.

34 He referred to a third estimate which he said had been subsequently produced during these proceedings, document 182 in the bundle. This was from a company called Action Roofing Services Ltd. It was an estimate dated 18 November 2010 to renew the rear roof extension and guttering for a figure of £2558. That was less than the original quotes received and which had been disclosed to renew the roof which were from Coomber Roofing Ltd dated 12 November 2010 for £3877.50 and Steve Bean Construction which was undated for £2950.

35 Whilst Mr Bennett accepted that the cheapest estimate was not always necessarily the best, he said it was impossible from the documents produced for the Respondent to demonstrate that best value had been achieved. That if there was a specification for the works, that should have been produced. If there was not a specification for the works, it was impossible to know on what basis estimates were produced and more particularly how estimates could be compared.

36 The Applicants' case was accordingly that there was no evidence that the works had been reasonably incurred. No evidence that the works were necessary or appropriate or reasonable.

37 **The Respondent's Case**

38 Mr Booth said that historically the works had come about because he had been in the course in 2010 of renovating the first floor flat. He was the lessee of that flat. The ceiling in the kitchen was rotten and there was evidence of leaks in the roof. It was clear that work was required to the roof. Scaffolding was already in place. There was always a degree of urgency with such work. That he had first obtained quotes from roofers for the cost of replacing the roof. That because he said the Applicants had queried the type of tiles to be used, he had got quotes for different types of tiles. That he presented two quotes to the Applicants which were the quotes from Coomber Roofing Ltd and Steve Bean referred to, document 182 in the bundle.

39 The cost of the scaffolding had been £700. He was concerned that he might need planning permission for replacing the roof and that would take some time. It seemed to him sensible to take the opportunity to make use of the scaffolding. He then went back to Coomber Roofing

Ltd, Steve Bean Construction and Action Roofing Services Ltd and asked for alternative estimates to carry out repair works to the roof which fell short of a replacement. That upon the basis that the works be carried out at short notice in December 2010 whilst the scaffolding remained in place. Action Roofing Services Ltd were unable to do the work at short notice and therefore they did not produce a further quote. Coomber Roofing Ltd and Steve Bean Construction however did. Of the two, Steve Bean Construction's quote was the lowest. He said he had sent copies to the Applicants. That he instructed Steve Bean Construction to proceed and then carried out the work just before Christmas in December 2010.

40 When he had been told by the Applicants that they had not received the quotes, he had sent them further copies in March 2011. There was he said a form of specification for the job and he referred to document 110 which included an email that he had sent to the Applicants dated 21 December 2014 setting out the work to be carried out.

41 He said the works carried out were necessary and appropriate. They were works that had to be carried out because the roof to the rear extension and the guttering were both leaking.

42 Mr Booth explained that the scaffolding had been due to come down on 12 December 2010. It had been put up originally on 5 October 2010. However the scaffolder did not take it down and agreed to let it remain in place over the Christmas period for no charge. That was why he said it represented a good opportunity for the work to be carried out albeit at short notice and thus save the cost of further scaffolding; a cost which based upon the cost of the scaffolding in place would have been in the region of £700.

43 Mr Booth then addressed the question of the VAT shown originally on the Steve Bean Construction estimate. He said whether or not VAT was chargeable was not his responsibility. It was a matter for the builder. That he has spoken to the builder about this who said that his bookkeeper had made a mistake. The bookkeeper had originally broken down the charge to include VAT, realised the mistake and re-issued the estimate removing the reference to VAT.

44 In conclusion Mr Booth said that the work was necessary, appropriate and reasonable and carried out in accordance with the specification set out in his email of 21 December 2012. As to supervising the works, his view was that given the nature of the works and the cost of the works, that would not be proportionate or necessary. That the builder he had used was a respected local builder. That the Applicants had produced no evidence that the work was sub-standard, unreasonably incurred or could have been done at a lower cost.

45 **The Tribunal's Decision**

46 The issue before the Tribunal was firstly whether or not the Applicants were liable to pay a proportion of the costs of the repair work to the roof under the terms of their lease as part of the service charge and secondly, whether the costs incurred in repairing the roof were reasonably incurred. There was no dispute that the costs of such works were properly recoverable as part of the service charge. The issue therefore was whether or not these particular costs had been reasonably incurred. There was no evidence that the works were not necessary. The Tribunal had been able to inspect some of the works from the bedroom window of the first floor flat. It inspected the replacement guttering from the ground floor level. The Tribunal accepts that the two estimates produced for the works that were carried out from Coomber Roofing Ltd dated 11 December 2010 and Steve Bean Construction of 8 December 2010 are to some extent difficult to compare. It may be that the work that Coomber Roofing Ltd had estimated for was more extensive than that of Steve Bean Construction. Of the two estimates, Steve Bean Construction's was the lower.

47 There was no evidence that the works carried out were inappropriate or sub-standard. 3½ years after the works have been carried out, there was no evidence produced of any failure of the works. The Applicants had not produced, and the Tribunal appreciates the difficulties they faced in doing so, any evidence that the works were sub-standard, inappropriate or could be carried out for a lower sum; no evidence that the works were not reasonably incurred.

48 Accordingly the Tribunal determines that the sum payable by the Applicants is 33.5% (5th schedule clause 1(2) of the basement flat lease) x £1685 = £564.47.

49 **Section 20ZA Application**

50 The Tribunal explained to the parties that in accordance with the decision in the Supreme Court in **Daejan Investments Ltd v Benson** (2013) UK SC14 that it must focus on the question of whether the failure by Mr Booth to consult with Mr Bennett and Ms West had caused prejudice to the extent that they had been required to pay for inappropriate works or pay more than was appropriate for those works. That the factual burden of identifying some relevant prejudice that Mr Bennett and Ms West might have suffered fell on them.

51 **The Respondent's (the Applicant for the purposes of the application) Case**

52 Mr Booth explained that in December 2010 when it became apparent that works were required to the roof of the rear extension and to the guttering, that scaffolding was already in place. The works he said were urgent because the roof was leaking. He accepted that he had

not followed the formal statutory consultation process. That he had however he said followed an informal consultation process. The work had been carried out in December 2010 just before Christmas. That the use of the scaffolding in place had constituted a substantial saving to the cost of the works. That there was no evidence that the Applicants had suffered any prejudice by reason of the failure to follow the statutory consultation process.

53 **The Applicant's (Respondent to the section 20ZA application) Case**

54 Mr Bennett said that the Applicants had not received the quotations for the work; not until after the event. That it was impossible to properly compare the quotes. It was impossible to tell from the quotes what works were proposed to be carried out. The Applicants had not agreed to the works nor had they been given the opportunity to properly consider the works. That he had, once he had been made aware of the proposed works, raised a number of points with Mr Booth but there had he said been no response. That Mr Booth had failed to address concerns that he had raised. That as such, prejudice had been suffered in that he had been unable to dig deep into exactly what works were required and what was being proposed. He had lost the opportunity to properly address and consider the proposed works. He had lost the opportunity to obtain comparable quotes.

55 He made reference to the advice which Mr Booth says that he obtained from his solicitor (document 181). That because the works were urgent and the scaffolding in place, that the work should proceed. That Mr Booth should explain the position to Mr Bennett because then it would be far harder for Mr Bennett to argue that Mr Booth had acted unreasonably by not following the statutory consultation procedure. That in effect was advice designed to circumvent the procedure so as to cause prejudice to the Applicants.

56 That in all the circumstances Mr Booth and Ms West had suffered relevant prejudice in that they had lost the opportunity to have their concerns as to the appropriateness and cost of the works addressed. They had lost the opportunity to establish whether or not best value was obtained and to establish whether or not the works were reasonable. That Mr Bennett would have expected his questions to be addressed. That had he received the quotations, he would have examined them and pin-pointed the differences. He would have asked why they were not direct comparables. He would have tried to establish whether or not there was a specification for the works and had there been a specification, taken the opportunity to use that to obtain alternative quotations. The failure to consult in essence Mr Booth said was the loss of an opportunity, a loss of chance.

57 The Tribunal asked Mr Bennett to consider the point made by Mr Booth that because scaffolding was in place a substantial saving had

been made by having the works carried out at relatively short notice. Mr Bennett said these were not urgent works. Leaking gutters and leaks to the roof were an historical problem; not a sudden event. That as such, there would have been an opportunity to follow a proper consultation process without risking significant further damage to the property. It would have been possible to carry out works on a temporary basis to make the property wind and water tight whilst the consultation process went ahead.

58 He accepted that it was possible that if the opportunity to use the scaffolding had been lost, that there may have been additional costs. However that was not necessarily the case. The consultation process may have resulted in the works being carried out even allowing for the loss of the potential saving in relation to the scaffolding for a lower sum. He accepted that he was not able to produce any evidence to support that. As to whether or not the works were inappropriate, that may not be known for some time he said because damage flowing from inappropriate works may take many years to manifest itself.

59 **The Tribunal's Decision**

60 The Tribunal is bound to follow the guidance in Daejan. The Tribunal must therefore focus on whether the failure by Mr Booth to undertake the statutory consultation process has caused Mr Bennett and Ms West any relevant prejudice. The Tribunal has borne in mind the guidance in Daejan that it is for Mr Bennett and Ms West as the lessees to identify any prejudice which they claim to have suffered as a result of Mr Booth's failure to follow the section 20 consultation requirements. The Tribunal accepts that the factual burden placed on Mr Bennett and Ms West by Daejan of identifying some relevant prejudice may cause some practical difficulty particularly as they are asked to do so some considerable time after the works had been carried out. Nonetheless, it is clear from Daejan that such evidential burden does rest with them.

61 The focus of the Tribunal is the extent, if any, to which Mr Bennett and Mrs West were prejudiced in respect of either paying for inappropriate works or paying more than appropriate by the failure of Mr Booth to consult. Mr Bennett says that prejudice has been suffered because there has been a loss of a chance, a loss of an opportunity to consider and address the proposed works. The loss of an opportunity if need be to obtain alternative estimates. The loss of an opportunity to consider whether the works were necessary or appropriate. The Tribunal has much sympathy with that. However, the loss of an opportunity or chance to be consulted and have an input is not evidence per se of relevant prejudice suffered. The purpose of the consultation requirement is to ensure that tenants are protected from paying for inappropriate works or paying more than would be appropriate (paragraph 44 of Daejan). As stated, the factual burden of identifying some relevant prejudice, identifying that works were either

inappropriate and/or cost more than would be appropriate, rests with Mr Bennett and Mrs West. While the Tribunal appreciates the difficulty that they faced in satisfying that burden, they were in the view of the Tribunal unable to do so. There was no evidence adduced before the Tribunal either in the documents or at the hearing by Mr Bennett and Mrs West to the effect that they had suffered some relevant prejudice by reason of the failure by Mr Booth to comply with the consultation requirements.

62 In all the circumstances, the Tribunal grants Mr Booth's application for dispensation pursuant to section 20ZA of the 1985 Act. This is not a case in the view of the Tribunal where it is appropriate to grant dispensation on terms. There are no terms proposed by Mr Bennett and Mrs West and no evidence of costs or expenses incurred by Mr Bennett and Mrs West in relation to the failure to consult or the application.

63 **Legal Fees £215.50**
Year ending 31 December 2011

64 **The Applicants' Case**

65 Mr Bennett said that it was incumbent upon a freeholder to have a general knowledge of the relevant law and the terms of the lease. If they had not, they inevitably may get into some difficulty and in those circumstances need to seek legal advice to get them out of trouble. Advice in relation to the section 20 consultation process was available on the Internet. It can be obtained from organisations such as the Association of Residential Managing Agents and the Royal Institution of Chartered Surveyors. It is possible to buy a handbook about the process.

66 Mr Bennett said the lease allowed the Respondent to seek legal advice. The question was whether or not it was appropriate and reasonable for him to do so in the circumstances.

67 Mr Bennett said that he had concerns that the advice that Mr Booth obtained may have been in respect of a number of issues not all of which might be properly chargeable and recoverable as service charge. Further, in his view the advice was wrong. It was not appropriate for the solicitor to give advice to Mr Booth on how he might circumvent the section 20 statutory consultation requirements. To that extent the cost of the advice was unreasonable. That it was impossible to know from the solicitors' invoice (document 37) exactly what the nature of the advice was. The only evidence of the nature of the advice given was in the extract produced by the Respondent from a letter or email from his solicitor Mr Deacon dated 21 December 2010 which appears at document 181. There was no evidence as to what the rest of the advice related to. That as such, the cost of obtaining advice was unnecessary, inappropriate and unreasonable.

68 **The Respondent's Case**

69 Mr Booth said that as freeholder he is entitled under the terms of the lease to seek legal advice. That he can recover the costs of doing so under the terms of the lease. He said the advice that he received all related to the management of the property. It related to the section 20 consultation process, the correctness of charging a 15% handling/management charge and to issues arising from the historic removal of a structural wall in the basement flat. That it was inappropriate and wrong for the Applicants to suggest that such advice properly should be obtained from the Internet. That it was perfectly reasonable in such circumstances for him to seek legal advice.

70 In response Mr Bennett said that if Mr Booth had questions relating to the removal of a structural wall historically in the basement, he could have asked. When Mr Bennett and Ms West purchased the basement flat, they had been provided with historic documents relating to those works which they could have provided. It was unnecessary as such to seek advice from a solicitor about that.

71 **The Tribunal's Decision**

72 The Tribunal notes that both sides agree that legal fees may be recoverable under the terms of the lease as part of the service charge. The issue therefore is whether the charges are reasonable.

73 In the view of the Tribunal it is not reasonable to suggest that a landlord who seeks advice on matters such as the statutory section 20 consultation process and the nature, terms and effect of a lease should rely upon the Internet. It is reasonable in such circumstances for the landlord to seek legal advice. Mr Booth explained the matters to which the advice related and all relate to the property. There was no evidence before the Tribunal that the costs of that advice were unreasonable. Indeed in the view of the Tribunal from its own knowledge, the costs do not appear to be unreasonable.

74 The Tribunal therefore determines that legal fees incurred by the Respondent were reasonably incurred and the sum payable in that regard by the Applicants as part of the service charge for the year ending 31 December 2011 is 33.5% x £215.50 = £72.19.

75 **Works to North Side of Building £862**
Year ending 31 December 2011

76 **The Applicants' Case**

77 Mr Bennett referred to the documents at pages 33, 34 and 35. Document 33 is an invoice from Steve Bean Construction dated 10

March 2012 for £862. It refers to repairs to the north side of the building carried out between October 2011 and March 2012 and breaks those works into 6 items. They are:

i *Remove side door frame and replace with new, instate weather strips, paint frame with 4 coats – primer, undercoat, 2 x gloss, rehang original door into new frame.*

ii *Paint north face of building – 2 coats Dulux Weathershield.*

iii *Remove old external pipe from rear extension and make good.*

iv *Repair leaking guttering above entrance to first floor flat.*

v *Seal gaps and cement fillet between wall and ground.*

vi *Clean rainwater drain.*

78 Document 34 is a handwritten invoice expressed as *'for ongoing works to north side of house as discussed'* and is in the sum of £662. Document 35 is dated 15 February 2012 and is a handwritten estimate headed *'decorating works at above address'* and is for £200.

79 Mr Bennett explained that the works to the door were works to the side door to the ground floor flat which had been inspected by the Tribunal that morning. The first issue to determine he said was who was responsible for the maintenance and repair of that door. Was it the responsibility of the lessee of the ground floor flat or the lessor? Mr Bennett referred to both the lease of the basement flat and the lease of the ground floor flat. He referred the Tribunal to his statement at document 13 of the bundle which the Tribunal confirmed it had read. Mr Bennett said that the lease of the basement flat clearly provided that the repair and maintenance of external doors was the responsibility of the lessee of the basement flat. That however the lease of the ground floor flat did not make reference to external doors. That he believed was an error by the draftsman.

80 The lease of the basement flat Mr Bennett said was the first lease to be granted in the building. The recital to that lease contained a statement as follows:

"It is intended to demise the said flats and gardens not hereby demised upon terms similar in all respects (except as to the rent reserved and maintenance charge imposed) to those contained herein ..."

81 The intention Mr Bennett said at the time that the lease to the ground floor flat was drafted must have been that the responsibility for the maintenance of the external door to the flat would be in line with the

provisions of the basement flat lease and as such would be the responsibility of the lessee.

82 Further he said that by reference to the demise of the ground floor flat as defined in the lease of that flat by reference to the plan attached to the lease that the door falls within the demise. That as such, that external door is not and cannot be described as a communal door. It is a door exclusive to the ground floor flat. That there was reference in the lease to the ground floor flat to the lessor being responsible for the maintenance and repair of communal areas. The external door to the ground floor flat did not form part of the communal areas. That Mr Bennett said in all the circumstances meant that the responsibility for the maintenance and repair of the door rested not with the Respondent as lessor but with the lessee of the ground floor flat (who also happened to be Mr Booth).

83 That as such, to the extent that the invoice from Steve Bean Construction related to the works to the exterior door to the ground floor flat, the cost of those works was not recoverable as part of the service charge.

84 If however the Tribunal was of the view that such works were recoverable as service charge, then it was a question of trying to work out how much of those charges related to the work to the door and whether those charges were reasonable.

85 Further he said that the works to the doorframe were not a good job. That the fillet below the sill of the doorframe appeared to be cement. It had not been painted. It was soft. It did not appear to be a good job. Indeed he thought that was the most likely cause of the ingress of damp inside the ground floor flat and within the basement flat. He had no difficulty with the work to the door itself as regards the weather bar or the door frame or the up-stand strip. His concern related to the nature and extent of the sealing below the door sill. That although he accepted that the door which faced north was not subject to excessive driving rain, there historically had been a leaking gutter above the door which had splashed down in front of the door and that may have caused the ingress of damp.

86 As to the apportionment of the invoice of £862, he said it was impossible to calculate how the invoice had been apportioned from the documents. The document at 33 sets out as stated above six different items. The document at 35 suggests that the cost of painting the north wall was £200. That is item 2 on document 33. That would leave a balance of £662 to cover the remaining five items of which only one was the work to the door. When asked by the Tribunal, the best he could say was that he thought a reasonable figure for the work to the door would be in the region of £250-350.

87 As to the other items set out in document 33 as listed above, he accepted that the cost of the works for items 4, repairing leaking guttering, 5, sealing gaps in cement fillet, and 6, clearing rainwater drain, were properly charges which could be recovered as part of the service charge. However he believed that work that had subsequently been carried out to the cement fillets arose because the work carried out at this time had not been to an appropriate or reasonable standard. Further, that as in his view the source of the ingress of damp was below the sill to the door, the work in that regard had not been carried out properly. That the area below the sill had not he believed been properly sealed.

88 That in all the circumstances, much of the work was not reasonably carried out and it was not at a reasonable price.

89 **The Respondent's Case**

90 Mr Booth said that he did now know whether the external door was part of the demise or the responsibility of the lessor to maintain or not. He had taken advice from his solicitor who had advised that it was the lessor's responsibility and he accepted that advice. He referred to the further response document that he had filed which was not in the main bundle. That included what he said was an extract of advice he received from his Solicitors Dean Wilson. That advice related to the terms of the ground floor flat. It provided as follows:

"The demise includes the stairs leading to the premises. However, this is not the defining clause in the lease for the purposes of who is responsible for repairs. At clause 3 the repairing covenant is limited by reference to the parts within the demise and includes the entrance door. This needs to be looked at together with the freeholders' covenant to repair which is set out at clause 4(5) to include the maintenance and repair of the main structure and all external walls, foundations and the common parts. The exterior steps are not expressly part of the tenant's covenant and are part of the main structure. On the basis that leases are generally construed against those granting them ie the freeholder, the covenant to repair the exterior falls to the freeholder".

91 The doorframe Mr Booth said was structurally part of the building. He said the doorframe had been replaced on the advice of Mr Bennett. That at the time Mr Booth had been abroad and he had given permission to Mr Bennett to investigate an alleged leak coming through the door. The doorframe had been slightly rotten. There was water ingress under the door frame but not through the door. That was a diagnosis he had accepted and he sought advice and had been told the best thing to do was to replace the whole frame.

92 He accepted there was not a breakdown of the works carried out by reference to price but the best he could do was suggest a reasonable

figure for the work to the door would be in the region of £350. He had thought that the cost of the removal of the old external pipe from the rear extension (item 3 above) would have been around £30.

93 The Tribunal asked Mr Booth if he could explain the documents at 34 and 35 in relation to the document at 33. Mr Booth explained that the documents at 34 and 35 had been handwritten invoices that Steve Bean Construction had given to him at the time the work had been carried out in return for payment by cash. He then asked for them to be rationalised into a proper invoice which had led to the production of the document at 33.

94 **The Tribunal's Decision**

95 The question of whether the works to the external side door of the ground floor flat can be recovered by way of service charge from Mr Bennett and Mrs West, is dependent upon the wording of the lease of the basement flat. The 5th schedule to the lease provides that the service charge shall be 33.5 per cent of the *"Total Expenditure"* incurred by the lessor in carrying out his or her obligations pursuant to clause 4(5) of the lease and *"any other costs and expenses reasonably and properly incurred in connection with the Building ..."*

96 Clause 4(5)(a) sets out those parts of the building which it is the lessor's responsibility to maintain and keep in good and substantial repair and condition. Clause 4(5) is set out at paragraph 21 above. There is no mention in clause 4(5) of doors or door frames, in particular doors or door frames serving an individual flat. Further, clause 4(5)(a)(v) is a form of sweeping-up provision. It provides that the lessor is responsible for maintaining and repairing all parts of the building not included in the previous four sub-paragraphs and *"... not included in this demise or the demise of any other flat or part of the building"*.

97 Mr Bennett says that the external doors to the basement flat are included within the definition of the demise of the basement flat (the 1st schedule to the basement flat lease). That although they are not specifically referred to in the definition of the demise of the ground floor flat, that must have been the intention of the draftsman. That not least in order to be consistent with the intention referred to in the recitals to the basement flat lease (paragraph 80 above).

98 The lease of the ground floor flat defines the demise at clause 2 firstly as *"all that the Flat described in the Particulars"*. The particulars refer to the flat as that *"shown edged with red on the plan annexed hereto"*. Clause 2 then goes on to set out more specifically those parts of the building which are included within the flat. It includes, amongst other things, the windows of the flat and the internal and external frames of such windows, but there is no reference to doors. The plan clearly shows the external side door to the ground floor flat

as being within the area of the plan edged in red. It therefore forms part of the *"Flat"*.

99 Further, clause 3 of the ground floor lease which contains the lessee's covenants provides at clause 3.3 that it is the lessee's responsibility to renew, repair, maintain etc *"the Flat"*. Similarly, clause 4.1 of the ground floor flat lease contains a covenant on the part of the lessee to *"repair, maintain, uphold and keep the Flat as to afford all necessary support, shelter and protection to the parts of the Building other than the Flat ..."*

100 In the opinion of the Tribunal, the external side door to the ground floor flat falls within the demise of that flat. Under the terms of that lease, it is the lessee's responsibility to repair, maintain etc *"the Flat"*. More particularly, clause 4(5) of the basement flat lease makes no reference to doors or door frames and specifically excludes from the areas of the building which the lessor is to maintain (and thus those areas in respect of which the costs of repairing and maintaining would not form part of the service charge) those parts of the building included in the demise of any flat in the building.

101 It follows that as the Tribunal finds that the external side door to the ground floor flat falls within the demise of that flat the responsibility for its maintenance and repair does not rest with the lessor and as such, the cost of repair and maintenance of it cannot be recovered by the Respondent as part of the service charge.

102 There was no evidence before the Tribunal as to how the invoice at document 33 for £862 should be apportioned as regards the cost of the works to the door. The best the Tribunal can do applying its own knowledge but in particular by reference to the figures suggested by both parties is to apply the sum of £350. That sum therefore falls to be deducted.

103 There was no evidence before the Tribunal to suggest that the remainder of the works set out on the invoice at document 33 were unnecessary or unreasonable. Therefore it determines that the amount payable as part of the service charge by the Applicants is:

£862 - £350 = £512 x 33.5% = £171.52.

104 **Invoice of F Humphrey Heating Services Ltd £338, 8 August 2011**
Year ending 31 December 2011

105 In response to questions from the Tribunal, Mr Booth confirmed that this had not been paid and did not form part of the service charge. It does not appear in the service charge accounts.

106 Mr Bennett explained that it had initially appeared in the accounts produced by Mr Booth but had been removed from the accounts subsequently produced by his accountant. That was why he had made reference to it in his application but accepted this was now no longer in issue.

107 **Steve Bean Construction works to dismantle boxing behind toilet cistern etc £587**
Year ending 31 December 2012

108 **The Applicants' Case**

109 This Mr Bennett said related to the works carried out by Mr Booth as lessee of the ground floor flat to investigate the source of leaks from the ground floor flat into the basement flat. As such the costs of the works were the responsibility of Mr Booth in his capacity as the lessee of that flat and were not recoverable as part of the service charge. That the cause of the damp was either the ingress of water under the sill of the external side door of the ground floor flat, or a slow leak from pipes in the floor of the ground floor flat. These works were to investigate whether there was leakage from the WC or the pipes serving the WC in the ground floor flat. That the Applicants had not asked for the boxing around the pipework of the toilet pan to be dismantled. That it was unlikely that that area would be the source of the leak and that such work was unnecessary. That following the works to repair the external side door of the ground floor flat, the damp problem had continued and the Applicants had suggested to Mr Booth that the source of the damp must therefore be a leaking pipe. That as such, M Booth as the lessee of the ground floor flat had agreed to investigate the pipework to the ground floor flat. It was never the case Mr Bennett said that the Applicants had thought the source of the leak would be in the area of the WC as that was not above the damp patch.

110 **The Respondent's Case**

111 Mr Booth said the work had been carried out at the request of the Applicants. He was concerned to establish that the source of the damp was not a leaking pipe from the ground floor flat. Whilst he did not suspect the leak emanated from the WC, it was necessary to dismantle the box work around the WC to access the heating pipes that run into the ground floor flat. No leaks had been found. This was a cost which had been incurred at the request of the Applicants. That in his view it was entirely appropriate in the circumstances for it to be met from the service charge fund. He made reference to document 15 which is part of his statement of case which refers to advice that Mr Booth said he received from his Solicitors Dean Wilson. That states "... *where the leaseholder complains in 2012 about the works carried out to the ground floor flat WC they go on in their own comments to confirm that the source of the leak is by water entry under the sill of*

the external side door (and not through the door itself) or a slow leak from the pipes under the floor. So for example, the description in respect of the flat demises to the leaseholder at 2(d) only those pipes etc which are not used by any other flat. Where the position is unclear or where there is a complaint regarding the leak it is safe to assume that the inspection and investigative works initially form part of the general service charge and if a problem is not found ie from the WC it remains a service charge item. If a problem had been found from the WC that would be charged back to the relevant leaseholder. However the investigation initially is a service charge item".

112 Mr Bennett responded by saying that if prima facie the source of damp is from the ground floor flat, then the costs of the work should be the responsibility of the lessee of the ground floor flat. If prima facie the source of the damp is from the structure of the building, then works carried out in that regard should be the responsibility of the lessor and recoverable as service charge. That if the position was not clear, then it may be possible to recover such works as part of the service charge and then if it was established that the source of the damp emanated from the interior of the ground floor flat, then the lessor would seek to recover the cost of those works from the lessee of the ground floor flat and on recovery credit the service charge account. In such circumstances he accepted it would be proper in the first instance for the item to be included within the service charge.

113 **The Tribunal's Decision**

114 The issue for the Tribunal is whether or not these works are payable by the Applicants as part of the service charge pursuant to the terms of the lease of the basement flat. They are works carried out exclusively within the demise of the ground floor flat. They are works to investigate whether or not internal pipework to the ground floor flat may be the cause of a leak into the basement flat. They may well be works carried out at the request of the Applicants but that does not mean they should form part of the service charge. The Tribunal is conscious that Mr Booth as well as being the lessor is also the lessee of the ground floor flat. Mr Booth on his own case said he was concerned to establish whether or not there were pipes leaking from the ground floor flat into the basement flat. In the view of the Tribunal, such works are carried out by him as lessee of the ground floor flat.

115 More particularly, they are not works which are covered by clause 4(5) of the lease to the basement flat. As such they are not works which are capable of forming part of the service charge which may be recoverable from the Applicants as lessees of the basement flat. Nor in the view of the Tribunal are they works carried out by reference to schedule 5 of the basement flat lease which constitute *"other costs and*

expenses reasonably and properly incurred in connection with the Building ..."

116 As such the Tribunal determines that this item is not recoverable as part of the service charge.

117 **£150**
Year ending 31 December 2012

118 **The Applicants' Case**

119 The Applicants say that this was the sum of £150 which was paid to them by Mr Booth as a contribution to the costs of redecorating the basement flat which arose by reason of the ingress of damp from the ground floor flat. That as such, this was a sum which was the responsibility of Mr Booth as lessee of the ground floor flat, not as lessor, and accordingly was not recoverable as part of the service charge.

120 **The Respondent's Case**

121 Mr Booth said he paid this sum from the service charge as he thought it was the fair thing to do. That in his opinion the damp in the basement flat was caused by a failure in the structural external parts of the building. That as such, such contribution was the responsibility of the lessor and should be contained within the service charge.

122 In response, Mr Bennett said that if the cause of the damp as he suspected historically had been the failure of the external side door of the ground floor flat and if the Tribunal were to determine that the responsibility for the repair and maintenance of that door was that of the lessor, then he would accept that the payment as a contribution to decoration works would form part of the service charge.

123 **The Tribunal's Decision**

124 There is no provision in the basement flat lease which provides that if the lessor decides to make a contribution to the costs of decorating the ground floor flat for whatever reason, that that should form part of the service charge. Further, the Tribunal has determined that the responsibility for the maintenance and repair of the external side door to the ground floor flat rests with the lessee of the ground floor flat and not the lessor. That if the cause of the damp was the ingress of water under that door or the escape of water from a pipe serving exclusively the ground floor flat, then any damage flowing from that would fall to be paid for by the lessee of the ground floor flat and not the lessor. However it has yet to be determined conclusively what the cause of the damp to the basement flat is. The question is whether in the interim it is reasonable for this sum to be included within the

service charge, more particularly whether it could be included within the service charge pursuant to the terms of the basement flat lease.

125 The payment was made to cover works of decoration to the interior of the basement flat. Such costs per se are the responsibility of the Applicants. It is their flat. Just because Mr Booth either as lessee of the ground floor flat or as lessor decides to make a contribution to those costs does not make such costs part of the service charge.

126 Accordingly the Tribunal determines that the costs are not recoverable as part of the service charge.

127 **Surveyor's Fees £342**
Year ending 31 December 2012

128 **The Applicants' Case**

129 These are fees incurred by Mr Booth for instructing a Surveyor Mr Stephen Hoadley of Stuart Radley Associates to carry out an inspection and to report on 23 November 2012 into the source of damp into the basement flat. The report appears at document 99.

130 This falls Mr Bennett said to be paid by the lessee of the ground floor flat. It relates to an investigation into leaks which Mr Bennett said emanate from the ground floor flat resulting in the damp in the basement flat. Whether ultimately this should form part of the service charge Mr Bennett said depends upon the findings. If the survey had clearly shown that the damp had emanated from the ground floor flat, then the costs of the survey should be met by the lessee of the ground floor flat. In his view the damp in the basement flat was caused by the ingress of water through the external side door to the ground floor flat or leaking pipes in the ground floor flat.

131 Further, he felt that the Surveyor had been hampered in his survey as he had not been given the opportunity to inspect everywhere in the ground floor flat. That as such, as he had not been able to undertake a complete job, these were wasted charges.

132 Mr Bennett said that if prima facie the report had showed that the damp problem emanated from the structure or the exterior of the building or such part as would be the responsibility of the lessor, that the fees should form part of the service charge. Again if subsequently the damp was shown to be the responsibility of the lessee of the ground floor flat, no doubt the lessor would seek to recover those fees from the lessee (albeit they are one of the same) of the ground floor flat and to credit the service charge account. Upon being questioned by the Tribunal, Mr Bennett said he accepted that the fees for the work done were in themselves reasonable.

133 **The Respondent's Case**

134 Mr Booth said he accepted that the survey was limited. However, floorboards were lifted. The survey was limited because Mr Bennett had wanted to know whether the leak emanated from pipes. It was purely speculative as to where the pipes ran which made it rather difficult for the surveyor to in practice carry out a thorough investigation. Further, the Surveyor had concluded that the most likely cause of the damp was penetrating dampness. That the external steps were the primary cause for concern and that works should be carried out to the steps and the external cement fillet. That as such, properly it was reasonable for Mr Booth as lessor to instruct a professional surveyor to carry out a survey and to advise as to works that required to the building, in particular as regards the cause of the ingress of damp to the building. That such fees properly formed part of the service charge.

135 **The Tribunal's Decision**

136 Clause 4(5) of the basement flat lease provides at clause 4(5)(f)(ii) that the lessor may *"employ all such surveyors, builders, architects, engineers, tradesmen, accountants or other professional persons as may in the opinion of the lessor be necessary or desirable for the proper maintenance, safety and administration of the Building"*.

137 The Tribunal notes that the Surveyor concluded that the damp was unlikely to be the case of leaking pipework. That it was likely to be caused by penetrating dampness and that the external steps to the ground floor flat would be the primary cause for concern. More particularly he advised that the fillet where the steps abutted the north elevation was breaking away. That in the first instance works should be carried out to render that fillet. That it should be removed where it abutted the north wall to the building and replaced in its entirety.

138 The Tribunal is satisfied that Mr Booth instructed the Surveyor because he felt it was *"necessary or desirable for the property maintenance, safety and administration of the building"*. There appears to be no dispute that the cost of replacing the cement fillet can be recoverable as part of the service charge. Those are works recommended by the Surveyor. There is no dispute that the fees were reasonable. Accordingly the Tribunal determines that the Surveyor's fees are recoverable as part of the service charge and the amount payable by the Applicants is £342 x 33.5% = £114.57.

139 **Cost of lifting foorboards £45**
Year ending 31 December 2012

140 **The Applicants' Case**

141 The relevant invoice is document 62 which is from JJ's Property Maintenance in the sum of £45 dated 12 November 2012 for *"uplift*

carpet, hardboard and floorboards to hallway, re-secure after inspection". It was accepted that these works were carried out for the benefit of the Surveyor to assist the Surveyor. Mr Bennett said the amount was not disputed. That the same arguments arose as were applicable in relation to the Surveyor's fees.

142 **The Respondent's Case**

143 Mr Booth confirmed that also for his part exactly the same arguments arose as he had raised in respect of the Surveyor's fees.

144 **The Tribunal's Decision**

145 It would appear that these were works which were necessarily carried out as part of the survey and to assist the Surveyor in his inspection. That for the reasons stated above in relation to Surveyor's fees, the Tribunal determines that this sum is recoverable as part of the service charge and the amount payable by the Applicants is £45 x 33.5% = £15.07.

146 **Works to External Steps £410**
Year ending 31 December 2013

147 **The Applicants' Case**

148 The relevant invoice is document 80. It is an invoice from Penfolds for £410 dated 30 July 2013. It refers to works carried out to external steps and to mortar 'flaunching'. Mr Bennett said that it was not in dispute that such works were payable as part of the service charge. His argument was that the works were not reasonable or necessary. The Surveyor Mr Hoadley had suggested that the steps be painted in a waterproof paint. They appear to have been painted in a red tile paint. As such the work was inappropriate. Further, that the works to the sealing of the filleting was in essence re-doing previous work which had not been done properly. He referred to photographs at document 182 which appeared to show the works to the step completed and within the foreground a tin of Acrypol sealant. He suspected that the steps had been painted red and the sealant put on top. In his view that was the wrong way round. The sealant should be put on first, and then the paint.

149 That the work was carried out because the work originally done by Steve Bean Construction was not done to an acceptable standard.

150 The invoice he said in his Statement of case also referred to filling a hole in the wall where a flue serving one of the upstairs flats had been removed as part of the works to those flats. Those were works carried out by Mr Booth in his capacity as a lessee. That item should not therefore be charged to the service charge account but paid by Mr Booth as a lessee.

151 **The Respondent's Case**

152 Mr Booth said that the previous fillet had deteriorated and needed re-doing. This was an item of maintenance and repair. That he thought that black Acrypol steps would have been unsightly which was why he had suggested red paint. In his view, the result aesthetically looked fine. He understood but could not say for sure that the sealant may have been applied first and then the paint on top. He did not think that the work originally carried out by Steve Bean was defective but had deteriorated due to inclement adverse weather conditions. Further he estimated that that element of the bill that related to works to the concrete fillet was no more than 5-10% of the overall bill. That this invoice he said covered a much bigger and more thorough job.

153 In his Statement of case as regards the hole in the north wall, he describes this as a very minor part of the overall invoice and did not involve any interior work to the first floor flat as the interior had already been filled and plastered. That the estimated cost of this item of the invoice was £40.

154 In response Mr Bennett said he accepted that the works to the concrete fillet would probably form around 10% of the overall invoice. He also agreed that aesthetically the steps looked better painted red than in black.

155 **The Tribunal's Decision**

156 It is not disputed that this item is recoverable as part of the service charge. The issue is whether or not the works are reasonable and appropriate. There is no evidence before the Tribunal to show that the works were not reasonable or inappropriate. It is not known whether or not the sealant was applied and if it was applied, whether it was applied on top of the steps before being painted or after. Either way, it does not necessarily mean that the works are inappropriate.

157 As to the external pipe, the Tribunal accepts Mr Booth's written submissions that these were to the external wall. As such, those costs were properly recoverable as part of the service charge.

158 The Tribunal determines that the sum of £410 is recoverable as part of the service charge and the amount payable by the Applicants is £410 x 33.5% = £137.35.

159 **Handling charge/Management Fees**
Years ending 31 December 2011, 2012 and 2013

160 The Respondent seeks to recover fees in relation to his own time and efforts for managing the property which appear in the accounts in the following sums:

Year ending 31 December 2011	531.13
Year ending 31 December 2012	265.71
Year ending 31 December 2013	248.32

161 The Tribunal asked Mr Booth if he was able to take the Tribunal to the provision(s) in the basement flat lease which allow the recovery of these fees. Mr Booth said he had not recently read the lease. That he relied upon the advice of his solicitor. The Tribunal said that as this matter had been raised by the Tribunal, that Mr Booth and indeed the Applicants should be given sufficient time to consider it. The Tribunal offered to adjourn the proceedings to allow the parties time to consider the point. Mr Booth said he would appreciate an adjournment. It would allow him the opportunity to phone his solicitor. The Tribunal then adjourned.

162 When the Tribunal reconvened, Mr Booth said he had spoken to his solicitor who was not able to provide any further advice to that which had been included in correspondence to Mr Booth. That correspondence however was not readily to hand.

163 The Tribunal stated that in the circumstances this was not an issue which could be properly addressed without allowing both parties time to consider it further. In consultation with the parties, it was agreed that it could be addressed by written submissions. The Tribunal therefore made an oral direction that the parties would by **4pm on 21 August 2014** submit to the Tribunal and serve on each other written submissions addressing the question of whether or not under the terms of the basement flat lease the Respondent was entitled to recover as part of the service charge fees a sum in respect of his time and efforts in managing and handling the property. It was appreciated that it might well be the case that the Applicants' submission would be very brief. That it was only reasonable for the Applicants to be allowed an opportunity to respond to any submissions submitted by the Respondent if they wished to do so. Such response to be filed with the Tribunal and served on the Respondent by **4pm on 28 August 2014**.

164 The Tribunal went on to explain that if it determined that such items were recoverable, it would then need to address the question of whether or not they were reasonable. The parties then made submissions as to the question of reasonableness.

165 **The Applicants' Case**

166 Mr Bennett said the fees were unreasonable. The Tribunal should, he said, take into account what he regarded as very poor management of the property. By way of example, he referred to the following:

i There had been a historic change in insurance. It had been changed at the Applicants' request because it transpired he said that the insurance cover was inadequate. That insurance had been arranged that was appropriate for a household insurance, not 3 flats.

ii There had been a historic failure as had been seen to consult.

iii There had been a lack of the provision of specifications for works being carried out so that proper estimates could be obtained.

iv That when the external steps were painted with tile paint, that was not in his view consistent with the advice of the Surveyor.

v There had been insufficient historic control of costs.

vi There had been poor itemisation of bills.

He invited the Tribunal to read the correspondence contained within the bundle and to draw its own conclusion.

167 Mr Bennett accepted that historically he had accepted a percentage figure ie a percentage of the cost of maintenance and repair as a way of calculating a management fee. However, given the events of the last few years he felt that properly with reference to guidance given under the RICS Code that fees based upon a percentage were no longer appropriate. Further, he said, it was not clear looking at the accounts how the fees had been calculated. They did not appear to be 15%.

168 He said there had been delay in producing accounts. For example, the accounts for the year ending 31 December 2011 had been produced 1 year and 10 months late. The lease says they should be produced as soon as reasonably practical. They had not been signed until January this year. It was not clear why they had not been produced. As to what would be a reasonable figure for the management fees, Mr Bennett said he did not know but was content to leave that as a matter to the Tribunal's discretion.

160 **The Respondent's Case**

170 Mr Booth said that insurance had been changed essentially in the Applicants' favour. The insurance historically had not been that for a domestic house. The Applicants had complained that their names were not noted on the insurance and therefore it should be changed to allow that. The new insurance he had arranged was cheaper.

171 He said historically he had carried out a lot of consultation with lessees. The Tribunal he said will note the lengthy amount of correspondence. That there was no difference in his management

style between 2007 and 2014. That problems arose he said when he acquired the lessee of the first floor flat. There was he said a precedent in that the parties had agreed and paid management charges historically. That if he employed a firm of managing agents, the fees no doubt would be higher. In his view the fees sought were reasonable for the work carried out. He accepted that there had been a delay in producing the accounts which he said was his mistake. He said the Applicants had not requested the accounts but as soon as they had done, he had produced them. He has now handed over the preparation of the accounts, as can be seen from the papers before the Tribunal, to an accountant.

172 He said the handling fee was based upon 15%. Historically he had omitted to include in its calculation the amount of the insurance premium. That is why the figures had changed and increased because the accountant had now included that. It was always open to the Applicants to go and see the accountant. That the charges that had been made were in line with the advice he had from his solicitor and his accountant.

173 **The Written Submissions**

174 **The Applicants' Case**

175 The Applicants submitted to the Tribunal as directed, written submissions dated 20 August 2014 and 27 August 2014 (the later in reply to the Respondent's submissions). It is the Applicants' submission that the lease of the basement flat does not make any provision which allows the Respondent as lessor to levy a handling charge or management fee. That the lease does allow the lessor to recover the costs of employing a managing agent. That it does allow the lessor to employ *"all such surveyors, builders, architects, engineers, tradesmen, accountants or other professional persons ..."* (clause 4(5)(f)(ii)). That however there is no provision in the lease which allows the recovery of a management fee or handling charge just because the Respondent takes on the management of the property himself.

176 **The Respondent's Case**

177 The Respondent, as directed, filed a written submission on 19 August 2014. The Respondent submitted that by reference to the documents before the Tribunal, that the Applicants were not taking issue with the principle of his charging a reasonable fee for managing the building. That it was the Tribunal who had raised the issue of whether or not such fees could be recovered at the hearing.

178 The Respondent submits that the leases of the ground and first floor flats provide that the lessor will *"use his best endeavours to keep in good working order and condition the common facilities"* and

"employ such persons as shall be reasonably necessary for the due performance of the covenants on his part in the schedule contained and for the purpose of management of the building". He refers to clause 4(5)(f) of the basement flat which he says permits the lessor to discharge *"all fees, salaries, charges and expenses payable to ... such other person who may be managing the building"*. That clause he says envisages the payment of charges and expenses to whoever is managing the building.

179 That as such the lease allows the lessor to employ a person for the purpose of managing the building or to discharge charges and expenses associated with the management of the building. Further, that pursuant to clause 4(5)(h) of the basement flat lease, the lessor is at his absolute discretion entitled to alter or modify services if in his opinion that would be *"reasonably necessary or desirable in the interests of good estate management"* or because he considered it necessary or advisable for the proper maintenance, safety and administration of the building. That as such he was entitled to expenses of complying with the obligations that he had, to include out of pocket expenses which he says are in any event chargeable.

180 Further, the Respondent says there is a precedent. That historically the lessees have accepted his reasonable management charges from 2007 to October 2013. That his charges for managing the building would be less than a managing agent would have charged.

181 In his written submission, the Respondent purported under a heading of 'Effectiveness of Management' to address issues which went beyond the question of whether or not the lease to the basement flat allowed for the recovery of management/handling charges and the Tribunal therefore has not had regard to those additional submissions.

182 **The Tribunal's Decision**

183 The question of whether or not where a lessor undertakes the management of a property himself instead of employing a managing agent or other professional, he can in effect charge for his own time is dependent on the terms of the lease. The Respondent seeks to recover a handling charge or management fee for the years ending 31 December 2011, 2012 and 2013. Those fees he says are calculated as a percentage of the costs of repairs and maintenance carried out.

184 The lease of the basement flat defines the *"Total Expenditure"*. The maintenance charge or service charge which the Respondent can recover is 33.5% of the *"Total Expenditure"*. *"Total Expenditure"* is expenditure incurred by the Respondent in carrying out his obligations under clause 4(5) of the lease and *"any other costs and expenses reasonably and properly incurred in connection with the Building including without prejudice to the generality of the foregoing (a) the cost of employing managing agents, and (b) the*

cost of any accountant or surveyor employed to determine the Total Expenditure and the amount payable by the Tenant hereunder".

185 Clause 4(5) sets out the lessor's maintenance and repairing obligations. Clause 4(5)(f)(i) allows the lessor at his discretion to employ a firm of managing agents to manage the building and for him to *"discharge all proper fees, salaries, charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof".*

186 Clause 4(5)(f)(ii) allows the lessor to *"employ all such surveyors, builders, architects, engineers, tradesmen, accountants or other professional persons as may in the opinion of the lessor be necessary or desirable for the proper maintenance, safety and administration of the Building".*

187 The provisions in clause 4(5) allow for the recovery of the cost of employing or retaining the services of a managing agent or other professional etc to manage the building. Neither clause 4(5) or the 5th schedule to the basement flat lease contains a provision which would allow the lessor to recover a fee to reflect his own time and efforts spent in managing the building. The Respondent can only recover by way of service charge payments those sums which the lease allows. The lease does not allow the recovery of the handling charges/management fees sought by the Respondent.

188 Accordingly the Tribunal determines that the handling charges/ management fees sought by the Respondent for the years ending 31 December 2011, 2012 and 2013 are not recoverable. It follows that the Tribunal does not need to consider the issue of whether or not the fees claimed are reasonable.

189 **Accountancy Fees**
31 December 2011: £198
31 December 2012: £198
31 December 2013: £204

190 **The Applicants' Case**

191 It was not disputed that accountancy fees could be recovered as part of the service charge under the terms of the basement flat lease. However Mr Bennett said the lease does not require a full account. He referred to clause 6 of the 5th schedule to the basement flat lease. This provided for a certificate signed by the lessor or his agents setting out the total amount of the expenditure which formed the service charge. That the accounts that had been produced by Mr Booth were not compliant with those provisions. He was concerned he said that certain balances shown in the accounts did not reconcile with the bank statements. The accounts were not, he said, compliant with the RICS

Guidance. That if the accounts were compliant with that Guidance and with the terms of the lease, then he would accept that the fees charges were reasonable.

192 **The Respondent's Case**

193 Mr Booth was brief. He said he had instructed a professional accountant to prepare the accounts and his assumption was that the accountant had produced the accounts correctly and in accordance with the terms of the lease. That the accountant's fees were properly incurred and were reasonable.

194 **The Tribunal's Decision**

195 The basement flat lease allows for the Respondent to employ, amongst others, accountants for the purposes of determining *"the total expenditure and the amount payable by the tenant hereunder"* (5th schedule clause 1(b)). It also allows the Respondent to employ all such *"... accountants ... as may in the opinion of the lessor be necessary or desirable for the proper maintenance, safety and administration of the Building"* (clause 4(5)(f)(ii)). It is not disputed that such fees are recoverable as part of the service charge.

196 The Tribunal is satisfied that such fees are payable as part of the service charge. There is no evidence before the Tribunal to the effect that such fees were unreasonable. Further, reasonably Mr Bennett has accepted that if the fees were payable that he felt they were reasonable.

197 Accordingly the Tribunal determines that the accountancy fees claimed are recoverable by way of service charge and the amount payable by the Applicants is as follows:

i	Year ending 31 December 2011, £198 x 33.5% =	£66.33
ii	Year ending 31 December 2012, £198 x 33.5% =	£66.33
iii	Year ending 31 December 2013, £204 x 33.5% =	£68.34

198 **Repairs to Rear Roof £441**
Year ending 2013

199 Mr Bennett said that following the site inspection today, this item was no longer in dispute and was accepted.

200 **20C Application**

201 Mr Booth confirmed that he wished to apply in accordance with the application form for an Order pursuant to section 20C of the 1985 Act, that any costs incurred by Mr Booth in connection with these

proceedings were not to be regarded as relevant costs for the purpose of future service charges.

202 The Tribunal asked Mr Booth whether he had incurred any costs in relation to these proceedings. He was not after all represented. Mr Booth said that he had for the purpose of these proceedings sought legal advice and the costs of that advice, details of which he did not have with him, were costs which he would seek to recover as part of future service charges.

203 Mr Bennett said that he accepted that it was reasonable under the terms of the lease for Mr Booth to seek advice in relation to these proceedings. However, he said these proceedings had only come about as a last resort. As he said could be seen from the paperwork, he had tried what he described as a low cost approach. He had endeavoured to find a solution. That he had not wanted to go down the Tribunal route but had no choice. That as such, it was unreasonable for the Respondent to recover any legal costs in connection with these proceedings as part of the service charge. That the Applicants he said had held off bringing these proceedings for at least 6 months.

204 **The Respondent's Case**

205 Mr Booth said it was perfectly reasonable and proper that he should seek legal advice in relation to these proceedings. He felt the Applicants had only held off starting proceedings by some 4 months.

206 **The Tribunal's Decision**

207 These proceedings, in the view of the Tribunal, had arisen in part due to a degree of fault by both parties. That is not intended to be a criticism of either party. There has it would appear to have been an historic failure by the Respondent to understand the need to properly consult with the Applicants, particularly as regards works which were subject to section 20 of the 1985 Act. There had been an historic failure by the Respondent to produce proper accounts. The Tribunal does not see anything sinister in that, merely a misunderstanding or lack of knowledge on the part of the Respondent as to his duties and obligations as lessor of the property.

208 The Applicants clearly and understandably have serious concerns as regards the ingress of damp into the basement flat. They quite understandably and properly wish to have the building maintained and managed to a proper standard and they wish to be involved in that process. (Indeed, Mr Bennett may well make a very good property manager). However, the Applicants' expectations as to the degree to which they should be consulted and involved in the day to day management of the property went perhaps further than properly they were entitled.

209 In all the circumstances, these proceedings had arisen at least in part due to a misunderstanding on both sides as to their respective rights, obligations and duties. Further, there were certain matters which the Tribunal had determined in favour of the Applicants and certain in favour of the Respondent.

210 That in all the circumstances the Tribunal determines that it does not make an Order pursuant to section 20C of the 1985 Act.

211 **Application for Reimbursement of Fees Rule 13(2) The Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013**

212 Mr Bennett said that he applied for an Order that the application fee and the hearing fee that he had incurred in respect of these proceedings should be reimbursed to him by Mr Booth. He made reference to a second application to the Tribunal which was not before the Tribunal today. He said that he was withdrawing the second set of proceedings in light of events that had happened since they had been instituted and he was not seeking, for the avoidance of doubt, to recover the fees incurred in relation to those proceedings.

213 The grounds relied upon mirrored those in respect of the section 20C application.

214 Mr Booth opposed the application and said that his grounds for opposing also mirrored those in relation to the section 20C application.

215 **The Tribunal's Decision**

216 For the same reasons as stated above in respect of the section 20C application, the Tribunal declines to make an Order for reimbursement of fees pursuant to rule 13(2).

217 **Summary of Tribunal's Decision**

218 With reference to the accounts produced by the Respondent for the years ending 31 December 2011, 2012 and 2013, (including items in the accounts not in dispute and/or which were not before the Tribunal) and taking into account the decisions made by the Tribunal as set out above, the amounts payable by the Applicants as service charge are as follows:

i **Year ending 31 December 2011**

Roof expenditure	1685.00
Works to side of house including painting	512.00
Buildings insurance	440.86

Legal fees	215.50
Accountancy	198.00
Total	£3051.36
Amount payable by Applicants 33.5% =	**£1022.21**

ii **Year ending 31 December 2012**

Professional fees/surveyors' fees	342.00
Cost of lifting floorboards	45.00
Cleaning out drain in the basement patio	60.00
Gutter clearing	120.00
Buildings insurance	532.30
Accountancy fees	198.00
Total	£1297.30
Amount payable by Applicants 33.5% =	**£434.60**

iii **Year ending 31 December 2013**

Gutter clearing	75.00
Works to external steps/side wall	410.00
Roofing repair to gutter edge	441.00
Buildings insurance	525.48
Accountancy fees	204.00
Total	£1655.48
Amount payable by Applicants 33.5% =	**£554.59**

219 The Tribunal grants the Respondent dispensation pursuant to section 20ZA of the 1985 Act from the consultation requirements referred to in section 20 of that Act in respect of the major works to the roof totalling £1685 in the year ending 31 December 2011.

220 The Tribunal does not make an Order pursuant to section 20C of the 1985 Act. The Tribunal does not make an Order for reimbursement of fees pursuant to rule 13(2) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013.

Dated 28th August 2014

Judge N Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.